



# THE KING'S STUDENT LAW REVIEW

## VOLUME III ISSUE 2 [2012]

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**“English Public Law on Children has Found  
a More Acceptable Balance 1 Between the  
Welfare of the Child on the One Hand and  
the Rights of the Child’s Parents on the  
Other than the Private Law on Residence  
and Contact Disputes”**

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University of Birmingham

## Abstract

*This paper will explore how parents' rights have become engulfed by the welfare principle in its purest sense. In doing so, the author will discuss how both the private and public law on children have attempted to revive parental autonomy through their impure application of the welfare principle with the use of presumptions and thresholds of intervention respectively, in which the public law on child protection is more successful.*

## Introduction

The basis of parental rights and autonomy is found in s.3 of the Children Act 1989 (CA), which provides for parental responsibility. Parental responsibility takes account of 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property', thus ensuring parental autonomy in regards to the child's upbringing, unless the child has the competence to act independently of his parents.<sup>1</sup> Mothers and married fathers automatically gain parental responsibility for their children (ss.2(1);(2)).<sup>2</sup> Somewhat controversially, unmarried fathers do not automatically gain parental responsibility and must acquire it through a court order if they wish to do so (s.4).

The doctrine known as parental autonomy refers to a belief that parents have an essential right to raise their children and to make decisions concerning their upbringing, free from government intervention. Without such a doctrine, family life would run the risk of continuously being interrupted through unwarranted, and at times, deficient, governmental interference, highlighting the importance of parental autonomy. This paper will argue that parents' rights have become engulfed by the welfare principle in its purest sense and will discuss how both the private and public law on children have attempted to revive parental autonomy through their impure application of the welfare principle with the use of

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<sup>1</sup> Gillick v West Norfolk Health Authority [1986] AC 112

<sup>2</sup> All sections referred to here after refer to the CA unless otherwise stated

presumptions and thresholds of intervention respectively, in which the public law on child protection is more successful.

## **Parental Autonomy at Private Law**

Section.1(1) is commonly referred to as the welfare principle or alternatively the paramountcy principle as it requires the interests of the child to be paramount to parental and other family members' interests. The welfare principle, 'connote[s] a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare.'<sup>3</sup> Furthermore, *Re P (Contact: Supervision)*<sup>4</sup> established that 'the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child'. Theoretically therefore, children's welfare is perceived without consideration for the rights of his/her family, friends or community. Consequently, Choudhry<sup>5</sup> asserts that s.1(1) is incompatible with Article 8 of the Human Rights Act 1998 (HRA) in protecting the parents' right to private family life with regards to contact and residence disputes governed by s.8.

Choudhry contends that domestic courts should adopt the stance of the European Court of Human Rights (ECHR), taking on the 'parallel analysis' or 'ultimate balancing act' to competing rights in contact and residence disputes. The ECHR does not begin with the assumption that the paramountcy principle will determine the outcome of the dispute, but attempts to balance the opposing rights of all parties, including the parents' Article 8 right with the child's rights. Consequently, the rights of the child will not always succeed. In *Re K v Finland*<sup>6</sup> the Strasbourg Court was willing to accord significant weight to the parents' Article 8 rights, despite the apparent risk to the child. In *Hansen v Turkey*,<sup>7</sup> a mother argued that failure to enforce contact breached her Article 8 rights. The Court found that a 'fair

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<sup>3</sup> *Re KD (A Minor) (Wardship: Termination Of Access)* [1970] AC 668 p710-711 McDermott LJ

<sup>4</sup> [1996] 2 FLR 314 p328

<sup>5</sup> 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the HRA' (2005) 453

<sup>6</sup> [2003] 36 EHRR 18.

<sup>7</sup> [2004] 1 FLR 142.

balance' between the child's and parents' Article 8 rights must be achieved, thus displacing the presumption that the child's welfare precludes this balancing exercise. Instead, the child's welfare will be significant rather than paramount. The ECHR approach guarantees that the child's welfare does not prevail automatically, but only after detailed balance of all the parties' rights has occurred. Thus far, the domestic courts have resisted such an approach; as such 'Article 8 remains the dog that fails to bark.'<sup>8</sup>

Although academic debate does not fully embrace the Convention-based jurisprudence, it does appear to be searching for alternatives to the welfare principle in order to afford protection to the rights of parents. Bainham rejects the supremacy of the children's interest within the welfare principle, insisting on both children and parents to respect each other's welfare.<sup>9</sup> Bainham classifies interests as either primary or secondary, so only a child's primary right would circumvent a parent's secondary right, and vice versa. This theory is evidently in agreement with the ECHR 'balancing' viewpoint discussed above.

Herring prefers a 'relationship-based welfare' in which the welfare principle is interpreted as taking on the rights of others. Herring believes that as children are brought up in relationships – healthy relationships, which best serve the child's welfare, require give and take. Consequently, the child's interests will not always predominate another's rights. Again, Herring prefers a balancing approach believing a child's welfare will not be maximised where his rights are always prioritised over another's, or where they are always subordinated to parental rights.

Although, the ECHR's approach itself is not completely rights-based as the second paragraphs of Articles 8-11 permit the rights to be compromised. Consequently, it may be argued, as it has been in the UK courts, that the approach of the ECHR and the CA 'may be less irreconcilable than some theorists have cared to acknowledge.'<sup>10</sup> Lord Templeman stated in *Re KD (A Minor) (Ward: Termination of Access)*<sup>11</sup> that in his opinion 'there is no

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<sup>8</sup> Ibid 5 p454

<sup>9</sup> 'A Non-intervention and judicial paternalism' (1994)

<sup>10</sup> Ibid 5 p465

<sup>11</sup> [1998] AC 806. Para.812



inconsistency of principle or application between the English rule and the Convention rule', mirroring Lord Oliver's opinion that:

Such conflict as exists is, I think, semantic only and lies only in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised norms which ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it.<sup>12</sup>

It is clear that both Lord Templeman and Lord Oliver had interpreted Article 8(2) in order to preserve the welfare principle.<sup>13</sup>

Despite the academic criticisms above, it will be argued that although the welfare principle theoretically impinges on parental autonomy, it is clear from UK case law that practically the welfare principle is not applied in its purest sense in contact and residence disputes. Many judicial presumptions relating to child welfare can be seen to protect parental autonomy. I will now discuss these presumptions and their effect on parent's rights.

## **A Presumption in Favour of the Mother**

As residence disputes concern the child's upbringing, his/her welfare will be of paramount consideration, as determined by s.1(1) and the welfare checklist (s1(3)-(4)), both of which are gender neutral. There has been conflict regarding the judiciaries' interpretation of the best interests of the child in residence cases. In *Re W (A Minor) (Residence Order)*,<sup>14</sup> it was presumed that babies and girls should be raised by mothers and boys by fathers. *Re A (Children: 1959 UN Declaration)*<sup>15</sup> however, clarified that although there is a strong presumption that babies should remain with their mothers, there is no such presumption

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<sup>12</sup> *ibid.* 11 para. 225

<sup>13</sup> J. Fortin, 'The HRA's impact on litigation involving children and their families' (1999) CFLQ 252

<sup>14</sup> [1992] FLR 332

<sup>15</sup> (1998) 1 FLR 354

with regards to older children in favour of either parent. Furthermore, Downey<sup>16</sup> finds no psychological evidence supporting the presumption found in *Re W*. Nevertheless, statistics from the ONS survey on non-resident parental contact reveal that '93% of the resident parents were female and 89% of the non-resident parents were male.'<sup>17</sup> These statistics suggest that fathers rights groups may have genuine cause to believe a gender bias exists in favour of mothers and residence, restricting fathers to substandard contact.

The judiciary deny such prejudice, perhaps so not to constitute a breach of Article 14 on the basis of sex under the HRA. In *Re A (A Minor) (Residence Order)*,<sup>18</sup> Thorpe J explicitly rejected the tender years doctrine:

'the trial judge fell into error... applying what he erroneously accepted as a principle, that since J was of tender years his interests would best be served by him being cared for by his mother.'

Nevertheless, it is evident that promotion of the welfare principle, whilst displacing individual rights in its non-Convention utilitarian approach, has indirectly elevated and protected the mother's rights above those of the father. This is because the courts, whilst rejecting any presumption in favour of the mother, believe it is 'natural' for children, particularly young children, to remain with their mother. The judiciary assume that while the father takes on the role of the economic provider, 'the mother, for practical and emotional reasons is usually the right person to bring up her children'.<sup>19</sup> The judiciary justify such an approach believing that the welfare of the child 'requires a great deal of constant and consistent care', usually provided by the mother, whilst the father works.<sup>20</sup> Such care cannot 'easily be substituted by alternative carers' on whom a working father would rely.<sup>21</sup> Consequently '[t]he privileging of the mother-child relationship devalues the parenting role of men, restricting it to one of distant, somewhat detached, economic provider'.<sup>22</sup> Fathers

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<sup>16</sup> D Downey, D 'Do children in single-parent household's fare better living with same-sex parents?' (1993) 55.

<sup>17</sup> S Harris-Short, J Miles, 'Family Law: Text, Cases, and Materials' (2007) 821

<sup>18</sup> (1998) 2 FCR 633

<sup>19</sup> *Re H (A Minor: Custody)* [1990] 1 FLR 51

<sup>20</sup> *Re W (Residence)* [1999] 2 FLR 390

<sup>21</sup> *ibid* 20

<sup>22</sup> *ibid* 17 824

are deemed incapable of providing for the child's emotional needs, and therefore a residence order in their favour will be hard-sought. Notwithstanding these concerns, the 'tender years doctrine' has remained prominent in residence case law. In *Re S (A Minor) (Custody)*,<sup>23</sup> Butler-Sloss LJ reiterated that 'it is natural for young children to be with their mothers', with Lord Donaldson in *Re W (Residence Order: Baby)*<sup>24</sup> claiming that there is a presumption that babies, 'I stress the word "baby" should remain with their mothers.

*Pennington v Pennington*<sup>25</sup> saw the US Supreme Court reject the tender years doctrine, asserting that it violated the 14<sup>th</sup> Amendment of the US Constitution by discriminating on the basis of sex. *Pennington* overturned Justice Neale's decision in *JB v AB*<sup>26</sup> in which he freely acknowledged the paternal preference-bias of his court, in holding that 'the mother is the natural custodian of a child of tender years.' *Pennington* held that, although there has been a long preference in placing a very young child in the custody of his mother, the preference operates only when all other things are equal and that the child's best interests are to be given primary consideration. In doing so, the court awarded custody to the father. *Pennington* is clearly more aligned with the Strasbourg jurisprudence than UK case law on residence disputes.

Further elevating the rights of the mother is the 'status-quo' argument. Although it can be applied to either parent, upon separation it is usually the father who leaves the family home, reflecting the division of parenting responsibilities pre-separation. Consequently, the mother is able to establish the role of sole-primary carer. In the interests of the child, the courts are usually unwilling to disturb such arrangements; especially as such arrangements will have been in place for lengthy periods of time due to the delay of the court process. Recently, however, according to Ward LJ, "it would be better to address the checklist factors than rely on any presumption of fact ... The status quo argument means no more than that, if the children are settled in one place, then the court is to have regard to section 1(3)(b) of

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<sup>23</sup> [1991] FCR 155

<sup>24</sup> [1992] FCR 603

<sup>25</sup> 711 P.2d 254 (Utah 1985)

<sup>26</sup> 242 S.E.2d 245 (W.Va. 1978)

the Act and consider the likely effect on them of any change in his circumstances."<sup>27</sup> Therefore, the courts have definitely considered moving a child from a settled placement.<sup>28</sup>

## **A Presumption of Genetic Parenthood over Social Parenting**

In disputes arising between a social parent and a genetic parent, Lord Templeman found there to be a strong presumption that '[t]he best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health is not endangered.'<sup>29</sup> Despite this passages questionable promotion of the child's welfare, it has recently been heralded as 'a bedrock of family law jurisprudence',<sup>30</sup> amounting to a presumption in support of natural parents. *Re D (Care: Natural Parent Presumption)*<sup>31</sup> held that for the natural parent presumption to be overridden, compelling reasons were required. As Fox J reiterated in *Re K (A Minor) (Ward Care and Control)*,<sup>32</sup> 'was it demonstrated that the welfare of the child positively demanded the displacement of that parental right?' If so, then the presumption will be rebutted otherwise, 'a child should not be removed from the primary care of his or her biological parents without compelling reason.'<sup>33</sup> However, *Re H (A Minor) (Interim Custody)*,<sup>34</sup> suggested that the presumption will only be applied in cases of very little difference once a balancing exercise of the child's welfare has been made. Nevertheless, the CA in *Re K* rejected the approach in *Re H*, applying the test laid down by Fox J (above) and relying on the natural parents' Article 8 rights.<sup>35</sup>

Baroness Hale, whilst emphasising the importance of the biological tie, denied any presumption existed in favour of the natural parent, claiming it was an important and significant factor. This is because 'the natural mother combines all three. She is the genetic,

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<sup>27</sup> *Re F (A Child)* [2009] EWCA Civ 313

<sup>28</sup> *Re N (A Child)* [2007] EWCA Civ 1053

<sup>29</sup> *Re KD (Ward: Termination of Access)* [1988] AC 806

<sup>30</sup> *Re P (A Child) (Care and Placement Proceedings)* [2008] 3 FCR 243

<sup>31</sup> [1999] 1 FLR 134

<sup>32</sup> [1990] 1 WLR 431

<sup>33</sup> *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43 Lord Nicholls para.1

<sup>34</sup> [1991] FCR 985

<sup>35</sup> *Gorgulu v Germany* [2004] 1 FCR 410

gestational and psychological parent. Her contribution to the welfare of the child is unique.<sup>36</sup> Of Hale's dictum, Herring commented: '[p]resumably she means an important and significant factor in favour of allowing the child to stay with the natural parent, which makes it a presumption in all but name.'<sup>37</sup>

*Re M (Child's Upbringing)*<sup>38</sup> is perhaps the most controversial application of the presumption. The judiciary had to resolve a residence dispute regarding a 10-year-old Zulu boy who had been given to a white couple by his parents four years previously. Despite the child's strong objections to his return, and the expert evidence suggesting psychological harm of the child if returned to his biological parents, Neill LJ ordered his return:

'Of course there will be cases where the welfare of the child requires that the child's right to be with his natural parents has to give way in his own interest to other considerations. But I am satisfied that in this case, as in other cases, one starts with the strong supposition that it is in the [child's] best interests ... that he should be brought up with his natural parents.'

This demonstrates the court's reluctance to grant residence to social parents upon the sacrifice of the child's immediate welfare so as to uphold the child's sense of identity.<sup>39</sup> Fortin argues that privileging biological parenting has distorted the rights of the child to be raised by their natural parents in order to further the rights and interests of the child's parents, rather than those of the child.<sup>40</sup> Although evidence suggests that a child who establishes psychological links with their natural parent will be harmed if removed from their care (as is the case where a child is removed from social parents), there exists no evidence suggesting that a baby raised by a third party is harmed any more than a child raised by their natural parent.<sup>41</sup> Such evidence questions the validity of the natural parent presumption, as reflected in *Re O (Adoption: Withholding Agreement)*,<sup>42</sup> where Thomas LJ

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<sup>36</sup> Ibid 34 para.36

<sup>37</sup> J Herring, 'Family Law' (4th ed.) (2009) 334

<sup>38</sup> [1996] 2 FCR 473

<sup>39</sup> *Re N (Residence: Appointment of Solicitor: Placement with Extended Family)* [2001] 1 FLR 1028

<sup>40</sup> J Fortin, 'The HRA's impact on litigation involving children and their families' (1999) 440 in *ibid* 17 860

<sup>41</sup> I Weyland, 'The blood tie: Raised to the status of a presumption' (1997) 173

<sup>42</sup> [1999] 2 FCR 262

held that where the child has 'formed very close bonds' to his social parents the judge is required 'to override the prima facie right of the child to be brought up by its surviving natural parent.'

## A Presumption in Favour of Contact

Contact orders can be made in varying forms and degrees due to the court's broad discretion under s.11(7) to attach conditions to it. As contact concerns the upbringing of the child, the welfare principle applies. In contested orders, the welfare checklist must be applied (s.1(3)-(4)). The case law, however, reflects that the judiciary have moved away from a pure application of the welfare principle towards a more rights-based approach, applying a strong presumption in favour of contact with the non-resident parent. These rights relate both to the child's right to contact under Article 9(3) of the United Nations Convention on the Rights of the Child 1989 [UNCRC],<sup>43</sup> and a parent's Article 8 right. However, the courts have expressed that contact 'is a basic right in the child than a basic right in the parent.'<sup>44</sup> Herring, states that to regard contact as a right is somewhat of a 'misnomer' as s.1 applies to contact as it relates to the upbringing of the child.<sup>45</sup> Bainham argues that 'those who assert that there is no right or presumption of contact are not merely misguided, but are plainly wrong.'<sup>46</sup> *Re M (Contact: Welfare Test)*<sup>47</sup> acknowledged that contact was not a fundamental right of the child. Thorpe LJ approved *Re M* in *Re L (A Child) (Contact: Domestic Violence)*,<sup>48</sup> preferring there to be an *assumption*, not presumption, of the benefit of contact when deciding the child's welfare. Furthermore, Thorpe LJ made clear that in deciding the benefits of contact with a non-resident parent, the nature of the relationship will be of importance. A good parent-child relationship will have a strong assumption, whereas a non-existent or abusive relationship will have a weaker one. However, this distinction between maintaining an existing relationship and establishing a

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<sup>43</sup> the UNCRC, however, is not enforceable in the English courts like ECHR

<sup>44</sup> *M v M (Child: access)* [1973] All ER 81 Wrangham J

<sup>45</sup> *ibid* 38 352

<sup>46</sup> A Bainham, 'Contact as a Right and Obligation' (2003) 74

<sup>47</sup> [1995] 1 FLR 274

<sup>48</sup> [2000] 2 FLR 334

new one, as hinted at in *M v J (Illegitimate Child: Access)*<sup>49</sup> was rejected in *Re H (Minors) (Access)*,<sup>50</sup> due to judicial preference towards contact, 'despite the lack of evidence that this will be for the child's good and even when the child exhibits signs of considerable distress before, during and after contact.'<sup>51</sup> However, the courts have stressed that in considering the child's welfare, the long-term benefits of contact should override short-term distress as this is 'usually minor and superficial. They are heavily outweighed by the long term advantages to the child of keeping in touch with the parent concerned so they do not become strangers.'<sup>52</sup> This approach is synonymous with the natural parent presumption – it protects the child's developing awareness of identity as well as providing for the child's needs for 'warmth, approval... information and knowledge'.<sup>53</sup> Despite attempts to return to a purer application of the welfare principle in *Re M (Minors) (Contact)*,<sup>54</sup> *Re O (A Minor) (Contact: Indirect Contact)*<sup>55</sup> has returned to a strong presumption in favour of contact, stating: '[t]he courts should not at all readily accept that the child's welfare will be injured by direct contact.'

*Re W (A Minor)(Contact)*<sup>56</sup> held the mother has no right to refuse contact. Nevertheless, *Re P (Contact Discretion)*<sup>57</sup> asserted that a resident parent may oppose contact for good reason. Such reasons may include: 'sexual and emotional abuse...self-abuse of either drugs or alcohol... mental illness or personality disorder... [and] threatening or dominating the primary carer'.<sup>58</sup> Cases in which refusal is justified due to the resident parents' genuine fears<sup>59</sup> must be distinguished from those in which the resident parents are 'implacably hostile' towards contact, which will not be tolerated by the courts.<sup>60</sup> Wall J in *Re H (Children) (Contact Order) (No.2)* held that research shows a child requires a strong; capable primary carer post-separation, therefore the presumption of direct contact will be negated if evidence can be found that the primary carer's mental health would suffer if contact took

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<sup>49</sup> [1982] 3 FLR 19

<sup>50</sup> [1992] 1 FLR 293

<sup>51</sup> R. Bailey-Harris, *From Utility to Rights? The Presumption of Contact in Practice* (1999) 354

<sup>52</sup> *M v M (Child: access)* [1973] All ER 81 Lately LJ

<sup>53</sup> C Struge, D Glasser, 'Contact and Domestic Violence – The Experts' Court Report' (2000)

<sup>54</sup> [1995] 1 FCR 753

<sup>55</sup> [1996] 2 FLR 124

<sup>56</sup> [1994] 2 FLR 441

<sup>57</sup> [1999] 1 FCR 566

<sup>58</sup> *Re L (A Child) (Contact: Domestic Violence) and Others* [2001] Fam 260

<sup>59</sup> *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48 p53

<sup>60</sup> *Re H (A Minor) (Contact)*[1994] 2 FCR 419

place.<sup>61</sup> This further entwines maternal rights and the child's welfare, as a mother's distress can cause acute stress in the child, thus prohibiting contact. Surprisingly, *Re L (Contact: Genuine Fear)*<sup>62</sup> held that a mother's genuine 'phobic disorder' towards her former husband, who had stabbed her, had no rational basis to it, and so an indirect contact order was created, favouring the father. Clearly, domestic violence will not impede contact. The court adopted the approach that where domestic violence is provable, a balancing act (much like the stance of the Strasbourg jurisprudence) of the risk to the child must occur, against the benefits of contact. Similarly, reflecting the court's strong preference for contact, in *Re U (Children) (Contact)*,<sup>63</sup> despite the father's conviction for a brutal assault on a child and the mother's worry for the safety of her two daughters, the court held that the father should have been given the opportunity to disclose evidence of receipt of therapy, proving he no longer posed a threat to children before refusing contact. Less than 1% of contact cases are refused despite fears of violence towards the resident parent or child, reflecting the courts' growing adherence to parental autonomy.<sup>64</sup>

Despite the courts presumption in favour of contact, father's rights groups remain unsatisfied due to the courts inability to enforce contact orders against protective or spiteful mothers. The courts have attempted to tackle this issue in varying ways. For instance, in *A v N (Committal: Refusal of Contact)*,<sup>65</sup> imprisonment of the resident parent was considered in which the child's welfare was of only material consideration, not paramount. Clearly, the judiciary were distancing themselves from a purer application of the welfare principle in favour of a more rights-based approach favouring fathers. Recently, however, the courts have avoided such draconian measures. In *Re F (Contact: Enforcement: Representation of Child)*<sup>66</sup> where a child was diagnosed with cerebral palsy, the courts held that imprisoning the mother would inappropriately harm the child; therefore 'the committal order would not conceivably be in the best interests of the child.'<sup>67</sup> *Re K (Children: Committal Proceedings)*<sup>68</sup> emphasised that to prevent a breach of both the mother's and

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<sup>61</sup> [2001] 1 FCR 49 Hale LJ para.58

<sup>62</sup> [2002] 1 FLR 621

<sup>63</sup> [2004] 1 FCR 768

<sup>64</sup> *ibid* 17 884

<sup>65</sup> [1997] 1 FLR 533

<sup>66</sup> [1998] 1 FLR 691

<sup>67</sup> *Churchurch v Churchurch* [1984] FLR 635 Ormrod J

<sup>68</sup> [2003] 2 FCR 336



child's Article 8 right, the committal must be justifiable under article 8(2). Therefore, other remedies must be considered before imprisonment is issued,<sup>69</sup> such as a fine,<sup>70</sup> further contact orders, family therapy and perhaps transfer of residence of the child to the non-resident parent.<sup>71</sup> It is difficult to see how imprisoning or fining a mother would provide for the welfare of the child.<sup>72</sup> However, short-term hindrances to the child's welfare may be justified due to the long-term benefits contact can bring. Despite these alternative remedies, Hedley J in *Re S (Contact Dispute: Committal)*<sup>73</sup> was prepared to imprison the child's mother for refusing to allow contact with the father. There has been proposed reform in this area of the law. The Children and Adoption Act 2006 (s.1) has incorporated provisions into the CA in order to make contact possible by making resident parents aware of the advantages of contact as well as providing support for family as they adjust to the contact arrangements.

The application of these presumptions noted above elevates parental autonomy over the child's welfare in certain circumstances. However, it is evident that this is not a universal protection or balance of rights, as one parent will always lose out. Consequently, it may be stressed that the elevation of these rights are not really the elevation of the parents' rights, but of the child's welfare, as one parent will always suffer detriment for the furtherance of the child's welfare. If the courts were truly trying to enhance parental autonomy through these presumptions, there would be a presumption to joint residency of which there is not.

## **Parental Autonomy at Public Law**

Articles 18 and 19 of the UNCRC, whilst recognising parental autonomy, establishes that in order to promote a child's welfare the state's principal function is to support families with children in need, only intervening into family life when the child is deemed at risk of significant harm. Article 8 ECHR however, enshrines the right to private family life,

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<sup>69</sup> *Re M (Contact Order: Committal)* [1999] 1 FLR 810

<sup>70</sup> *Re M (Contact Order)* [2005] 2 FLR 1006

<sup>71</sup> *Re A (A Child) (Residence)* [2008] 1 FCR 599

<sup>72</sup> *Re S (A Child) (Contact)* [2004] 1 FCR 439.

<sup>73</sup> [2004] EWCA Civ 1790

protecting both children and parents from unjustifiable state invasion into private family life.

The state must ensure it achieves an adequate balance between these two competing interests. Intervention into family life may be necessary at times as statistics reveal an average five or six children die a year at the hands of strangers, while between seventy and hundred will die at the hands of their families.<sup>74</sup> This balance of rights is less significant in private disputes on residence and contact, as the parents invite the state to intervene into family life. The CA reflects that the child's welfare is best promoted where services are provided to the child in conjunction with parental involvement, as it is this contact between a child in care and his family that will result in a more successful return of the child to the family home. By operating in partnership with the child's family, the state hopes to achieve recognition of parental autonomy, without compromising the child's welfare.

In evaluating this system of child protection, I will ascertain whether it achieves a suitable balance between the competing rights of the child and the parents and whether it does so more sufficiently than the private law in relation to child contact and residence disputes.

Before the state can intervene, it must establish to the court's satisfaction not just that the intervention is in the interest of the child's welfare, but that it is necessary due to the risk of harm to the child. Therefore, in child protection disputes a threshold of intervention is imposed before the welfare principle is applied.

Parental autonomy is protected when the state is involved in safeguarding the welfare of a child 'in need' (s.17(10)), by encouraging the upbringing of the child by his/her family (s.17(1)(a);(b)). In protecting the child's Article 8 rights, the state is under a duty to, 'where the existence of a family tie is established, act in a manner calculated to enable that tie to be developed and take measures that will enable parent and child to be reunited.'<sup>75</sup> In providing these services the state hopes to achieve such an aim.

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<sup>74</sup> C Lyon, 'Children's rights and human rights' (2001) FL 31

<sup>75</sup> Hasse v Germany (2005)EHRR 19

Voluntary accommodation is a service available to children 'in need' when those with parental responsibility are unable to care for the child themselves (s.20(1)). Accommodation is provided with the consent of those with parental responsibility (s.20(7)).<sup>76</sup> Whilst parental consent is not required for children over sixteen (s.20(3)), therefore a competent child's wishes cannot override the objections of a parent. Consequently, parental responsibility remains free from the circumvention of the local authority general duty to provide services in order to promote the child's welfare.

The local authority does not acquire parental responsibility of the child during this time (s.9(3)), therefore those who do have parental responsibility can veto any plans made regarding the child and can remove the child from the accommodation (s.20(8)) without notice (s.9(5)). Although *Re G (Minors) (Interim Care Order)*<sup>77</sup> suggested formal notice is required, at the committee stage of the Children Bill, this requirement was rejected as it was believed Part III of the CA aims to help families care for their children by guaranteeing their autonomy, not undermining it.<sup>78</sup> A parent with parental responsibility, however, may not remove a child if a person holding a residence order placed him/her. Bainham<sup>79</sup> argues that this limitation inappropriately impinges on the parental autonomy of those with parental responsibility.

Such 'partnership' may weaken the local authority position in relation to the autonomy of the parent as it may prevent proper long-term planning for children in need, resulting in them drifting in and out of care.<sup>80</sup> Smith alludes to the notion of voluntary accommodation as a means by which the local authority are utilised as nothing more than childminders by those who have parental rights.<sup>81</sup> Despite the possible damaging effect drifting in and out of care can have on a child's welfare parental authority takes precedence.

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<sup>76</sup> *R v Tameside MBC* [2000] 1 FLR

<sup>77</sup> [1993] 2 FLR 839 para.843

<sup>78</sup> Hansard HL, vol.502 Children Bill Committee Stage 1342-4

<sup>79</sup> *Children: The Modern Law* (1998) 339

<sup>80</sup> *ibid.* 17 910

<sup>81</sup> V Smith, 'Child Act 1989 –The Accommodation Trap' (1992) 350

Masson<sup>82</sup> argues that there is a great concern that the local authority are inappropriately abusing the use of voluntary care, with parents being pressured into agreeing to voluntary accommodation to avoid the threat of compulsory intervention. Parton labels it as the 'soft policing' of families.<sup>83</sup> Consequently, parental autonomy becomes constrained as the local authority influence the decisions of the parent's in their duty to provide for the child's welfare.

As well as establishing parental autonomy, the CA also provides for compulsory state intervention, which occurs once a child is deemed to be at risk of significant harm. The investigation need not be based on proven fact before the local authority can take action – suspicion will do.<sup>84</sup> Consequently, parental autonomy becomes constrained as the local authority puts these compulsory measures into effect in order to promote the child's welfare. The extent of the constraint varies according to the degree of intervention. There are three levels of intervention.

The first measure of intervention is child protection investigations (s.47). Where a child is reasonably suspected of being at risk of significant harm, the local authority is under a statutory duty to investigate. The local authority may make 'such enquiries they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare' (s.47(1)(b)). Whilst the local authority must respect the claimant's Article 8 rights, the threshold of state intervention during early stages of child abuse investigations are lowered since the local authority has an overriding duty to safeguard the child.<sup>85</sup> The local authority is required to see the child unless content that all necessary information about the child has been obtained (s.47(4)). The parents are under an obligation to produce the child at the local authority request (s.43(6)). If the local authority are prevented from seeing the child, and the child's welfare cannot otherwise be protected, the local authority are compelled to request either an emergency protection order, a child assessment order (CAO), or a care order (s.45(7)).

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<sup>82</sup> *ibid.* 17 913

<sup>83</sup> *ibid.* 17 916

<sup>84</sup> *R (On the Application of S) v Swindon BC* [2001] EWHC 384

<sup>85</sup> *ibid.* 85

Despite government guidelines<sup>86</sup> that the local authority should work in partnership with those who have parental responsibility of the child during child protection enquiries, it is evident that s.47(4) constrains parental autonomy. The government guidelines and s.47(4) assume that those with parental responsibility will co-operate with the local authority in order to prevent a compulsory order being issued. Consequently, this forced pressure on parents to allow the local authority to see the child limits the parental autonomy guaranteeing successful state intervention on behalf of the child's welfare.

If the measures taken during the enquiries are considered to be ineffective in protecting the child's welfare, the level of intervention will increase, further displacing the parental autonomy of those with parental responsibility. The second level of intervention consists of the emergency measures taken during the court process. Where there is reasonable belief that a child is in danger of significant harm the court is authorised to make an emergency protection order (s.44). The emergency protection order provides the court with parental responsibility of the child, enabling the applicant to remove a child from the family home to emergency accommodation (s.44(4)). The order is valid a maximum eight days, with possible renewal for an additional seven (s.45(1), (5)). However, the applicant must return the child to the guardian if it is reasonably believed that it is safe to do so (s.44(10)). The emergency protection order may be apportioned by those holding parental responsibility under s.45(8) if they had notice of the application or under a right to discharge after seventy-two hours if they were not present at the initial application. In order to guarantee the child's immediate welfare, those with parental responsibility retain it throughout the emergency protection order but their autonomy is curtailed insofar as they do not adhere to the terms of the emergency protection order.

Section 31(2) sets out a two-stage test of intervention.<sup>87</sup> Before a court can authorise a care order or supervision order the threshold criteria must be satisfied. The welfare of the child only becomes significant at second stage, once the threshold criteria are satisfied. Unless the state can satisfy the threshold of significant harm, it cannot act in respect of the child against parental wishes. This threshold is the key mechanism by which the state recognises

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<sup>86</sup> Working Together (Department of Health, 1991)

<sup>87</sup> *Humberside CC v B* [1993] 1 FLR 257 Booth J

parental autonomy against state intervention. 's.31(2) performs a crucial 'gate-keeping' function' in ensuring an adequate balance is established between respecting private family life and the need to protect the welfare of the child.<sup>88</sup> This interaction between the two tests in determining what significant harm is and how to balance that against the child's interests has been subject to important House of Lords decisions, in which they grapple with the child's welfare and the parent's rights. Usually the courts take a protectionist view in favour of the child and downgrade the interests of the parents. Nonetheless, there has been a recent shift in reinforcing the notion of private family life in which the state should not be able to interfere. This case law will now be considered.

Section.31(9) broadly defines 'harm' as 'ill-treatment or the impairment of health or development'. *Re R(Care: Rehabilitation in Context of Domestic Violence)*,<sup>89</sup> held that harm includes a child witnessing domestic violence as it is an abuse of mental health.<sup>90</sup> This wide definition of harm allows for possible state intervention, and thus curtailment of parental autonomy. However, in *Re MA (Care: Threshold)*<sup>91</sup> the witnessing of violence towards the elder child by the younger children was not regarded to be significant enough to remove them from the family home. Wilson LJ was 'staggered' at the outcome, as it exposed the younger children to the risk of harm that the elder child suffered. *Re S-B (Children) (Care Proceedings: Standard of Proof)*<sup>92</sup> held that "it is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society." The harm must be significant. Booth J defined 'significant' in *Humberside CC v B*<sup>93</sup> as 'considerable, noteworthy or important'. In determining whether the harm suffered is significant, 'the child's health or development must be compared with that which could be reasonably expected of a similar child' (s.31(10)). In *Re D (Care: Threshold Criteria)*<sup>94</sup> the judiciary held that what amounted to significant harm should be free from the child's

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<sup>88</sup> *ibid* 17 928

<sup>89</sup> [2006] EWCA Civ 1638

<sup>90</sup> *Re O (A Minor) (Care Order: Education: Procedure)* [1992] 2 FLR; *LB of Haringey v Mrs E, Mr. E* [2004] EWHC 2580

<sup>91</sup> [2009] EWCA Civ 853

<sup>92</sup> [2009] UKSC 17

<sup>93</sup> *ibid* 88

<sup>94</sup> (1998) FL 656

cultural or religious background. However, Munby J in *A Local Authority v N*,<sup>95</sup> stated there *was* a need to consider the ‘underlying cultural, social or religious realities’ of a situation.

Evidently, the judiciary were taking a less paternalistic approach, respecting the right to private family life, which includes religious and cultural practices.

*Re U (A Child) (Serious Injury: Standard of Proof)*<sup>96</sup> established that s.31 requires proof on the balance of probabilities that the child is suffering or likely to suffer significant harm. *Re H & R*<sup>97</sup> went on to confirm that although the alleged maltreatment may not have been proved, the possibility that it may in the future due to some worrying evidence that suggests the child’s welfare has been affected means that s.31(10) can be employed. Such a paternalistic approach therefore bears upon parental autonomy. Again, a paternalistic approach was taken in order to intervene into family life in *Re M (A Minor) (Care Order: Threshold Conditions)*.<sup>98</sup> The case clarified that ‘is suffering’ refers more accurately to the period immediately prior to the protective arrangements, not the date of the hearing, even though the child was no longer ‘suffering’. This interpretation is undoubtedly correct, as both Lord Templeman and Lord Nolan clarified, requiring the child to still be suffering at the time of the hearing means the local authority will be compelled to delay taking protective measures until a court hearing has taken place. Arguably, other satisfactory and less intrusive measures could have been taken in protecting the child’s welfare. When the trial approached the child was settled with his aunt, and although Lord Templeman justified the decision by suggesting ‘a watching brief’ on behalf of the child was needed, a supervision order or emergency protection order would have provided adequate protection in order to do so, which would have resulted in a less intrusive measure than a care order. Nevertheless, *Re M* has been followed in several cases such as *Re S H (Care Order: Orphan)*,<sup>99</sup> suggesting the courts paternal desires in protecting the child despite family’s rights.

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<sup>95</sup> [2005] EWHC 2956

<sup>96</sup> [2004] 2 FCR

<sup>97</sup> [1996] AC 583

<sup>98</sup> [1994] 2 AC 424

<sup>99</sup> [1996] 1 FCR 1

State intervention of family life is also authorised if the child is 'likely to suffer significant harm' in the future (s.31(2)(a)). The controversy over s.31(2)(a) is emphasised in *Re H (Minors) (Sexual Abuse: Standard of Proof)*<sup>100</sup> where the HL was divided by a three-to-two split. Lord Nicholls dicta, who was of the majority view, held that 'the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability'.<sup>101</sup> In doing so, the court prioritised the parents' Article 8 rights over both the child's Article 8 and 3 rights. Lord Lloyd and Lord Browne-Wilkinson, dissenting, were concerned that the majority view that care order should only be granted on the basis of facts placed the bar to state intervention too high, exposing children to avoidable danger. Keenan comments:

'It is fundamentally wrong as a point of principle that an allegation of severe misconduct should make it more difficult to prove, because it is assumed that it only happens rarely...'<sup>102</sup>

Despite criticisms that this parents rights approach 'creates a bias against the child's credibility',<sup>103</sup> *Re H* was confirmed in *Re U (A Child) (Serious Injury: Standard of Proof)*,<sup>104</sup> where Baroness Hale remarked:

'To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions would be to deny them their essential role in protecting both children and their families from the intervention of the state, however well intentioned that intervention may be.'<sup>105</sup> The '[t]hreshold is there to protect both the children and their parents from unjustified intervention in their lives. It would provide no

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<sup>100</sup> [1996] AC 563

<sup>101</sup> para.586

<sup>102</sup> C Keenan, 'Finding that a Child is at Risk from Sexual Abuse: *Re H (Minors) (Sexual Abuse: Standard of Proof)*' (1997) 864

<sup>103</sup> *ibid* 100 865

<sup>104</sup> [2008] 2 FCR 339

<sup>105</sup> para.59



protection at all if it could be established on the basis of unsubstantiated suspicions...<sup>106</sup>

Consequently, the court must consider whether there is an 'imminent risk of really serious harm'<sup>107</sup> arguably a hard threshold to satisfy.

Conversely, in determining whether the harm is attributable to the care given or likely to be given (s.31(2)), Wall L.J held that 'the local authority must prove that an injury is non-accidental'<sup>108</sup> deliberate, or a result of serious negligence.<sup>109</sup> Lord Nicholls in *Lancashire CC v B*<sup>110</sup> took a more intrusive approach into family life than he did in *Re H*, authorising state intervention upon suspicion that the parents has caused the child significant harm. The case concerned non-accidental injury sustained by a child who was cared for by his parents and a childminder while the parents were at work. Despite the fact that it could not be proved that the parents injured the child, it could not be proved that the child sustained the injuries through the acts of the childminder, therefore a care order was authorised.

Even where the threshold criteria has been established, a care order will only be granted if it encourages the child's welfare (s.1(3)) in which the local authority care plan will be vital. Elevating parental autonomy, *Re V (A Child) (Care Proceedings: Human Rights Claims)*<sup>111</sup> held the welfare criteria insists that the local authority application must be proportionate to the harm in order to be permitted under the HRA.<sup>112</sup> In *Kutzner v Germany*,<sup>113</sup> the ECHR held that although the parental autonomy were justified in having concerns over the welfare of the children, the parents' Article 8 rights had been infringed because the parental autonomy had not considered whether additional support for the couple, who suffered from learning difficulties, would adequately protect the children, thus avoiding the most intrusive measure of a care order which would remove them from the family home.

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<sup>106</sup> para.70

<sup>107</sup> *Re L (Care Proceedings: Removal of Child)* [2007] EWHC 3404; *Re L-A (Children)* [2009] EWCA Civ 822

<sup>108</sup> *Re L (A Child) (Care Proceedings: Responsibility for Child's injury)* [2006] 1 FCR 285

<sup>109</sup> *X v Liverpool CC* [2005] EWCA Civ 1173

<sup>110</sup> [2000] 1 FLR 583

<sup>111</sup> (2004) 1 FCR 289

<sup>112</sup> *Re O (A Child) (Supervision Order: Future Harm)* (2001) 1 FCR 289

<sup>113</sup> (2002) (Application no.46544/99)

Kutzner suggests that parents with learning difficulties will never meet the threshold criteria, as support should always be provided, whereas the same treatment of children by parents without learning difficulties will meet the threshold. In *Re L (Care: Threshold Criteria)*,<sup>114</sup> Hedley J held commented:

‘society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent... It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting.’<sup>115</sup>

This approach clearly elevates parental autonomy over accommodating the welfare of the child.

As in *Re H and Others, Re M and R (Minors) (Sexual Abuse: Expert Evidence)*<sup>116</sup> found when judging harm at the welfare stage mere suspicion regarding current or potential future harm will be disregarded, however, suspicion as to the perpetrator's identity will be sufficient. Lord Nicholls reiterated this in *Re O and N (Children) (Non-Accidental Injury)*.<sup>117</sup> The joint cases involved proven harm to children, and therefore are distinguishable from *Re H* in which it was unclear whether the child had been harmed at all. Lord Nicholls believed it would undermine the child's welfare to conclude that just because the perpetrator was unknown that the child would be deemed free from risk of harm from them. Consequently, despite not proving on the balance of probabilities that the parent caused the harm to the child, the state may still remove the child from his/her parents. ‘Lord Nicholls has clearly swung the child protection pendulum back towards the child.’<sup>118</sup> Alleviating any possible harshness of this approach, *North Yorkshire CC v SA*<sup>119</sup> warned that a person will not be deemed a suspected perpetrator unless there is a real possibility of his/her guilt.

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<sup>114</sup> [2007] 1 FLR 2050

<sup>115</sup> para.50

<sup>116</sup> [1996] 4 All ER 239

<sup>117</sup> [2003] 1 FCR 673

<sup>118</sup> *ibid* 17. 943

<sup>119</sup> [2003] 3 FCR 118

Once the threshold criteria are satisfied and the care plan has been considered (s.31A(1)), a care order will be authorised by the court. Under s.33(1), the care order confers parental responsibility on the local authority. The local authority is required to keep the child in their care for the length of the order.<sup>120</sup> The local authority is under no duty to place the child with a member of his/her family if this will not promote the child's welfare (s.23(6)),<sup>121</sup> for which they are under an obligation to uphold (s.22(2); Reg.3).<sup>122</sup> Under s.23(7), however, the local authority is obliged to accommodate the child near his home in order to encourage contact with his family. Whilst making plans for the child, the local authority is required to act alongside those who retain parental responsibility of the child (ss.22(4), (5)).<sup>123</sup> The local authority must take into account the wishes of both the child and his/her parents.<sup>124</sup> Parental autonomy, however, is limited under s.33(3) allowing the local authority to restrict parents exercising their parental responsibility in cases of disagreement as to the child's welfare. A parent cannot object to this constraint on their autonomy because a prohibited steps order cannot be issued in respect of a child in care (s.9(1)). Consequently, the local authority is invested with the power to formulate plans in order to promote the child's future welfare, whilst protecting him/her from significant harm, against the views of those with parental responsibility. As a result, whilst the care order reflects the principle of parental autonomy and partnership between the parents and the state in regards to the future welfare plans of the child, it will not compromise the decision making power of the local authority in relation to the welfare of the child in preference to parental autonomy.

## Conclusion

The position of the parent's in child protection cases can be likened to an Olympic hurdles athlete. Before the race, the athlete is provided with support and training by his coach in order to better perform his role as an athlete. Similarly, the state provides services to

<sup>120</sup> Re M (Care Order: Parental Responsibility) [1996] 2 FLR 521

<sup>121</sup> Ibid 6

<sup>122</sup> Arrangement for Placement of Children Regulations 1991.

<sup>123</sup> R v Tameside Metropolitan BC [2000] 1 FCR 173

<sup>124</sup> R (CD) v Isle of Anglesey CC [2004] EWHC

parents so they can provide for their child's welfare. However, when the pistol blows and the race begins the situation becomes more serious. The athlete can no longer turn back and must finish the race. Similarly, once a child is deemed at 'significant risk of harm' the situation takes on a more serious tone. The athlete must battle against the hurdles he approaches, just as parent's fight against the differing stages of the threshold criteria and welfare stages. At points the athlete gains momentum in his sprint, just as parents gain force in their rights through the judiciaries' rights-based approach. However, the athlete, like the parent, comes face to face with hurdles, which are comparable to the judiciaries' paternalistic approach to child welfare, which the parents must overcome in order to retain their child and finish the race triumphant. However, these hurdles are not easily overcome. The judiciary places the bar too high in places in order to protect the child's welfare, making it difficult for parents to protect their rights. Nevertheless, it is clear that the courts are attempting to recognise the rights of the parents even at the expense of the child's welfare at times.<sup>125</sup> Whereas, the courts approach in the private law does not seem to have included the presumption with the parents' rights in mind, but instead they are enhanced in furtherance of the child's welfare. The public law on child protection can be regarded as finding a more acceptable balance between the competing rights than the private law, as a parent will not always inevitable lose out in public law disputes.

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<sup>125</sup> *ibid*100



# **The Horizontal Direct Effect of Directive – Time for a Change in Direction?**

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## Abstract

*The Court of Justice will go to great lengths to ensure that individuals derive the benefits they are intended to enjoy under directives. Though this is a commendable aim, the Court has often lacked logic in its methods of achieving it. This paper will focus on the rule against the horizontal direct effect of directives in the case law of the Court of Justice and the ways in which it has attempted to circumvent its own case law. The various exceptions to the rule have slowly eroded its scope so that it is now reduced to a shadow of what it once was. In light of the continuing extension of the powers of the European Union and the increasing importance of its directives for the individual, it seems that the time has now come for the rule, that directives cannot have horizontal direct effect, to be abandoned altogether.*

## Introduction

The Court of Justice (ECJ) first recognised the principle of direct effect in *Van Gend en Loos v Netherland Inland Revenue Administration*<sup>1</sup> where it was stated that Treaty provisions, subject to certain conditions, can be relied upon by individuals in their national courts<sup>2</sup>. This principle was extended to give direct effect to directives in *Yvonne van Duyn v Home Office*<sup>3</sup>. In *Marshall v Southampton and South-West Hampshire Area Health Authority*<sup>4</sup>, the ECJ declared that 'a directive may not of itself impose obligations on an individual'. Thus a distinction was drawn between vertical and horizontal direct effect of directives; the former being reliance on a directive as against the state and the latter as against an individual. It will be argued that logic is lacking in the case law of the ECJ in this area. The Court's reluctance to abandon the rule set out in *Marshall*<sup>5</sup> has resulted in a mass of confusing exceptions and qualifications that do little to assist those individuals attempting to assert their rights under an EU directive. Academic opinion has for some time been critical of the

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<sup>1</sup> Case 26/62 *Van Gend en Loos v Netherland Inland Revenue Administration* [1963] CMLR 105.

<sup>2</sup> *Ibid*, para 130.

<sup>3</sup> Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR I-1337.

<sup>4</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723.

<sup>5</sup> *Ibid*.

ECJ's approach and today there is much to be said for abandoning altogether the rule that directives cannot have horizontal direct effect.

## A Refusal to Confer Horizontal Direct Effect to Directives

Ms Marshall was a dietician who had been dismissed by her employer once she had passed the retirement age of 62<sup>6</sup>. The ECJ was asked by the Court of Appeal whether the Directive could be relied upon against the employer. The ECJ firstly pointed out that the reason that a directive has vertical direct effect is so as prevent the State from benefitting from its failure to implement a directive<sup>7</sup>. This is often termed the 'estoppel' argument and was first recognised in *Pubblico Ministero v Tullio Ratti*<sup>8</sup>. Secondly, the ECJ noted that article 189 EC<sup>9</sup> (today article 288 TFEU<sup>10</sup>) states that a directive is binding in relation to 'each Member State to which it is addressed'<sup>11</sup>. This is often termed the 'textual' argument. From these observations, the ECJ deduced in this case (hereafter *Marshall I*) that directives cannot have horizontal direct effect.

The Court reconsidered this approach in *Faccini Dori v Recreb Srl*<sup>12</sup> (hereafter, *Faccini Dori*). Miss Faccini Dori had signed a contract for an English language course and later changed her mind. A right to cancellation in such situations was provided for by (unimplemented) *Council Directive 85/577/EEC*<sup>13</sup>. The ECJ followed its earlier case law, refusing to allow horizontal direct effect<sup>14</sup>. It noted firstly that the estoppel argument does not apply when directives are invoked against individuals and as such, the justification for allowing vertical direct effect does not exist in horizontal situations<sup>15</sup>. Secondly, the ECJ stated that to allow horizontal direct effect would remove the distinction between Regulations and Directives.

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid, para 47.

<sup>8</sup> Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] ECR 1629.

<sup>9</sup> Consolidated Version of the Treaty Establishing the European Community [1992] C244/92, article 189.

<sup>10</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] C83/01, article 288.

<sup>11</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723, para 48.

<sup>12</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325.

<sup>13</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

<sup>14</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325, para 20.

<sup>15</sup> Ibid, para 22-23.

The Community would then be entitled to 'enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations'<sup>16</sup>. In other words it would be unjustifiably extending the competence of the Union.

In *Wells v Secretary of State for Transport, Local Government and the Regions* the ECJ offered another explanation for its refusal to allow horizontal direct effect stating that 'the principle of legal certainty prevents directives from creating obligations for individuals'<sup>17</sup>. As Craig notes, it is difficult to tell exactly what the ECJ meant by this 'legal certainty' reference<sup>18</sup> and he finds the argument unconvincing. However, Weatherill takes a different view and argues that, despite its problems, legal certainty is 'one of the strongest arguments against accepting the horizontal direct effect of directives'<sup>19</sup>. He notes in particular that to recognise horizontal direct effect would result in obligations being placed on individuals by directives 'of which they were quite unaware'<sup>20</sup>. It certainly seems quite plausible that horizontal direct effect may result in confusion on the part of individuals in relation to unimplemented directives. Though Craig argues that, if horizontal direct effect were permitted, the simple response ought to be that individuals should apply the directive instead of national law<sup>21</sup>, that may be easier said than done. Individuals may be reluctant to break their own national law and arguably should not be expected to do so.

This section has outlined the key arguments put forward by the ECJ to justify its position vis-à-vis horizontal direct effect. However, despite the ECJ's loyalty to its decision in *Marshall*<sup>22</sup>, it has been equally keen to ensure this does not result in individuals being deprived of the benefits they were intended to enjoy under a directive. In itself this raises questions as to why the Court does not simply allow horizontal direct effect and suggests that the ECJ is unconvinced of its own arguments<sup>23</sup>. It will therefore be helpful to discuss the qualifications and exceptions to the rule that directives cannot have horizontal effect. In particular it will

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<sup>16</sup> Ibid, para 24.

<sup>17</sup> Case 201/02 *Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723, para 56.

<sup>18</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 353.

<sup>19</sup> Stephen Weatherill, 'Breach of Directives and Breach of Contract' (2001) 26 ELR 177, 184.

<sup>20</sup> Ibid.

<sup>21</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 354.

<sup>22</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>23</sup> Ibid, 376.



be considered how far these qualifications go towards circumventing that rule and to what extent they undermine the rationale behind *Marshall I* and *Faccini Dori*<sup>24</sup>.

## Ensuring Individuals are not Deprived of the Benefits of Directives

The first way in which the ECJ has attempted to ensure *Marshall I*<sup>25</sup> is not too restrictive is by broadly defined the concept of ‘the State’ so as to ensure vertical direct effect has as wide a scope as possible. Thus in *Marshall I* the Health Authority was considered part of the State<sup>26</sup>. The ECJ has since gone further, for example in *Foster and Others v British Gas plc* (hereafter, *British Gas*) it held that bodies responsible for providing public services and which have special powers for that purpose form part of the State<sup>27</sup>. This has essentially resulted in the number of cases that are between truly private parties being considerably restricted which in turn has reduced the effect of the rule in *Marshall I*.

Although it seems reasonable at first that a Public Health Authority may be deemed part of the State, one wonders if the ECJ is stretching the concept a little too far in the case of *British Gas*. Furthermore, if the logic of the Court for denying horizontal direct effect is correct, then it cannot be correct to stretch the concept of the State even as far as a health authority, indeed a narrow conception of the State ought to have been adopted<sup>28</sup>. In *Marshall I* the ECJ, by making the arguments in successive paragraphs<sup>29</sup>, implied that one reason for denying *horizontal* effect was that the justification for *vertical* effect, namely that the State ought not to be able to plead its own failure as a defence, does not apply between individuals. By the same reasoning it ought not to apply to public bodies who are in no way responsible for the implementation of the Directive<sup>30</sup>. It is perhaps arguable that bodies such as Health Authorities operate using a State budget and as such any costs they may incur will damage the State. Thus holding a Health Authority liable is an incentive for the State to implement directives in a timely fashion. However, this surely cannot apply to

<sup>24</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325

<sup>25</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>26</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723.

<sup>27</sup> Case 188/89 *Foster and Others v British Gas plc* [1990] ECR I-3313, para 20.

<sup>28</sup> Paul Craig, ‘The Legal Effect of Directives: Policy, Rules and Exceptions’ (2009) 34 ELR 349, 356.

<sup>29</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723, paras 47-48.

<sup>30</sup> Case 316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763, Opinion of AG Jacobs, para 20.

organisations such as British Gas who will, no doubt, be expected to foot the bill for any costs they incur as a result of the State's failings. It therefore seems that the ECJ's approach has taken a step too far and rather undermines the rationale in *Marshall I*.

The second way in which the ECJ has ensured that the outcome in cases between individuals is as close as possible to the outcome that would be achieved were horizontal direct effect permitted can be seen in *Sabine von Colson v Land Nordrhein-Westfalen*<sup>31</sup>. The ECJ set out the principle of indirect effect by stating that 'it is for the national court to interpret and apply the legislation adopted for the interpretation of the directive in conformity with the requirements of Community law'<sup>32</sup>. This principle was extended further in *Marleasing v La Comercial Internacional de Alimentacion*<sup>33</sup> so as to cover the interpretation of *all* national law, regardless of when it was adopted.

However, there are many flaws to the doctrine of indirect effect. Firstly, it can apply only where there is national law to interpret<sup>34</sup> and is of no benefit to those wishing to rely on a wholly unimplemented directive. It can also be contended that the ECJ's approach 'smacks of formalism'<sup>35</sup> since it achieves the same effect but via a different means. Serious concerns have also been raised in relation to legal certainty and Craig notes that it is worrying that indirect effect actually renders the law far less certain<sup>36</sup>. In particular, if horizontal direct effect were permitted then only directives with clear and precise wording would be able to be relied upon by individuals. As it stands, all directives, regardless of their level of clarity, must be given effect by national judicial interpretation<sup>37</sup>.

The principle of State liability for unimplemented directives is the next qualification to the rule. Thus in *Faccini Dori*<sup>38</sup> the ECJ stated that Miss Faccini Dori, though unable to rely on the Directive in the proceedings before the Giudice Conciliatore di Firenze, was entitled to claim

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<sup>31</sup> Case 14/83 *Sabine von Colson v Land Nordrhein-Westfalen* [1984] ECR I-1891.

<sup>32</sup> Case 14/83 *Sabine von Colson v Land Nordrhein-Westfalen* [1984] ECR I-1891, para 28.

<sup>33</sup> Case 106/89 *Marleasing v La Comercial Internacional de Alimentacion* [1990] ECR I-4135.

<sup>34</sup> Andreas Raubenheimer 'The possible effects of EU Directives on relations between individuals' (1997) 28 IIC 191, 200.

<sup>35</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 358.

<sup>36</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 354.

<sup>37</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 360.

<sup>38</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325

against the Italian State<sup>39</sup>. This again demonstrates that the ECJ is gnawing away at the rule in *Marshall*<sup>40</sup>. However, the principle of State liability is seriously lacking in benefits for individuals as compared to horizontal direct effect. Tridimas points out the considerable extra costs of bringing new claims against the State, the time that will take and the likelihood that different procedural rules will apply<sup>41</sup>. It must also be acknowledged that the party seeking to rely on the Directive does not actually achieve that aim by suing the State. Applying horizontal direct effect would therefore be far more beneficial to the individual litigant.

None of the above was sufficient to ensure directives are given their full effect and so the ECJ has introduced the concept of incidental effect. In *CIA Security International v Signalson*<sup>42</sup>, Signalson was attempting to prevent CIA from marketing its alarms on the grounds they were incompatible with Belgian law. CIA argued that Belgian law did not apply since Belgium had failed to notify the Commission of the regulations as it was obliged to do by Directive 83/189. The ECJ allowed CIA to rely on the Directive without making any real comment on the fact ‘that this was a prima facie horizontal dispute’<sup>43</sup>. In *Unilever Italia v Central Food* [2000]<sup>44</sup>, Italy had failed to postpone the adoption of its regulations governing the labelling of olive oil as it was required to do under Directive 83/189. Unilever’s olive oil labels did not conform with the new Italian legislation and Central Food refused to accept the delivery. The ECJ decided that, since Directive 89/189 does not create any rights or obligations, Unilever was entitled to rely on it.

These cases appear at first to be the application of horizontal direct effect since Directives were relied upon in litigation between private parties. However, various methods of explaining the decisions and reconciling them with *Marshall*<sup>45</sup> and *Faccini Dori*<sup>46</sup> have been offered by academics. One such method is the sword and shield analogy whereby it is argued that, although a directive can be used as a shield against a private party, it cannot be

<sup>39</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325, para 27.

<sup>40</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>41</sup> Takis Tridimas, ‘Horizontal Effect of Directives: a Missed Opportunity’ (1994) 19 ELR 621, 634.

<sup>42</sup> Case 194/94 *CIA Security International v Signalson* [1996] ECR I-2201.

<sup>43</sup> Michael Dougan, ‘The “Disguised” Vertical Direct Effect of Directives?’ (2000) 59 CLJ 586, 594.

<sup>44</sup> Case 443/98 *Unilever Italia v Central Food* [2000] ECR I-7535.

<sup>45</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>46</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325

used as a sword<sup>47</sup>. Though, as Lenz quite rightly points out, whilst this easily explains some cases, it can result in 'an excessively theoretical approach' in others<sup>48</sup>.

A second possible explanation relies not on what the parties are trying to achieve but rather on the type of directive. A distinction can be made between 'ordinary directives' which create rights for individuals, and directives which govern relations between Member States and the EU. In the case of the latter, direct effect is possible, regardless of the nature of the parties to the proceedings and it will simply be a coincidence that individuals derive benefits. This was the explanation offered by Advocate General Jacobs in *Unilever v Central Foods*<sup>49</sup>. However, as Dougan points out<sup>50</sup>, this does not offer an explanation for decisions such as *Österreichische Unilever v Smithkline Beecham Markenartikel*<sup>51</sup> and *Panagis Pafitis v Trapeza Kentrikis Ellados*<sup>52</sup>. In those cases directives which appear to have been 'ordinary' according to AG Jacobs' classifications were allowed to have incidental effect. A further distinction has therefore been offered, which is the distinction between directives aiming to regulate individual conduct and directives aiming solely to regulate State actions<sup>53</sup>. However, the problem here is that technically, directives only impose an obligation on the State to implement them. As such all directives would fall into the second category mentioned above<sup>54</sup>. This approach also fails to explain *Pafitis*<sup>55</sup>.

Dougan therefore offers the theory of 'disguised vertical direct effect' as a solution to these problems<sup>56</sup>. He argues that the reason the national measures were struck out was to prevent an individual benefitting from the State's failures. In other words, 'not only the guilty public authority but also an opportunistic passer-by should be prevented from taking advantage of the Member State's substantive breach of Community law'<sup>57</sup>. Nonetheless, despite considering this the best way of explaining cases such as *CIA*, *Unilever*<sup>58</sup> and *Pafitis*,

<sup>47</sup> Miriam Lenz, 'Horizontal what? Back to basics' (2000) 25 ELR 509.

<sup>48</sup> Ibid, 516.

<sup>49</sup> Case 443/98 *Unilever Italia v Central Food* [2000] ECR I-7535

<sup>50</sup> Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59 CLJ 586, 601.

<sup>51</sup> Case 77/97 *Österreichische Unilever v Smithkline Beecham Markenartikel* [1999] ECR I-431.

<sup>52</sup> Case 441/93 *Panagis Pafitis v Trapeza Kentrikis Ellados* [1996] ECR I-1347.

<sup>53</sup> Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59 CLJ 586, 601.

<sup>54</sup> Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59 CLJ 586, 605.

<sup>55</sup> Ibid, 605.

<sup>56</sup> Ibid, 606.

<sup>57</sup> Ibid, 607.

<sup>58</sup> Case 443/98 *Unilever Italia v Central Food* [2000] ECR I-7535

Dougan recognises that some problems remain. For example, he notes both the difficulties involved in maintaining the distinction and also that it is the less culpable individuals (those passively taking advantage rather than those actively breaching EU law) against whom directives will be enforced<sup>59</sup>.

It is therefore perhaps more helpful to consider the way in which the directive is being used. In other words, whether the directive is being relied on in order to prevent national law applying (*invocabilité d'exclusion*) as opposed to when the individual is seeking to have the directive applied instead of national law (*invocabilité de substitution*)<sup>60</sup>. The latter is available only in vertical situations whereas the former is a potential explanation for the way in which incidental direct effect works. Lenz considers this to be a useful way to understand the ECJ's case law in this area<sup>61</sup>. Lenz was writing before the judgment in *Unilever v Central Foods*<sup>62</sup> was delivered, however it appears that the explanation offered can be applied successfully to that case. *Unilever* was simply asking that the Directive prevented the national regulations from applying. It was very clearly a case of *invocabilité d'exclusion*.

It seems that either of these theories (offered by Dougan and Lenz) would serve to explain the ECJ's approach in this area. Dougan's suggestion certainly seems to have a more solid rationale behind it, although it is perhaps a little more complicated to apply than the explanation offered by Lenz.

The latest qualification to the principle that directives cannot have horizontal effect came in *Mangold v Rüdige Helm*<sup>63</sup> (hereafter, *Mangold*). Mr Mangold had concluded an employment contract with Mr Helm and argued that the contract, though compatible with German law, conflicted with Directive 2000/78 inasmuch as it discriminated against him on the grounds of his age. However, Mr Helm is an individual and as such the rule in *Marshall I*<sup>64</sup> might have been expected to prevent Mr Mangold from relying on the Directive. This was not so, and

<sup>59</sup> Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59 CLJ 586, 608.

<sup>60</sup> Case 287/98 *Grand Duchy of Luxembourg v Linster* [2000] ECR I-6917, Opinion of AG Léger, para 57.

<sup>61</sup> Miriam Lenz, 'Horizontal what? Back to basics' (2000) 25 ELR 509, 520.

<sup>62</sup> Case 443/98 *Unilever Italia v Central Food* [2000] ECR I-7535

<sup>63</sup> Case 144/04 *Mangold v Rüdige Helm* [2005] ECR I-9981.

<sup>64</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

the ECJ proceeded to ensure the rule in *Marshall I* was circumvented, stating that, since the right to non-discrimination is a general principle of EU law, and the Directive is an expression of that principle, 'it is the responsibility of the national court ... to ensure that those rules are fully effective'<sup>65</sup>. Despite the criticism of the ECJ following *Mangold*, it is not the first case in which such logic has been used. Dougan, writing five years before *Mangold*, analysed *Nils Draehmpaehl v Urania Immobilienservice OHG*<sup>66</sup> in a similar manner claiming that the ECJ was simply applying the general principle of ensuring minimum standards of judicial protection<sup>67</sup>.

It has often been argued that, rather than according horizontal direct effect as it first appears, the ECJ in fact created a new exception. Thus *Mangold* can be seen a case in which a directive has 'direct effect on a legislative activity that impacts on horizontal relations' and it is not in itself having direct effect<sup>68</sup>. Advocate General Mazák<sup>69</sup>, agrees with Schiek, that the ECJ did not accord horizontal direct effect in *Mangold*. However, whereas Schiek feels that this was because *Mangold* ought to be understood as a case in which vertical effect was applied, Advocate General Mazák believes that the ECJ simply avoided the question of horizontal direct effect altogether<sup>70</sup>.

Tobler takes a slightly different approach, analysing the reasoning of the ECJ in a way that restricts the application of *Mangold* considerably thus, apparently, removing the need to investigate whether the ECJ accorded horizontal direct effect<sup>71</sup>. Tobler understood the ECJ to base its decision in *Mangold* on a combination of the fact that there was a positive obligation on the State and that the Directive in question was a Framework Directive<sup>72</sup>. However, it does not necessarily follow from the fact that the practical effects will be limited, that criticism is not warranted. It is perhaps for that reason that others have been

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<sup>65</sup> Case 144/04 *Mangold v Rüdige Helm* [2005] ECR I-9981, para 77.

<sup>66</sup> Case C180/95 *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195.

<sup>67</sup> Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59 CLJ 586, 592.

<sup>68</sup> Dagmar Schiek, 'The ECJ Decision in *Mangold*: a Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation' (2006) 35 ILJ 329, 337.

<sup>69</sup> Case 411/05, *Félix Palacios de la Villa v Cortefiel Servicios* [2007] ECR I-8531, Opinion of AG Mazák, para 132.

<sup>70</sup> *Ibid.*

<sup>71</sup> Christa Tobler, 'Putting *Mangold* in perspective: in response to *Editorial Comments*, Horizontal direct effect - A law of diminishing coherence?' (2007) 44 CMLR 1177.

<sup>72</sup> *Ibid.*, 1182.

less convinced, noting the weaknesses in the Court's decision<sup>73</sup>. In light of the fact that the ECJ maintains that the authors of the treaty did not intend directives to confer rights on individuals, it seems fair to ask 'what plausible theory would explain why they would think that it is acceptable for an individual to be bound by obligations from a general principle of law'<sup>74</sup>? In consequence, if the Court's logic in refusing to accord horizontal direct effect to directives were not already wholly undermined, the *Mangold* decision certainly appears to finish the job.

The ECJ has therefore gone a long way (arguably out of its way) to ensure that the lack of horizontal direct effect can be circumvented in most situations. This, coupled with the illogical reasoning offered in support of the decisions in *Marshall I*<sup>75</sup> and *Faccini Dori*<sup>76</sup> have resulted in considerable, and justified, criticism of the Court's approach from both academics and from the ECJ's own Advocate Generals (AG). Contrasting some of these views will be informative and will demonstrate that recognising full horizontal direct effect is by far the best solution.

## The Need to Recognise Horizontal Direct Effect

In 1993 AG Van Gervern delivered his opinion in *Marshall v Southampton and South-West Hampshire Area Public Health Authority*<sup>77</sup>. He noted that 'the coherence of the Court's case-law would benefit if the Court were now also to confer *horizontal direct effect* on sufficiently precise and unconditional provisions of directives'<sup>78</sup>. According to AG Van Gervern the current situation is unsatisfactory; especially the broad concept of the State and the doctrine of indirect effect, and for this reason full horizontal direct effect ought to be adopted<sup>79</sup>. He also notes that there are issues of unfair competition between individuals in Member States who have not implemented the directive and who are consequently

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<sup>73</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 372-3; Anthony Arnall, 'Out with the old...' (2006) 31 ELR 1, 2.

<sup>74</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349, 373.

<sup>75</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>76</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325

<sup>77</sup> Case 271/91 *Marshall v Southampton and South-West Hampshire Area Public Health Authority* [1993] ECR I-4367, Opinion of AG Van Gervern.

<sup>78</sup> *Ibid*, para 12.

<sup>79</sup> *Ibid*.

disadvantaged as compared to their competitors established in Member States who have correctly implemented the directive<sup>80</sup>. Tridimas agrees that it is the unsatisfactory nature of the current law that justifies recognising horizontal direct effect, stating that it is 'not correct to say...that the principles laid down...[by the ECJ] provide sufficient alternative remedies...so as to render horizontal effect of directives superfluous'.<sup>81</sup>

AG Jacobs, delivering his opinion in *Vaneetveld v Le Foyer* [1994]<sup>82</sup>, strongly suggested the rule in *Marshall I* ought to be abandoned. His starting point was with the textual argument relied upon by the Court in *Marshall I*, which, like many academics<sup>83</sup>, he felt was 'not wholly convincing'<sup>84</sup>. In *Defrenne v Sabena* [1976] the ECJ accorded horizontal direct effect to article 119 EC<sup>85</sup> (today 157 TFEU<sup>86</sup>) pointing out that 'it is impossible to put forward arguments based on the fact that article 119 only refers expressly to Member States'<sup>87</sup>. It reached the opposite conclusion in *Marshall I* in relation to (today) article 288 TFEU<sup>88</sup>. It is quite clearly impossible for these cases to be reconciled<sup>89</sup>. AG Jacobs then went on to point out that horizontal direct effect would not blur the distinction between directives and other Community norms and that no significant democratic problems would result<sup>90</sup>. It has been argued that the European Parliament has little involvement in enacting directives but AG Jacobs notes that the same can also be said of Regulations and yet they are able to impose obligations upon individuals.

A few weeks later it was the turn of AG Lenz, delivering his opinion in *Faccini Dori*, to point out how 'unsatisfactory' he considered the ECJ's approach<sup>91</sup>. Advocate General Lenz felt that the two key arguments in favour of horizontal effect are that the current law fosters inequality and discrimination<sup>92</sup>. He noted that individuals living in Member States who have

<sup>80</sup> Case 271/91 *Marshall v Southampton and South-West Hampshire Area Public Health Authority* [1993] ECR I-4367, Opinion of AG Van Gerven, para 12.

<sup>81</sup> Takis Tridimas, 'Horizontal Effect of Directives: a Missed Opportunity' (1994) 19 ELR 621, 633.

<sup>82</sup> Case 316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763, Opinion of AG Jacobs.

<sup>83</sup> Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 ELR 349.

<sup>84</sup> Case 316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763, Opinion of AG Jacobs, para 20.

<sup>85</sup> Consolidated Version of the Treaty Establishing the European Community [1992] C244/92, art 119.

<sup>86</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] C83/01, art 157.

<sup>87</sup> Case 43/75 *Defrenne v Sabena* [1976] ECR 455, para 30.

<sup>88</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] C83/01, art 288.

<sup>89</sup> Case 316/93 *Vaneetveld v Le Foyer* [1994] ECR I-763, Opinion of AG Jacobs, para 20.

<sup>90</sup> *Ibid*, paras 23-25.

<sup>91</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325, Opinion of AG Lenz, para 47.

<sup>92</sup> *Ibid*, para 50 – 51.



implemented a directive are ‘frequently placed at a [competitive] disadvantage’ as compared to those individuals in Member States where the directive remains unimplemented<sup>93</sup>. Furthermore, individuals are ‘subject to different rules, depending on whether they have comparable legal relations with a body connected with the State or with a private individual’<sup>94</sup>.

Given all these arguments in favour of horizontal direct effect, along with the weakness of arguments put forward against it, it seems incomprehensible that the ECJ continues down the path it has chosen. It could be that the ECJ genuinely believes that its justifications (estoppel, textual and legal certainty) are correct. This seems unlikely given the abundance of academic criticism. The only real explanation appears to be the concern that according full horizontal direct effect would result in a considerable expansion of the powers of the EU, powers which, under the Treaties are to be accorded by the principle of conferral as opposed to judicial activism. It must be noted that this has rarely been a concern of the ECJ in the past (for example when it first applied direct effect in *Van Gend*<sup>95</sup>). However, Weatherill believes that it is this ‘constitutional issue, laid bare in *Dori*, that is the real constraint on the Court’<sup>96</sup>. Indeed some academics have noted that, in spite of the considerable force of the arguments in favour of abandoning the rule in *Marshall I*<sup>97</sup>, only a Treaty amendment could achieve this<sup>98</sup>. It is also quite possible that the ECJ is concerned about the response of national authorities, national courts in particular, if it were to accord full horizontal direct effect to directives<sup>99</sup>. Its experience with the French and German courts following *Van Duyn* perhaps has some bearing on this fear<sup>100</sup>.

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<sup>93</sup> Ibid, para 50.

<sup>94</sup> Case 91/92 *Faccini Dori v Recreb Srl* [1994] ECR I-3325, Opinion of AG Lenz, para 51.

<sup>95</sup> Case 26/62 *Van Gend en Loos v Netherland Inland Revenue Administration* [1963] CMLR 105

<sup>96</sup> Stephen Weatherill, ‘Breach of Directives and Breach of Contract’ (2001) 26 ELR 177, 185.

<sup>97</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>98</sup> Andreas Raubenheimer ‘The possible effects of EU Directives on relations between individuals’ (1997) 28 IIC 191, 197.

<sup>99</sup> Deirdre Curtin, ‘The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context’ (1990) 15 ELR 195, 223.

<sup>100</sup> *Minister of the Interior v Cohn-Bendit* [1980] 1 CMLR 543 ; *Re Value Added Tax Directives* [1982] 1 CMLR 527.

## Conclusion

It can be concluded that the ECJ's reasoning for applying the rule that directives cannot have horizontal direct effect, is fundamentally flawed. The rule creates inconsistencies and uncertainties that could be alleviated if it were abandoned. Though there are, perhaps understandable, reasons why the ECJ does not wish to reverse its decision in *Marshall I*<sup>101</sup>, in particular the fear that national courts may refuse to follow its lead, this is not something that has prevented it from adopting the correct (if unpopular) approach in the past. It is submitted that it should not prevent it from doing so now. It is, after all, reasonably clear from the multitude of exceptions and qualifications the ECJ has introduced, that it may be willing to afford horizontal direct effect to directives if it were able to overcome its concerns. Regardless of the ECJ's fears, the time has most definitely come for the rule in *Marshall*<sup>102</sup> to be abandoned.

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<sup>101</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723

<sup>102</sup> Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR I-723



# **Racially Biased Juries in the Criminal Court**

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## Abstract

*This paper considers allegations of racial bias on juries in England and Wales. It argues that despite allegations of juror misconduct, juries in England and Wales are not racially biased towards black and ethnic minority defendants. Allegations of racial bias are without borders and this paper draws upon research conducted in several jurisdictions which examines the public's attitude towards jury service and the criminal justice system, while also proposing alternatives which could be utilised to reduce the risk of racial bias having an adverse effect on criminal trials in the future.*

## Introduction

There has been academic evidence gathering for several years now, that members of racial and ethnic minorities are being treated unfairly by the criminal justice system in England and Wales.<sup>1</sup> There is no other area of public life where both the perception and the reality of discrimination are more damaging than in the field of criminal justice.

Over the course of this paper I will focus on the area of racial bias and its presence on juries in criminal trials. Perhaps more importantly, I hope to determine whether such allegations are based in reality or simply on perception, and whether there are any remedies which may remove such bias from the jury system.

In England and Wales the public places a great deal of confidence and trust in the jury. This includes members of racial and ethnic minorities (REM) – given the choice, the majority of REM defendants will elect for a trial by jury.<sup>2</sup> However, this confidence is a fragile thing and may evaporate if the law is seen as incapable of dealing effectively with a plausible

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<sup>1</sup> R. Hood, *Race and sentencing : Study in the Crown Court; a report for the Commission of Racial Equality* (Oxford : Clarendon Press , 1992); D. Smith, "Ethnic Origins, Crime and Criminal Justice" in M. Tonry (ed.), *Ethnicity, Crime and Immigration: Comparative and Cross National Perspectives* (Chicago: The University of Chicago Press, 1997); B. Bowling and C. Phillips, *Racism, Crime and Justice* (Harlow: Longman, 2002); B. Bowling and C. Phillips, "Racism, Ethnicity, Crime and Criminal Justice" in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002).

<sup>2</sup> C. Bootman, "Race and Racism – the Missing Dimensions in the Royal Commission on Criminal Justice" in M. McConville and L. Bridges (eds.), *Criminal Justice in Crisis*. (Aldershot: E. Elgar, 1994).

allegation of juror bias.<sup>3</sup> The criminal justice system is no stranger to allegations of racial bias, and other areas which have attracted criticism include the legal profession and the judiciary.

The legal profession has been criticised for its low rate of representation from REM. At the first national conference on minority entry to the legal profession, Mr Justice Richard Scott 'slammed the legal profession for discrimination against black barristers.'<sup>4</sup> More recently it has been alleged that the Bar Council has 'consistently failed to address issues of racism.'<sup>5</sup>

The judiciary have also been guilty of blatant discrimination in the courtroom. In 1994 a County Court judge in Liverpool used the phrase 'nigger', while in Derby in 1995, a judge stated to an all-white jury: 'I have before me photographs of 12 Asian men, all of who look exactly the same.'<sup>6</sup>

This paper will be divided into several sections, each one dealing with a particular aspect of relevance. The first section will examine case law where specific allegations of racial bias have been made against the jury. This will be the main focus of the paper and I will focus on cases from England and Wales. For persuasive authority from other jurisdictions I will consider case law from Canada and the United States. Allegations of racial bias will be examined with regards to Article 6 (1) of the European Convention on Human Rights (ECHR).<sup>7</sup> The second section will then examine the available research on both the jury and the criminal justice system from the UK and internationally. This will allow comparisons to be made between public opinion on the jury in the UK and internationally. Finally, I will

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<sup>3</sup> G. Daly and R. Pattenden (2005) "Racial Bias and the English Criminal Jury." *The Cambridge Law Journal*, 64 , 678-710.

<sup>4</sup> S. Shute, R. Hood and F. Seemungal. *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Devon: Willan Publishing, 2005) p. 4.

<sup>5</sup> The Guardian (2004) *Barrister in Bar Council race row* 26/05/2004. Available at: <http://www.guardian.co.uk/society/2004/may/26/raceintheuk.uknews> Last Accessed 30/03/2012.

<sup>6</sup> S. Shute, R. Hood and F. Seemungal. *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Devon: Willan Publishing, 2005) p. 5.

<sup>7</sup> Art. 6 (1) ECHR states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

focus on possible remedies and alternative models which have been suggested to combat racial bias on juries.

## Racial Bias on the Jury

Juries in England and Wales are selected at random in accordance with the Juries Act (1974). Random selection is required in order to ensure that an impartial jury is empanelled. However, random selection provides no guarantee that a jury will be impartial. In the Review of the Criminal Court of England and Wales it was stated that 'juries in England and Wales still do not reflect the broad range of skills and experience or ethnic diversity for the communities from which they are drawn.'<sup>8</sup>

According to Darbyshire: 'Random selection is unlikely to produce a cross section of society... random selection may throw up juries which are all male, all conservative, all white.'<sup>9</sup> This statement was endorsed by Cheryl Thomas, whose 2007 research revealed that most defendants in most Crown Courts outside London will be tried by an all white jury. However, she notes that this is simply a consequence of population dynamics.<sup>10</sup>

In the case of *R v Ford*<sup>11</sup> the defendant was a black man convicted of several traffic offences. The defendant was originally convicted on three charges. He had entered a not guilty plea for two and a guilty plea for one. He successfully appealed the two convictions he received for the offences to which he pleaded not guilty, on the grounds that the judge had openly admitted that he had failed to ensure that the jury would have no concern with race, colour or prejudice. He was sentenced to nine months for the charge to which he pleaded guilty.

I would contend that the motive behind the appeal was not for the defendant to have all of his convictions quashed, as he had already admitted his culpability for at least one offence.

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<sup>8</sup> Lord Justice Auld. *Review of the Criminal Courts in England and Wales* (2001) Chapter 5 paragraph 11. Available at <http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/chpt5.pdf> Last Accessed on 30/03/2012

<sup>9</sup> P. Darbyshire (1991) "The Lamp that shows that Freedom Lives – is it worth the candle?" *Criminal Law Review* 740.

<sup>10</sup> C. Thomas with N. Balmer. *Diversity and Fairness in the Jury System* (London: Ministry of Justice, 2007)

<sup>11</sup> (1989) QB 868

If he was seeking a complete acquittal it is likely that he would not have pleaded guilty to any of the charges and would have attempted to have them all quashed on appeal. The motive behind the appeal would therefore appear to be a black man pursuing justice after being wrongly convicted by a jury which, by the judges own admission, had issues over the race of the defendant.

In the case of *Gregory v UK*,<sup>12</sup> a black man was convicted by a jury on the charge of robbery. During the course of the trial the trial judge received a note from one of the jurors claiming that the jury was showing racial overtones. When a judge receives any sort of communication from a juror which alleges some form of misconduct or bias on the part of the jury, the judge has the following options:

1. Give the jury further direction
2. Discharge up to three jurors and allow the trial to continue
3. Discharge the jury and order a retrial
4. Ask the jury if they can continue and if they can return a verdict.

With a charge as serious as racial misconduct on a jury, I would contend that the only fair and just option for the judge would be to discharge the jury and order a retrial. However, the judge in this case simply told the jury to “put any thoughts of prejudice of one form or another out of your minds.”

Despite acting within his remit of giving the jury further direction, I would argue that the judge should have discharged the jury and ordered a retrial, given the serious nature of the allegations. The applicant was eventually convicted and he appealed his conviction to the European Court of Human Rights (ECtHR). His conviction was upheld, despite there being a clear violation of Article 6(1) ECHR. The ECtHR even stated in its judgement that “a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view.”<sup>13</sup> In my naivety I must then pose the following question in relation to the ruling of the ECtHR:

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<sup>12</sup> (1997) 25 EHRR 577

<sup>13</sup> Ibid p. 583

how can a jury be impartial if a jury member admits that the jury is showing racial overtones?

In the case of *Sander v UK*,<sup>14</sup> the applicant, who was Asian, was part of a group which was convicted of conspiracy to defraud. During the trial it was alleged by a juror that “at least two of the jurors have been making openly racist remarks and jokes, and I fear are going to convict the defendants not on the evidence, but because they are Asian.”<sup>15</sup> Upon being made aware of this, the defence requested that the judge discharge the jury as any conviction obtained would be extremely unsafe due to the possibility of racial bias adversely affecting the outcome. The judge refused to discharge the jury and openly discussed the matter with 11 jurors – excluding the juror who made the allegation.

There are several issues arising from the judges’ actions. First of all, the exclusion of the juror who made the allegation from the discussion would have allowed the eleven jurors to identify the accuser. Secondly, this may have resulted in feelings of betrayal on the part of the eleven jurors. Thirdly, this may have resulted in pressuring the accuser to co – sign a letter to the judge which refuted the allegation.

It is worth noting that the judge also received a second letter from one of the jurors admitting to making racist remarks about the applicant. However, the judge took no action upon receiving this letter. On the strength of the first letter signed by all twelve jurors, the judge allowed the trial to proceed and the applicant was convicted.

The applicant appealed his conviction to the ECtHR on the grounds that his rights under Article 6(1) ECHR had been breached. The ECtHR agreed and his conviction was quashed. It was stated by Loucaides J. that ‘a juror who, in the context of carrying out his duties, makes racist jokes or comments in respect of the accused, cannot be reasonably impartial as regards the trial of the latter.’<sup>16</sup>

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<sup>14</sup> (2001) 31 EHRR 1003

<sup>15</sup> Ibid p. 1005

<sup>16</sup> Ibid p. 1012



The Canadian case of *R v Williams*<sup>17</sup> highlighted the proactive measures taken in the Canadian Courts to ensure that racial bias on juries does not arise. In this case the defendant was an aboriginal man accused of robbery. At his first trial the defendant was allowed to question potential jurors under Section 638 of the Canadian Criminal Code, to see if any of the jurors were 'Indian haters'.<sup>18</sup> This was due to the fact that there was a lot of prejudice towards aboriginals in the area of British Columbia where the trial took place and there was evidence that these prejudices had eased their way into the criminal justice system.<sup>19</sup>

Due to procedural error in the defendants questioning of the jurors, the Crown applied for, and received, a mistrial. At the retrial, the judge did not allow the defendant to question any jurors and he was duly convicted. He appealed his conviction to the Canadian Supreme Court, where it was held that he should have been allowed to question the jurors at his second trial, just as he did at his first. The applicable test was that the defendant could challenge potential jurors on the grounds that the jurors lacked indifference between the Queen and the accused.<sup>20</sup>

The Supreme Court held that the right to a trial by an unbiased and impartial jury was both a fair trial right and a non-discrimination right, and it ordered a re-trial on the basis that the defendant had neither of these rights enforced by the Courts. The Supreme Court also noted that racial prejudice could be detrimental to an accused in a variety of ways. This was clearest when there was an inter-racial element to the charge, but even without such an element, racial bias could affect the manner in which a jury assessed the testimony of a witness or of the accused. The Court stated:

'Racial prejudice and its effects are as invasive and elusive as they are corrosive. We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather we should

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<sup>17</sup> (1998) 1 S.C.R. 1128

<sup>18</sup> Section 638 of the Canadian Criminal Code (1985) provides that 'an accused is entitled to any number of challenges on the ground that a juror is not indifferent between the Queen and the accused.'

<sup>19</sup> Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on the Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communications Group, 1996)

<sup>20</sup> (1998) 1 S.C.R. 1128

acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be re-examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not.<sup>21</sup>

Racially biased juries do not always result in a conviction – there have been several high profile cases in the past where the racial composition of the jury has been linked to an acquittal. The two most high profile cases which featured such acquittal were the cases of Rodney King and OJ Simpson in the United States.

The Rodney King case took place in 1992 and it centred on the trial of four white police officers who were videotaped beating Mr King in Los Angeles. The four officers were charged with assault, battery and use of excessive force. Due to the extensive media coverage of the case, the trial was moved from Los Angeles to Simi Valley, where a jury composed of 10 white people, one Asian and one Hispanic person was empanelled.

Despite being shown the actual footage of the four officers beating Mr King, who had been tasered and on the ground, the jury acquitted three of the officers, and failed to reach a verdict on the fourth. Within two hours Los Angeles was in flames.<sup>22</sup> Commenting on the verdict, the Mayor of Los Angeles later stated that 'the (criminal justice) system failed us all.'<sup>23</sup>

In the OJ Simpson case, OJ Simpson, a former black American football star, was acquitted of a double homicide, despite there being overwhelming evidence to support a guilty verdict. The jury was composed of 11 members of REM (nine black and two Hispanic) and one white person. This verdict was widely discussed in the context of the Rodney King case two years earlier, as it was feared that a conviction could lead to another riot in Los Angeles.

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<sup>21</sup> Ibid paragraph 22

<sup>22</sup> D. Linder (2001) *The Rodney King Beating Trials*. Available at <http://jurist.law.pitt.edu/trials24.htm> Last accessed on 30/03/2012.

<sup>23</sup> The New York Times (1992) *The Police Verdict: Los Angeles policemen acquitted in taped beating* 30-04-1992 Available at <http://www.nytimes.com/books/98/02/08/home/rodney-verdict.html> Last accessed on 30/03/2012.

## Jury Research in the UK

The greatest obstacle to conducting in depth jury research in the UK is held to be the Contempt of Court Act (1981). Section 8(1) of the Act states: 'It is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed arguments advanced or votes cast by members of a jury in the course of their deliberations or any legal proceedings.'

The policy which underlined section 8(1) of the 1981 Act was described as one of 'protecting the finality of verdicts.'<sup>24</sup> The problems created by section 8(1) were highlighted in the case of *R v Mirza*,<sup>25</sup> where there was a post – verdict complaint made by a juror alleging that racial bias was present during the deliberations. Unlike the cases previously discussed, this complaint was made post – verdict, and therefore could not be investigated under the 1981 Act. This was upheld in the later cases of *R v Smith (Patrick)*<sup>26</sup> and *Attorney General v Scotcher*<sup>27</sup>. These decisions were eventually overturned by the House of Lords and investigations into allegations of jury impropriety are now allowed, as the common law permits.<sup>28</sup>

Benefits of reviewing section 8(1) of the 1981 Act include:

- improving the information, guidance and directions given to jurors, particularly jury foremen
- to discover what jurors think of the trial process
- to determine whether there is any evidence of gender or racial or any other bias
- any other factors which would allow jurors to do their job better.<sup>29</sup>

<sup>24</sup> S. Enright and J. Morton *Taking Liberties: The Criminal Jury in the 1990's* p. 156 (London: Weidenfeld and Nicolson , 1990)

<sup>25</sup> (2004) UKHL 2

<sup>26</sup> (2005) UKHL 12

<sup>27</sup> (2005) UKHL 36

<sup>28</sup> Department of Constitutional Affairs *Jury Research and Impropriety: Consultation Paper* (2005) p. 5 Available at [http://webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/consult/juryresearch/juryresearch\\_cp0405.pdf](http://webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/consult/juryresearch/juryresearch_cp0405.pdf) Last accessed 30/03/2012.

<sup>29</sup> Ibid p. 29

However, section 8(1) does not actually prevent jury research. Unfortunately it has created 'confusion about what jury research can and cannot be conducted and has contributed to an information vacuum about juries in this country.'<sup>30</sup>

A BBC survey carried out in 2002 showed that 49% of black respondents and 46% of Asian respondents would be concerned over the racial makeup of a jury if they found themselves on trial. Only 25% of white respondents had such concerns. Another question examined fair trial expectations. 53% of black respondents and 61% of Asian respondents expected to receive a fair trial. However, 79% of white respondents expected to receive a fair trial.<sup>31</sup>

This research shows that white people are much less concerned with issues of race when it comes to the composition of a jury. This may be linked to their expectation of receiving a fair trial. REM respondents clearly have less faith in both the jury and the trial process than white respondents.

In 2005 Shute et al<sup>32</sup> carried out on REM perceptions of the criminal courts. They found that in the case of black defendants who were interviewed, 20% thought that the jury in their trial was racially biased against them. One interviewee was a white Court usher who stated: 'Jury members sometimes just want to see them (ethnic minority defendants) go down: they're prejudiced.'<sup>33</sup>

In 2010 the Ministry of Justice published a report examining the fairness juries in England<sup>34</sup>. The key findings included:

- There is very little evidence to suggest juries are not fair
- All-white juries did not discriminate against black and minority ethnic defendants

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<sup>30</sup> C. Thomas *Are Juries Fair?* (London: Ministry of Justice, 2010) p. i

<sup>31</sup> As cited by J. Roberts and M. Hough in *Public Opinion and the Jury: An International Literature Review* (London: Ministry of Justice, 2010)

<sup>32</sup> S. Shute, R. Hood and F. Seemungal. *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Devon: Willan Publishing, 2005)

<sup>33</sup> Ibid p. 80

<sup>34</sup> C. Thomas. *Are Juries Fair?* (London: Ministry of Justice, 2010) p. i

- White jurors did not racially stereotype defendants as more or less likely to commit a certain offence based on race
- White jurors in a racially diverse area were significantly more likely to convict a white defendant when he was accused of assaulting a black or minority ethnic victim compared to a white victim.

Perhaps most importantly the research showed that section 8 of the 1981 Act does not prevent jury research being carried out, and that international research on juries should not presume to understand juries in England and Wales. However, in order to provide some level of comparative analysis, we must examine findings from other jurisdictions in order to understand views internationally.

## Comparing International Research

Fukurai and Krooth have carried out cross national analysis of lay participation in the criminal justice systems of several countries.<sup>35</sup> The following table is adapted from their findings.

### 1. Cross national comparison of attitudes and opinions on lay participation in legal institutions<sup>36</sup>

Attitudes	Mexico	Ireland	Japan	Korea	New Zealand	U.S.A.
The importance of jury duty is advocated in my community	49.9	29.8	7.8	34.4	26.7	26.2
I feel it is my duty to serve as a juror when needed	71.9	85.1	74.3	71.4	73.3	64.0
If I became a defendant I would prefer a jury trial to a judge trial	62.2	73.7	32.3	51.6	60.0	61.2
A jury trial is not the best way to determine a trial outcome	39.0	29.0	43.0	59.2	35.5	26.9
The more diverse the juries racial and gender background, the fairer the trial	73.4	65.8	86.2	77.4	71.1	76.0
A jury's decision reflects the community's values and judgements	64.9	73.6	81.0	78.0	72.2	53.9
In criminal court, non-English speakers are more likely to be treated worse than English speakers	43.4	47.4	54.2	67.8	44.5	71.1

There is very little we can compare this to from England and Wales. However, Roberts and Hough<sup>37</sup> cite evidence provided by Thomas, where some similarities in the questions are comparable. For example, the notion of jury service being associated with civic duty is comparable. In England and Wales 76% of respondents agreed that jury service was their 'duty' as a citizen. This is a similar result to all the countries in Table 1. Only in Ireland was there a higher sense of 'duty' when it came to jury service.

<sup>35</sup> H. Fukurai and R. Krooth (2010) The Establishment of All Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross National Analyses of Lay Participation and the Search for Mexico's Judicial Sovereignty in *Texas Hispanic Journal of Law and Policy* Vol. 16: 51

<sup>36</sup> Adapted from H. Fukurai and R. Krooth. (2010) The Establishment of All Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross National Analyses of Lay Participation and the Search for Mexico's Judicial Sovereignty in *Texas Hispanic Journal of Law and Policy* Vol. 16: 51

<sup>37</sup> J. Roberts and M. Hough. *Public Opinion and the Jury: An International Literature Review* (London: Ministry of Justice, 2009)

There appears to be a preference for trial by jury over trial by judge in most jurisdictions. Japan records a low preference, but this may be to do with the fact that trial by jury has not been in place in Japan throughout most of the Twentieth century, and has only recently been reinstated.

Results from Ireland (73.7%), Mexico, New Zealand and USA (all above 60%) compare favourably with research published in the UK by the Bar Council in 2002 where 64% of respondents to a poll preferred trial by jury.<sup>38</sup> Some of the statistics from the Bar Council report can be compared with the research carried out by Fukurai and Krooth. The following table is adapted from both reports.

## 2. Cross national comparison of people's confidence in legal institutions<sup>39</sup>

Criminal Justice Institution	Mexico	Ireland	Japan	Korea	New Zealand	U.S.A.	England and Wales
Police	15.9	53.1	60.7	31.8	77.9	54.4	81
Judiciary	45.2	88.2	87.3	55.4	87.8	68.4	71
Prosecutions	27.5	86.8	78.9	42.2	82.0	63.3	-
Jurors	52.0	75.9	44.4	45.9	63.3	65.1	81
Defence Lawyers	57.8	89.7	82.9	42.8	79.0	68.2	-
Government	42.7	46.2	48.3	22.6	41.9	23.0	43

In England and Wales, the public have a great deal more confidence in the police (81%) than in any of the other sample countries. Only New Zealand comes close (77.9%). However, the same cannot be said of trust in the Judiciary. Although a relative high percentage of respondents in England and Wales (71%) do have confidence in the judiciary, this is eclipsed by Ireland, Japan and New Zealand (all above 87%).

England and Wales reports the highest level of confidence in jurors (81%) and seems to follow suit with the overall low level of confidence placed in government. In all of the four

<sup>38</sup> The Bar Council. *Views of Trial by Jury: The British Public takes a Stand* (London: The Bar Council, 2002)

<sup>39</sup> Adapted from Hiroshi Fukurai and Richard Krooth (2010) *The Establishment of All Citizen Juries as a Key Component of Mexico's Judicial Reform: Cross National Analyses of Lay Participation and the Search for Mexico's Judicial Sovereignty in Texas Hispanic Journal of Law and Policy* Vol. 16: 51 and Julian Roberts and Mike Hough. *Public Opinion and the Jury: An International Literature Review* (London: Ministry of Justice, 2009)

comparable areas of police, judiciary, jurors and government, respondents in England and Wales have a greater level of confidence than those in the USA and Mexico.

On the specific topic of racial bias on the jury, a 1997 report by the American Bar Association<sup>40</sup> highlights the lack of credibility which the American judicial system faces in the eyes of African –Americans, Asians –Pacific Americans and Hispanics: 'The legitimacy of the courts and judicial system will be called into question with increasing frequency unless our judiciary and the judicial system reflect the diversity of the society in which we live.'<sup>41</sup>

The report shows that 70% of African – American lawyers believe that the courts treat blacks worse than whites. 52% of African American lawyers believe 'very much' that racial bias exists within the American criminal justice system, and one of the main indicators of this bias was held to be racially unrepresentative juries.<sup>42</sup>

Racial prejudice within the Canadian criminal justice system was highlighted in the Report of the Aboriginal Justice Implementation Commission in 1999<sup>43</sup>. The report identified racial prejudice in the Canadian criminal justice system, which from its inception has systematically excluded Aboriginal people from juries.

The Report of the Aboriginal Justice Inquiry of Manitoba, also published in 1999, claimed that the primary reason why Aboriginals were not being properly represented on jury panels was due to jury panels being selected in a way designed to work against members of the Aboriginal community.<sup>44</sup>

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<sup>40</sup> American Bar Association *Justice in Jeopardy: Report of the American Bar Association Commission on the 21<sup>st</sup> Century Judiciary* (1997). Available at <http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf> Last accessed on 30/03/2012.

<sup>41</sup> Ibid p. 14

<sup>42</sup> Ibid pp.55 - 56

<sup>43</sup> Aboriginal Justice Implementation Commission. *Final Report of the Aboriginal Justice Implementation Commission* (1999). Available at [http://www.ajic.mb.ca/reports/final\\_toc.html](http://www.ajic.mb.ca/reports/final_toc.html) Last Accessed on 30/03/2012

<sup>44</sup> Aboriginal Justice Implementation Commission *Report of the Aboriginal Justice Inquiry of Manitoba* Chapter 9. Available at <http://www.ajic.mb.ca/volume1/chapter9.html#1> Last Accessed on 30/03/2012



## Remedies and Alternatives

Given that research by Cheryl Thomas has shown that jury trials are quite fair and impartial, one may question the need for remedies to the allegations of racial bias on the part of the jury. However, seeking remedies need not be limited to one specific area – they may help address the issue of expectations as referred to in the BBC report where only 50% of black respondents expected to receive a fair trial. A fair trial is a fundamental human right under Article 6(1) of the ECHR and therefore everyone should expect to receive one.

In 2001 the Review of the Criminal Courts in England and Wales was published. This was a systematic and comprehensive review of the criminal courts and their function and operation. The Report recognised the issue of racial bias within jury panels and it held the issue of racial and ethnic minorities not being entitled to serve on juries as a ‘fundamental problem.’<sup>45</sup>

The Review also referred to the recommendations made by the Royal Commission on Criminal Justice in 1993. The Royal Commission recommended that:

‘in exceptional cases, where compelling reasons can be advanced for such a course, it should be possible for either the prosecution or the defence to apply to the judge before a trial for the selection of a jury containing up to three or more people from ethnic minority communities .....and to argue the need for one or more of the three jurors to come from the same ethnic minority as the defendant or victim.’<sup>46</sup>

This recommendation was never adopted.

The Review of the Criminal Courts in England and Wales made three recommendations to try and tackle the problem of racially biased juries in the criminal justice system:

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<sup>45</sup> Lord Justice Auld. *Review of the Criminal Courts in England and Wales* Chapter 5 paragraph 52. Available at <http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/chpt5.pdf> Last Accessed on 30/03/2012

<sup>46</sup> Royal Commission on Criminal Justice. *Report of the Royal Commission on Criminal Justice* (London: HMSO, 1993). pp. 207- 208. Available at <http://www.official-documents.gov.uk/document/cm22/2263/2263.pdf> Last Accessed on 30/03/2012

1. The Central Summoning Bureau could ask potential jurors to state their racial or ethnic backgrounds
2. The parties could be required to indicate early in their preparation for pre-trial assessment whether race is likely to be a relevant issue, and if so, whether steps should be taken to secure some ethnic minority representation on the jury
3. There could be a minimum number of ethnic minority jurors who must be included on the jury for it to be deemed valid.<sup>47</sup>

The Review also recommended that the restrictions on jury research under section 8 of the 1981 Act be completely lifted, and that appeal judges should be allowed to investigate jury room deliberations where there were allegations of misconduct by jurors.

In the United States, where the issue of race has proved contentious for several hundred years, academics, legal practitioners and social scientists have been continually debating over how best to secure a jury which is representative of the community from which it is selected.

Fukurai has claimed that mandating racially mixed juries would 'help ensure fair trials by discouraging race based prosecutions' and 'ensure that investigations are done in a non-discriminatory manner and that evidence is gathered, presented and argued without racial discrimination.'<sup>48</sup>

He has put forward three models which he claims would be suitable for all jury trials, and which would ensure racially representative juries.

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<sup>47</sup> Lord Justice Auld. *Review of the Criminal Courts in England and Wales* Chapter 5 paragraph 60. Available at <http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/chpt5.pdf> Last Accessed on 30/03/2012

<sup>48</sup> Available at <http://currents.ucsc.edu/03-04/10-20/juries.html> Last accessed 30/03/2012

## Jury de Medietate Linguae

The Jury de Medietate Linguae (Jury of the half tongue) is a jury model which originated in England in the Twelfth - century. Its purpose was to ensure that Jewish people could receive a fair trial.<sup>49</sup> Under this model, the essential feature was that regardless of the number of minorities in the general population, the composition of the mixed jury was considered to be fixed, whereby half the jury would come from the majority group and the other half from the minority group.

This process of selection was a 'narrowly defined conception of equity, with the judging group composed of representatives of an accused peers...the peers in most cases were defined in terms of the defendants own social, racial and national identity.'<sup>50</sup>

The Jury de Medietate Linguae remained in place for all foreigners who were resident, and was also extended to all newly arrived foreigners. This endured until the passing of the Naturalisation Act (1870). This Act permitted aliens to serve on juries in the same manner as an English born citizen, thus eliminating the need for a mixed jury privilege.<sup>51</sup>

The Jury de Medietate Linguae was only discussed by the American Courts once. This was in the case of *United States v Wood*<sup>52</sup> when the United States Supreme Court stated *in dictum* and without analysis that: 'The ancient rule which an alien might have a trial by a Jury de Medietate Linguae 'one half denizens and the other aliens', - in order to ensure impartiality – no longer applies.'

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<sup>49</sup> M. Constable *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994)

<sup>50</sup> H. Fukurai and R. Krooth. *Race in the Jury Box: Affirmative Action in Jury Selection* p. 65 (New York: SUNY Press, 2003)

<sup>51</sup> D. Ramirez. "The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: a history and a proposal for change." *Boston University Law Review* 74 (1994) p. 777

<sup>52</sup> 229 U.S. 123 (1936)

## The Hennepin Country Model

The Hennepin County Model was developed in the United States in Hennepin County, Minnesota. This model works on the notion of allocating jury seats to minority groups within a community, based on the percentage of the community made up by minority groups. The process was originally designed to facilitate Grand Jury selection, but there is no reason to conclude that the process cannot be utilised for regular jury selection. The process works as follows:

'If after randomly selecting the first 21 Grand Jurors, either only one or no minority persons appear on the panel, selection shall continue down the list of 55 randomly selected and qualified persons, until there are at least 2 minority persons out of 23 on the Grand Jury. If no minorities appear on the list of 55 potential grand jurors, and other 55 qualified persons should be selected until the goal of at least two minority jurors is obtained.'<sup>53</sup> Therefore the racial composition of the jury is not fixed. Rather it remains changeable depending on the changing racial demographics of the area from which the jury is being selected.<sup>54</sup>

## The Social Science Model

The Social Science Model is based on the group dynamics which take place during jury deliberations. This method involves a mandatory minimum requirement of three members of racial minorities to be empanelled on to a jury. It is a form of peremptory inclusion and it is claimed that the inclusion of these three minority group jurors will allow for resistance to the opinions of the majority of the jurors. The remaining jury slots are then filled through the normal jury selection process.<sup>55</sup>

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<sup>53</sup> L. Smith, Final Report of the Hennepin County Attorney's Task Force of Racial Composition of the Grand Jury (1992) in *Hamline Law Review* 16 879 – 921, as cited by H. Fukurai (2000) Where did all the Hispanic Jurors Go? Racial and Ethnic Disenfranchisement in the Grand Jury and the Search for Justice in *Western Criminology Review* 2 (2). Available at <http://wcr.sonoma.edu/v2n2/fukurai.html> Last accessed 30/03/2012.

<sup>54</sup> H. Fukurai. "Where did all the Hispanic Jurors Go? Racial and Ethnic Disenfranchisement in the Grand Jury and the Search for Justice." *Western Criminology Review* 2 (2) (2000) . Available at <http://wcr.sonoma.edu/v2n2/fukurai.html> Last accessed 30/03/2012.

<sup>55</sup> H. Fukurai and D. Davis "Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas and Affirmative Jurors of the Hennepin and the Jury de Medietate Linguae". *Virginia Journal of Social Policy and Law* (Spring) (1997) 4: 645

This method of jury selection not only preserves the appearance of fairness, but also the legitimate viability of both jury deliberations and verdicts. While some may argue that this is simply of form of racial quotas, advocates would argue that such a system would:

1. Appease society's dissatisfaction with racially discriminatory peremptory challenges
2. Lead to fairer decisions on the assumption that minority jurors are more able to understand and relate to the character of a defendant with a similar racial background
3. Increase society's faith in the fairness of trial by jury.<sup>56</sup>

## Further Suggestions

The Aboriginal Justice Inquiry of Manitoba issued its final report in 2001. Its recommendations included:

1. When an exemption from jury service is granted, the person exempted should be replaced by a person of the same racial or ethnic background
2. Challenges for cause should be removed from the hands of the prosecution and defence, and should be left up to the presiding judge
3. In the event that there is a need to look elsewhere for jurors, the jury should be selected from a community as similar as possible, demographically, culturally and racially, to the community where the offence took place.<sup>57</sup>

There are also prophylactic safeguards in place which are supposed to guarantee impartiality on the part of the jury. These include the oath taken by jurors to remain impartial, the random selection of the jury and the fact that majority verdicts are permitted.<sup>58</sup>

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<sup>56</sup> S.L. Johnson "Black Innocence and the White Jury." Michigan Law Review 83 (1985): 1611

<sup>57</sup> For the full set of recommendations go to [http://www.ajic.mb.ca/reports/final\\_a1.html](http://www.ajic.mb.ca/reports/final_a1.html) Last accessed 30/03/2012.

<sup>58</sup> G. Daly and R. Pattenden (2005) "Racial Bias and the English Criminal Jury." The Cambridge Law Journal, 64, 678-710.

One practical suggestion which has recently been suggested, and which may go some way to reducing the risk of racial bias on the jury, is that jury deliberations should be tape recorded. There would be three conditions attached:

1. The tapes are never made public
2. The parties will have access to an edited transcript from which anything identifying the jurors will be edited
3. Access is conditional on the Court of Appeal being satisfied of a plausible allegation of racial bias.<sup>59</sup>

However, whether this recommendation is considered remains to be seen.

## **Alternatives to Jury Trial**

Trial by jury is not the only option in the criminal justice system. In fact, jury trials make up less than 1% of all criminal cases in England and Wales.<sup>60</sup> By examining alternatives to jury trials in other jurisdictions, Enright and Morton have identified three alternatives which could be used in the criminal courts in England and Wales. They are:

1. Laymen sitting with judges
2. Judge alone
3. A bench of three Judges.<sup>61</sup>

## **Laymen Sitting With Judges**

The German system of the Schoeffengericht is one where two laymen sit with the judge. In serious cases there will also be two legal observers and a two thirds majority will be

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<sup>59</sup> Ibid pp. 703-708

<sup>60</sup> S. Shute, R. Hood and F. Seemungal. *A Fair Hearing? Ethnic Minorities in the Criminal Courts* (Devon: Willan Publishing, 2005) p. 1.

<sup>61</sup> S. Enright and J. Morton. *Taking Liberties: The Criminal Jury in the 1990's* (London: Weidenfeld and Nicolson, 1990) pp. 144 - 146

required to convict. The lay people are present to ensure that the panel is representative of the community. The value of the lay people sitting with the judge has been questioned by Knittel and Seiler who claim that ‘although on occasions the laymen may outvote the judge, they lose their candour in this presence.’<sup>62</sup>

I would be inclined to agree with this view for two reasons. First of all, judges are not keen on being told what to do by any group or person. They see their independence as being paramount to the integrity of the criminal justice system, and therefore may simply ignore what is being suggested by a lay person. Secondly, a case which is full with legal terminology and jargon may have an overwhelming effect on a lay person and they may simply end up deferring to the views of the judge.

## Judge Alone

In England and Wales up to 95% of cases are disposed of by a judge sitting alone.<sup>63</sup> It is often claimed that this is the best situation for a lawyer who is running a solid as opposed to a speculative legal defence. According to Devlin, a trial by judge alone is going to be more expeditious and cheaper than trial by jury.<sup>64</sup>

Usually a case will only be heard by a judge alone if it is to try a minor offence and can therefore be dealt with in a court of summary jurisdiction. These courts are limited in their powers of punishment, and defendants who plead guilty to such an offence are usually reprimanded with a slap on the wrist in the shape of a fine or a suspended sentence.

## A Bench of Three Judges

The simple question to be asked here is ‘are three minds better than one?’ A bench of three judges is an attractive option as it offers three differing views from legal experts and it may assist in rooting out any bias which may be present. Dawkins uses this argument in favour of

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<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> Sir Patrick Devlin. *Trial by Jury* (London: Stevens, 1956)

a jury of 12 when arguing against judging alone: 'Twelve heads are better than one, because they represent twelve assessments of the evidence.'<sup>65</sup>

There are drawbacks with this measure, one of which is cost. Three judges with pensions, holidays and benefits would have to be paid. As well as this there would be the matter of recruiting judges of the required calibre and the issue of patronage, whereby a senior judge may inhibit a junior appointee. An example of a bench of three judges is the use of the Special Criminal Court in the Republic of Ireland. Under the Offences against the State Act (1939) the Special Criminal Court was established and is allowed to make its own rules governing practice and conduct. It was established to deal with cases of terrorism and paramilitary activity. However, in recent year sit has been used to try serious organised crime. The lack of a jury and the increasing use of the Court for a function it was not designed for have resulted the United Nations Commission on Human Rights calling for an end to its jurisdiction.<sup>66</sup>

## Conclusions

Trial by jury is regarded as a bastion of the criminal justice system. That the jury is not biased in any way is of the utmost importance for it to carry out its duty in an impassioned manner, and make decisions based on the facts and merits of a case.

Over the course of this paper I have examined the notion of racially biased juries. Several cases from England and Wales where allegations of racial bias was made against members of the jury were considered. These were examined in the context of the European Convention on Human Rights as a fair trial right under Article 6(1).

The next section examined available research findings on the jury in the UK. Thomas has shown conclusively that Section 8(1) of the Contempt of Court Act (1981) does not prevent in depth research being carried out in to the jury – it has simply created confusion over

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<sup>65</sup> The Observer, (1997) *Three Herring Gull Chicks – The reason juries don't work* 16/11/1997. Available at <http://tonymusings.blogspot.co.uk/2007/08/trial-by-jury-two-points-of-view.html> Last accessed on 30/03/2012.

<sup>66</sup> <http://www.un.org/News/Press/docs/2000/20000728.hrct587.doc.html> Last accessed on 30/03/2012.



what can and cannot be done. I then compared UK research with international findings which showed that the public in England and Wales place a great deal more confidence in the jury than in the other countries sampled.

Finally, I discussed some of the remedies which can be used to make juries more representative of the communities' from which they are selected. Alternatives to jury trial were also considered.

Researching and writing this paper has allowed me to reach several conclusions on the topic of racially representative juries. Despite the allegations that have been circulating for several decades that the racial composition of juries affects their fairness, there is no evidence to suggest that all-white juries discriminate against black and ethnic minority defendants. There is no evidence to suggest that all – white juries will convict black and ethnic minority defendants based on race, nor is there any evidence to suggest that all – white juries will acquit a white person accused of assaulting a black and ethnic minority victim.

When surveyed it was revealed that 49% of black respondents and 46% of Asian respondents would be concerned over the racial makeup of a jury if they found themselves on trial. Where such concerns are raised, perhaps the Hennepin County Model could be adopted whereby jury seats would be allocated to minority groups within a community based on the percentage of the community made up by minority groups.

The non-white British population of England and Wales has grown from 6.6 million in 2001 to 9.1 million in 2009 – nearly one in six of the population.<sup>67</sup> Adopting the Hennepin Model at a national level would ensure that there would be at least one member of the panel from a minority group. At a local level, to use London as an example, there would be at least 3 minority members on a jury.<sup>68</sup> This model would ensure a racially representative jury every time as it would bypass the population dynamics which may affect the panel.

<sup>67</sup> <http://www.guardian.co.uk/society/2011/may/18/non-white-british-population-ons> Last accessed on 30/03/2012

<sup>68</sup> London population (7,556,900) / London minority population (2,267,070) = 3.33 approx. 3 persons: Statistics available at <http://neighbourhood.statistics.gov.uk/dissemination/LeadTableView.do?a=3&b=276743&c=London&d=13&e=13&g=325264&i=1001x1003x1004&m=0&r=1&s=1201351285750&enc=1&dsFamilyId=1812> Last accessed on 30/03/2012

It would simply be impossible to guarantee that a random selection of 12 people will be free from biases or prejudices. However, this is not a vote in favour of doing away with trial by jury. Jury trial is deemed as the palladium of justice,<sup>69</sup> and those 12 people provide an essential safeguard against the will of the State being enforced on the public: 'Replace these persons by a single judge and the critical safeguard has gone...it is the unpredictability of the verdict that is the guarantee of independence.'<sup>70</sup>

Despite the safeguards provided, the jury, as an institution, 'should be no more free from scrutiny and discussion than any other institution... such scrutiny must permit bona fide research and the interviewing of jurors for this purpose.'<sup>71</sup> However, any clarification in the Contempt of Court Act must not:

- Undermine public confidence in the jury
- Compromise frank discussion among the jury in reaching their verdict
- Prejudice the privacy or security of jurors
- Undermine the finality of their decisions.<sup>72</sup>

As I have stated, to have an unbiased jury would be next to impossible. Cardozo affirms this stating:

'We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. Deep below the consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and habits and convictions which make the person.'<sup>73</sup>

<sup>69</sup> L. Levy *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999)

<sup>70</sup> N. Blake. *The Case for the Jury* in M. Findlay and P. Duff *The Jury under Attack* (London: Butterworths, 1988) pp. 140 – 161.

<sup>71</sup> Hansard 2 March 1981 p 31 column 41, as cited in Department of Constitutional Affairs *Jury Research and Impropriety: Consultation Paper* (2005) p. 5 Available at [http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/juryresearch/juryresearch\\_cp0405.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/juryresearch/juryresearch_cp0405.pdf) Last accessed 30/03/2012.

<sup>72</sup> Department of Constitutional Affairs *Jury Research and Impropriety: Consultation Paper* (2005) p. 46 Available at [http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/juryresearch/juryresearch\\_cp0405.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/consult/juryresearch/juryresearch_cp0405.pdf) Last accessed 30/03/2012.

<sup>73</sup> B. Cardozo. *The Nature of the Judicial Process* (Yale: Yale University Press, 1921) p. 12.

An allegation of racial bias against a juror is unique, as it is very difficult to prove, yet is enough to cast a doubt over the legitimacy of the verdict. Unless this doubt can be reduced as much as possible, then the validity of the jury's decisions may always be called into question.



# **Why TWAIL Must Not Fail: Origins and Applications of Third World Approaches to International Law**

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This research paper is dedicated to the Late Prof. Ram Prakash Anand, a pioneer TWAIL-er. Although I have never met him personally, his books and papers have enlightened me on several subjects of International Law.

## Abstract

*In this paper I have, rather simplistically, started with the history and basics of TWAIL. Then I focused on the connection of TWAIL with recent scenarios such as the Iraq invasion i.e. the ‘tolerance view’ v.s. ‘intolerance view’. Lastly, I have tried to get rid of many misconceptions associated with TWAIL such as the promotion of legal nihilism. I have also expressed my own original views on future aims and objectives of TWAIL and attempted to solve some of the problems and contradictions in connection with TWAIL as well as fill in some blanks in the approach, which have not, to my knowledge, been discussed in detail. I would only like to add that this paper was written primarily to make third world countries conscious of colonizing and dominating first world countries.*

*“They (The Europeans) found themselves in the middle of a network of States and inter-State relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization.”<sup>1</sup>*

Prof. R. P. Anand

## Introduction

While international law originally adopted an attitude of indifference towards colonialism, it eventually ended up justifying and spreading it. In this manner, international law ensured the survival and promotion of colonialism. In simplest terms, Third World Approaches to International Law (TWAIL), as given by Mutua, is “the broad dialectical of opposition to

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<sup>1</sup> RP Anand , *Asian States and the Development of International Law* (1972); CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, 18th Centuries)* (1967) 224:

International Law”<sup>2</sup>. TWAIL offers theories as well as methods and, as its name suggests, can be best described as an approach<sup>3</sup> or rather as a spectrum consisting of several approaches<sup>4</sup>. It is an approach drawn from the history of international law and colonization.

As a distinct way of thinking about international law, TWAIL is a historically aware approach that, through academic scholarship and discussion, makes innocent third world countries aware of openly colonizing and dominating first world countries<sup>5</sup> and works towards eliminating the disadvantages of an underdeveloped Third World. Gathii also agrees that “Third World positions exist in opposition to, and as a limit on, the triumphal universalism of the liberal/conservative consensus in international law.”<sup>6</sup>

The study of international law’s universalism has been done through theoretical workouts. Consequently, the academic study of new international law is able to accommodate novel movements and intellectuals. TWAIL is such a movement<sup>7</sup>. It responds to international law as an imperial project and seeks internal transformation of the conditions in the Third World. Thus, it facilitates the understanding of the relation between international law and the shortcomings of the lesser developed regions.

## History of TWAIL

As a phenomenon, TWAIL is not new, but as a scholarly network it formed grew in and around the 1990s. It is also to be noted that the term TWAIL has expanded to refer to all scholarships that have advocated a postcolonial approach to international law including those associated with NAIL, (New Approach to International Law) and the significant amount of scholarship that had occurred before the 1990s<sup>8</sup>. In fact, it is believed that TWAIL

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<sup>2</sup> Makau Wa Mutua ‘What Is TWAIL?’ 94 AM. SOC’Y INT’L L. PROC. 31 (2000)

<sup>3</sup> O. C. Okafor / International Community Law Review 10 (2008) 371–37

<sup>4</sup> James Thuo Gathii, ‘Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory’ (2000) 41 *Harvard International Law Journal* 263 at 273

<sup>5</sup> James Gathii, ‘Imperialism, Colonialism, and International Law’, (2007) 54 BUFF. Law REVIEW, 1013.

<sup>6</sup> James Thuo Gathii, ‘Rejoinder: Twailing International Law’, (2000) 98 Michigan LR 2067

<sup>7</sup> Singh Prabhakar, Why Wield Constitutions to Arrest International Law? (October 3 2011)

<sup>8</sup> (I would like to express my gratitude to Monica Mishra, a fellow admirer of international law and classmate of mine. I am indebted to her for bringing this point as well as several other basic points to my notice, which have helped me in this research and am sure will be useful in many future projects)

emerged from NAIL. The 'post' in 'postcolonial' does not refer to 'after period of colonialism' or 'triumphing over colonialism', but to the 'continuation of colonialism in the consciousness of formerly colonized peoples, and in institutions imposed in the process of colonization'<sup>9</sup>.

The terms 'Third World', 'the South', 'less-developed', 'underdeveloped' and even sometimes 'developing', all refer to those states where the people are socially backward and lag behind in terms of economic growth<sup>10</sup>. The term Third World has also been criticized given the growing diversity amongst Third World states and the fracturing and reshaping of alliances between them. Some scholars believe that the notion of a Third World may disguise the differences between and within these nations. When reference is made to a Third World immediately, images of starving, unwashed and terminally ill people come to mind. These images stand in contrast to those we hold of the First World, characterized by prosperity, luxury, and liberty. However, international law is not meant to differentiate between the Third and First worlds or between prosperous and underdeveloped nations. Hardt and Negri notably declared that globalization had made the Third World obsolete as there is a First World in every Third World, and a Third in the First, and the Second almost nowhere at all<sup>11</sup>. However, classifying states into inferior and superior has always facilitated in changing the legal system<sup>12</sup>. In fact, when these groups refer to themselves as 'Third World', it makes it hard for states to ignore their constant exploitation and the subordination that they have come to represent in the minds of the people all around the globe.

International law lays down rules that intentionally ignore the condition of uneven development in favour of prescribing uniform global standards. It has almost completely discarded the principal of special and differential treatment. TWAIL scholars have had to negotiate these issues continually from the very early years of the movement. In reality

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<sup>9</sup> Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46 Harvard International Law Journal 459, 469.

<sup>10</sup> Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 Wisconsin International Law Journal 353-356.

<sup>11</sup> Nigel Harris, *The End of the Third World* (1987); Mark T Berger, 'The End of the Third World' (1994) 15 Third World Quarterly 257 and 'The End of the Third World? History, Destiny and the Fate of Third Worldism' (2004) 25 Third World Quarterly 9; Also see James H. Mittleman & Mustapha Kamal Pasha, *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World* (New York: St. Martins Press, 1997) at 23.

<sup>12</sup> Balakrishnan Rajagopal, 'Locating the Third World in Cultural Geography' (1998-9) Third World Legal Studies 1, 2.

though, the international law regime is not universal and impartial in relation to sovereign states. TWAIL scholars point to a two-tiered system of 'international' law that legitimizes and supports the actions of First World nations while concurrently criminalizing the actions of their Third World counterparts.

## **TWAIL in Present Time**

The rapid increase in the number of books, articles, PhDs and papers written on TWAIL is evidence of it gaining prominence, especially among those in the legal profession. Many law schools have even offered courses on TWAIL. The surfacing of TWAIL is proof, of a step away from the dominant Western vision of the International law. Leading books and scholars of international law are no longer based in Europe and North America but from all over the globe. In fact, North American based TWAIL-ers are only a small part of a larger tradition of third world scholarship in international law that dates back decades<sup>13</sup>. They have addressed several issues relating to society, politics, and economics with a primary dedication to democratic values.

But the reason why the most people are still not aware of it is because TWAIL has, till now, not been a well structured group with formal membership<sup>14</sup>. Until December 2011, only five TWAIL conferences were held. These conferences are sometimes referred to as TWAIL I, II, III, IV and V but are not to be confused with the different generations of TWAIL. TWAIL is a spread-out network of scholars, with common ideologies but no structure of authority. It has operated as a loose network. Okafor says that TWAIL-ers are "solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help create or maintain the generally unequal, unfair, or unjust global order."<sup>15</sup> Also, students of international law refer to books which may promote the interests of a particular country or support the current world order. Not researching both sides of the argument and not critiquing what one reads

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<sup>13</sup> James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography' 3(1) Trade Law & Development 26 (2011)

<sup>14</sup> Ibid.

<sup>15</sup> Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective', (2005) 43 OSGOODE HALL L.J. 171, 176



is harmful for progressive scholars. In many institutions in the First World countries TWAIL is thought of as a 'conspiracy theory', giving the first world countries a posture of innocence because very few professors are TWAIL-ers themselves.

## TWAIL Scholars

For decades, TWAIL scholars have challenged the existing international legal system. TWAIL has risen even more in the last decade with the work of academicians such as Prof. B.S. Chimni, Prof. R.P. Anand, Antony Anghie, Karen Mickelson, Prof. J. T. Gathii, and Prof. O. Okafor. However, TWAIL scholars do not all share the same political, economical or ideological views. Antony Anghie and Bhupinder Chimni have distinguished what may be referred to as the old and new schools of thinking into TWAIL I and TWAIL II scholarship<sup>16</sup>. Three main characteristics of TWAIL I are:

- (1) condemnation of "colonial international law for legitimizing the subjugation and oppression of Third World peoples";
- (2) Focus on "sovereign equality of states" and the doctrine of "non intervention" as protection from renewed imperial interference;
- (3) Stress on the fact that "Third World states were not strangers to the idea of international law";<sup>17</sup>

Another characteristic of TWAIL I is contributionism. TWAIL I overemphasizes contributions by varied communities in the creation of international customs and norms. TWAIL II does not condemn contributionism but focuses on examination of scenarios, selection of approaches and concepts and equality which transcends the size of a community<sup>18</sup>.

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<sup>16</sup> Anghie and Chimni divide scholarship into TWAIL I and TWAIL II James Thuo Gathii, in 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184, 191, identifies strong and weak strains of TWAIL. Makau Mutua, in 'What is TWAIL?' (2000) 94 ASIL Proceedings 31, 32, also writes about two trends in TWAIL; that of the affirmative reconstructionists and the minimalist assimilationists

<sup>17</sup> A. Anghie & B.S. Chimni, 'Third World Approaches To International Law And Individual Responsibility In Internal Conflicts' (2003) 2 Chinese J. Int'l L 77, At 79.;

Ardi Imseis, 'Third World Approaches To International Law And The Persistence Of The Question Of Palestine', Palestine Yearbook Of International Law, Vol XV (2008)

<sup>18</sup> Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective' (2005) 43 OSGOODE HALL L.J. 179

Some TWAIL scholars, after critically analyzing TWAIL I, labeled it as a weak form of scholarship<sup>19</sup>. In fact, TWAIL I scholarship is believed to be not only weaker than TWAIL II but also counter-productive as it does not, speaking broadly, challenge the status quo but allows and strengthens injustices in the prevailing system.

TWAIL II has concentrated on international institutions and the impact of globalization. It is posited that the TWAIL discourse is in the process of entering into a new phase post 9/11<sup>20</sup>. This phase can be understood as one in which TWAIL scholarship must respond to a series of new challenges in a world where terrorism is a serious concern<sup>21</sup>. David Kennedy describes it as arising “among a generation of scholars in rebellion. Against the tradition of third world engagement with the international legal order associated with decolonization, the UN, and the politics of the nineteen sixties and seventies”<sup>22</sup>. TWAIL II is generally considered as the stronger of the two trends because it gave more consideration to Third World people than the Third World states. Several TWAIL I scholars from the third world countries showed traces of an anti-western sentiment, which is not what TWAIL aims at<sup>23</sup>.

There is also “TWAIL III” scholarship which is awaiting recognition. TWAIL III implies “a linear conception of the history of Third World scholarship on international law, a gradual progression towards some glorious enlightened future.”<sup>24</sup>

Matua states that TWAIL is driven by three basic, interrelated and purposeful objectives. The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms

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<sup>19</sup> James Thuo Gathii, ‘International Law and Eurocentricity’ (1998) 9 *European Journal of International Law* 184, 191, Gathii considers TWAIL I as weak because it fails to challenge the existing conditions and attempts to re-establish a Western regime rather than engage with it for reform. See also Antony Anghie and BS Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) 2 *Chinese Journal of International Law* 77; Makau

Mutua, ‘What is TWAIL?’ (2000) 94 *American Society of International Law Proceedings* 31,

<sup>20</sup> Madhav Khosla, *The TWAIL Discourse: The Emergence Of A New Phase* [International Community Law Review](#), (2007) Volume 9, Number 3

<sup>21</sup> *Ibid*

<sup>22</sup> David Kennedy, ‘The TWAIL Conference: Keynote Address’ (2007) 9 *International Community Law Review* pp333–344, 335.

<sup>23</sup> Dipesh Chakrabarty, ‘Modernity and Ethnicity in India’ in *Multicultural States: Rethinking Difference and Identity* (1996), See also Edward Said, *Culture and Imperialism* (1993) 17. See also Dipesh Chakrabarty, *Habitations of Modernity: Essays in the Wake of Subaltern Studies* (2002) xxi

<sup>24</sup> Karin Mickelson, ‘Taking Stock Of TWAIL Histories’, (2008) *International Community Law Review* 10 355–36; *Ibid*.

and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the diverse geographies<sup>25</sup>.

Anghie believes that the concept of 'sovereignty' was made in the 'colonial encounter', and this has backed international law ever since<sup>26</sup>. He states in his book that "international lawyers over the centuries maintained this basic dichotomy between the civilized and the uncivilized, even while refining and elaborating their understanding of each of these terms. Having established this dichotomy, furthermore, jurists continually developed techniques for overcoming it by formulating legal doctrines directed towards civilizing the uncivilized world. I use the term 'dynamic of difference' to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society."<sup>27</sup>

Micheal Fakhri attempts to use the theories of Polanyi and Foucault to understand TWAIL. Polanyi states that it was not only the economic system that ruined the lives of the third world; but in fact, it was the speed of the institutional changes brought upon them by the first world. Foucault examines the various effects of power, which is central to his theory of change<sup>28</sup>. Polanyi's theory is known for its rich framework of law, social change, and creation of links based on interest<sup>29</sup>, while Foucault's theory studies the relationship between power and knowledge, which further provides a way of further understanding the market's influence on the international regime. Both Foucault and Polanyi considered the conflict and power between ever-shifting social actors to shape and be shaped by ideas and institutions<sup>30</sup>.

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<sup>25</sup> Makau wa Mutua, 'What is TWAIL?' (2000) Proceedings of the 94th Annual Meeting of the American Society of International Law 31 at p.31

<sup>26</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press, 2004), pp. 5, 32, 11

<sup>27</sup> Ibid.

<sup>28</sup> Michel Foucault, *The History of Sexuality, Volume I: An Introduction*, (1978) pp. 92–96; Michel Foucault, "Intellectuals and Power", in Sylvère Lotringer, *Foucault Live (Interviews, 1961–1984)* (1996) pp. 70–82 and Michel Foucault, "Truth and Power", in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (1980) pp. 109–133.

<sup>29</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origin of Our Time* (1944)

<sup>30</sup> 'Law as the Interplay of Ideas, Institutions, and Interests: Using Polanyi (and Foucault) to Ask TWAIL Questions', 10(4) International Community Law Review, 455 (2008).

## Quest for Global Order

At the heart of TWAIL is, however, unity in "opposition to the unjust global order"<sup>31</sup>. The Third World has contributed and is capable of continuing to contribute to a system of global order<sup>32</sup>. The hunt for a post-hegemonic global order began after World War II and during the period of decolonization<sup>33</sup>. Once the deconstruction of the "use of international law for creating and perpetuating Western hegemony" is over, the new generation of TWAIL scholarship sets out, ultimately, to "construct the basis for a post-hegemonic global order."<sup>34</sup>

The problem facing the TWAIL-ers in their attempt to achieve global order arises when it becomes difficult to distinguish between the interests of the states and the interests of the individuals which, particularly when it comes to humanitarian intervention and human rights law in general. It is impossible to completely separate the interests of both<sup>35</sup>. Questions like 'Is external intervention which violates international law justifiable when the state does not act in accordance to popular sovereignty?' are not those that can be answered with a simple 'yes' or 'no'.

Some TWAIL scholars place importance on local and international social movements as engines of reform for the Third World and international law<sup>36</sup>. Scholars who have studied

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<sup>31</sup> David P. Fidler, 'Revolt Against Or From Within The West? TWAIL, The Developing. World, And The Future Direction Of International Law', (2003) Chinese Journal Of International Law

<sup>32</sup> See generally RP Anand , *Asian States and the Development of International Law* (1972); CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, 18th Centuries)* (1967) 224: See also Christopher Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988); SP Sinha, *Legal Polycentricity and International Law*, (1996); Yasuaki Onuma, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective' (2000) 2 Journal of the History of International Law 1. For a more recent example, see Christopher Weeramantry, *Universalising International Law* (2004).

<sup>33</sup> R. P. Anand, *New States and International Law* (1972), 46; See generally, Nagendra Singh, *India and International Law: Ancient and Mediaeval* (1973); James Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184; S P Sinha, *New Nations and the Law of Nations* (1967); J J G Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961)

<sup>34</sup> Ibid. 6 at 31

<sup>35</sup> Philip Cunliffe, *The Responsibility to Protect: A Critique*, prepared for ECPR Standing Group on International Relations Conference, September (2007), 17-19.

<sup>36</sup> Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, (2000) 41 Harvard ILJ

the Third World's connection to international law believe that the current global scenario suffers from narrow-mindedness that badly affects humanity<sup>37</sup>.

Despite the quick spread of the spirit of democracy to even the most remote areas, the structure of the United Nation Organization suffers from a serious democratic defect. That is that the General Assembly, which consists of all the members of the UNO, only has the power to make recommendations to the Security Council, whereas the Security Council consists of only fifteen members of which five members are permanent<sup>38</sup>.

## Tolerance VS. Intolerance

Some confusion about the TWAIL quest for a post-hegemonic global order comes from the tension created by the plea for non-dependence against the demand for assistance from the West, which creates a paradox in TWAIL. The cry for legal pluralism is a sign of the dislike of the Third World for what Friedman called the "golden straitjacket"<sup>39</sup>. Some TWAIL-ers support the substantive tolerance view whereas some support the substantive intolerance view. The tolerance view is that Third World countries continue to be dependent on developed countries, when critical situations such as wars, tyranny of leaders arise. The intolerance view demands that developed countries not interfere in the affairs of lesser developed ones. The debate on justification of the Iraq invasion is the best example of the debate of tolerance against intolerance view. Fidler argues that in the context of international law, solidarism is connected with intolerance and pluralism with tolerance<sup>40</sup>. Tolerance requires the solidarism between states that pluralism is an indispensable attitude of inter-state relations and international law. Hence, Fidler stresses and muses on the paradox that tolerance emerges out of intolerance<sup>41</sup>.

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<sup>37</sup> Upendra Baxi, 'Some Remarks on Eurocentrism and the Law of Nations', in: R. P. Anand (ed.), *Asian States and the Development of Universal International Law* (1972); 3. See also, Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, (1999) 40 Harvard ILJ, 1. See also, F. E. Snyder and S. Sathirathia (eds.), *Third World Attitudes Toward International Law* (1987), 3

<sup>38</sup> Article 9(1), 10-14 and 23 of the UN Charter (October 24, 1945)

<sup>39</sup> Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (2000), 101-111 (discussing his concept of the "Golden Straitjacket" of the rules of the free market in today's global economy).

<sup>40</sup> David P. Fidler, 'Revolt Against Or From Within The West? TWAIL, The Developing World, And The Future Direction Of International Law', (2003) Chinese Journal Of International Law, 63

<sup>41</sup> *Ibid.* p 63-75

In pluralistic society, the scope of international society among states is restricted because the common aims and objectives of different states do not make a place in the domestic affairs<sup>42</sup>. The pluralist conception of international society "highlights the procedural and institutional features of the international system . . . , such as the exchange and treatment of diplomats, treaty law, the requirement of reciprocity, and the principle of non-intervention."<sup>43</sup>

## TWAIL and the Iraq Invasions

TWAIL has helped tremendously in understanding the legality of the Iraq invasions and the Iraq invasions have in turned helped TWAIL scholars test the strength and weaknesses of TWAIL. TWAIL scholars have argued that theoretical views that take root from colonialism and imperialism are essential for the understanding of the practicality of international law<sup>44</sup>. Colonialization itself was initially justified as a 'civilizing mission' and that it was the duty of the more developed Western states to civilize the Third World states<sup>45</sup>. The narrative of the civilizing mission has shaped the way both the historical and modern discipline has engaged with cultural differences. The central arguments indicate a faith that the West has a duty to civilize the failed state, the rogue state and the terrorist, so as to rescue the Third World from its backwardness as well as prevent this backwardness from threatening civilized regions<sup>46</sup>.

Since destroying a nation and attempting to recreate it in accordance to the destroyer's image was a central characteristic of colonialism, the Iraq invasion has raised many

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<sup>42</sup> [‘Zhongguo guo ji fa xue hui’ \(Beijing, China\)](#), Chinese journal of international law, Volume 2, (World Academy Press, 2003)

<sup>43</sup> David P. Fidler and Jennifer M. Welsh, *Introduction, in: Empire and Community*, 52.

<sup>44</sup> See James Thuo Gathii, 'Imperialism, Colonialism, and International Law' (2007) 54 Buffalo Law Review 1014. See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004) 11.

<sup>45</sup> J. Gathii, 'Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 Buffalo Human Rights Law Review 107–177; See also, A. Anghie, 'Universality and the Concept of Governance in International Law' in E.K.Quashigah and O.C.Okafor (Eds.), *Legitimate Governance in Africa* (1999) 21– 40, at 25

<sup>46</sup> Usha Natarajan, *The 2003 Iraq Invasion and the Nature of International Law: Third World Approaches to the Legal Debate*, A thesis submitted for the degree of Doctor of Philosophy of the Australian National University, (August 2008)

questions regarding the nature of TWAIL and international lawyers. Hilary Charlesworth muses that “for a short glamorous moment, international lawyers could feel relevant. We are used to being either ignored or pushed to margins of debates about world affairs, and suddenly everyone was interested in our views.”<sup>47</sup>

The issue raised was whether preventive defense was justified in such a scenario. The central questions at the time were ‘Whether the Iraq invasions could be viewed as Western countries misusing its dominant power?’ and ‘By showing disregard to international norms, is the American government taking a stand of legal nihilism at the international level?’ In reality, Iraq invasion was not a case of a western country like the U.S. seeking to dominate and control Third World states. It is interesting to note that many of the usual allies of the U.S. spoke against the invasion, and several Third World countries sided with the U.S. Falk has warned that the recent “post-9/11” terrorist threat does not justify most of the other measures that the Bush administration has taken seemingly in response to the 9/11 attacks, in particular its invasion and occupation of Iraq<sup>48</sup>. It is also worth noting that most of those in the United States who initially opposed the invasion of Iraq have now lost much political ground to those who supported and executed it<sup>49</sup>.

In the case of Iraq, the US justified its actions on the basis of Iraq’s human rights violations, attacks on its neighbors and non-cooperation with the UN weapons inspectors. The state of lawlessness in Iraq was believed to be a threat not only to the US but other nations as well. The preventive invasion of Iraq to abolish future threats indicated that the US believed, and probably still does, that the laws of self-defense are not to be applied when a nation like Iraq forfeits the privileges of the rule of law by their very state of lawlessness<sup>50</sup>. It is therefore seen, that generally, the ‘tolerance view’ is more popular and necessary in today’s global scenario. However, there is a thin line between a justified invasion and colonization. And it remains a line that requires defining in international law.

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<sup>47</sup> Hilary Charlesworth, ‘What’s Law Got to Do with the War?’ in Raimond Gaita (ed), *Why the War was Wrong* (2003) 35, 35.

<sup>48</sup> Richard A. Falk, *The Great Terror War* (New York: Olive Branch Press, 2003); See also Richard A. Falk ‘Rediscovering International Law after September 11<sup>th</sup>’ (2002) 16 Temp. Int’l & Comp. L.J. 363

<sup>49</sup> Obiora Chinedu Okafo, ‘Newness, Imperialism, And international Legal Reform In our Time: A Twail Perspective’ (2005) 43 Osgoode Hall Law Journal 171-191

<sup>50</sup> See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 296.

## Conclusion

Concepts which have common goals but varied interpretations and trends are a necessary and inevitable part of approaches, like TWAIL, that think about broad patterns of dominance and resistance. Whether it be TWAIL I or TWAIL II, both generation of scholars believe that there is a good reason to participate in disciplinary critique<sup>51</sup>. Eliminating any paradoxes is an effort which should involve discussions and debates among scholars and a clear understanding of the common good<sup>52</sup>. While maintaining the 'tolerance view', the limits to the scope of interference from developing countries, must be well defined. It is also necessary that the scholars have an open mind to new theoretical interpretations, ideas and concepts such as Fakhri's understanding of TWAIL through Polanyi and Foucault.

The proposed plan of action for TWAIL includes adopting a policy of seeking legitimacy through defiance in the area of customary international law in a bid to internally transform the discipline of international law without losing sight of the broader objective of fundamentally transforming its very basis. What remains to be seen is whether TWAIL can actually provide the proverbial twist in the tale of international law by freeing it once and for all from the shackles of colonialism.

Nevertheless, we must protect ourselves from the horror of legal nihilism, which TWAIL is often wrongly associated with. Although TWAIL scholars have pointed to the bias at the very foundation of international law, it does not mean that we must show disregard towards international law. International law must not be criticized completely but must be appreciated for its virtues as well. It needs to be recognized that the existing international regime also offers somewhat of a regulatory shield, however delicate, to the under developed countries. While a proper plan of action is essential for progress of the international legal system, it is also to be acknowledged that mere planning and discussion of theory is useless without practical implementation.

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<sup>51</sup> Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46 Harvard International Law Journal 459, 460.

<sup>52</sup> Philip Darby, 'Pursuing the Political: A Postcolonial Rethinking of Relations International' (2004) 33 Millennium: Journal of International Studies 1, 25; See also, VS Naipaul, in *Among the Believers: An Islamic Journey* (1981)



The luxuries and privileges that come along with living and working in the West often “creates blind spots in the vision” of those scholars of International law and TWAIL who live and work outside the Third World<sup>53</sup>. In such cases, if international law reform must continue on a reasonable, ethical and ultimately maintainable basis, TWAIL should be understood better and deeply researched by the authors of international law reform and action<sup>54</sup>. Development through structural adjustment programs and neo-liberal policies that need to be indicted should be given higher priority than the pursuit a life of extravagance<sup>55</sup>.

The success of TWAIL is highly desirable but in no way easy. B.S. Chimni, in the Paris Conference of TWAIL, stressed that the TWAIL movement must always be a non-violent one. The challenges facing TWAIL in its endeavors are internal disintegration, the problem of cooperative action among the third world states and the obstacles that developed nations may produce. NGOs that support TWAIL must be organized and voice their opinions clearly. TWAIL’s support by local and international NGOs and their social movements may stand for acceptance of a chief substantive characteristic of a globalized and liberal civilization<sup>56</sup>.

International law must promote democracy not just at the national but transnational level as well, which will lead to an increase transparency and accountability in the system. Secondly, it is also seen in many states that unemployment increases among the native people because foreigners (generally from less developed countries) migrate there and work for lower wages. Migration of laborers is another important aspect which the current international law has failed to regulate. Also, people’s understanding of the concept of sovereignty is often blurred when international law is referred to. The international organizations and agreements must clearly explain their action plans, their basic principles and what they hope to achieve in the long run. Lastly and most importantly, international

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<sup>53</sup> Craig Calhoun, ‘Social Science and the Crisis of Internationalism: A Reflection on How We Work After the War in Iraq,’ online: Social Science Research Council [http://www.ssrc.org/president\\_office/crisis\\_of\\_internationalism.page](http://www.ssrc.org/president_office/crisis_of_internationalism.page) (Last viewed 5th January 2012)

<sup>54</sup> Obiora Chinedu Okafo, *Newness, Imperialism, And International Legal Reform In our Time: A Twail Perspective* (2005)

<sup>55</sup> B.S.Chimni, *Third World Approaches to International Law: A Manifesto*, *International Community Law Review* (2006) 8:3–27

<sup>56</sup> B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993), 142; Chimni argues that “It is not unusual to see a Third World scholar speaking of rejecting rules which are prejudicial to the interests of developing countries [yet] embracing a theory of international law and world order which seeks to justify and protect the status quo and has little to say on the situation of the developing world. This eventually leads him to assume positions which strengthen that which he had set out to fight.”

law must, in the simplest of terms, focus on the effects of any policy on the individual's life instead of only the relationship of the states.



# **Poets As Legislators: Robert Browning's Influence on the Reform on Equity in the Victorian Era**

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## Abstract

In this article, I will first explore the importance of historical and cultural context in understanding the reform of the law of equity in the Victorian era. I will then analyze how Robert Browning, through his unique position at the time, was able to play a part in the reform of the Judicature and the fusion of the courts of Chancery and Equity. I will be making specific reference to the poet's own life and his epic poem, *the Ring and the Book*, to indicate how he became such an influence and the extent to which he impacted the reform process.

## Introduction

“...Wondrous were the effects of the primitive Verse,  
Which settled and reform'd the Universe:  
This did all things to their due ends reduce,  
To publick, private, sacred, civil use:  
[...] property with wholsom Laws dispos'd:  
And bounds were fix'd of Equity and Right,  
To guard weak Innocence from wrongful might.  
Hence Poets have been held a sacred name,  
And plac'd with first Rates in the Lists of Fame.”<sup>1</sup>  
- John Oldham

“[I]t is better to suffer a great wrong than to have recourse to the much greater wrong of  
the law.”<sup>2</sup>  
- Charles Dickens

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<sup>1</sup> J Oldham, “Horace His Art of Poetry, Imitated in English,” in *The Works of Mr. John Oldham together with His Remains* (London: 1684)

<sup>2</sup> Reported in W S Holdsworth, *Charles Dickens as a Legal Historian*, (Yale University Press: New Haven, 1928) p9

These quotations are from writers who belong to two distinct literary periods and eschew from experiences of different socio-legal circumstances but they collectively depict the frustration felt at ‘wrongs’ committed by the law and assert the roles that poets play in averting such injustice. The excerpt from Oldham reflects the *paideic*<sup>3</sup> duties of poets and authors of fiction, which include not only educating the masses but also guarding *weak conscience from wrongful might*. This conscience was that of the Crown’s Chancellor, who was supposed to mitigate the harshness of the common law but often delivered arbitrary and uncertain decisions. As noted by Bezrucka: “Equity’s champions defended it as the means to adapt law to social wants (referring it to its ancient meaning) [while] Equity’s detractors contested its insubstantiality.”<sup>4</sup> This debate gathered momentum and by the nineteenth century, prominent philosophers like Jeremy Bentham could state that the state of English law was, largely due to the distinct administration of common law and equity, a “fathomless and boundless chaos made up of fictions, tautology and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximized delay and denial of justice”<sup>5</sup>. Dickens, who experienced this chaotic state and its attached severity<sup>6</sup> first-hand, particularly criticized this in the behemoth case of *Jarndyce v Jarndyce* in *Bleak House*: “Equity sends questions to law, law sends questions back to Equity, Law finds it can’t do this, Equity find it can’t do that; neither can so much as say it can’t do anything!”<sup>7</sup> Similar criticism about the inconsistency and arbitrariness of the legal system was made by Robert Browning, one of the most celebrated poets of the Victorian era, in his novel-poem *The Ring and the Book*<sup>8</sup>. In an ‘age of high profile litigation’<sup>9</sup> which included three Reform Bills, a number of *Chancery Reform Acts*, a *Matrimonial Causes Act*<sup>10</sup> and *Married Women’s Property Acts*<sup>11</sup>, such literary criticism was key in the reform of the

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<sup>3</sup> The Greek term which Elliott Visconsci defines as “the comprehensive civic and moral instruction of citizens.” (E Visconsci “Cultivating Equity, Disciplining Race: The Fictional Method and the Origins of Law in Later Stuart England” in *Lines of Equity: Literature and the Origins of Law in Later Stuart England* (Cornell University Press: Ithaca, 2008) pp1-35, 23)

<sup>4</sup> Y Bezrucka “Representation and Truth – Law and Equity in The Ring and the Book” (June-July 2008) *Polemos* 1, p25

<sup>5</sup> Quoted in F N Judson, “A Modern View of the Law Reforms of Jeremy Bentham” (Jan. 1910) 10 *Columbia Law Review* 1, p42

<sup>6</sup> See Y Bezrucka’s short overview of Dicken’s early life in Y. Bezrucka “Law vs. Equity: Jarndyce vs. Jarndyce in Charles Dicken’s *Bleak House*” in D. Carpi (ed.) *The Concept of Equity: An Interdisciplinary Assessment* (Universitätsverlag Winter: Heidelberg 2007) p269

<sup>7</sup> C Dickens, *Bleak House* (1853) (Penguin: London 1985) p146

<sup>8</sup> R Browning *The Ring and the Book* (1864-68) (ed. R.D. Altick) (Penguin: London, 1971)

<sup>9</sup> E F Judge “Law and the Victorian Novel” in *A Companion to the Victorian Novel* (Eds. W. Baker & K. Womach) (Greenwood Press: London, 2002) pp123-135, 123

<sup>10</sup> *Matrimonial Causes Act 1857* (20 & 21 Vict., c85)

<sup>11</sup> *Married Women’s Property Act 1870* (33 & 34 Vict. c93) and *Married Women’s Property Act 1882* (45 & 46 Vict. c75)

Judicature and the resultant fusion of common law and equity. In this article, I will be establishing the importance of historical and cultural context in understanding the reform of the law of equity and will then analyze how Robert Browning, through his unique position at the time, was able to play a part in the reform of the Judicature<sup>12</sup>. I will be making specific reference to the poet's own life and his epic poem, *the Ring and the Book*, to indicate how he became such an influence and the extent to which he impacted the reform process.

## Historical Background

During the period in which Browning lived, prominent Barristers such as C.F. Trower and C.W. Chute were opining that the distinct administration of law and equity was an "intolerable nuisance" and "unphilosophical absurdity"<sup>13</sup> and that the creation of two separate systems was merely an "accident of history"<sup>14</sup>. However, it is through such 'accidents' that legal developments often occur and it is history that provides a basis on which the debates concerning legal reform in the Victorian period can be understood. As noted by Sir Henry Maine, law is often a product rather than an agent of change: "To make good laws it is necessary to understand how society...evolved."<sup>15</sup> Other academics have furthered this argument by contending that English law and justice is largely a 'personified abstraction'<sup>16</sup> that has been "moulded in the background of political, juridical and theological clashes."<sup>17</sup> This historical understanding is also beneficial for the appreciation of literary works like *the Ring and the Book* because literature, like law, "is concerned with the interplay of intention, reader response and historical and cultural contexts."<sup>18</sup> Robert Cover in fact argued that law and narrative are inseparably related: "Every [legal] prescription is insistent in its demand to be located in discourse – *to be supplied with history and destiny*."

<sup>12</sup> *Judicature Acts of 1873 and 1875* 36 & 37 Vict. C66

<sup>13</sup> See CF Trower, *The Anomalous Condition of English Jurisprudence* (Hatchard & Sons: London, 1848)

<sup>14</sup> CW Chute, *Introduction to Equity under the Judicature Act, or the Relation of Equity to Common Law* (Butterworths: London 1874) p viii

<sup>15</sup> Sir Henry Maine's, *A Study in Victorian Jurisprudence* is quoted in E. Visconsi "Cultivating Equity, Disciplining Race: The Fictional Method and the Origins of Law in Later Stuart England" in *Lines of Equity: Literature and the Origins of Law in Later Stuart England* (Cornell University Press: Ithaca, 2008) pp1-35, 2

<sup>16</sup> M Fortier "Equity and Ideas: Coke, Ellesmere and James I" (1998) 51 *Renaissance Quarterly*, pp1255-1281

<sup>17</sup> C Costantini "The Judicature Acts and the con-fusion of Law and Equity" in *Practising Equity, Addressing Law: Equity in Law and Literature* (ed. D. Carpi) (Universitätsverlag Winter: Heidelberg 2008) pp91-99, 91

<sup>18</sup> E F Judge "Law and the Victorian Novel" in *A Companion to the Victorian Novel* (Eds. W. Baker & K. Womach) (Greenwood Press: London, 2002) pp123-135, 124

And every narrative is insistent in its demand for its prescriptive point, *its moral*. History and literature cannot escape their location in a normative universe, nor can [legal] prescription...escape its origin and its end in experience.”<sup>19</sup> It is hoped that a brief overview of this complex area will at least provide a context for the debate regarding the judicature that occurred in Victorian society and demonstrate that their era was not the first in which such a discussion took place.

According to James Bryce, it was from the time of King Henry II that the variety of courts in the country was brought under the two committees of the *Curia Regis*<sup>20</sup>. In the reign of King Edward I, these committees evolved into their modern shapes as the Courts of Common Pleas, Queen’s Bench and Exchequer. Under these committees a very rigid and technical system of rules and procedures developed through which they refused to recognize new rights for which some precedent could not be quoted or give any new form of judgment or relief<sup>21</sup>. In the course of time, through the fourteenth and seventeenth century, cases where justice was not done by the Common law courts were referred to the King’s Chancellor, the King’s chief minister of Justice, who sought to correct the “practical harm which flows from the error of genuine routine”<sup>22</sup> or ‘absolute statements’<sup>23</sup> through equitable maxims. Or to put it in other words, by using the words of Grotius: “*lex non exacte definit, sed arbitrio boni viri permittit*” (“the correction of that, wherein the law by reason of its universality is deficient”)<sup>24</sup>.

During this early period, equity was ‘wide’ and ‘indefinite’ and included under it such ideas as justice and analogy<sup>25</sup>. This was particularly so as the Chancellors of the time, who were usually bishops or archbishops, derived their judgments from canon law and adhered to the

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<sup>19</sup> E Visconsci “Cultivating Equity, Disciplining Race: The Fictional Method and the Origins of Law in Later Stuart England” in *Lines of Equity: Literature and the Origins of Law in Later Stuart England* (Cornell University Press: Ithaca, 2008) pp1-35, 2 [italics mine]

<sup>20</sup> Ibid, pp428-429

<sup>21</sup> Ibid, p.432

<sup>22</sup> G Watt, *Equity Stirring: The Story of Justice Beyond the Law* (Hart Publishing: London, 2009)

<sup>23</sup> Aristotle *Nicomachean Ethics* (Tr. H. Rackham) (Harvard University Press: Cambridge, 1926) 5.10.5-7 pp316-317

<sup>24</sup> Quote and Translation from William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-1769), I BL COMM 62

<sup>25</sup> See Vinogradoff, “Reason and Conscience in the Fifteenth and Sixteenth Centuries,” 29 *L.Q.R.* 373

principle that “a human law could not be valid in contradiction to divine law.”<sup>26</sup> The Chancellor would therefore interfere with the course of law, even when the general rule was just, if according to conscience the rule would work against the law of God. Over time, through the Chancellorship of the last great ecclesiastical judge Wosley to the appointment of a common lawyer, Sir Thomas More, “the development of a settled practice in the Chancery and the growth of the principles of the common law combined to define much more clearly the exact ambit of the Chancellors’ jurisdiction.”<sup>27</sup> It was also during this time that literature could be seen as a significant contributor to the development of the law of equity, as the *Doctor and Student* by St. Germain gave greater coherence to the Chancellor’s jurisdiction and the guiding rule of conscience<sup>28</sup>. Lord Ellesmere, who followed More, went on to reform the practice of the court to make it more efficient and gave a judgment that set in case-law the distinction between common law and equity:

“The office of the Chancellor is to correct men’s consciences for frauds, breach of trusts...and to soften and mollify the extremity of the law...*And for the judgment etc., law and equity are distinct, both in their courts, their judges, and the rules of justice.*”<sup>29</sup>

However, with this final settlement of jurisdiction, the volume of work for the Court of Chancery increased considerably. This exacerbated the problems that had already begun to appear in the dispensation of Equity. Remedies that were given to applicants required a wide variety of details and a broad sphere of knowledge as compared to the courts of common law, as it had to handle the administration of estates for the deceased, trusts and mortgages which required the Chancellor, at great expense, to employ a number of quasi-judicial officers. To add to this expense, were the fees that were charged by clerks to issue writs which Kiralfy admits only increased the burden of fees and gave the clerks an incentive to increase the work done under their supervision. Ironically, while there were a number of clerks and quasi-judicial officers, the court of Chancery suffered from an endemic shortage

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<sup>26</sup> AKR Kiralfy “Potter’s Historical Introduction to English Law and Its Institutions” (4<sup>th</sup> Ed) (Sweet & Maxwell Limited: London, 1962) p578

<sup>27</sup> Ibid, p584

<sup>28</sup> See St Germain, *Doctor and Student* (S. Richardson & C. Lintot: London, 1531) (16th ed.)

<sup>29</sup> *Earl of Oxford’s Case*, 1 W. & T. at p 617



of judges as it was only the Lord Chancellor and his Master of the Rolls who could preside over such cases – despite the burgeoning list of suits<sup>30</sup>. This inevitably led to the creation of a judicial morass in which the Court of Chancery seized to be for the benefit of the poor since litigation became unreasonably expensive and the administration of justice was unduly delayed. It served as a confirmation of one of equity's maxims that "delay defeats equity"<sup>31</sup>.

This period in equity overlapped with the printing boom in the 1640s and 1650s which facilitated the entry of political critique into the public domain with a new "intensity, speed and volume."<sup>32</sup> It witnessed the skeptical demystification of "*jure divino* absolute kingship" and "more broadly the rise of a new 'modern' epistemology in which political authority had been rendered explicit – justified and *legitimized in public controversy* rather than tacitly naturalized as an immanent aspect of a traditional order."<sup>33</sup> This consciousness continued to grow in the following centuries but in regard to the judicature controversy of the 1600s, one pamphleteer of the time wrote: "This Court of Chancery which was so anciently famous, and erected to so good an end (was) like to become a mere monopolie to cozen the subject of their monies."<sup>34</sup>

Despite the discussion of a Bill intended to establish a less bureaucratic judicial structure and a simpler process for obtaining relief and even the passage of some of these ideas into law by Cromwell, the Restoration allowed the Chancery to fall back onto its old abuses<sup>35</sup>. It was the period immediately after the Restoration, in which Lord Nottingham laid down the general principles of equitable jurisdiction and the Court of Chancery ceased to be simply a court of conscience but became a part of the system of law. As notable Chancellors like Lord Nottingham and Lord Hardwicke began to make judgments based on precedent and grounds for judicial decisions were made more explicit, equity became increasingly

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<sup>30</sup> See generally A K R Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions* (4<sup>th</sup> Ed) (Sweet & Maxwell Limited: London, 1962) pp160-163

<sup>31</sup> See K Dolin, "Fiction and the Law" in *Legal Discourse in Victorian and Modernist Fiction* (Cambridge University Press: Cambridge, 1999) p81

<sup>32</sup> P Lake and S Pincus, "Rethinking the Public Sphere in Early Modern England," (2006) *Journal of British Studies* 45 p280

<sup>33</sup> E Visconti "Cultivating Equity, Disciplining Race: The Fictional Method and the Origins of Law in Later Stuart England" in *Lines of Equity: Literature and the Origins of Law in Later Stuart England* (Cornell University Press: Ithaca, 2008) pp1-35, 2

<sup>34</sup> See quotation in Kerly, "Equity", at p156

<sup>35</sup> Ibid, p163

inflexible. This lack of fluidity was most noticeable in the long tenure of Lord Eldon as Chancellor who, despite being a renowned legal mind in his own right, brought a great measure of disrepute to the Chancery court due to the time he took to arrive at decisions. Kiralfy describes his reign as such: "the accumulated arrears of causes mounted steadily under his regime until matters became so bad as to justify the dystopian picture given by Dickens in the celebrated case of *Jarndyce v Jarndyce*<sup>36</sup>. Again, in the early 1800s, there was an effort to unencumber the process of seeking remedies through equity, even by Lord Eldon himself. In 1825, a commission was set up to inquire into the abuses of the court and though no radical alterations were made, there was progress towards reducing the burden on judicial staff and making the clerical staff more efficient. The following decades witnessed the passage of more Acts to reform the Judicature, notably the *Court of Chancery Act* in 1842<sup>37</sup> to transfer the jurisdiction of equity from the Exchequer to the Chancery and the *Chancery Amendment Acts* of 1852 and 1858<sup>38</sup> to transfer certain common law powers to Chancery so as to avoid a multiplicity of suits. These reforms, however, had the effect of widening the jurisdiction of the Court of Chancery which proved to be an "intolerable nuisance" as it continued to be "too incomplete in its jurisdiction and cumbersome in its procedure to provide adequate remedies for all the cases brought before it."<sup>39</sup> So while the early-to-mid 1800s was a period of stupendous legal reform, with Romilly and Brougham campaigning against the greater excesses of the criminal law and the law of evidence and Mill and Bentham rallying against the 'arbitrariness' of equity<sup>40</sup>, the Chancery Court still remained an inefficient exponent of justice.

However, the public at the time, with the backdrop of the French and American Revolutions was no longer satisfied with the constitutional status quo or the remote possibility of finding legal relief. In such a revolutionary epoch, a desire awakened in the public to understand the system they lived in and they became impatient of restrictions and technicalities. This was due not only to a desire for simplicity but also because of an aesthetic sense that had

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<sup>36</sup> A K R Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions* (4<sup>th</sup> Ed) (Sweet & Maxwell Limited: London, 1962) p598

<sup>37</sup> 5 Vict c5; 5 & 6 Vict c103

<sup>38</sup>; 21 & 22 Vict c27; 17 & 18 Vict c125

<sup>39</sup> A K R Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions* (4<sup>th</sup> Ed) (Sweet & Maxwell Limited: London, 1962) p 167

<sup>40</sup> Y Bezrucka "Representation and Truth – Law and Equity in *The Ring and the Book*" (June-July 2008) *Polemos* 1, p25

begun stirring amongst the middle classes during this period<sup>41</sup>. As Chesterton describes it, it was a time when men lived in mean streets but had magnificent daydreams. Given this, who then would be better placed than a poet to inform and shape public opinion concerning socio-political changes? The fictional method employed by poetry, can impose the universality of philosophical inquiry on the infinitely various particulars of human action and disclose the causes of action in the agents' characters and intentions<sup>42</sup>. According to Visconsi, poetry can also be an instrument for the cultivation of virtuous citizens."<sup>43</sup> The development of this new aestheticism can be discovered in the life of a writer like Browning, and the influence of the socio-cultural events of his time can be observed in his work. As a famous poet in his time, his work can be seen as an influence on public opinion, but can also be considered a prism through which later generations can understand the debate going on at the time. In fact, poetry or poesis can be considered "more philosophical and more elevated than history, since poetry relates more of the universal, while history relates particulars"<sup>44</sup> and is chained to facts.

## Robert Browning

His life began in the "afterglow of the great Revolution" in France and "the great dominant idea of the whole of that period, the period before, during, and long after the Revolution, [was] the idea that man would by his nature live in an Eden of dignity, liberty and love, and that artificial and decrepit systems [were] keeping him out of that Eden."<sup>45</sup> Later on in life, he was further influenced by the political events that occurred in Italy, his adopted home. Chesterton picturesquely describes it as such:

"[he] lived at the time of the most moving and gigantic of all dramas – the making of a new nation, one of the things that make men feel that they are still in the morning

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<sup>41</sup> G.K. Chesterton, *Robert Browning: English Men of Letters* (Macmillan & Co: London, 1914) pp. 15-16

<sup>42</sup> K Eden, *Poetic and Legal Fiction in the Aristotelian Tradition* (Princeton University Press: Princeton, 1986) p61

<sup>43</sup> E Visconsi "Cultivating Equity, Disciplining Race: The Fictional Method and the Origins of Law in Later Stuart England" in *Lines of Equity: Literature and the Origins of Law in Later Stuart England* (Cornell University Press: Ithaca, 2008) pp1-35, 4

<sup>44</sup> Aristotle, *Poetics* (Cambridge: Harvard University Press, 1995) (Ed. & Tr. Stephen Halliwell), p59

<sup>45</sup> G K Chesterton, *Robert Browning: English Men of Letters* (Macmillan & Co: London, 1914) pp15-16

of the earth...They lived in a time when affairs of state had almost the air of works of art”<sup>46</sup>

It would be difficult to find an institution less ‘artistic’ or ‘Eden-like’ than the Chancery Courts described above. Given the state of the Courts as they stood at the first half of the 19<sup>th</sup> century, it would be fairer to describe the court system as a kitchen garden where God’s flowers – truth, beauty and reason – had been prevented from blooming freely and has been largely overgrown with the weeds of judicial red-tape<sup>47</sup>. It is this metaphorical conflict between his poetic idealism and his liberal political attitude against the torturous state of the judicial system of the time, which spills over into his work during that time and thus becomes emblematic of the debate that occurred in the years leading up to the passage of the Judicature Acts. According to Petch, the key terms of this public debate were law, conscience and equity and they were underwritten by the vague but powerful concepts of justice and natural law.<sup>48</sup> Browning is able to contribute to this by interrogating natural law and thereby reflecting and illuminating the contemporary discussion on equity. He, unlike many other poets of his time and preceding him, was not concerned about drawing a line between ‘poetic’ and the ‘non-poetic’ and did not subscribe to the idea that even a touch of the present would destroy a poem simply by being solid and substantial.<sup>49</sup> This outlook also afforded him the opportunity to act as an agent of *paidea*, which on a small scale involves critiquing the state of legal institutions but on the broader plane allows the possibility of achieving “miracles among irrational and insensible creatures [by raising] beauty out of deformity, order and regularity out of Chaos and confusion.”<sup>50</sup>

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<sup>46</sup> Ibid, pp85-86

<sup>47</sup> Ibid, p. 25

<sup>48</sup> S Petch “Equity and Natural Law in The Ring and the Book” (Spring 1997) 35 *Victorian Poetry* 1, pp105-111, 106

<sup>49</sup> P Drew, *The Poetry of Browning: A Critical Introduction* (Methuen & Co Ltd: London, 1970) p291

<sup>50</sup> See E Phillips, Preface to “Teatrum Poetarum”, in *Critical Essays of the Seventeenth Century*, (ed. J E Spingarn) (Bloomington: Indiana University Press, 1957), 2:257

## The Ring and the Book

“Poets are the unacknowledged legislators of the World”

- Shelley

Browning discovered *the Old Yellow Book*<sup>51</sup> in Florence and wrote his magnum opus, *the Ring and the Book*, between 1864 and 1868. This novel-poem details the course of a real Italian murder case in 1697. It tells the tragic murder of a young girl, Pompilia, and her parents by her husband, Count Guido Franceschini, after she flees from him during her pregnancy with a sub-deacon of the Church whom the Count suspects she had an adulterous relationship with. The case, after trial, is brought in front of the Pope who does not find Pompilia guilty of adultery and sentences the Count and his accomplices to death for murder. The poem provides a multi-perspective narrative of this case and reflects the various arguments and reflections made during that time.

It is clear from the outset that the intention of the author is to link this one case with broader legal events occurring in England when he states: “If the rough ore be rounded to a ring, Render all duty which good ring should do...Linking our England to his Italy!”<sup>52</sup> Making such an association is also characteristic of this work according to Matthew Reynolds, whereby the “family scandal is treated as a cardinal instance of wider social and political conflict.”<sup>53</sup> At a time when the foremost theorists – Bentham, Mill, Carlyle – were considering “what ought to be the ends of social organizations”<sup>54</sup> – Browning was doing the same by transposing the question into a personal key and discussing how far a given individual can justify his conduct by reference to the ends for which he is working. For instance, the Pope, who is presented as a symbol of equity, validated his judicial authority and conscience by asserting himself as “God’s historical emissary on Earth”<sup>55</sup>:

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<sup>51</sup> See Cencini *The Old Yellow Book: Source of Robert Browning’s The Ring and the Book* (Ed & Tr C W Hodel) (2<sup>nd</sup> ed.) (J M Dent & Sons: London, 1917) ppix-x; Y. Bezrucka “Representation and Truth – Law and Equity in The Ring and the Book” (June-July 2008) *Polemos* 1, pp23-24

<sup>52</sup> *The Ring and the Book* (12: 865-70);

<sup>53</sup> M Reynolds “Browning’s Forms of Government” in *Robert Browning in Contexts* (ed. J Woolford) (Wedgestone Press; Winfield, 1998) pp118-147, 129

<sup>54</sup> P Drew, *The Poetry of Browning: A Critical Introduction* (Methuen & Co Ltd: London, 1970) p283

<sup>55</sup> Y Bezrucka “Representation and Truth – Law and Equity in The Ring and the Book” (June-July 2008) *Polemos* 1, p27

"In God's name! Once more on this earth of God's,  
 While twilight lasts and time wherein to work,  
 I take His Staff [...] *And forthwith think, speak, act, in place of Him -*  
*The Pope for Christ.*"<sup>56</sup>

He uses this as a basis for not having to justify his verdict according to precedents and exercising the law of God/nature instead. This leads to a certain degree of confusion, for both the Pope, when deciding against the Count, and the Count's defense counsel use the law of nature as the grounds for their arguments. Petch uses the phrase "*ius naturale est, quod natura omnia animalia docuit*" (the law of nature is that which she taught all animals; a law not particular to the human race, but shared by all living creatures) to define the law of nature<sup>57</sup>. The Pope contends that Pompilia upheld such law by betraying the 'standing ordinance' of God to obey her parents and her husband for the sake of protecting her child. The Count's lawyer argued, in a similar vein, that if even the poorest of animals can feel that their honor has been offended<sup>58</sup>, then why can't the Count after Pompilia's actions? The Pope is able to distinguish this by identifying Pompilia as a trustee, who by fleeing from the Count and defending the young priest, was acting as protector of the most important of trusts: "Life from the Every Living"<sup>59</sup>. As she was acting as the very image of equity, the Pope did not have any problem in using his conscience to find in her favor and sentencing the Count and his accomplices to death.

Browning is clearly dissatisfied with this as he considers that the role of the courts of Equity should be to distribute merciful judgments rather than retributive punishment. This is most clearly evidenced in the passage in Book X where he graphically depicts the barbaric trial and punishment of the dead Pope Formosus by Pope Stephen to which an on looking Jew enquires: "Wot ye your Christ had vexed our Herod thus?"<sup>60</sup> While justice may have seen to be done, mercy was not exercised. It is 'paradoxical'<sup>61</sup> that the Pope, while admitting to being Christ's Chancellor on Earth, would not exercise the divine prerogative of mercy.

<sup>56</sup> *The Ring and the Book* (10: 162-168)

<sup>57</sup> S Petch "Equity and Natural Law in *The Ring and the Book*" (Spring 1997) 35 *Victorian Poetry* 1, pp105-111, 107

<sup>58</sup> *The Ring and the Book*, (8:521-540)

<sup>59</sup> *The Ring and the Book*, (10: 1080) Also see S Petch "Equity and Natural Law in *The Ring and the Book*" (Spring 1997) 35 *Victorian Poetry* 1, pp105-111, 108-109

<sup>60</sup> *The Ring and the Book* (10:100)

<sup>61</sup> Y Bezrucka "Representation and Truth – Law and Equity in *The Ring and the Book*" (June-July 2008) *Polemos* 1, p27

Through the poem, Browning is also able to reflect his concerns about the arbitrariness and fallibility of the brand of equity represented by the Pope (and therefore the English Courts of Chancery). The first aspect is reflected in his lack of the use of precedent, which is commented upon by the Count:

“If [Pope] Innocent succeeds to Peter’s place,  
Let him think Peter’s thought, speak Peter’s speech!”<sup>62</sup>

While admitting to be fallible (“Mankind is ignorant, a man am I: Call ignorance my sorrow, not my sin!”) he also uses the authority conveyed by divine provenance to rely on his own personal notions of goodness. As Yvonne Bezrucka points out, the Pope’s faith is completely relative to him as he expresses his doubts in Book X, but it becomes clear that his judgment cannot claim universal validity<sup>63</sup>.

The Pope in his final judgment hesitates before finding for Pompilia as he is afraid of challenging the established order:

“shift a pillar...Out of its place i’ the tenement...may...bring it  
toppling o’er our heads.”<sup>64</sup>

This is a concern that Browning clearly feels should not be used to excuse the restriction of justice or equity. Finally, the slow and circuitous deliberation of the Pope can be seen as a commentary on the slowness of procedure in the English courts of conscience – especially under Chancellors like Lord Eldon.

Therefore, it can be seen in *the Ring and the Book* that Browning is able to demonstrate the problematic usage of the term ‘natural law’ and ‘equity’ in legal discourse and share his view that Equity should be held up in its highest meaning – *epieikeia* – to interpret the law as mercifully as possible. He also uses the work to comment upon the arbitrariness, fallibility and lethargic nature of the courts of equity, thereby implicitly calling for its reform.

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<sup>62</sup> The Ring and the Book (11: 332-33)

<sup>63</sup> Y Bezrucka “Representation and Truth – Law and Equity in The Ring and the Book” (June-July 2008) *Polemos* 1, p27

<sup>64</sup> The Ring and the Book (9: 253-254| 10, 1068; 285-288;10; 2046-49)

## Conclusion

The Judicature Acts, in some ways, brought the judicature system back full circle to the system that existed under Henry II's Curia Regis. The new Supreme Court of Judicature could make all the rights that were provided under the abolished courts available as well award all their remedies, thereby extinguishing the distinction between Law and Equity. While one of the primary driving forces behind the reform were the needs of the commercial community in face of the increasing complexity of contractual dealings and financial systems, it is evident that *the Ring and the Book*, and other works like it<sup>65</sup>, still played a crucial role in the debate that led to the Acts. Browning's depiction of the arbitrariness of Equity may seem to be overstated since the distinction between the two jurisdictions were not as great in the 19<sup>th</sup> century<sup>66</sup> but it could still be said that a great deal of uncertainty in contemplating the term equity still persisted. As Spence remarked, there was an "Equity which is required in all law whatsoever...which makes a very important and a very necessary branch of the *jus scriptum*...and that Equity which is opposed to written and positive law"<sup>67</sup>. It was the latter characteristic, the individualism of the Court of Chancery, unrestrained by precedent, that common lawyers in England – and Browning - found most threatening. It was also the characteristic that Browning criticized in his poem. However, it was the former characteristic, which the eleventh subdivision of the 25<sup>th</sup> section of the 1873 Act enshrined by stating that the Rules of Equity shall prevail if there is a conflict with the common law. Through Browning's implicit criticism of how the Pope handles the Count's case, it is clear that this is a characteristic that Browning advocates. It is not surprising that this Act was met by widespread praise, even amongst its initial detractors<sup>68</sup>, since it appeals to a more communal sense of justice rather than simply to the might 'marauders of the money market'<sup>69</sup>.

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<sup>65</sup> Note the work of Tennyson and Maurice

<sup>66</sup> CW Chute, *Introduction to Equity under the Judicature Act, or the Relation of Equity to Common Law* (Butterworths: London 1874) p8

<sup>67</sup> George Spence, *The Equitable Jurisdiction of the Court of Chancery, Comprising the Rise, Progress and Final Establishment of the Modern Jurisdiction of the Court of Chancery* (Vol. 1 ) (Stevens & Norton: London, 1984) p326

<sup>68</sup> G W Hemming, "The Judicial Investigation of Truth," *The Quarterly Review* 138 (1875) 229-65

<sup>69</sup> S Petch "Law, Equity, and Conscience in Victorian England", (1997) 25 *Victorian Literature and Culture* 1, pp123-139, 135



This article, in conclusion, has sought to develop on two points. Firstly, to understand the state of the law of equity at any point in time, it is essential to understand the historical context from which it derives, the socio-political debates surrounding it and even how it is represented in contemporary literature. Such an approach allows for invaluable scrutiny. This was especially necessary in regards to the Equity debate in the Victorian era, as it was not just a matter of administrative reform but was central to the culture of the time. This leads to the second point, that Browning's *the Ring and the Book* does fulfill such a role as it reflects the confusion and debate surrounding the nature of equity and conscience, even if it does not engage directly with the legal debate. It can be seen as a medium for broad civil reform, as it is able to bring the discussion of such issues to a greater swathe of people. It could be argued, as Phillip Drew does, that Browning more than any other poet of his time could bring such issues:

“Down to the level of our common life,  
Close to the beating our common heart”<sup>70</sup>

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<sup>70</sup> R Browning “Aristophanes' Apology, Including a Transcript from Euripides: Being the Last Adventure of Balaustion” (Smith, Elder & Co: London, 1875)



# **The Case for Kosovo's Statement and the Use of Principles of International Law**

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## Abstract

*This article looks at the issues surrounding Kosovo's claim for statehood. In surveying the history of the situation in Kosovo it applies well established norms of public international law that may remedy or prevent Kosovo's claim to statehood. The debate on statehood is often polarised between the declaratory theory enunciated in the Montevideo Convention and the constitutive theory based on recognition. It is clear that the traditional requirements of statehood set out in the Montevideo Convention cannot be ignored. However the approach argued for here requires recognising statehood as a legal situation rather than a purely factual one. Accordingly, laws relating to self-determination, recognition, territorial integrity and the use of force can be utilised in determining the legal status of Kosovo's statehood.*

## Introduction<sup>\*</sup>

In July 2010, the International Court of Justice delivered its Advisory Opinion on Kosovo's unilateral declaration of independence. By 10 votes to 4 it held that the declaration did not violate international law.<sup>1</sup> The Advisory Opinion did not formally or informally deliver judgment on whether Kosovo was in fact a state. Judge Simma in his Separate Opinion criticised the court having such a narrow scope and for not addressing such issues.<sup>2</sup> The purpose of this article is to elucidate the issues surrounding the substance of whether Kosovo is a state. Part II takes a brief look at the history of the conflict, outlining the factual background to which the international legal principles discussed will be applied.

Part III looks at the traditional requirements of statehood given in the Montevideo Convention. It will be asked whether Kosovo falls short of these requirements, in particular, the requirement of effective government. Part IV explores how self-determination can help cure the remedy the defects of government effectiveness. Part V discusses the relationship

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<sup>\*</sup> Sincere thanks to Penelope Nevill of 20 Essex Street and Dr. Charlotte Peevers of the London School of Economics and Doughty Street Chambers who kindly made comments on a draft of this article. Any mistakes are, of course, my own.

<sup>1</sup> *Accordance With International Law Of The Unilateral Declaration Of Independence In Respect Of Kosovo* (Advisory Opinion) 2010 I.C.J 141 at [123] hereafter *Advisory Opinion on Kosovo's Unilateral Declaration*.

<sup>2</sup> *Ibid*, Separate Opinion of Judge Simma particularly at [5] and [8]

between self-determination and territorial integrity and how this does not preclude the finding of statehood. Part VI considers the effect of recognition and concludes that it can be used as one of the principles to help the finding of statehood. The argument throughout is that statehood is no longer confined to the Montevideo Convention requirements but the use of general principles and norms can help an entity like Kosovo become a state.

The issue is important for two main reasons. Firstly, the use of principles may help other unrecognised entities gain statehood based on Kosovo's precedent. Indeed, Spain refused to give support to Kosovo's statehood because it feared that it would give support to separatists in its territory.<sup>3</sup> It is thus important to know exactly if, and why, Kosovo is or is not a state. Secondly, it has implications on the ground for Serbia and Kosovo. In March 2012, the Serbians still refuse to recognise Kosovo's independence and Kosovars refuse to recognise any sovereign link with Serbia.<sup>4</sup> Accordingly, a legal framework will provide key answers to the dispute as to the law.

## Brief Historical Background

Kosovo is and always has been overwhelmingly populated by ethnic Albanians--despite a concerted 'settlement policy' to shift the balance in favour of Serbian and Montenegrins in the early half of the 20<sup>th</sup> century.<sup>5</sup> The populations had been fighting one another long before the First World War for reasons as varied as nationalism, land, religion and regional power.<sup>6</sup> Serbs were attacked and Kosovar were attacked.<sup>7</sup>

After the Second World War, the Serbs were dominant and Kosovo was defined as an 'autonomous region' of Serbia.<sup>8</sup> Despite this title, there was no significant power in the hands of the majority Albanian population. Serbs, despite being the minority, held over 60%

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<sup>3</sup> Warbrick, 'Kosovo: the Declaration of Independence', (2008) I.C.L.Q, 57(3), 675, 685

<sup>4</sup> 'Kosovo and Serbia Reach Key Deal' New York Times (New York, February 24, 2012) <<http://www.nytimes.com/2012/02/25/world/europe/25iht-kosovo25.html>> Accessed 30 March 2012

<sup>5</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) Vanderbilt Journal of Transnational Law (2009) 779, 784

<sup>6</sup> Tim Judah, *Kosovo: War and Revenge* (Yale Note Bene, 2002) 11

<sup>7</sup> Ibid, 14

<sup>8</sup> Ibid, 34

of positions in public service.<sup>9</sup> Things changed in the 1960s and the situation became more bearable for the Albanian population. The 1974 constitutional framework incorporated and crystallised a new found autonomy.

Slobodan Milosevic came to power as the leader of the Serbian Communist Party in the 1980s. One of his aims was Serbian domination of Kosovo. Once the Albanians achieved local autonomy as part of the 1974 constitutional settlement, the balance of power had shifted and Serbs lost their privileges. This led to hostility amongst the Serbian population in both Kosovo and Serbia--much of which contributed to Milosevic's rise.<sup>10</sup> He told angered Serbians that:

Comrades... you should stay here [in Kosovo]. This is your country, these are your houses, your fields and gardens, your memories. You are not going to abandon your lands because life is hard... But I do not suggest that you stay here suffering and enduring a situation with which you are not satisfied. On the contrary! It should be changed... Yugoslavia does not exist without Kosovo!<sup>11</sup>

When Milosevic came to power, the constitutional arrangement meant that Serbia could not significantly interfere with the competence of the autonomous region of Kosovo. Milosevic therefore had to secure the agreement of the local assembly in Kosovo to his changes. In 1989, with a heavy Serbian political and police presence, the local assembly accepted the amendments. It was with these amendments that any shred of autonomy had been terminated.<sup>12</sup>

By 1991, the Serbian domination was entrenched. Kosovars increasingly saw independence as the only solution. In an 'illegal' referendum organised in 1991, 87% of the electorate voted and 99.87% supported independence.<sup>13</sup> Between 1991 and 1999 a campaign of

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<sup>9</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,785

<sup>10</sup> Tim Judah, *Kosovo: War and Revenge* (Yale Note Bene, 2002) 44

<sup>11</sup> *Ibid*, 53

<sup>12</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,786

<sup>13</sup> Tim Judah, *Kosovo: War and Revenge* (Yale Note Bene, 2002) 65

systematic violence began with the Serbian military taking up positions inside Kosovo. A leading historian has stated that to document the varied human rights abuses would "require several long chapters in itself".<sup>14</sup>

There were violations of international humanitarian law on the Kosovar side by the militant "Kosovo Liberation Army."<sup>15</sup> However this paled in comparison to Serbia's "widespread and systematic campaign of terror and violence," the purpose of which was "to displace a number of [Kosovar Albanians] sufficient to tip the demographic balance toward ethnic equality and in order to cow the Kosovo Albanians into submission".<sup>16</sup>

In 1999, negotiations led by Western nations eventually resulted in the draft Rambouillet Accords, under which all parties would agree to end hostilities and meaningful autonomy would be returned to Kosovar Albanians. The Kosovars signed but the Serbians refused.<sup>17</sup> The scale of the human rights violations which followed prompted NATO to undertake a military operation which was successful in forcing the Serbs to cease hostilities. NATO's action was not authorised by the United Nations Security Council. By the end, Serbian forces had killed over 10,000 Kosovar Albanians.<sup>18</sup> Mass graves were still being found in 2010.<sup>19</sup> Nonetheless, as Samantha Power notes, "the United States and its allies likely saved hundreds of thousands of [Albanian] lives".<sup>20</sup>

The UNSC passed Resolution 1244 soon after hostilities ended. The Resolution reaffirmed the territorial integrity of the Federal Republic of Yugoslavia and it called for an international presence to maintain peace. This paved the way for the United Nations Mission in Kosovo (UNMIK) which has significant control in Kosovo. It was in the context of

<sup>14</sup> Noel Malcolm, *A Short History of Kosovo*, (Papermac, 1998) 349 quoted in J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,790

<sup>15</sup> Human Rights Watch, *World Report 1999*, (HRW, 1998), 311

<sup>16</sup> *Milutinovic et al.*, International Criminal Tribunal for the former Yugoslavia, IT-05-87-T Volume 3 at [95]

<sup>17</sup> Tim Judah, *Kosovo: War and Revenge* (Yale Note Bene, 2002) 223

<sup>18</sup> *Ibid*, 310 notes that the UN received reports of over 11,000 dead and the Humanitarian Law Centre has 'registered around 13,000 victims so far' quoted in AFP, 'Serbia Death toll could be Kosovo's argument at ICJ: analysts' *Daily Telegraph* (London, 30 November 2009) <<http://www.telegraph.co.uk/expat/expatnews/6692257/Kosovan-death-toll-is-its-argument-for-independence.html>> Accessed 14 February 2012

<sup>19</sup> 'New mass grave 'of Kosovo Albanians' found in Serbia' *BBC* (London, 10 May, 2010) <<http://news.bbc.co.uk/1/hi/8671783.stm>> Accessed 14 February 2012

<sup>20</sup> Samantha Power, *A Problem From Hell: America in the Age of Genocide*, (Basic Books, 2002) 471-2, notwithstanding Human Rights Watch, 'Civilian Deaths in the NATO Air Campaign' <<http://www.hrw.org/sites/default/files/reports/natbm002.pdf>> Accessed 30 March 2012

Resolution 1244 that the control over Kosovo was finally taken away from the Serbian leadership. Negotiations attempting to achieve a final political solution to the situation were fruitless. In 2007, Former Finnish President Martti Ahtisaari acting as a Special Envoy to the Secretary General attempted to break the stalemate in negotiations. The Kosovars wanted fully fledged independence and Ahtisaari agreed concluding that:

A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia—however notional such autonomy may be—is simply not tenable.<sup>21</sup>

The Ahtisaari plan recommending Kosovo's full independence was rejected by Serbia but accepted by the EU, US and Kosovo. In 2008, Kosovo declared its independence from Serbia. Almost half the members of the United Nations recognised Kosovo as an independent State.

## **Montevideo Convention Requirements**

Article 1 of the Montevideo Convention, accepted as listing the traditional requirements of statehood, requires that a state has (a) a permanent population, (b) defined territory, (c) government and (d) a capacity to enter into international relations. If it can be shown that Kosovo meets these requirements, it can be shown that the assertion of statehood is not contrary to the 'traditional requirements.' It is clear that Kosovo has a permanent population of 1.8million. The size of the population is not determinative; whether a country has 60 million people like the United Kingdom or a 9,000 population like Nauru.

Kosovo also has a defined territory. The fact that the borders of Kosovo are disputed will not mean that it does not preclude this finding. It was stated by the German-Polish Mixed Arbitral Tribunal in *Deutsche Continental Gas-Gesellschaft v Polish State* that it is sufficient for the "territory to have sufficient consistency, even though its boundaries have not yet

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<sup>21</sup>Report of the Special Envoy of the Secretary General on Kosovo's Future Status, Ahtisaari, <<http://www.ico-kos.org/d/Ahtisaari%20Comprehensive%20Proposal%20in%20English.pdf>> Accessed 11 February 2012

been accurately delimited".<sup>22</sup> The case of Israel provides a clear example of this: despite its borders being disputed on all sides, even pre-independence, it was undoubtedly a state in 1948.<sup>23</sup>

The criteria of government can be doubted. In the *Aaland Islands case* it was held that Finland did not become a sovereign state until a political organisation had been created which was strong enough to assert itself without the assistance of the foreign troops.<sup>24</sup> While United Nations Security Council Resolution 1244 essentially established that Serbia had effectively lost control of Kosovo, "independence of all *other* governments—not only of one particular government—is required".<sup>25</sup> By virtue of the presence of NATO peace keeping force and UNMIK which has 'all legislative and executive jurisdiction',<sup>26</sup> Kosovo is not independent of 'all *other* governments.' This would seem to preclude the finding of effective 'government'. Indeed, this would also seem to preclude a finding that the more relaxed criterion of 'independence' developed by Crawford is met, – that is, "the existence of an organized community on a particular territory which exclusively or substantially exercises self-governing power".<sup>27</sup>

Charlesworth and Chinkin have argued that restraints of independence do not infringe on statehood if they are accepted voluntarily.<sup>28</sup> Furthermore, once a state has statehood, a subsequent failure to meet the requirement of government will not negate statehood; Somalia is a state even though there is no effective government.<sup>29</sup> However, Kosovo's declaration of independence came *after* the Security Council Resolution 1244 and, therefore, it could not be said that Kosovo accepted restraints on its statehood because it did not exist as a state at the relevant time. Indeed, "Kosovo did not accept restrictions to

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<sup>22</sup> *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 A.D. 11 at 15

<sup>23</sup> David Harris, *International Law: Cases and Materials*, (Sweet and Maxwell, 2010), 92

<sup>24</sup> *Legal Aspects of the Aaland Islands Question*, League of Nations O.J. Spec. Supp. (1920) 3, 8–9

<sup>25</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,820

<sup>26</sup> United Nations Security Council Resolution 1244

<sup>27</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 437

<sup>28</sup> Charlesworth and Chinkin *The Boundaries of International Law: A Feminist Analysis*, (MUP, 2000) 134

<sup>29</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,820



independence on its government voluntarily but in order to comply with the pre-existing legal arrangements".<sup>30</sup>

Kosovo achieving the criteria of entering into international relations with other states can also be doubted. Shaw argues, under the UNSC Resolution 1244, the Secretary General's Representative reserves the right to "the exercise of powers and responsibilities of an international nature... [including] concluding agreements with States".<sup>31</sup> On the other hand, the fact that Kosovo has now been recognised by 85 countries shows that Kosovo does engage in international relations. This criterion can be criticised as Crawford is undoubtedly correct that it is better described as a consequence of statehood not as requirement of statehood (contrary to the constitutive theory of recognition which will be addressed below).<sup>32</sup>

## **Using Principles of International Law in Statehood: Self-Determination**

The Montevideo Convention requirements, then, clearly are not met by Kosovo. However, if we accept that statehood is actually a legal status rather than a set of factual requirements, it leads to the view that other legal principles can help or prevent statehood. James Crawford in his seminal book *The Creation of States in International Law* states that:

Statehood is not simply a factual situation. It is a legally circumscribed claim of right, specifically to the competence to govern a certain territory. Whether that claim of right is justified as such depends both on the facts and on whether it is disputed. Like other territorial rights, government as a precondition for statehood is thus, beyond a certain point, relative.<sup>33</sup>

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<sup>30</sup> Ibid, 821

<sup>31</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Oral Statements: CR 2009/24, 75 but see Written Contribution of the authors of the Unilateral Declaration of Independence regarding the Written Statements, July 2009, 26: "the Secretary-General has made clear, the role of UNMIK in this field is strictly limited; it is confined to "facilitating, where necessary and possible, arrangements for Kosovo's engagement in international agreements""

<sup>32</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 61

<sup>33</sup> Ibid, 61

In other words, “it is to suggest that this criterion of [government] effectiveness operates as a legal principle which is conditioned by other relevant principles like self-determination and the prohibition on the use of force”.<sup>34</sup> Applying the relevant principles can work to either impede or assist an entity achieve statehood. Crawford illustrates this point with reference to Belgian Congo and when it achieved independence in 1960. He notes the following circumstances existed at the time of independence:

- The existence of various secessionary movements, at least one of which (in Katanga) was inspired by foreign interests and led to civil war.
- The division of the central government, shortly after independence, into two fractions, both claiming to be the lawful government.
- The introduction of United Nations forces shortly after independence to restore order and prevent civil war.
- ‘[T]he continued presence of Belgian and other foreign military and paramilitary personnel and political advisers, and mercenaries...’<sup>35</sup>

It would follow from the discussion of the Montevideo Convention requirements that Congo is clearly not a state. Yet, despite having no effective government, Congo was admitted into the United Nations without dissent. Indeed, subsequent UN Resolutions referred to the ‘sovereign rights of the Republic of Congo’. Crawford states that there are three possible explanations for this. First, recognition was premature. Second, recognition was constitutive of statehood (a view that will be considered below). Thirdly, the view--preferred by Crawford--that, “the requirement of ‘government’ is less stringent than has been thought, at least in particular contexts’ including where a state has a right to self-determination”.<sup>36</sup> Accordingly, this may help Kosovo weaken the requirement of government. However, it must be established the Kosovar Albanians have a right to self-determination.

Article 1(1) of the International Covenant on Civil and Political Rights 1966 recognises that “All *peoples* have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural

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<sup>34</sup> Matthew Craven ‘Statehood, Self-determination and Recognition’ in Malcolm D. Evans (eds), *International Law*, (OUP, 2010) 225

<sup>35</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 56-7

<sup>36</sup> *Ibid*, 57

development". The ICJ explicitly recognised the right to self-determination outside of the colonial context in the *Advisory Opinion on the Wall*.<sup>37</sup> To establish whether the right of self-determination can be applied in context of Kosovo, it must be established whether the Kosovar Albanians are 'people'.

Jure Vidmar notes that the definition of 'peoples' is 'not entirely clear' and the term was intended to provide a contrast to the 'minorities.'<sup>38</sup> He quotes Musgrave who writes that:

[t]he creation of the minorities treaties regime was, in one respect, an attempt of the Allies to prevent those ethnic groups which had been separated from their respective nation-states as a resolute of the [Paris Peace] Conference from claiming a right to self-determination by categorizing them as minorities.<sup>39</sup>

Vidmar quotes remarks from International Commission of Jurists in 1972 who state that 'people' have common features including their language, race, religion and geography. However, the jurists stated these features are neither sufficient nor necessary for 'people' to exist and therefore conclude that the main characteristic is:

...ideological and historical: a people begin to exist only when it becomes conscious of its own identity and asserts its will to exist... the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.<sup>40</sup>

Applying this definition to Kosovar Albanians, it is hard to deny that they are indeed a people who therefore have a right to self-determination. Part II noted the history of the Kosovar Albanians: a decade worth of human rights violations surely affords them a distinct ideological and historical identity. Indeed, after their autonomy was taken away in the late

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<sup>37</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ 131, at [88] and Separate Opinion of Judge Higgins at [28]-[30]

<sup>38</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,810

<sup>39</sup> Musgrave, *Self-Determination and National Minorities*, (OUP, 1997) 167 quoted in J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,810

<sup>40</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779,810

1980s they manifestly became 'conscious of their own identity' by holding the referendum which overwhelmingly supported independence. In any event, Vidmar notes that the distinction between minorities and peoples may be falling apart. Indeed, he argues that the Badinter Commission accepted that the Serbs were peoples in Bosnia-Herzegovina and Croatia--despite technically being minorities in those two states.<sup>41</sup>

Thus, it is clear that the Kosovar Albanians have a right to of self-determination. However, Crawford goes on to state that "the criterion of effective government may be applied more strictly" where a state is newly being created as in the case of Kosovo rather than "the subsistence or extinction of an established State on the other" as in Congo.<sup>42</sup> This would preclude the use of self-determination of weakening the requirement for effective government. As Crawford emphasises:

The point about 'government' is that it has two aspects: the actual exercise of authority, *and the right or title to exercise that authority...*by withdrawing its own administration and conferring independence on local authorities, Belgium was precluded from denying the consequences of its own conduct.<sup>43</sup>

However, it is submitted that if an entity such as Kosovo has a positive right to external self-determination, then the requirement of government effectiveness should be weakened. If a right to *external* self-determination is accepted, then it is clear that the analogy with Belgian Congo can work because, as will be shown, the right to external self-determination would have arisen by action of Serbia. Serbia cannot, therefore, deny the consequences of its action. It may not be as strong as a grant but it is submitted that circumstances that would give rise to a right of self-determination should constitute action which cannot be denied by Serbia – and thereby weaken the requirement of effectiveness. Part V will show not only that there exists a right to external self-determination with this effect but also that territorial integrity cannot be used to preclude a finding of statehood.

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<sup>41</sup> Ibid, 812

<sup>42</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 59

<sup>43</sup> Ibid, 57-8 (my emphasis)

## Self-Determination and Territorial Integrity

There is a distinction between *internal* self-determination through some sort of constitutional settlement and internal autonomy (for example, like Quebec in Canada) and *external* self-determination which amounts to a right to secede. It is clear by virtue of being a people that the Kosovars have a right to internal self-determination. However, to have a successful claim for statehood, they must show that they have a right to external self-determination.

The principle of territorial integrity requires that a state does not have its territory or sovereignty infringed. It is clear that the establishment of a *new* state in one's territory is a violation of the principle. This would seem to preclude the finding of statehood. Indeed, Malcolm Shaw states that "declaration of independence is thus tainted by illegality".<sup>44</sup> As the Supreme Court of Canada notes in *Reference re: Secession of Quebec* case:

A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances...The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. [There is support] of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.<sup>45</sup>

However, the Supreme Court also noted that there were exceptions to this rule which arise "in only the most extreme of cases and, even then, under carefully defined circumstances".<sup>46</sup> They give three examples, the first two of which are colonial or 'alien domination'. Kosovo, however, is outside of the colonial context and would therefore have to rely on the Supreme Court's third example whereby 'a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort,

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<sup>44</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Oral Statements: CR 2009/24, 75

<sup>45</sup> *Re: Secession of Quebec* [1998] 2 S.C.R. 217, [126]-[127]

<sup>46</sup> *Ibid*, 126

to exercise it by secession.<sup>47</sup> The Supreme Court did state that it was uncertain if this third possibility 'reflects an established international law standard.'<sup>48</sup> This latter part of the judgment is supported by Crawford who writes that:

Since 1945 the international community has been extremely reluctant to accept unilateral secession of parts of independent States if the secession is opposed by the government of that State. In such cases the principle of territorial integrity has been a significant limitation.<sup>49</sup>

It is submitted that the Supreme Court is incorrect to express reluctance about how far the proposition reflects international law. *The Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter* which states that:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

This suggests that *if* a state does not conduct itself 'in compliance with...self-determination of peoples' then territorial integrity *can* be impaired. This interpretation has support from the Netherlands in its submissions in the *Advisory Opinion on Kosovo's Unilateral Declaration*. Furthermore, it noted, while the *Declaration* is a UNGA Resolution, provisions of the Resolution have been held to be in line with customary international law by the ICJ.<sup>50</sup> Moreover, Wildhaber J and Ryssdal J stated in the European Court of Human Rights case *Loizidou v. Turkey*:

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<sup>47</sup> Ibid, 134

<sup>48</sup> Ibid, 135

<sup>49</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 390 but Crawford nonetheless accepts that "The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally"

<sup>50</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Written Statement of the Netherlands, April 2009, 8

Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years *a consensus* has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way.<sup>51</sup>

In its submissions before the ICJ, the Netherlands persuasively explained why there are few precedents for this proposition. Liesbeth Lijnzaad, who represented the country, explained that the 'post-colonial' right to external self-determination had only emerged in the last 50 years and therefore examples were likely to be less forthcoming. Furthermore, there are procedural impediments such as exhausting the negotiations which have precluded the right from being manifested. Accordingly, the lack of examples should not be construed as lack of law. This is not to admit that there are no precedents. Lijnzaad notes that the examples of Bangladesh and Croatia serve as examples of such a right being exercised.<sup>52</sup> Finally, as Hersch Lauterpacht notes, "international law does not condemn rebellion or secession aiming at the acquisition of independence".<sup>53</sup> Accordingly, the Supreme Court of Canada's reluctance cannot withstand scrutiny.

It is clear from the history documented above that meaningful exercise of internal self-determination was taken away from the Kosovar Albanians. Not only were the internal rights of self-determination removed but the Kosovar Albanians suffered extensive human rights violations. It thus follows, that the right to secede in these circumstances arises. Contrary to Shaw's claim that the 'principles of territorial integrity and self-determination fit together',<sup>54</sup> the *right* of external self-determination shows that the territorial integrity is not an absolute guarantee against internal developments.<sup>55</sup>

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<sup>51</sup> *Loizidou v Turkey* (1997) 23 EHRR 513, 535 (my emphasis)

<sup>52</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Oral Statements: CR 2009/32, 8-10

<sup>53</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 390

<sup>54</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Oral Statements: CR 2009/24, 68

<sup>55</sup> See the discussion of *The Declaration of Principles of International Law Concerning Friendly Relations* above, see also *Advisory Opinion on Kosovo's Unilateral Declaration*, Written Statement of the United Kingdom, April 2009, 86-7: territorial integrity "has not been extended to the point of providing a guarantee of the integrity of a State's territory against internal developments which may lead over time to the dissolution or reconfiguration of the State" and Written Comments of the Netherlands, July 2009, 4: "... any attempt to limit the scope of this right [of self-determination] or attach conditions not provided for in the relevant instrument undermines the concept [of self-determination itself]..."

It might be objected that while Kosovo may have had the right to external self-determination in the past, they no longer have the right because the situation is no longer as severe as it was in 1999. Vidmar advocates this argument stating that “the crucial element of remedial secession—[that it must be a] last resort—seems to be missing”.<sup>56</sup> However, it is submitted that Vidmar is incorrect. To exercise external self-determination, a state must show that it has exhausted all effective remedies to achieve a settlement. *Prima facie*, therefore, the fact that time has passed since 1999 should not stop Kosovo from asserting such a right. As was noted in Part II, Kosovo and Serbia were engaged in negotiations after the NATO intervention and it was only when these failed that Kosovo declared its independence.

Furthermore, as observed above, the Special Envoy to the Secretary General concluded as a matter of fact that “autonomy of Kosovo within the borders of Serbia—however notional such autonomy may be—is simply not tenable”. This suggests that there is no real choice. He also suggests that violence would return. It runs counter to logic to say that a return to severe circumstances, which would give rise to a right of self-determination, would also preclude self-determination. In this way, the insistence that external self-determination be an option of ‘last resort’ is still complied with.

It has been shown that there is clear support for the right of external self-determination. This precludes the use of the principle of territorial integrity from impeding the finding of statehood. Furthermore, because Serbia denied the internal right of self-determination to the Kosovar Albanians, it gave Kosovo the right to external self-determination. *Pace Crawford*, this amounts to an analogous situation with Belgian Congo: through its actions it gave Kosovo a right and it cannot deny the consequence of its actions. Accordingly, just like Belgian Congo, “there was no international person as against whom recognition of the Congo [or Kosovo] could be unlawful”.<sup>57</sup> However, even if self-determination only works to

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<sup>56</sup> J.Vidmar, ‘International Legal Responses to Kosovo’s Declaration of Independence’, 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779, 817

<sup>57</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 58



counter the application of territorial integrity, Part VI will show how recognition can help remedy the defects in Kosovo's claim to statehood.

## Recognition

Under the constitutive theory of recognition, meeting the criteria of statehood and asserting statehood would not constitute statehood unless other states recognise that assertion. A declaration (or assertion) is in the words of Crawford "the sound of one hand clapping... what matters is what is done subsequently, especially the reaction of the international community".<sup>58</sup> As of October 2011, 85 members of the 193 in the United Nations recognise Kosovo as an independent state.<sup>59</sup> It is not clear that this is enough to constitute recognition by itself. Vidmar doubted that it would when writing at a time when 56 states recognised Kosovo.<sup>60</sup>

In any event, this approach should be rejected. There is simply little authority to support it. State practice is more inclined to the declaratory approach than the constitutive approach.<sup>61</sup> The UK for example has stated that recognition should not "depend on whether the character of the regime is such as to command His Majesty's Government's approval" but on 'conditions specified in international law' being 'in fact, fulfilled'.<sup>62</sup>

The Arbitration Commission established by the International Conference on Yugoslavia stated in its Opinion No. 1 that effects of recognition are 'purely declaratory'.<sup>63</sup> The Mexico-US Claims Commission case of *Cuculla v Mexico* also stated that "[r]ecognition is based upon pre-existing fact; [it] does not create fact. If this [fact] does not exist, the recognition is falsified".<sup>64</sup> Indeed, similar statements have been made by the US Supreme Court,<sup>65</sup>

<sup>58</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Oral Statements: CR 2009/32, 47

<sup>59</sup> Kosovo Ministry of Foreign Affairs; <<http://www.mfa-ks.net/?page=1,33>> Accessed 14 February 2012

<sup>60</sup> J.Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779, 848

<sup>61</sup> Shaw, *International Law*, (4<sup>th</sup> ed., CUP, 2010),

<sup>62</sup> Hansard, HC Vol.485 cols 2410-2411 quoted in David Harris, *International Law: Cases and Materials*, (Sweet and Maxwell, 2010), 140-41

<sup>63</sup> Opinion No. 1, *Bantinder Commission*, 92 ILR 165

<sup>64</sup> Krystyna Mare, *Identity and Continuity of States in Public International Law*, (Droz, 1968), 150

<sup>65</sup> *Tinoco Arbitration* (1924) 18 AJ 147, 154

German-Polish Mixed Arbitral Tribunal,<sup>66</sup> and the ICJ seems to have ambiguously accepted this position too.<sup>67</sup> Moreover, the constitutive theory leads to the conclusion that, where there is minimal recognition, that an entity does and does not have international personality at the same time. As Vidmar notes “the constitutive theory of recognition would lead to the conclusion that Kosovo simultaneously is and is not a state”.<sup>68</sup>

However, even if the constitutive theory is rejected, Crawford says that nevertheless substantial recognition can heal the deficiencies in the manner the state came into being:

A substantial measure of recognition is strong evidence of statehood, just as its absence is virtually conclusive the other way. In this context, general recognition can also have a curative effect as regards deficiencies in the manner in which a new State came into existence.<sup>69</sup>

Shaw approves of this approach stating that “lack of effective central control might be balanced by significant international recognition culminating in membership of the UN”.<sup>70</sup> Accordingly, even though Kosovo does not meet the Montevideo Convention requirement of an effective government, recognition can work to remedy the defects. Part VII looks at the final principle which may preclude the Kosovo from being a state.

## **Principles that Preclude Statehood:**

### **The Prohibition on the Use of Force**

As stated, international legal norms can not only be used to aid statehood but to preclude it. Indeed, during the ICJ proceedings, Malcolm Shaw submitted on behalf of Serbia that

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<sup>66</sup> *Deutsch Continental Gas Gesellschaft v Polish State* (1929) 5 ILR 11, 13

<sup>67</sup> James Crawford, *The Creation of States in International Law*, (2nd ed., OUP, 2007) 25: “The ICJ in *Bosnian Genocide* case, though not address the matter of recognition directly, may be seen, by implication to have favoured the view that statehood and its attendant rights exist independently of the will of states”

<sup>68</sup> J.Vidmar, ‘International Legal Responses to Kosovo’s Declaration of Independence’, 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779, 851

<sup>69</sup> *Advisory Opinion on Kosovo’s Unilateral Declaration*, Oral Statements: CR 2009/32, 48

<sup>70</sup> Shaw, *International Law*, (4<sup>th</sup> ed. CUP, 2010) 201

international law requires an “aspirant State to emerge in a manner not incompatible with the key principles of international law”.<sup>71</sup> Article 2(4) of the UN Charter states:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The intervention in Kosovo was not an action taken in self-defence and there was no authorisation of the use of force by the United Nations Security Council. Thus it could be said that because the creation of Kosovo was contingent on the unlawful use of force, this would preclude a weakening of the Montevideo Convention requirements.<sup>72</sup> Vidmar, however, argues that the declaration of independence was not caused by NATO's intervention and therefore, “the illegality of the NATO intervention does not influence the question of legality of the creation of the state of Kosovo”.<sup>73</sup> But this ignores the reality of the situation: the use of force laid the path for the introduction of UNMIK and the assertion of statehood would be worthless had NATO not intervened—much like the annexation of Kuwait was only possible with the illegal use of force by Iraq.

Accordingly, to be able to convincingly show that Kosovo is a state this point must be countered. Firstly, it could be argued that Article 2(4) does not prohibit the use of force where it is not directed against the political independence or territorial integrity of a State. This is an argument made by D'Amato in reference to the intervention by the United States in Panama in 1991. He argues that:

There was never an intent to annex part or all of Panamanian territory, and hence the intervention left the territorial integrity of Panama intact. Nor was the use of force directed against the ‘political independence’ of Panama: the United States did not intend to, and has not, colonized, annexed or incorporated Panama.<sup>74</sup>

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<sup>71</sup> *Advisory Opinion on Kosovo's Unilateral Declaration*, Oral Statements: CR 2009/24, 75

<sup>72</sup> J.Vidmar, ‘International Legal Responses to Kosovo's Declaration of Independence’, 42 (3) *Vanderbilt Journal of Transnational Law* (2009) 779, 826

<sup>73</sup> *Ibid*, 827

<sup>74</sup> D'Amato ‘The Invasion of Panama was a Lawful Response to Tyranny,’ 84 *AJIL*, 516, 520

This would apply equally to Kosovo. The intervention was aimed entirely at stopping a humanitarian catastrophe. Secondly, while controversial, the UK does believe that there is a right to unilateral humanitarian intervention in international law.<sup>75</sup> The concept has also received support from Belgium. Sir Christopher Greenwood (now Judge Greenwood of the ICJ) has long been a proponent for such a right. Pre-1990, Greenwood accepts "the body of state practice... was not great".<sup>76</sup> The examples often used are Tanzania's overthrow of Idi Amin's government in Uganda (1979), the use of force by Vietnam against Cambodia (1979) and India's intervention in East Bengal (1971). However, in all of these cases, self-defence was the primary legal basis for the action.

Post-1990, there are two important precedents. First, the intervention by the Economic Community of West African States (ECOWAS) in Liberia to avert further escalation of a civil war and prevent serious human rights abuses.<sup>77</sup> There is some debate about whether this could be intervention by consent<sup>78</sup> but after the government of President Doe (who was supported ECOWAS) was removed, it seems clear that this was "first genuine case of humanitarian intervention".<sup>79</sup> Greenwood notes that the international reaction was 'generally supportive of ECOWAS'.<sup>80</sup> Levitt notes that there were 15 UNSC Resolutions and:

...[A]lmost every resolution and statement commended ECOWAS for its efforts, asked UN member states to support it financially, requested African states to contribute troops to its mission, and condemned attacks against it by rebel factions; not once was ECOWAS condemned for unlawful action or inappropriate conduct.<sup>81</sup>

Greenwood's second important precedent are the no fly zones established over the north and south of Iraq to protect Shiites and Kurds from Saddam Hussein's brutal crackdowns in

<sup>75</sup> Christine Gray, *International Law and the Use of Force*, (3<sup>rd</sup> ed., OUP, 2008), 49 where Gray notes that Slovenia made similar arguments at the UNSC and Belgium use the same justification before the ICJ

<sup>76</sup> Christopher Greenwood, 'Jurisdiction, NATO and the Kosovo Conflict' in Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, 2003) 155

<sup>77</sup> For a concise account of the Liberia intervention see Jeremy Levitt, 'Pro-Democratic Intervention in Africa,' *Wisconsin International Law Journal* 785, 796-798

<sup>78</sup> Christine Gray, *International Law and the Use of Force*, (3<sup>rd</sup> ed., OUP, 2008), 48: Gray believes that the action was taken with the consent of Liberia but as Greenwood (n77, 156) notes "legal basis cannot rest on the consent of the original Liberal government, as that government soon ceased to exist..."

<sup>79</sup> Jeremy Levitt, 'Pro-Democratic Intervention in Africa', *Wisconsin International Law Journal* 785, 797

<sup>80</sup> Christopher Greenwood, 'Jurisdiction, NATO and the Kosovo Conflict' in Patrick Capps, Malcolm Evans and Stratos Konstadinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, 2003) 156

<sup>81</sup> Levitt, 'Pro-Democratic Intervention in Africa,' *Wisconsin International Law Journal* 785, 797

the 1990s. He makes clear that while some argued that the no fly zones were based on UNSC Resolution 688, there was no explicit authorisation and therefore it could “not furnish a legal basis for the intervention”. This is in line with statements of the British government who, along with the US, were the largest contributors to the effort to protect Iraqi civilians. Greenwood quotes the following from a British official:

Not every action that the British government...takes has to be underwritten by a specific provision in a UN Resolution provided we comply with international law. International law recognises extreme humanitarian need...We are on strong legal as well as humanitarian ground in setting up this no fly zone.<sup>82</sup>

This Anglo-American unilateral action “received widespread international support”.<sup>83</sup> Greenwood concludes from these two examples that the law recognises unilateral humanitarian intervention if there is “the most serious of humanitarian emergency”. In such circumstances, military action may be used without UNSC authorisation (which is not forthcoming, “for example because of the exercise or threatened exercise of a veto) where it is the only practicable means by which loss of life can be ended”.<sup>84</sup>

This argument—it is submitted—should be accepted not least because it accords with the established and growing emphasis on human rights. Indeed, it is quite telling that when Russia (with the support of China and Namibia) attempted to pass a resolution through the UNSC, it was rejected by 12 votes.<sup>85</sup> Accordingly, this argument would rebut the charge that the NATO intervention was illegal and therefore does not preclude the finding of statehood. Gray suggests that the fact that the UK and US did not use such a legal argument when using force in Afghanistan in 2001 and Iraq in 2003 shows that it is “another indication of its controversial status”.<sup>86</sup> A more reasonable response is that humanitarian concerns were not a sufficient or necessary condition for military action and therefore such a legal argument

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<sup>82</sup> Christopher Greenwood, ‘Jurisdiction, NATO and the Kosovo Conflict’ in Patrick Capps, Malcolm Evans and Stratos Konstantinidis (eds), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart Publishing, 2003) 158

<sup>83</sup> *Ibid*, 158

<sup>84</sup> *Ibid*, 159 and Greenwood, ‘International Law and the NATO Intervention in Kosovo’, *ICLQ*, Vol 49, No 4 (Oct., 2000), 926, 931

<sup>85</sup> Christine Gray, *International Law and the Use of Force*, (3<sup>rd</sup> ed., OUP, 2008), 42 and see also at 46 where Gray quotes the UN Secretary General as stating that “emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty”

<sup>86</sup> *Ibid*, 51

would add little and could even distract from the purpose in each case (harbouring non-state actors and non-compliance with UNSC Resolutions respectively).

## **Conclusion**

Kosovo has yet to be admitted into the United Nations because of the Russian veto over its membership. Nonetheless, it has been shown how a convincing case can be made that Kosovo has satisfied the criteria of statehood in international law. Self-determination works in two ways: firstly, it helps remedy the defects in Kosovo's claim. It also works to rebut the argument that statehood would be contrary to the territorial integrity of Serbia. Recognition also fulfils the same function. Finally, the prohibition on the use of force does not preclude the finding of statehood because, as argued here, the Kosovo intervention was legal on the basis of humanitarian intervention.

It should be noted that the foregoing analysis is extremely sensitive to facts. For example, if a country is democratic and represents its entire people equally (i.e., allows for the meaningful expression of self-determination), then the principle of territorial integrity will likely not be defeated. Moreover, some of the concepts defined here are insufficiently defined to allow for a rigid framework to be advocated. The concepts of 'meaningful exercise' and 'internal self-determination' have not been assessed but represent a real threat to international stability if stretched.



# **Sadomasochism and the Criminal law: A Human Rights Approach**

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## Abstract

*On 11th March the House of Lords handed down judgment in the well-known case Regina v Brown [1993] 2 All ER 75, with the majority upholding the convictions under the Offences Against the Person Act of 16 homosexual men who had engaged in consensual sadomasochistic acts. The issue that ultimately divided their Lordships was the categorisation of sadomasochism: by the majority as primarily concerned with violence and by the minority as private sexual relations.*

*This paper questions the soundness of this reasoning on the basis that the distinction between sex and violence is unsustainable in light of modern discourse on sadomasochism. The core thesis of this paper is that once this distinction is removed from their Lordships' reasoning the majority decision in Brown is based on a judicial conception of morality; and that both the legal and practical consequences of this judgment on sadomasochists is unsatisfactory. By exploring the relationship between morality and the criminal law, with particular reference to the Hart/Devlin debate, this essay highlights the need for a principled approach which adequately balances the protection of public morals and the Article 8 rights of sadomasochistic practitioners. It is suggested that this balance is ultimately one which ought to be struck by Parliament.*

## Introduction

*Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think.*

*Jeremy Bentham<sup>1</sup>*

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<sup>1</sup> Bentham, J., *The Principles of Morals and Legislation* (1789), Great Books in Philosophy (New York: Prometheus, 1988) Chapter I, p. 1



In 1987 the Greater Manchester police conducted 'Operation Spanner' as part of an investigation into a group of individuals suspected of torturing and murdering their victims. During the course of the operation it emerged that this was not the case as the police acquired a number of video tapes depicting homosexual men indulging in sadistic and masochistic practices – that is, deriving sexual gratification from infliction and receipt of physical or emotional abuse. Consequently, in 1990 some 16 men were charged and convicted of a number of offences including assault occasioning actual bodily harm and unlawful wounding, contrary to s.47 and s.20 of the 1861, Offences Against the Person Act. The most serious of these convictions carried sentences of four and a half years in prison. The acts themselves, which included instances of branding and piercing, left no permanent injuries and were done with the full consent of the recipient.<sup>2</sup> Nonetheless, a sense of indignation pervades all of the judgements in *Brown*. 'It is sufficient to say', opined Lord Mustill, 'that whatever the outsider might feel about the subject matter of the prosecutions - perhaps horror, amazement or incomprehension, perhaps sadness - very few could read even a summary of the other activities without disgust.'<sup>3</sup> It is argued that one of the most striking aspects of this case is the extent to which their Lordships felt that the moral turpitude of these acts was such that they should be considered criminal.

The reason the *prima facie* enforcement of morality raises alarm bells can be ascertained when we consider the report of the Wolfenden Committee, which reviewed the position of the law in relation to homosexuality 30 years prior to *Brown*. It stated that 'it is not the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour.'<sup>4</sup> As such, Lord Mustill's opinion in *Brown* must be seen as controversial and the first part of this paper discusses the relationship between morality and the criminal law. This sets up the theoretical framework for a detailed discussion of their Lordships' reasoning in *Brown* in the second part of this essay. It will be argued that the House of Lords was unconstrained by precedent when deciding the legality of these sadomasochistic practices. Subsequently it is suggested that two distinct but interrelated

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<sup>2</sup> *R v Brown* [1992] 2 All ER 552 at 557

<sup>3</sup> *R v Brown* [1993] 2 All ER 75 at 100

<sup>4</sup> *The Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (New York: Stein & Day, 1963), paragraph 13

problems lie at the heart of the reasoning of the House of Lords. First, their Lordships fumbled the issue in attempting to draw a distinction between sex and violence. This ultimately proved to be a vital aspect of their reasoning but is not one which can be readily drawn in the case of sadomasochism. Second, the majority acted too readily on the preconceived notion that sadomasochistic practice was immoral. Their Lordships do make reference to principles supporting their decision, but it will be shown that they are made on the basis of speculation and the same misinformation that led them to differentiate between sex and violence in the first place. Once we remove this veil of principle, what lies at the core of *Brown* is the intuition of three members of the senior judiciary. As a result there has been a lack of coherence and consistency in the law. The final part of this essay seeks to embrace a fuller understanding of sadomasochism and attempts to develop a reasoned and modern approach to this difficult area of law, which adequately protects practitioners' human rights.

Bentham's liberal philosophy speaks of our two sovereign masters: pain and pleasure. Implicit in this theory is that humanity is governed by two kinds of acts: good and evil. In *Brown*, the House of Lords accepted the dichotomy between the two, ultimately polarising the judgements of the majority and the minority. For the former, sadomasochistic acts were primarily concerned with violence and as a consequence they should be prohibited. For the latter, they concerned the private acts of individuals and such questions of sexual preference were beyond the purview of the criminal law. But in doing so both the majority and the minority are guilty of oversimplifying what is, in fact, much more complex. Sadomasochistic practice does not fit easily within our traditional precepts. But this does not mean that sadomasochistic relationships are not loving ones. Our knowledge of this often misunderstood practice has expanded greatly since *Brown* and, as we shall see below, the criminal law in this area is drastically outdated. Sadomasochism is a complex phenomenon which breaks down the barriers between sex and violence, pain and pleasure, good and evil. As a result, any law governing sadomasochistic practice cannot set rigid parameters and it cannot adhere to purely liberal or paternalistic, let alone moralist principles. Any modern theory must incorporate balance, and in practice our most powerful tool in striking this balance is the doctrine of proportionality. It is on this basis that we

should consider the legal status of sadomasochism, and determine whether it ought to be recognised as an exception to the Offences Against the Person Act.

## Morality and the Criminal Law

The capacity of the state to enforce morality has long been pervasive in political and legal discourse. Plato viewed immorality on level terms with physical sickness, whilst Socrates and the Stoics went so far as to hold that 'moral harm' is the only genuine harm.<sup>5</sup> Modern theories concerning the enforcement of morality broadly fall into three camps. The first is Mill's libertarian 'harm-principle.' This principle states that society only has jurisdiction over an individual's conduct when it negatively affects the interests of others.<sup>6</sup> Libertarians value self-determination and choice, and demand the minimum interference of the state in the affairs of individuals. The second is paternalism, where state interference with liberty against the will of the individual is permitted, insofar as the interference is designed to protect that individual from harm as a result. The extent to which paternalism is at odds with the harm-principle is uncertain. Feinberg has asserted that on a strict reading of Mill, no coercive interference on the grounds that adults must be protected from their own folly can be justified.<sup>7</sup> Raz has challenged this view; he believes that autonomy can be protected by the maintenance of good options (choices) whilst bad options hold no integral value and can therefore be limited by the state.<sup>8</sup> However, in doing so the state must not resort to coercion because the restriction of liberty has the net effect of restricting choice, and this violates autonomy.<sup>9</sup> On either reading, it is clear that both doctrines hold it as common ground that immorality alone ought not to be punished by the criminal law. In stark contrast stand the views of the legal moralist. Mill's contemporary critic Stephen questioned the state's ability to determine 'any question whatever if it is not competent to decide that

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<sup>5</sup> Feinberg, J., *Harm to Others: The Moral Limits of the Criminal Law, Vol. 1* (New York: Oxford University Press, 1985) pp. 66-7

<sup>6</sup> Mill, J.S., *On Liberty* (1859), Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1989) chapter 1

<sup>7</sup> Feinberg, J., *Harm to Others: The Moral Limits of the Criminal Law, Vol. 1* (New York: Oxford University Press 1985) p. 117

<sup>8</sup> Raz, J., *The Morality of Freedom* (Oxford: Clarendon Press, 1986) pp. 412-3

<sup>9</sup> Ibid pp. 415-20

gross vice is a bad thing.<sup>10</sup> The leading proponent of this viewpoint came a century on from Mill when, in response to the report of the Wolfenden Committee, Lord Devlin spoke at the Maccabean Lectures in favour of the law's right to restrict immoral sexual conduct.<sup>11</sup> It is worth exploring his arguments and the ensuing debate with Professor Hart in some detail.

Lord Devlin believes that immoral behaviour can create internal pressure on society and that a loosening of moral bonds is the first stage of social disintegration.<sup>12</sup> There are two kinds of morals: those simple moral standards that exist in society and those which the majority place beyond toleration.<sup>13</sup> To protect itself society can insist on the enforcement of these morals<sup>14</sup> and it has a right to use the criminal law as a tool to achieve conformity.<sup>15</sup> However, society must also exercise its discretion in doing so; it is only where maximum individual liberty cannot be tolerated that society is entitled to protect its own integrity. The threshold test is where the reasonable man would feel 'intolerance, indignation and disgust' at such immoral behaviour.<sup>16</sup> Lord Templeman made a clear reference to Devlin's legal philosophy when he held that 'society is entitled and bound to protect itself against a cult of violence.'<sup>17</sup> The problem that arises is that Devlin's social disintegration theory is far from incontrovertible and may not be a firm foundation for the judgement in *Brown*. Professor Hart argues that this model is based on a fraught conception of society.<sup>18</sup> Devlin's conception of 'public morality' is criticised as 'sociologically naïve', and that society is characterised by a complex of moral ideas and attitudes which are much more fluid than Devlin's assumption of moral continuity within society suggests.<sup>19</sup> Furthermore, Hart holds the social disintegration theory in the same regards as the Emperor Justinian's belief that homosexuality was the cause of earthquakes: it is utterly irrational.<sup>20</sup> In supporting Mill's harm principle, Hart could not countenance the thought that coercive measures could be

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<sup>10</sup> Green, R., (*Serious*) *Sadomasochism: A Protected Right of Privacy?* (2001), *Archives of Sexual Behaviour*, Vol. 30, No. 5, p. 548

<sup>11</sup> Devlin, P., *The Enforcement of Morals* (1959) reprinted in Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965)

<sup>12</sup> *Ibid.* p. 13

<sup>13</sup> *Ibid.* pp. 15-17

<sup>14</sup> *Ibid.* p. 17

<sup>15</sup> *Ibid.* p. 20-22

<sup>16</sup> *Ibid.* p. 17

<sup>17</sup> [1993] 2 All ER 75 at 84

<sup>18</sup> Hart, H. L. A., *Law, Liberty and Morality* (London: Oxford University Press, 1972) p. 51-2

<sup>19</sup> *Ibid.* p. 51-52, 62-3; cf. Devlin, P., *The Enforcement of Morals* (Oxford: Oxford University Press, 1965) p. 18

<sup>20</sup> *Ibid.* p. 50

used to enforce the status quo; this would arrest social change<sup>21</sup> and with particular regards to sexual liberty, 'create misery of a quite special degree'.<sup>22</sup> With such strong opposition to Devlin in mind, questions are raised as to how the House of Lords came to their decision in Brown, and the extent to which their position on sadomasochism can be justified.

## The Decision in Brown

### *Unlocking the Moral Judgment*

*This is not a witch-hunt against homosexuals...nor is it a campaign to curtail the private sexual activities of citizens of this country. Much has been said about individual liberty and the rights people have to do what they want with their own bodies but the courts must draw the line between what is acceptable in a civilised society and what is not.*<sup>23</sup>

*Judge Rant QC*

Speaking at first instance, Judge Rant pointed towards the position in which the court found itself in Brown, where a decision was made not on precedent, but upon the standards of civilised society as determined by five senior Law Lords. In reviewing the authorities their Lordships acknowledged that they were working with a clean slate in determining whether sadomasochism ought to be criminalised.<sup>24</sup> For the majority the relevant authorities simply established that, to allow the appeal, sadomasochism would have to be excluded as a special category of Offence against the Person.<sup>25</sup> For the minority, it was a question of whether it could be included in the scope of this offence.<sup>26</sup> The distinction is immaterial; in either scenario all five Law Lords felt that the matter was one to be determined by reference to public policy rather than any positivist legal reasoning. Their Lordships' judgements appear to have two components: morality and principle. In deciding what was acceptable in civilised society, the majority relied too heavily on the former.

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<sup>21</sup> Ibid p. 75

<sup>22</sup> Ibid p. 22

<sup>23</sup> Young, D., 'Leaders of vicious and perverted sex gang jailed; Pornography ring', The Times, December 20 1990 p. 5.

<sup>24</sup> [1993] 2 All ER 75 as per Lord Templeman at 82; Lord Jauncey at 90; Lord Lowry at 98; Lord Mustill at 112; Lord Slynn at 119;

<sup>25</sup> For example, see Lord Lowry [1993] 2 All ER 75 at 99

<sup>26</sup> As per Lord Mustill [1993] 2 All ER 75 at 115

Lord Mustill held that sadomasochism did not concern the criminal law of violence, but rather the law of private sexual relations.<sup>27</sup> The basis upon which the minority allowed the appeal was that the realm of private morality was out of reach of the criminal law.<sup>28</sup> Where the majority differed was in framing sadomasochistic acts as primarily concerned with violence. As such the majority could not allow consent to operate as a defence to the infliction of actual bodily harm. An exception to the Offences Against the Person Act could not be created for sadomasochistic acts because they saw a distinction between sport, where violence is incidental,<sup>29</sup> and the indulgence of cruelty to 'satisfy a perverted and depraved sexual desire.'<sup>30</sup> With this framework in mind, the majority set out a number of factors which justified the prohibition of sadomasochism as a matter of policy. Lord Templeman held that pleasure derived from the infliction of pain was inherently evil, and that 'society is entitled and bound to protect itself against a cult of violence.'<sup>31</sup> Lord Jauncey and Lord Lowry further considered the danger of the proselytisation and corruption of young men,<sup>32</sup> and the potential for the infliction of serious injury as a result of the uncontrollable nature of sexual activity.<sup>33</sup>

However, these opinions are deeply problematic. Modern understandings of sadomasochism acknowledge the complexity of this behaviour.<sup>34</sup> What is certain is that Lord Templeman's image of a 'cult of violence' is outdated. Indeed as early as 1976 Leigh conducted a study which acknowledged that, for the most part, sadomasochistic sex was not dangerous and that the environment was one of 'controlled violence'.<sup>35</sup> Subsequent studies have undermined much of the reasoning of the House of Lords. The sadomasochistic community has adopted a mutually understood code of conduct which ensures that the infliction of pain is safe and consensual through the implementation of safe words and

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<sup>27</sup> Ibid at 100

<sup>28</sup> As per Lord Slynn [1993] 2 All ER 75 at 122

<sup>29</sup> [1993] 2 All ER 75 at 83

<sup>30</sup> As per Lord Lowry [1993] 2 All ER 75 at 99

<sup>31</sup> [1993] 2 All ER 75 at 84

<sup>32</sup> [1993] 2 All ER 75 at 92

<sup>33</sup> [1993] 2 All ER 75 at 99

<sup>34</sup> Moser, C. & Kleinplatz, P. J., 'Introduction', *Sadomasochism: Powerful Pleasures* (2006) *Journal of Homosexuality*, 50: 2, p. 4

<sup>35</sup> Leigh, L.H., 'Sado-Masochism, Consent, and the Reform of the Criminal Law' (1976) *Modern Law Review*, Vol. 39, No. 2 p.134-5

other control mechanisms.<sup>36</sup> This contradicts Lord Jauncey's concern about the escalation of violence. Weinberg's sociological study has found that most dominant partners were skilled in their practice and that over-aggressive 'tops' found it difficult to find partners, a point corroborated by the findings of the Law Commission.<sup>37</sup> Weinberg also found that the community were opposed to forced participation running contrary to Lord Lowry's concern over the proselytisation of young men.<sup>38</sup> Finally, Lord Templeman's contention that sadists indulged in cruelty<sup>39</sup> is radically undermined by Cross and Matheson, whose study found that sadists were much more likely than masochists to express tenderness and caring.<sup>40</sup> The lack of understanding of sadomasochism in Brown has led White to demand greater public discourse on the issue.<sup>41</sup> Hoolpe has expressed similar concerns, highlighting the fact that sadomasochists see their behaviour in a manner which is at odds with public perception.<sup>42</sup>

It is concerning that the majority did not provide strong reasons justifying the classification of sadomasochism as inherently violent. This in turn invites questions as to how their Lordships reached these judgements. The distinction drawn between sex and violence lies at the heart of Brown, but behind the rhetoric and hyperbole there does not appear to be any concrete foundation to justify it. Although their Lordships go on to bolster their positions by evoking what appear to be legal moralist (Lord Templeman) and paternalist (Lord Jauncey and Lord Lowry) principles, these appear to follow, rather than precede the assumption that sadomasochism is primarily concerned with violence. In any event it has been suggested that these arguments were based on preconceived notions of sadomasochistic practice, rather than matters of fact. Consequently, the majority judgements in Brown appear to originate from a judicial conception of morality, rather than by reference to firm principles backed by strong evidence.

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<sup>36</sup>Weinberg, Thomas S. 'Sadomasochism and the Social Sciences', (2006) *Journal of Homosexuality*, 50: 2, p.34

<sup>37</sup>Ibid p. 34; *Law Commission Consultation Paper No. 139, Criminal Law: Consent in the Criminal. Law* (1995)

<sup>38</sup>Ibid

<sup>39</sup>[1993] 2 All ER 75 at 83

<sup>40</sup>Cross, P. A., and Matheson, K.,(2006) '*Understanding Sadomasochism*', *Sadomasochism: Powerful Pleasures*(2006) *Journal of Homosexuality*, 50: 2, p. 138

<sup>41</sup>White, C., '*The Spanner Trials and the Changing Law on Sadomasochism in the UK*', *Sadomasochism: Powerful Pleasures* (2006) *Journal of Homosexuality*, 50: 2, pp. 167-187

<sup>42</sup>Hoolpe, T., '*Conflicting Visions: SM, Feminism, and the Law. A Problem of Representation*' (1996) *Canadian Journal of. Law and Society* 11, no. 1 pp. 177-220

## *Critiquing the Moral Judgement*

*In establishing morality as the foundation upon which the majority based their decisions, two major cracks emerge which bring the stability of these foundations into question.* The first is that in drawing the distinction between sex and violence their Lordships based their judgements on a misunderstanding both of material fact and of sadomasochism generally. In her study of the 'Spanner Trials,' White highlighted a number of alarming evidential problems. Of 18 hours of footage obtained by the police, only a three hour edit showing the most violent of these acts, and omitting much of the context, was shown at trial.<sup>43</sup> An act involving a victim's penis being nailed to the floor was met with feelings of disgust by their Lordships,<sup>44</sup> but what the video failed to make clear was that it was done through an existing, legal<sup>45</sup> piercing cavity.<sup>46</sup> On top of this, the majority adopted a narrow perception of sadomasochism and, by resorting to hyperbole and speculation,<sup>47</sup> described acts which no practitioner would have thought of as safe or consensual.<sup>48</sup> Lord Jauncey acknowledged that the whole information had not been laid before the court,<sup>49</sup> yet found no hesitation in making a policy decision based on what limited understanding he had, filling the gaps in by resorting to intuition and prejudice.<sup>50</sup>

This brings us to the second problem: in adopting this narrow view the majority were preoccupied with the moral turpitude of these acts. The rhetoric permeating the majority judgements makes this clear. The 'Spanner' men were chastised for the repugnance of their actions; they glorified cruelty<sup>51</sup> and promoted a 'cult of violence'<sup>52</sup> that was unacceptable to society. Mullender has argued that the majority framed the issue in such a way as to enable them to give expression to their intuitions regarding the propriety of criminalising

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<sup>43</sup>White, C., *'The Spanner Trials and the Changing Law on Sadomasochism in the UK'*, *Sadomasochism: Powerful Pleasures* (2006) *Journal of Homosexuality*, 50: 2, p.171

<sup>44</sup>[1993] 2 All ER 75 at 92

<sup>45</sup>*Law Commission Consultation Paper No. 139, Criminal Law: Consent in the Criminal. Law* (1995) p.14

<sup>46</sup>White, C., *'The Spanner Trials and the Changing Law on Sadomasochism in the UK'*, *Sadomasochism: Powerful Pleasures* (2006) *Journal of Homosexuality*, 50: 2, p.171

<sup>47</sup>[1993] 2 All ER 75 at 83

<sup>48</sup>White, C., *'The Spanner Trials and the Changing Law on Sadomasochism in the UK'*, *Sadomasochism: Powerful Pleasures* (2006) *Journal of Homosexuality*, 50: 2, p. 173

<sup>49</sup>[1993] 2 All ER 75 at 92

<sup>50</sup>Mullender, R., *'Sado-Masochism, Criminal Law and Adjudicative Method: R v Brown in the House of Lords'* (1993) 44 *NILQ* 380 p. 382.

<sup>51</sup>[1993] 2 All ER 75 at 83

<sup>52</sup>[1993] 2 All ER 75 at 84



sadomasochism.<sup>53</sup> Some have gone further and pointed towards the frequency with which the word 'sadomasochism' is prefixed with 'homosexual' as well as Lord Lane's description of a 'normal heterosexual relationship' in the Court of Appeal.<sup>54</sup> Morgan and other commentators<sup>55</sup> have argued that their Lordships sought to use the criminal law to marginalise homosexual activity.<sup>56</sup> Whilst the more extreme of these accusations perhaps benefit from hindsight and Brown's subsequent application by other courts, Mullender's view is convincing and it appears that their Lordships made a value judgement based on their own perception of morally acceptable behaviour. In doing so they did not voice fears over social disintegration, as Lord Devlin would have. Nor were they in a position to determine the moral consensus of the public, as judges rather than legislators. This moral judgement was personal, and it was one which prevailed over principle.

By relying on a moral assessment of sadomasochism Brown muddied the waters and has left the law in an unsatisfactory position. Bereft of any guiding principle, domestic case law has done little to strengthen the position of the courts. In 1992, a jury were directed to acquit a military man who used nipple clamps and nipple piercing during bondage with his female partner.<sup>57</sup> Similarly in *Wilson* the Court of Appeal, feeling unconstrained by the House of Lords' precedent in *Brown*, overturned the conviction of a man who branded his initials into his wife's buttocks.<sup>58</sup> It was held by Russell LJ that consensual activity between husband and wife, in the privacy of the matrimonial home, was not a proper matter for criminal prosecution.<sup>59</sup> However, in *Emmett* a conviction was upheld where heterosexual partners engaged in asphyxiation and the use ignited lighter fluid on the surface of the skin; this led to the female partner acquiring a number of bruises on her neck, passing out, and receiving serious burns to her breasts.<sup>60</sup> Wright J felt that the degree and risk of harm

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<sup>53</sup> Mullender, R., 'Sado-Masochism, Criminal Law and Adjudicative Method: *R v Brown in the House of Lords*' (1993) 44 NILQ 380 p. 382

<sup>54</sup> Bamforth, N., *Sado-masochism and consent* (1994) Cr App R 302 at 310

<sup>55</sup> Green, R., (Serious) Sadomasochism: A Protected Right of Privacy? (2001), *Archives of Sexual Behaviour*, Vol.30, No. 5, p. 548

<sup>56</sup> Morgan, L.J., 'Violence and the Law: The Case of Sado-Masochism', *Social and Legal Studies*, (1995) Vol 4, p. 227

<sup>57</sup> Thompson, B., *Sadomasochism: Painful Perversion or Pleasurable Play?* (London: Continuum, 1994) p. 242

<sup>58</sup> *R v Wilson* [1997] Q.B. 47 at 50

<sup>59</sup> Ibid

<sup>60</sup> *R v Emmett* (Unreported, 18 June 1999)

involved was such that the criminal law could justifiably intervene.<sup>61</sup> The inconsistent and haphazard approach of the courts in the wake of the *Spanner* litigation is a direct consequence of the unprincipled judgements of the majority in *Brown*. Indeed, in *Wilson* Lord Justice Russell went to such lengths to avoid implementing the precedent that he factually distinguished the cases,<sup>62</sup> despite the fact that an instance of consensual branding in *Brown* sustained a conviction for occasioning actual bodily harm.<sup>63</sup> In relying on intuition, their Lordships failed to lay down any comprehensible precedent and this has led to an erratic treatment of sadomasochistic behaviour which, amongst other things, flirts with legal uncertainty and raises questions about its compatibility with the Rule of Law.

## In Search of Principle Understanding Sadomasochism

The problems with the law go to the very core of their Lordships' reasoning; the first step towards resolving these problems must be to ask how we should define sadomasochism. Should we view it simply as a question of sexual orientation? Is it genetically set? These were the questions posed by Moser and Kleinplatz in the preface to a study aimed at developing this discourse.<sup>64</sup> Scholarly opinions are diverse in this area, but a few trends can be summarised presently. Cross and Matheson challenged the traditional psychoanalytical analyses of sadomasochistic behaviour and found that practitioners were no different in terms of psychopathology than the control subjects taking part in a series of psychometric tests.<sup>65</sup> What they found, through their study of online sadomasochistic role-playing was that power exchange was at the centre these practices and that pain was a tool in maintaining and enhancing power differentials, alongside the use of linguistic indicators of status.<sup>66</sup> This view accords with the finding of Weinberg, who has argued that traditional models miss the point of sadomasochistic practice, and that pain is a tool geared towards

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<sup>61</sup> *Ibid*

<sup>62</sup> *R v Wilson* [1997] Q.B. 47 at 49

<sup>63</sup> [1993] 2 All ER 75 at 83

<sup>64</sup> Moser, C.& Kleinplatz, P. J., '*Introduction*', *Sadomasochism: Powerful Pleasures*(2006) *Journal of Homosexuality*, 50: 2,p.4

<sup>65</sup> Cross, P. A., and Matheson, K.,(2006) '*Understanding Sadomasochism*', *Sadomasochism: Powerful Pleasures*(2006) *Journal of Homosexuality*, 50: 2, p. 145

<sup>66</sup> *Ibid* p. 153

the maintenance of the power dynamic.<sup>67</sup> A minor critique of Cross and Matheson's study is that as a result of the medium of online role-playing through which their study was conducted, they understated the importance of pain in sadomasochistic practice. Weinberg acknowledges that pain is important to sadomasochists and that it forms part of the sexual pleasure.<sup>68</sup> Many of the respondents to the Law Commission's report in the wake of Brown found that pain was an important aspect of sadomasochistic practice – one woman had taken to self-mortification, which she later involved her husband in.<sup>69</sup> Others described pain as a medium through which a trance-like state can be achieved.<sup>70</sup> It is submitted therefore that a modern view of sadomasochism cannot hold sex and violence as separate entities, but rather we should view violence as so closely related to a sadomasochist's sexual pleasure that distinguishing between them misses the point. It is on this basis that we must consider the merits of its criminalisation.

Brown is undoubtedly controversial amongst scholars and there remains no consensus as to when the criminal law can justifiably interfere with sadomasochistic practice. Edwards has supported the decision, criticising the minority on the basis that they view sex and violence as separate species and that the former is somehow beyond the purview of the criminal law.<sup>71</sup> More recently Green has backed a liberal viewpoint using the reasoning of the majority to argue that sexual liberty is a 'good reason' for excluding sadomasochism from criminal sanction.<sup>72</sup> But as we have seen, sadomasochism is a complex phenomenon; the law should treat it as such. Edwards was right to point out that the distinction between sex and violence cannot be maintained for the same reasons that Bentham's discussion of pain and pleasure as our sovereign masters cannot support a logical analysis of sadomasochism. Herein lays the problem. Their Lordships in Brown were correct to recognise the importance of the relationship between sex and violence, but in their attempts to reason it one way or the other they opted to maintain a dichotomy which overlooks the nature of

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<sup>67</sup> Weinberg, Thomas S. 'Sadomasochism and the Social Sciences', (2006) *Journal of Homosexuality*, 50: 2, p.33

<sup>68</sup> *Ibid*

<sup>69</sup> *Law Commission Consultation Paper No. 139, Criminal Law: Consent in the Criminal. Law* (1995) p. 131-2

<sup>70</sup> *Ibid*

<sup>71</sup> Edwards, S., *No Defence for a Sado-Masochistic Libido* (1993) *New Law Journal* 143 pp. 406-7

<sup>72</sup> Green, R., *(Serious) Sadomasochism: A Protected Right of Privacy?* (2001), *Archives of Sexual Behaviour*, Vol. 30, No. 5, pp. 549-50

sadomasochism. By interpreting these acts as predominantly about sex, or predominantly about violence it is easy to miss the obvious point that sadomasochism is somewhere between the two. The rules governing the legality of these acts must therefore incorporate balance.

## Proportionality and the Human Rights Approach

The Hart/Devlin debate appears to bring us no closer to a workable solution in this area, and both theories contain their flaws. A number of criticisms may be levelled at Hart. The first is that in extracting Mill's harm principle from the context of his political philosophy Hart is guilty of over-simplifying his views. Mill's philosophy, like Raz's, was grounded not only in the right to liberty but in the permanent interests of progress. Hittinger has argued that Mill's understanding of the task of self-development enabled him to arrive at an equally strong moral judgement about coercion as some of his contemporaries, like Stephen.<sup>73</sup> Devlin himself has expressed frustration with Hart's critique, as attacking the style of the argument rather than paying attention to its substance.<sup>74</sup> On the other hand, Dworkin has viewed Lord Devlin's model as unsatisfactory, not because the social disintegration theory is inherently implausible, but rather because it accords too much weight to society's sense of 'intolerance, indignation and disgust', and that there is no room to assess the gravity of the threat that the immoral behaviour poses.<sup>75</sup> Furthermore, any firm support for either of these models would inevitably maintain the distinction between sex and violence to bolster their positions.

But this does not mean that the positions are necessarily irreconcilable. Dworkin goes on to challenge the orthodox interpretation of Devlin's thesis and takes into account a number of other extra-judicial writings to propose a new understanding of his legal philosophy. It reads that the environment we live in is determined by social patterns and that immoral actions can have knock on effects that impact on those who do not engage in them. For example,

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<sup>73</sup> Hittinger, R., *The Hart-Devlin Debate Revisited*, (1990) 35 Am. J. Juris. 47 pp. 47-53

<sup>74</sup> Devlin, P., *The Enforcement of Morals* (Oxford: Oxford University Press, 1965) preface p. viii

<sup>75</sup> Dworkin, R., *Lord Devlin and the Enforcement of Morals*, (1966) 75 Yale L.J. 986 p. 989-992.

the legalisation of homosexuality challenges the traditional role of the family in society.<sup>76</sup> This effect is not one which grants an uninhibited power to prohibit immoral behaviour; this must be done through an assessment of the extent of this threat. Individual freedom can be justifiably limited where the severity of this threat is sufficient; this is easier where the behaviour is also immoral.<sup>77</sup> In deciding whether the threat is sufficient, democratic principles demand that moral consensus has been reached; this decision must be taken by the community responsible for their own protection.<sup>78</sup> By challenging the orthodox reading of this theory, it may be possible to reconcile the seemingly incompatible views of Lord Devlin and Professor Hart. It is on this basis that a principle must be formulated and applied to sadomasochism.

The idea that immorality has knock on effects means that past a certain point private actions between consenting individuals can become harmful to society. When society reaches consensus that this behaviour is immoral it begs the question as to whether or not it should be prohibited. In answering this question, as Dworkin suggests, we must strike a balance between the threat posed to society by such behaviour (Devlin) and the right to individual liberty (Hart).<sup>79</sup> This balancing process adds the flexibility demanded when faced with the legal status of sadomasochism. Whilst on the one hand we do not seek to restrict sexual liberty, its intrinsic relationship with violence in sadomasochism requires that we draw the line somewhere. It is submitted that the most appropriate tool through which this principle may be implemented already exists in our legal system; the doctrine of proportionality. This doctrine demands that any interference with individual liberty or the right to privacy ought to be the minimum necessary to achieve a legitimate aim. The application of this doctrine to the law in relation to sadomasochism would have the added benefit of ensuring compliance with the European Convention of Human Rights. This argument may look familiar. In *Laskey v. U.K.*<sup>80</sup> a number of the Spannermen appealed to the European Court of Human Rights on the grounds that their Article 8 right to privacy had been violated as a result of their convictions. The Strasbourg court accepted the argument

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<sup>76</sup> Ibid p. 992-3

<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Ibid

<sup>80</sup> *Laskey, Jaggard, and Brown v. U.K* (1997) 24 Eur. H.R. Rep. 39

that sadomasochism concerned sexual expression but held that the breach had been justified on the grounds of public health.<sup>81</sup> However, the reasoning in this case is weak and the fact that these men sustained no permanent injuries suggests that the court adopted an unduly wide margin of appreciation, which failed to properly account for the rights of the appellants. We have already shown that the sadomasochistic community have developed methods of ensuring that their practice is both safe, as well as consensual. Furthermore, the finding was counter-intuitive; the illegal status of sadomasochism hinders the dissemination of literature and guidance on safe practice.<sup>82</sup> Respondents to the Law Commission's 1995 consultation expressed concerns about the added risk of fatalities due to autoerotic asphyxiation.<sup>83</sup> Having made their decision on the basis of public health, the European Court of Human Rights did not then go on to consider the issue in relation to the protection of public morals. If they had, it seems unlikely that they could have framed the question as one of sexual expression and still found against the appellants. Even Lord Templeman would not have countenanced this verdict, stating that the appellants' assertions would have been acceptable if it had been shown that their actions concerned sexual satisfaction, rather than violence.<sup>84</sup> Consequently, the previous decision of the Strasbourg court is of no assistance in determining where the line ought to be drawn. However, we can attach our understanding of sadomasochism to their reasoning.

In doing so we must consider the point at which sadomasochistic practice may be restricted, and where this restriction is the minimum necessary in order to ensure the adequate protection of public morals or on grounds of public health. With regards to the former, Dworkin rightly argues that this line is one which should be drawn by the legislator on behalf of his constituents.<sup>85</sup> The issue is one of public policy which, as we have seen, their Lordships failed to adequately deal with in *Brown*. By exposing the issue to the democratic process a moral consensus may be reached, but it is important that this process takes in to account a deeper understanding of sadomasochism than was the case in the House of

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<sup>81</sup> Green, R., (*Serious*) *Sadomasochism: A Protected Right of Privacy?* (2001), *Archives of Sexual Behaviour*, Vol. 30, No. 5, p. 546

<sup>82</sup> "Spanner Trust submission to the Home Office Review Board on Sexual Offences", The Spanner Trust, Retrieved 2008-01-27.

<sup>83</sup> Law Commission Consultation Paper No. 139, *Criminal Law: Consent in the Criminal Law* (1995)

<sup>84</sup> [1993] 2 All ER 75 at 82

<sup>85</sup> Dworkin, R., *Lord Devlin and the Enforcement of Morals*, (1966) 75 Yale L.J. 986 p. 1001

Lords. As a starting point for reform in this difficult area of the law, it is suggested that the Law Commission's 1995 consultation should be given due consideration. Adopting a pragmatic approach they felt that consent ought to operate as a defence to all but those offences causing 'serious disabling injury'.<sup>86</sup> Such a limitation would recognise that, for the most part, sadomasochists do not pose a threat to society. No doubt a large section of the population would consider the acts in *Brown* distasteful, if not immoral, but they carry no risk to established social patterns. But it would also allow the criminal law to bite when these practices carry both a serious risk to public health and when the degree of injury is so severe that it becomes a genuine offence to public morality.

## Conclusion

The social consequences of the current state of the law are difficult to calculate. By its nature sadomasochism takes place in private and its illegality means that the exact number of practitioners is unknown, though some suggest that practice is widespread.<sup>87</sup> According to Tame, those that 'out' themselves risk imprisonment, loss of employment, invasion of privacy, social stigmatisation, personal despair and even suicide.<sup>88</sup> Those practitioners seeking to teach safe bondage and other practices are deterred from doing so on the basis that they may be assisting or encouraging crime. The Spanner Trust has voiced fears that this will lead to unnecessary harm and even accidental death as a result.<sup>89</sup> The social impact of criminalising sadomasochism is wider than their Lordships in *Brown* anticipated and any attempt to reform the law in this area requires a degree of flexibility.

This paper has sought to create a principled basis upon which the legislature may decide whether an exception to the Offences Against the Person Act can be created for sadomasochism by balancing a number of factors which are difficult to reconcile. Pain and pleasure, good and evil, and sex and violence are normally terms describing diametrically

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<sup>86</sup> Ibid p.18-20

<sup>87</sup> Tame, C. R., *Why Sado-Masochism Should Not Be Criminalised*, Legal Notes No. 20, Libertarian Alliance, London, (1994) p. 4

<sup>88</sup> Ibid p. 2

<sup>89</sup> "Spanner Trust submission to the Home Office Review Board on Sexual Offences", The Spanner Trust, Retrieved 2008-01-27

opposed concepts, yet in sadomasochism these distinctions break down and the law has not succeeded in reconciling them. I have adopted a multi-disciplinary approach which embraces a wider discourse on sadomasochism in an attempt to forward a workable solution. The overarching theme of this paper has been one of balance and by applying the doctrine of proportionality to this difficult area it is possible to strike a balance between sex and violence, between the views of Professor Hart and Lord Devlin, indeed between the right to privacy and the protection of public morals.





# **Morality in Laws and Victimless Crimes**

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## Abstract

*This essay deals with the aspects of victimless crimes as statute-prohibited acts that should be decriminalised. Morality is discussed in its influence of the criminal law and the creation of offences based on moral standards. It also explores the principle of mala prohibita and the acts prohibited under this doctrine. The role of morality in creating legislations and the judges enforcing such laws have also been taken into consideration. A case for the legalization of assisted suicide has been made with reference to the laws pertaining to the topic in various countries. It concludes by seeking the decriminalization of acts that cause no harm and produce no victims, by legislative action.*

## Introduction

‘The domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature that they will be found to possess is that they are prohibited by the State and that those who commit them are punished.’ - Lord Atkin<sup>1</sup>

There is an urgent need to analyze the laws that create crimes out of activities with no discernible victims and no definitive harm caused to any individual. Many statute books around the world in various legal systems are filled with laws that prohibit activities purely on the basis of the moral standards perceived accurate by legislators representing the society. Order in social life is concerned with the establishment of patterns for human action and conduct, and such patterns cannot be accomplished without assimilating the behavior of the present day. When law strives to promote the social value of order, it is bound to pay homage to the ideas of continuity and stability.

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<sup>1</sup> Proprietary Articles Trade Association v. Attorney - General for Canada [1931] AC 324

Society has created a formal framework of laws to prohibit types of conduct thought to be against the public interest. Laws proscribing homicide, assaults and rape are common to most cultures. But in addition to this, there are laws that directly aim to control the behavior of the people and extend punitive measures to those who do not conform. Moral standards vary, and hence cannot be made into binding legislation. Harmless activities are prohibited because some archaic and anachronistic law does so. Hence the need for reviewing the existing laws based on moral grounds and updating them to reflect the current standards of the society.

### **What is a Victimless Crime?**

‘Law must be stable, yet it cannot stand still’ – Roscoe Pound<sup>2</sup>

Before that question is answered, a more basic one that crops up is what exactly defines a crime? A crime or an offence is a legal wrong that can be followed by legal proceedings that may result in punishment. Within a broad spectrum of cultural and historical variations, crime constitutes the intentional commission of an act usually deemed socially harmful or dangerous and specifically defined, prohibited and punished under criminal law.

Criminal behaviour is defined by the laws of particular jurisdictions, and there are differences between and even within countries regarding the types of behaviour are prohibited. Conduct that is lawful in one country may be prohibited in another. Changing times and social attitudes may lead to changes in the criminal law, so behaviour that was once criminal becomes lawful. Abortion, once prohibited except in the most unusual circumstances, has become lawful in many countries, as has homosexual behaviour in private between consenting adults in most western countries, though it remains a serious offense in many other parts of the world. Once criminal, suicide and assisted suicide have also been removed from the scope of criminal law in many countries.

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<sup>2</sup> Pound, *Interpretations of Legal History* (Cambridge University Press 1923) 1

Though the criminal codes of most commonwealth countries are derived from English criminal law, England itself has never had a criminal code. English criminal law still consists of a collection of statutes, of varying age. The major difficulty with such a system of criminal laws is the vast number of often overlapping and inconsistent statutes covering the same conduct, often with widely varying judicial discretion makes determining precisely what the law provides on any particular topic enormously difficult.

Ascertaining which particular conduct constitutes a crime usually requires an examination of the terms of the relevant provisions, but these must be interpreted within the context of several general principles. Most legal systems tend to divide crimes into categories for various purposes connected with the procedures of the courts, such as determining which kind of court may deal with that particular offense. The common law usually divides crimes into graver and lesser offences.

It is a widely held belief that in situations in which no harm is done to any individual and no infringement of their personal rights and freedoms occur against their free will, then such acts should no longer be categorised as criminal acts. A crime is a violation of established law, but not all crimes have a readily identifiable victim. A *victimless crime* is one where an act that violates an established law is committed, without leaving a victim behind; that is, there is no resulting damage to a person or property. In these cases, there is usually no victim because the illegal activity was consensually entered into. For this reason, victimless crimes are often called consensual crimes.

The term victimless crime was first used by Edwin Schur who defines these crimes as voluntary exchanges of a commodity or personal service that is socially disapproved of and legally proscribed.<sup>3</sup> He further explains it as involving 'the willing exchange, among adults, of strongly demanded but prohibited goods and services'. A "victimless crime" has also been defined as any activity that does not physically harm a person or property of another, or to which the act was in fact consented and is currently illegal if based on statutory laws. In a victimless crime, there is no apparent victim and no apparent pain or injury. The idea behind

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<sup>3</sup> Hugo Bedau and Edwin Schur, *Victimless crimes: Two sides of controversy*. (Prentice Hall 1974) 8 - 9

the concept of victimless crimes is that in terms of prosecutions, most crimes do not actually hurt anyone. They were introduced in a bid to control moral behaviour (e.g. laws against pornography, homophobia etc) or to try to prevent dangerous behaviour by limiting everyone to a lowest common standard of behaviour (e.g. speed limits enforced by machines). The entire population is therefore criminalised by use of 'preventative' or 'behavioural' laws involving no actual harm to others. This is entirely unacceptable in an advanced society, as it replaces personal responsibility by a bewildering framework of blunt legal instruments.

Victimless crimes can fall into a number of categories, including crimes without a clear victim, moral crimes, crimes against the state, or activities where the victim and the perpetrator could be considered the same person. In all cases, the government deems a particular activity a crime for health, safety, or social reasons, but it doesn't have an identifiable victim who experiences harm as the result of a perpetrator's actions. Some legislation pertaining to such crimes is controversial, and in some regions, reformers work to dismantle laws they feel are unfair or unnecessary. Among the members of any community at a given period, certain offences are by general agreement regarded as venial and are more or less condoned, especially when the infringed laws are unpopular. It is indeed inevitable that this apportionment of blame should be made.<sup>4</sup> Thus, when the supposed victim freely consents to be the victim in one of these crimes, the question that arises is whether the state should make an exception from the law for this situation. The only reasons that such acts are classified as crimes are due to the fact that they have been categorised as such by the prevailing legislation, though contemporary moral standards of the society might find such acts perfectly acceptable. There are critics who argue that no such thing as victimless crimes exists. Even if there is no visible harm being caused to any individual, the society is being affected as a whole, and therefore such acts may not be crimes against individuals, but crimes against the society; much the same as acts of terrorism are considered to be acts against the State, rather than acts against individual constituents of the society, even though it is the individuals who are affected. The contention behind such an explanation is that these acts shock the collective consciousness of the society so as to create a sense of public and moral outrage.

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<sup>4</sup> Kenny, *Outlines of Criminal Law* (19th Edition JW Cecil Turner 2002) 28 - 29

Moral crimes include activities classified as criminal for social or moral reasons; many nations, for example, historically barred sodomy between consenting adults on the grounds that it was an offense to common decency. Activities like vagrancy, public drunkenness, and loitering are also deemed as social crimes, or crimes against the society. Breaking these laws does not actively harm anyone, but such acts may be undesirable, or even morally reprehensible to other members of society. An example of a victimless crime is drug possession. While it could be argued that a person under the influence of illegal drugs might cause damage to other people or property, the general possession or personal use of those drugs is usually characterised as a victimless crime. Most users or possessors of drugs do not ascribe to the status of being a victim or a perpetrator. Usually, the laws which make possession of these substances a criminal offense are largely written and enforced by non-users, who argue that the victim in such acts is usually, the public at large.

Experts have long debated what crimes constitute victimless ones. However there are several identifiable and unique features that tend to be present in most activities classified as victimless crimes.

1. Lack of a Victim: The most obvious characteristic of a victimless crime is the lack of a direct identifiable victim. No one individual is truly hurt in this type of crime; and since no one is hurt, there is no victim. Consensual homosexual activities between adults do not have any identifiable 'victim', yet is a criminal offense in many nations.

2. Willing Participants: Another element that can make a crime victimless is if participants are willing to partake in the illegal act. It usually involves an exchange of prohibited goods or services that are strongly desired by the concerned participants. The consensus and willingness exhibited by the parties involved, usually as a means for obtaining a greater reward for the risk undertaken, shows a drastic diminishing of the deterrent effect of the law. Prostitution and drug usage are examples of these types of victimless crimes. Adult women consent to have sex with paying, adult men while drug addicts take part in victimless crimes simply by using drugs.

3. No Complaints: If crimes are not reported to the police, then it is as if the crime did not occur. Law enforcement agents cannot file reports and cannot seek out the offenders. Those who do not report the crime are fearful that they will be arrested if they are connected with the act or are wanted for other crimes. An example of this was seen in the United States, where a man found a video disk in a park and deposited it with the police. On reviewing the disk it was found that the disk contained child pornography. While the creator of the disk was imprisoned, the person who had turned in the disk, without knowing its constituents was also arrested for possession of the same. Furthermore, some individuals fail to report a crime because they fear that the offenders may harm them. Others do not feel that the crime warrants any legal intervention. They believe that it is not really a crime.

A fundamental issue about so-called crimes without victims is whether, though consensual in regard to the participants, they have the potential to inflict harm upon others, such as spouses or families of compulsive gamblers and residents in a drug-trading neighbourhood, or whether they injure society in regard to its moral traditions. Proponents argue that for its well-being, a society has to uphold standards of decency, as generally defined, or risk disorganization and disintegration. A major argument forwarded by them is that all seek to prevent individual or social harms that are widely believed to be less serious and less likely to occur than the harms involved in crimes with victims. Critics however maintain that the idea of victimless crimes is essentially a political and ideological construct, embraced as a rallying cry in an effort to eliminate a variety of controversial behaviours.

The most pronounced development over the past decades with regard to crimes without victims has been the success of campaigns to remove many of them from the statute books. Gambling, once outlawed throughout the United States because of religious doctrine and fraud in the operation of lotteries, is now a prominent fixture on the U.S. scene, with a proliferating array of slot machines and lottery tickets marketed even at convenience stores. Homosexuality, now buried in the criminal law closet, today centers on the dispute over whether couples of the same sex can legally marry. Once outlawed, abortion became permissible in the first trimester of pregnancy, though intense controversy continues to divide people on the issue. And some states and countries have moderated drug laws, particularly in regard to marijuana.

The concept of a victimless crime often plays a role in the proposed repeal of certain laws, especially the criminalization of drugs, prostitution and other purported vices. The argument usually presented by supporters of civil liberties is that such laws only serve to punish citizens for personal lifestyle decisions which do not violate the legal rights of others. A citizen should be allowed to purchase and smoke marijuana legally, for example, because his or her private consumption in private surroundings does not affect the rights of any other person.

Decriminalizing of certain victimless crimes would greatly reduce the current prison population and take significant pressure off an overworked judicial system. Huge amounts of bureaucracy and police and court time is wasted on harassing the law-abiding majority in inappropriate ways. Several millions worth public money in the exchequer could be saved, and the people set free.<sup>5</sup> It is as Edwin Schur states, 'victimless crimes are effectively unenforceable, as such laws only create secondary deviance, state rebellion and police corruption, which rather than aiding social moralisation can only lead to social demoralisation.'<sup>6</sup>

## Principle of Mala Prohibita

'Whenever the offence inspires less horror than the punishment, the rigor of penal law is obliged to give way to the common feelings of mankind' - Edward Gibbon<sup>7</sup>

*Malum Prohibitum*, derived from Latin, means "wrong due to being prohibited". It covers those specific acts which are wrong only because they have been made so by statute.<sup>8</sup> Such acts are in themselves indifferent and become right or wrong as the municipal legislature

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<sup>5</sup> Geordietoff, Abolish All Victimless Crimes <<http://www.govyou.co.uk/abolish-all-victimless-crimes>> accessed 27 February 2012

<sup>6</sup> Edwin M Schur, *Crimes Without Victims: Deviant Behaviour and Public Policy* (Hall, 1965) 8

<sup>7</sup> Gibbon, "The Decline and Fall of the Roman Empire" (Strahan & Cadell, London 1776) 495

<sup>8</sup> *State v Trent*, USA 38 C.J. Or. 444



sees proper for protecting the welfare of society and more adequately carrying on the purpose of civil life.<sup>9</sup>

It is used to describe something that is not inherently evil, but which is wrong because it is expressly forbidden by law. An offense that is *malum prohibitum*, may not appear on its face to directly violate moral standards. Examples of acts which are *mala prohibita* include public intoxication, carrying a concealed weapon, speeding, etc. *Mala prohibita* crimes are derived from the common law legal system, which is based on societal customs and appropriate behaviour. At one time these violations were taken very seriously by courts and carried severe penalties, but are considered minor offenses in present times by modern society. Due to this standing, most crimes that fall under the *mala prohibita* classification do not carry stiff penalties for violation.

The activities covered under such statutes are prohibited because they seemingly infringe upon the rights of others, although no moral turpitude or dereliction may be attached to them.<sup>10</sup> Generally, crimes *mala in se* involve as aspect of moral turpitude, while crimes *mala prohibita* do not. It is fundamentally true that whatever a court of equity may enjoin may be by legislation declared *malum prohibitum*.<sup>11</sup> *Mala Prohibita* crimes are sometimes called as “quasi-criminal offences” - offences that are regarded as “not criminal in any real sense, but acts which in the public interest are prohibited under penalty.”<sup>12</sup> They are also known as “public welfare offences” or “regulatory offences”.

The *mala prohibita* were said by Blackstone to comprise breaches of 'those laws which enjoin only positive duties, and forbid only such things that are not mala in se... without any intermixture of moral guilt'. For this he gave examples such as exporting wool into foreign countries, exercising a trade without previous service as an apprentice, not burying the dead in woolen and not performing work on public roads according to statute.<sup>13</sup>

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<sup>9</sup> People v Halbert, USA 6 Cal. 2d 541

<sup>10</sup> Riss & co. v U.S. (C.A. Mo.262 F.2d)

<sup>11</sup> Or. Hall v Johnson 169 P. 515, Ann.Cas.1918E, 49

<sup>12</sup> Alphacell v Woodward [1972] AC 839 G

<sup>13</sup> Blackstone, Commentaries on the Laws of England, (1st Edition 1771) 54

*Mala Prohibita* is the only thing that makes any act a crime. It is fundamentally different from those acts classified as '*Mala In Se*', which categorizes acts so fundamentally abhorrent to human nature that a person knows intrinsically about the wrong nature of the act. This is not the case with acts under *Mala Prohibita* as they have been identified as crimes only because of the fact that they have been prohibited under some legislation by the State, and are acceptable to a large proportion of citizenry. *Mala Prohibita* crimes remain one way to better understand a society's moralities and beliefs. Depending on the conservativeness or the liberalness of these rules, a tone is set for how a society carries itself via the laws.

While some *mala prohibita* enactments are necessitated for the welfare of the people, when the gamut of a number of these enactments is considered, it can be easily concluded that they have been passed either under a species of duress or under an erroneous conception of the duties of the State. Both circumstances tend to have a vitiating effect as these misguided and abortive attempts to "legislate morality into the people" are in direct conflict with the principles of Natural Law. Consequently they are unjust laws without the binding force of true laws.<sup>14</sup> The common law countries uniformly follow the principle of '*nullum crimen sine lege*', i.e. there is no crime without a law. This immoral or anti-social behaviour not forbidden and punished by law is not criminal in nature. The law however may not be a codified law but may be customary, as in many common law nations.

Crimes *mala prohibita* are usually those which incur no serious punishment, such as minor infractions and misdemeanors. However, the primary feature of crimes *mala prohibita* is not their lack of severity, but that they are acts criminalised by statute in an effort to regulate the general behaviour of society members. Consequently, crimes *mala prohibita* do not usually carry powerful moral stigmas along with them. There is nothing wrong with an unmarried couple holding hands in a public park in London, but the same thing will have severe repercussions from the society in Saudi Arabia. In an attempt to optimize society's performance and prosperity, the criminal law is continually undergoing changes on legislative and judicial levels and, because they exist more firmly in the letter of the law than in the hearts of mankind, crimes *mala prohibita* are the ones most often transformed. The modern understanding of the *mala prohibita* doctrine is applied to laws created to reflect a

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<sup>14</sup> John B. Murphy, 'Is It Right To Break Unjust Laws?' (7 Loy. L.J. New Orleans 207 1926) 211

society's morality. These laws control actions that may or may not be considered crimes by other societies. Generally, these are not crimes against any person or property, but things like drug use, government criticism, larceny et al. A close analysis of acts considered *mala prohibita* often helps to explain where a country's fundamental philosophical beliefs lie.

The common law system in England has evolved over the last few centuries to reflect the changes in society, as have the acts once criminalised under *mala prohibita* laws. One significant example would be the modification of views on alcohol in United States of America. Once legal, alcohol was prohibited for much the 1920s only to be declared legal again in the 1930s, reflecting changing attitudes on the use of liquor. The American experiment with prohibition clearly showed a society with rapidly changing views, seen through the prism of national laws.

The alternative to criminal law as prevention and deterrence of crime is the idea that the criminal law should punish only behaviour which is morally wrong. On this view the criminal law is an institutionalised expression of moral condemnation. The idea that criminal law should enforce and reflect morality is commonly associated with the views of noted English Judge Lord Devlin.

Lord Devlin argued strongly in 1960s that the function of the criminal law is to punish conduct which threatens or undermines the common morality. He staunchly supported the view of James Fitzjames Stephen that popular morality should be allowed to influence lawmaking, and that even private acts should be subject to legal sanction if they were held to be morally unacceptable by the "reasonable man", in order to preserve the moral fabric of society.<sup>15</sup> Stephen has argued that the law might justifiably enforce morality as such or, as he said, that the law should be 'a persecution of the grosser forms of vice'.<sup>16</sup>

However, such notions of a morality driven criminal law have several flaws. The first difficulty lies in Devlin's belief that common morality is essentially derived from Christian teachings, instead of universally accepted systems, such as that of natural law. Devlin admits that modern society is comprised of many different cultures and religions. However,

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<sup>15</sup> Devlin, *The Enforcement of Morals* (Oxford University Press 1996) 22

<sup>16</sup> J.F. Stephens, *Liberty, Equality, Fraternity* (Cambridge University Press 1967) 152

he still argues that it is possible to identify shared moral values. The truth in a modern multicultural society is that it is difficult to discover a shared moral position, even within the community on many issues, like abortion, pornography, violence against women etc. The second issue is that the content of the modern criminal law does not, to any great extent, reflect this kind of moralist conception of the criminal law. Some offences certainly do have a moral dimension. For example there is an offence of conspiring to corrupt public morals or outrage public decency. But at the same time, there are a great many offences which do not have a moral purpose, like those dealing with motor traffic and environmental matters. However, the point can be made that the widespread belief in the community that the criminal law does serve this function of reinforcing a shared moral view does underpin its existence. On this view, the criminal law has an important symbolic and ideological function in upholding core social values.<sup>17</sup>

## Morality in Legislation

‘All punishment in itself is evil. It ought only to be admitted in as far as it promises to exclude some greater evil.’ – Jeremy Bentham<sup>18</sup>

Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good. Legislation also aims at the same end result, yet they vary greatly. The simple demand that rules of law be expressed in intelligible terms seems on its face ethically neutral towards the substantive aims that the law may serve. If any principle of legal morality is, in Hart's words, ‘compatible with very great inequity,’ this would seem to be it. Yet, if a legislator is attempting to remove some evil and cannot plainly identify the target at which his statute is directed, it is obvious he will have difficulty in making his laws clear. Besides, in many cases, morality derives its existence from the law; that is, to decide whether an action is morally good or bad, it is necessary to know whether the laws permit or forbid it. Most legal systems necessarily possess certain moral characteristics as a result

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<sup>17</sup> Ashworth, *Principles of Criminal Law* (Oxford University Press 1995) 42 - 44

<sup>18</sup> Bentham, *Morals and Legislation* (Universal Law Publishing 2006)189

of the fact that they have other properties which are necessary for them to fulfill their unique social role.

The most immediate idea that is derived from such arguments is that an attempt has been made to codify the public morality into legislative statutes. And while it is easy for the extremely devout to determine such acts as fundamentally correct on the basis of divine ubiquity, the truth remains that morality just cannot be defined in terms of absolutes, much less codified as laws. Morality in its pure form differs from person to person. Whilst some may have greater tolerance of differing values, others more imbibed in orthodoxy would try to impress their own particular forms of moral values onto others and further endeavor to make them conform to those standards.

Legal morality can be neutral over a wide range of issues, but not in the view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rule, and answerable for his defaults. Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him an indifference to his powers of self determination. As the wisest course, greatest possible latitude should be allotted to individuals, in all cases where they can injure none but themselves, for they are the best judges of their own interests. If they deceive themselves, it is to be assumed that they will alter their conduct on discovering their error. The power and authority of the law need only interfere to prevent them from injuring each other.<sup>19</sup>

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<sup>19</sup> Upendra Baxi, *Bentham's Theory Of Legislation* (Lexis Nexis Butterworths Wadhwa 2006) 36 - 37

## The Judiciary as a Moral Compass for Society

'Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless'

– Martin Luther King Jr.

The Judiciary in the United Kingdom has always been in the forefront in the interpretation of statutes and formation of new laws based on the doctrine of precedents. Whenever the courts have felt that the legislations created by the Parliament has been lacking in clarity of some essential topic under discussion or has become an anachronistic in applicability, the courts have taken the liberty of expounding the laws and bringing them to reflect current societal standards. The same holds true in several recent cases related to victimless crimes which have had a significant impact on the law. Some specific topics that have come up for consideration include obscenity, homosexuality and prostitution etc. Few examples have been used from English criminal law to show the role that the judiciary has played in upholding laws based on morality.

Obscenity is a standard set by the currently prevailing set of societal morality. The word 'obscene', denotes the quality of being obscene, which means offensive to modesty or decency, lewd, filthy and repulsive. It is undeniable that it is in the interest of the society at large to suppress obscenity. Standards of what is considered obscene are very subjective and varying, and usually tend to reflect the present views of a majority of the society. On the subject of obscenity, a general submission has been that a work of art is not necessarily obscene if it treats sex, even with nudity and that work of art or a book of literary merit should not be destroyed if the interest of the society is to be preserved. The standards to be adopted while judging it must be not that of an infant or an abnormal person, but that of one who is normal, that is to say, with a *mens sana in corpore sano*.

Laws against obscenity have always imposed a strict responsibility. In the case of *Queen v Hicklin*,<sup>20</sup> Cockburn CJ laid down the test of obscenity thus: '... whether the tendency of the

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<sup>20</sup> [1868] 3 Q.B. 360

matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. If it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of advanced years, thoughts of a most impure and libidinous character.'

The courts in the United Kingdom have always taken a harsh view of offences relating to public morals and decency. One of the earliest attempts to regulate activities that potentially outrage the societal sense of morality was done in the case of *Shaw v Director of Public Prosecution*,<sup>21</sup> where the appellant was convicted of having committed an indictable misdemeanor of outraging public morality by publishing a booklet titled "The Ladies Directory", with advertisements from prostitutes.

A further example of attempts to prohibit corruption of public morals by way of *mala prohibita* is the case of *Kneller Ltd v Director Public Prosecution*.<sup>22</sup> The House of Lords held that the act of publication of lewd and offensive advertisements to promote homosexual practices (though legal) to attract customers amounts to corrupting public morals and is punishable by law. Lord Kilbrandon JJ, speaking for the quorum stated that 'the crucial question is whether conspiracy to corrupt public morals and outrage public decency by publication of the 'lewd, disgusting and offensive' advertisements is an offence known to law. The published matter that offends against public decency means ... that the degree of indecency is such that decent members of the public who read the material will not merely feel shocked or disgusted, but will feel outraged ... Outraging of public decency goes considerably beyond offending the susceptibilities of or even shocking, reasonable people. Moreover the offence is concerned with recognised minimum standards of decency, which are likely to vary from time to time. Finally notwithstanding that 'public' in the offence is used in a locative sense, public decency must be viewed as whole'<sup>23</sup>

Even though there is no harm done by the publication of the above advertisements, the courts considered it as a part of their duty to punish those acts on flimsy grounds. It is but

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<sup>21</sup> [1961] 2 All ER 446 (HL)

<sup>22</sup> [1972] 2 All ER 898 (HL)

<sup>23</sup> Ibid

an example of Victorian moral ideas still holding sway in the aspect of decision making by the courts. Many of the ideas of what is decent and what is not has been on the receiving end of a paradigm shift in views, with many acts that would have shocked the entire Victorian class for its audacity, does not elicit even a raised eyebrow in today's times. In both the cases, a common thread that lies is that both publications were those of advertisements, with some relation to sexual activities, though neither contained any sexually graphic material which would be unfit for public display. It was simply a method of disseminating information to reach those who may be unaware of the existence of such possibilities. This is the case with every other commercial or social activity which has advertised its various benefits in the public media with an intention to reach a larger number of people. The advertisement can in no way influence those who do not already have some sort of underlying interest in such activities. Yet, due to the fact that the courts felt that such acts were much too discordant with the prevailing social mores in the United Kingdom at that point in time, they penalised their acts.

### **A Case for Legalizing Assisted Suicide for Terminally Ill Patients**

'Death is not the greatest of evils; it is worse to want to die, and not be able to'

– Sophocles

Suicide has been described as an act of voluntarily or intentionally taking one's own life. Since the European Middle Ages, the western countries have attempted to use first the canonical and then the criminal law to combat suicide. Suicide was a crime under the English common law, at least in limited circumstances, probably as early as the thirteenth century. Bracton incorporated Roman Law, as set forth in Justinian's Digest with great fidelity into the English common law. However, he deviated on the subject of suicide and declared that if a man slays himself in weariness of life or to avoid further pain of the body, he may still retain his inheritance (his real property) but his movable, personal property will be confiscated. The English common law has ever since treated suicides resulting from the



inability to "endure further bodily pain" with compassion and understanding.<sup>24</sup> Sir Edward Coke, in his Third Institute, held that killing oneself was an offense and that someone who committed suicide should forfeit his movable property. But Coke listed an exception for someone who "by the rage of sickness or infirmity or otherwise," kills himself "while he is not of *compos mentia*," or sound mind.<sup>25</sup> Thus, although, formally, suicide was long considered a crime under English common law, in practice it was a crime that was punished leniently, if at all, because juries frequently used their power to nullify the law. Following the French revolution of 1789, criminal penalties for attempting to commit suicide were abolished in European countries, with England being the last to follow suit in 1961.<sup>26</sup>

Many law givers have questioned the moral right that any person may have over taking their own lives. The taking of one's own life has been condemned as against the order of nature by most religions. For example, Roman Catholics categorize suicide as a sin, since they propound that all life is the property of god and a gift to the world, and to destroy that life is to wrongly assert dominion over what belongs to god. No legislator can therefore, as a matter of general principle, disaffirm the value of life; the question remains whether human life is an absolute value that must be protected at all costs. If one person intentionally takes the life of another, this is usually murder. If the motive for such an act is inherently evil, then society has no qualms in convicting and punishing the killer. But if the motive is to relieve the suffering of a terminally ill person by providing a clean death that would otherwise be denied, can society apply the same set of exacting standards?

Society faces a unique dilemma in such a situation. It could either impose pain and suffering on the patient by forcing him to endure a long decline into death. Or society could permit a system for terminating life under controlled circumstances so that the victim's wishes could be respected without exposing others to the criminal system for assisting in realizing those wishes. This may be done by soliciting the cessation of life - sustaining treatment, so that an injured or ill person may die a natural death, or leaving instructions not to resuscitate in the event of death.

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<sup>24</sup> Henry de Bracton, George Edward Woodbine, Samuel Edmund Thorne, *On The Laws and Customs of England* (Harvard University Press 1968) 366

<sup>25</sup> Coke, *Institutes of the Laws of England* (Third edn 1644) 54

<sup>26</sup> Suicide Act 1961, CHAPTER 60 9 and 10 Eliz 2

Consideration of victimless crime involving more than one participant needs to take account of whether all the participants are capable of giving genuine consent. This may not be the case if one or more of the participants are incapable of giving proper consent due to a wide variety of factors such as youth, senility, intoxication etc. A Libertarian view would suggest that each person has the right to control his or her body and life and so should be able to determine at what time, in what way, and by whose hand he or she will die. Behind this lies the idea that human beings should be as free as possible - and that unnecessary restraints on human rights are a bad thing, for human beings are independent biological entities, with the right to take and carry out decisions about themselves, providing the greater good of society doesn't prohibit this.

In the United Kingdom, the act of assisting, aiding or abetting another person in committing suicide was criminalised by the Suicide Act 1961, while simultaneously decriminalizing attempt to commit suicide. The application of s. 2(1) has been the source of high profile criminal litigation in cases such as *R v Pretty*<sup>27</sup> and *R v Purdy*<sup>28</sup>, because the outright prohibition on assisting another person to end their life is considered by many to be inappropriate, unhelpful and unfair. But decisions in the above cases have reignited a nationwide debate on the topic and it has resulted in the publishing of a policy for prosecutors in respect of cases of encouraging or assisting suicide. The law on assisted suicide remains unchanged by the introduction of the DPP's policy for prosecutors, but its implications for those seeking assisted suicide and anybody who might provide that assistance are profound.

The Law Commission in 2006 even recommended the enactment of a partial defence for assisted suicide to cover compassionate cases.<sup>29</sup> The outright prohibition on assisted suicide can therefore only be a deliberately inflexible rule intended to serve a moralistic purpose. It assumes a view which is not shared by all and makes it law. Faced with these difficulties, it can be argued that compassionate assisted suicide must be the most serious victimless

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<sup>27</sup> *R (on the application of Pretty) v DPP*, (2001) UKHL 61 (2001) 3 WLR 1598 (HL)

<sup>28</sup> *R v Director of Public Prosecutions* [2009] UKHL 45

<sup>29</sup> Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No. 304, 2006) para 7.28

crime of all. Such sanctions are ultimately more harmful to society than helpful, as punishing non harmful acts only weakens the stigma and deterrent effect of criminal conviction for harmful conduct.

In January 2010, in the case of *R v Gilderdale*,<sup>30</sup> the defendant helped her seriously ill daughter administer fatal doses of morphine, assisting her in ending her “unimaginably wretched” life. In respect of the attempted murder charge, the jury took less than two hours to return a unanimous 'not guilty' verdict. However, for the charge of assisted suicide the judge gave her only a conditional discharge. Mrs Gilderdale's actions were not punished despite law to the contrary. Therefore, while there is still no legal defence of consent for assisted suicide, in this case evidence of the daughter's competent and fully informed consent was accepted, and her mother was not convicted. This rendered the unnecessarily over-moral provisions of the Suicide Act completely ineffective.

Many countries worldwide still have laws that criminalise attempt to commit suicide. In India, for example, Section 309<sup>31</sup> in the Indian Penal Code still criminalises attempted suicide. This section was challenged in the case of *C.A. Thomas Master v Union of India*,<sup>32</sup> where the courts held that a person cannot claim his own life by saying that he had led a successful life and the mission of his life was fulfilled, stating that ‘No distinction can be made between suicide as ordinarily understood and the right to voluntarily put an end to one’s life’.<sup>33</sup> However, in the case of *Siddheswari Bora*,<sup>34</sup> the courts took cognizance of the fact that euthanasia entitles the accused in U.K. to get the benefit of diminished responsibility. The Constitutional validity of this section was questioned in the landmark case of *P. Rathinam v Union of India*,<sup>35</sup> where the Supreme Court observed that the provision punishing attempt to commit suicide is cruel, irrational and in violation of the fundamental right to life under Article 21, and therefore deserves to be effaced from the statute book to humanise penal laws. It further added that an act of attempted suicide has

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<sup>30</sup> R v Gilderdale (Crown Court, 25 January 2010)

<sup>31</sup> Section 309 states: “Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.”

<sup>32</sup> 2000 Cr L J 3729 (Ker)

<sup>33</sup> Ibid

<sup>34</sup> 1981 Cr L J 1005 (Gau)

<sup>35</sup> 1994 Cr L J 1605 (SC)

no baneful effect on society and it is also not against religion, morality or public policy, besides suicide or attempt to commit it causes no harm to others. However, this judgment was overruled by the decision of a larger Constitutional bench in *Gian Kaur v Union of India*.<sup>36</sup> Hence, attempt to commit suicide still remains a criminal offence in India.

In the United States of America, the states of Washington, Oregon and Montana have legalised assisted suicide. The legislation in effect requires that the person requesting assisted suicide should be of sound mind, make the request in front of several witnesses and be diagnosed with a terminal illness. The Oregon Death With Dignity Act does not allow the active administration of a lethal dose of medicine, but allows a physician to prescribe a lethal dose of medicine that the patient will knowingly take to commit suicide. The Act became a cause for controversy when Daniel Ashcroft, the U.S. Attorney General, effectively nullified it by threatening to revoke the license to prescribe federally controlled substances from any physician who prescribed a federally controlled substance during physician-assisted suicide. However, in the case of *Oregon v Ashworth*,<sup>37</sup> the courts held that the Attorney General had exceeded his authority and enjoined him from enforcing his threat. In the state of Washington, the case of *Washington v Glucksberg*,<sup>38</sup> the Supreme Court unanimously held that the state should generally prohibit assisting suicides, even amongst terminally ill patients. However, Initiative 1000 of 2008 established Washington's Death With Dignity Act,<sup>39</sup> which legalised physician assisted suicides with some limitations. This made it the second state to permit some terminally ill patients to determine the time of their own death. Finally in the state of Montana, the case of *Montana v Baxter*,<sup>40</sup> created a judicial decision affirming the right to die for terminally ill patients. In the judgment, Justice Nelson stated that 'This right to physician aid in dying quintessentially involves the inviolable right to human dignity — our most fragile right'. The major difference between the laws in Montana and the other two states is that while the law was passed by a referendum in the former two, it was done via a judicial decision in the latter. Assisted suicide is still illegal in a large number of states since age old customs defining abhorrence

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<sup>36</sup> 1994 Cr LJ 1660 (SC)

<sup>37</sup> 192 F.Supp.2d 1077

<sup>38</sup> 521 U.S. 702 (1997)

<sup>39</sup> RCW 70.245

<sup>40</sup> MT DA 09-0051

of taking one's life continue to persist. However steps to decriminalise assisted suicide for the terminally ill are being taken in many states and it can be foreseen that most states may follow the examples of Oregon and Washington.

Euthanasia and assisted suicide are illegal in the Netherlands; they are prohibited under Articles 293<sup>41</sup> and 294<sup>42</sup> of the Criminal Code respectively. However, Dutch courts have held that Article 40<sup>43</sup> of the Criminal Code can provide a defence (excuse or justification) to a charge under Article 293. Through the concept of *overmacht* found in Article 40, defendants may argue that their actions were excused by duress or justified by necessity. There have been several cases through which Dutch courts have explored the applicability of *overmacht* in cases of euthanasia. The landmark case of Ms Wertheim is of a special significance since the court laid down guidelines with respect to the person requesting assistance for justifiable violations of Article 294 and also with respect to the person providing the assistance. Euthanasia is still illegal in the Netherlands, but, if certain conditions are met, a defence of necessity will be available to a physician who performs euthanasia having followed the "requirements of careful practice".<sup>44</sup>

Assisted suicide has always had a place in the laws of Switzerland. Under Swiss law, the 'intentional killing' of a person is not synonymous with murder. A person who intentionally kills another person will be guilty of *vorsätzliche Tötung* (intentional killing) and this will only be increased to murder (*Qualifizierung*) if it can be shown that the perpetrator acted with a 'reprehensible motive'.<sup>45</sup> A person brought to court on a charge could avoid conviction by proving that they were 'motivated by the good intentions of bringing about a requested death for the purposes of alleviating suffering' rather than for "selfish" reasons.<sup>46</sup> In order to avoid conviction, the person has to prove that the deceased knew what he or she was

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<sup>41</sup> Article 293: "A person who takes the life of another person at that other person's express and earnest request is liable to a term of imprisonment of not more than twelve years or a fine of the fifth category"

<sup>42</sup> Article 294: "A person who intentionally incites another to commit suicide, assists in the suicide of another, or procures for that other person the means to commit suicide, assists in the suicide, is liable to a term of imprisonment of not more than three years or a fine of the fourth category, where the suicide ensues."

<sup>43</sup> Article 40: "A person who commits an offense as a result of a force he could not be expected to resist [*overmacht*] is not criminally liable."

<sup>44</sup> Jocelyn Downie, The Contested Lessons of Euthanasia in the Netherlands, *Health Law Journal* Vol.8, (2000) 126

<sup>45</sup> Schwarzenegger & Summers, Criminal law and Assisted Suicide in Switzerland, Hearing with the Select Committee on the Assisted Dying for the Terminally Ill Bill, House of Lords (2005) 2

<sup>46</sup> Whiting, Raymond, *A Natural Right to Die: Twenty-Three Centuries of Debate* (Greenwood Press Connecticut 2002) 178

doing, had legal capacity to make the decision, and had made an "earnest" request, meaning he/she asked for death several times, repeatedly and insistently. The person helping also has to avoid actually doing the act that leads to death, lest they be convicted under Article 114<sup>47</sup> of the Swiss Penal Code. For instance, it should be the person committing suicide, who actually presses the syringe or takes the pill, that causes death. This way the country can criminalise certain controversial acts, which many of its people would oppose, while legalizing a narrow range of assistive acts for some of those seeking help to end their lives.

In analyzing the spectrum of different laws related to assisted suicide, one common concept that emerges is the fundamental nature of the right of the patient to die with dignity and on their own terms. Those who assist such individuals are branded murderers, yet they are the truly compassionate ones, for it takes a lot more courage and benevolence to enable a dear one to depart without having to go through the anguish of a slow death, instead of watching them suffer in the hope of being with them for just a bit longer. Assisted suicide remains a controversial topic in most nations, with many afraid of legalizing it for the fear of a religious and conservative backlash. Yet some hopeful signs can be seen from the more developed countries that a person's fundamental freedoms are being given more precedence than antiquated morality based laws.

## Conclusion

'Every judgment of conscience, be it right or wrong, be it about things evil in themselves or morally indifferent, is obligatory, in such wise that he who acts against his conscience always sins.' – Thomas Aquinas

Changing hues of societal values have always had a deep impact on every other aspect of the human life. The sphere of law is especially influenced by variations in social setup, since the preliminary aim for any piece of legislation is to address a grievance faced by the

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<sup>47</sup> Article 114: Killing on request (Tötung auf Verlangen) - A person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request, will be sentenced to a term of imprisonment (Gefängnis).

members of the society. But when the essential fundamental rights of a person are violated in a bid to uphold the moralistic standards, then the very validity of such standards comes into question. No society is composed of entirely homogenous individuals, tailor made to adhere to every single rule that might be imposed by an arbitrary sovereign. As every person has their distinctive defining characteristics that identify them, they also possess their own personal set of moral and ethical values. Most of the citizenry remains unaware of the existence of laws that prohibit certain acts or omissions. It is their own morality that guides them in their actions.

Moral standards have deviated considerably from what they used to be even a few decades ago. Something that would be outrageous in the 1900's is perfectly acceptable today, both socially and morally. The problem arises when laws created in earlier times have failed to keep pace with newer beliefs. It is a unique situation when an anachronistic law forbids something when the society itself does not. The judiciary goes some way in interpreting statutes in ways to be better adapted to current scenarios, but when laws created without great forethought being given to their future operability come into context, then even the judges find themselves bound.

It is therefore for the general betterment of humanity that antiquated laws that have fallen out of sync with shifting values be expunged from the statute books by legislative action. Otherwise people who have committed acts for their own personal reasons, without giving any cause of affront to any individual or society in general, are hounded like common criminals and put into already overcrowded prisons. Though no harm is suffered by another because of their act, the person is deemed guilty of violating social morals and ethics and made to undergo the ignominy of life under state sponsored surveillance in grimy penitentiaries.

It is extremely surprising that in this day and age, a lot of money, manpower and resources of the state are enjoined in efforts to police the moral behaviour of the general populace, when ever greater numbers of felons, having committed extremely serious crimes are still free. Apart from crimes that involve no moral turpitude, even others such as those of assisted suicide remain prohibited because the Council of Nicaea deemed it so. Those who

attempt to have a dignified end to their lives, instead of having to undergo extremely unbearable pain and anguish in a bid to be delivered from their torment are painted with the same brush as any common thief or murderer. This is tantamount to the state interfering with the inalienable right we have to choose what to do with our lives. The State can extend any number of arguments on the basis of its need to protect the right to life of an individual, but the fact remains that the personal freedom of an individual forms the basis of all forms of law and will always be paramount to any other statute created by man for controlling the behaviour of the public.

It can hence be irrefutably concluded that antiquated laws based on archaic moral standards have lost the *locus standi* that they once possessed, and need to be updated if they are to fulfill the ideals that they were once created for. The principle of *malum prohibitum* does not hold much water in current society, where greater exposure to rational and logical thinking exposes fundamental flaws in the continuation of such an imperfect doctrine. Furthermore, the right to exercise of free will is the most fundamental of all rights possessed by a human. Prohibition in violation of this right does not enjoy the requisite moral authority to be completely obeyed. Judicial decisions can only go along to such a degree that the widest possible interpretation of the statute would enable. The only comprehensive method for ensuring that such acts do not remain punishable offences is for national legislators to create newer laws or update older ones so that they genuinely reflect the needs and moral ideals currently in force among the rational members of the society. Therefore it would be served much better if the essential human element be given higher importance in all aspects of life controlled by the law.





# **NAFTA Chapter 19: The Good, The Bad & The WTO**

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## Abstract

*The law of dumping and subsidy is becoming an increasingly important and contentious issue in international trade today. The aim of this dissertation is to attempt to identify how the two largest bilateral trading partners in the world, Canada and the United States, have dealt with it. Chapter 19 of the NAFTA which is the backbone of the anti-dumping and countervailing duties has been examined. Various procedural and substantive aspects of Chapter 19 are the subjects of study in this dissertation. The researcher has tried to survey the critique mounted on Chapter 19 by various other writers. The negotiating rounds between the Governments were an important milestone which led to the conclusion of the NAFTA. But the question still remains that what if the talks had gone the other way and competition laws were adopted in place of anti dumping duties, like in the case of Australia and the New Zealand. The researcher has attempted to answer that question. The scope of the dissertation becomes multi-dimensional when NAFTA and the WTO, of which both the countries are partners are brought into the picture. What follows this is a clash between the dispute resolution and adjudicatory mechanisms of NAFTA and WTO. Can the mechanisms of both the trading institutions act in a parallel or mutually exclusive manner? The study is done with a backdrop of the cases and literature which the researcher feels are necessary to be read to arrive at conclusion regarding the importance of Chapter 19 today.*

## Introduction

North American Free Trade Agreement (NAFTA) is a trilateral agreement creating a trading bloc in North America. It is signed by the Governments of Canada, Mexico and the United States. It is one of its kinds in the world establishing a trading regime and at the same time dispute settlement mechanisms for potential differences that might arise between the member countries.

Canada and the United States have the largest bilateral trading relationship in the world totalling \$600 billion in 2009.<sup>1</sup> Canada is the biggest export market for United States products, more than China, Japan, the United Kingdom, and Germany combined.<sup>2</sup> Similarly Canada exports about \$ 7.5 billion worth of softwood lumber to the U.S.<sup>3</sup> This combined with the fact that the combined GDP of all the three NAFTA members is the largest in the world helps us to further understand the magnanimity of the issue at hand. It is prudent to mention here that the primary goal of NAFTA was to remove the barriers to trade and investment between Canada, Mexico and the US.

Duties on an imported product that is sold below its '*normal value*' or below its cost of production can be labelled as anti dumping duties (AD) whereas countervailing duty (CVD) law imposes additional duties to offset subsidies provided to the foreign producer by its government. These are often regarded as non-tariff barriers to trade and are powerful weapons in the hands of the Government when they want to limit foreign competition. The procedure to apply these duties is set out in the World Trade Organisation (WTO) and NAFTA and they require the domestic agencies<sup>4</sup> to make three determinations prior to the levying of an anti-dumping or countervailing duty.<sup>5</sup> These are (1) dumping, subsidisation, or the threat of either, (2) material injury to the domestic industry or threat thereof, and (3) a causal link between the activity and the injury.

## Negotiations under CUSFTA: Origins

Chapter 19 of NAFTA has its origins in the Canada US Free Trade Agreement (CUSFTA). During the negotiation of the Free Trade Agreement between Canada and the U.S. in the

<sup>1</sup> Prime Minister of Canada: Stephen Harper, 'Canada/U.S. trade and investment', (4 Feb. 2004), <<http://pm.gc.ca/eng/media.asp?id=3935>> accessed 31 March 2012.

<sup>2</sup> Statistics Canada, 'Imports, exports and trade balance of goods on a balance-of-payments basis, by country or country grouping' <<http://www40.statcan.gc.ca/l01/cst01/gblec02a-eng.htm>> accessed 31 March 2012.

<sup>3</sup> Chi Carmody, 'International Decisions: Softwood Lumber Dispute (2001-2006)' 100 (July) Am J Int'l L (2006) (Chi Carmody: Softwood Lumber).

<sup>4</sup> In the U.S., Department of Commerce (DOC) conducts an inquiry in order to determine dumping or subsidization. The International Trade Commission (ITC), an independent agency of the government, determines whether the domestic industry is being injured or threatened due to the imports. If both agencies reach positive determinations, an AD or CVD is levied. The same process is carried out in Canada by the Canada Border Services Agency (CBSA) and the Canadian International Trade Tribunal (CITT).

<sup>5</sup> Chi Carmody: Softwood Lumber (n 3).

1980's, elimination of anti dumping duties and countervailing duties had been Canada's long lasting demand. Canada claimed that this would be economically viable in the context of a Free Trade Agreement.<sup>6</sup> Unfortunately, the political pressure and lobbying in Washington would not let that happen though and Canada realized that the U.S. Congress kept its AD/CVD laws too close to its heart to let go of them so easily. This issue then became a deal breaker and the Canadian negotiators were on the verge of walking out of the negotiations.

A compromise was struck at the last minute though. Canada and the U.S. agreed on the establishment of binational panels to adjudicate on disputes of AD/CVD instead of the domestic courts. This was supposed to be a temporary step to be replaced within seven years<sup>7</sup> by special rules between Canada and the U.S. relating to AD and CVD laws on trade.<sup>8</sup> It was a win-win situation for both the parties. The Canadian Negotiators believed that a panel to be composed of trade experts would be a better forum to adjudicate than the judges of the domestic courts in matters relating to trade law. These experts would have much more expertise about the process of AD/CVD law than the judges who always did not have necessary prior experience. Also if U.S. authorities were aware that their decisions would be reviewed by these expert panelists, they would be less prone to errors and more careful while making determinations. The U.S. negotiators also believed that a panel would be a faster and a less expensive forum for dispute settlement than the domestic judiciary. Also the Panel would have to use the domestic law of the country involved to issue its decision and the U.S. believed that the decision would not differ when using the domestic law.<sup>9</sup>

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<sup>6</sup> Canada feared that the trade-liberalizing benefits of the FTA could be undercut by what it viewed as arbitrary administration of U.S. unfair trade laws. Hufbauer, Gary Clyde, Reginald Jones, Jeffrey Schott and Yee Wong, 'NAFTA Dispute Settlement Systems' Institute for International Economics (2004).

<sup>7</sup> The working group issued no report and, in fact, held no substantive meeting during those five years.

<sup>8</sup> Patrick Macrory, 'NAFTA Chapter 19 A Successful Experiment in International Trade Dispute Resolution', C.D. Howe Institute No. 168, (September 2002) <<http://www.worldtradelaw.net/articles/macrorychapter19.pdf>> accessed 31 March 2012 (Patrick Macrory).

<sup>9</sup> *ibid.*

## Alternate to Anti Dumping?

It would be pertinent to note here that some writers<sup>10</sup> felt that it would have been in the interest of all three countries if during the CUSFTA Negotiations a consensus had been reached to do away with the domestic anti dumping law and adopting a harmonized law approach to address the cross border price discrimination. Canada did have this proposal when negotiating the CUSFTA in 1987-88.<sup>11</sup> As has been discussed earlier, a trilateral working group was established to see the possibility of making rules related to government subsidy and unfair pricing.<sup>12</sup> But in the early 90's both the Governments of U.S. and Canada's attention focused on the Uruguay Round talks and this matter died a silent death.

The main problem with anti dumping law is that it punishes differential cross border pricing regardless of whether such pricing is predatory, impedes competition or is non- predatory and promotes competition. It has also been seen that anti dumping laws tend to protect inefficient industries.<sup>13</sup> Competition law it is argued focuses on the activities that undermine the competition process.<sup>14</sup>

Writers<sup>15</sup> have even tried to propose the Australia-New Zealand model for NAFTA. Australia and New Zealand signed a Closer Economic Relations pact in March 1983 and in the first five years of the agreement the two countries made progress to decrease the barriers to trade including elimination of tariff and export subsidies. As the bilateral trade picked up in the two countries the two countries agreed to take steps to have a single market in 1988<sup>16</sup>, treat the other countries produce as its own and to replace the anti dumping law with their domestic competition law.<sup>17</sup> The investigation agency in one country also had the power to

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<sup>10</sup> Gary N Horlick & Eleanor C Shea, 'Alternative to National Antidumping & Countervailing Duty Law: Are the feasible or Appropriate in the context of NAFTA', in *Trading Punches, North American Committee of the National Policy Association Washington* 206 (1996) (Gary Horlick & Eleanor Shea).

<sup>11</sup> *ibid.*

<sup>12</sup> G Bruce Doern & Brian W Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart 1991) 195-199.

<sup>13</sup> Robert W Staiger & Frank A Wolak, 'Measuring Industry Specific Protection: Antidumping in the US' (1994) Working Paper 4696, National Bureau of Economic Research <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=254561##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=254561##)> accessed 31 March 2012.

<sup>14</sup> Ravi P Kewalram, 'The Australia-New Zealand Closer Economic Trade Agreement' (1993) 27 J World Trade 111, 122.

<sup>15</sup> Gary Horlick & Eleanor Shea (n 10).

<sup>16</sup> Graeme Thomson & Christopher Langman, 'The Removal of Trade Remedy Law in Trans-Tasman Commerce (1991) 17 Can-US L J 203.(Thomson & Langman).

<sup>17</sup> Gary Horlick & Eleanor Shea (n 10).

investigate against an entity in the other including powers to issue summons and take evidence.<sup>18</sup>

However, such a scenario is not feasible in NAFTA, this is because although Canada and U.S. share MOU's relating to antitrust for a long period of time<sup>19</sup>, Mexico is still in its nascent stage of evolving and developing its antitrust laws.<sup>20</sup> Mexico being a developing country is aiming for better support mechanism and infrastructure for better enforcing its laws. This imbalance between the laws of the three countries poses difficulty for harmonizing laws.

## The Structure of Chapter 19

Chapter 19 operates on the premise of replacement of domestic courts, but not domestic law. It is a unique hybrid of international dispute resolution with national law with no parallel in the world.<sup>21</sup> Parties had the option to challenge a domestic agency's determination in a bi-national panel under Chapter 19 instead of going to a domestic court. It is important to note that NAFTA does not substantiate any law or treaty about AD/CVD to be applied by these Chapter 19 panels or generally. The Panel only applies the laws of the domestic country, in other words Panel review extends only to the question "*whether such determination was in accordance with the antidumping or countervailing duty law of the importing party.*"<sup>22</sup> The ad hoc nature of these panels and the fact that they lack authority to bind in subsequent cases is justified on grounds that panels are not precedent making. The 5 trade expert panelists are chosen from a roster of at least 75 (at least 25 from each NAFTA country) and have to include at least two from both countries involved in the dispute to balance and ultimately, redress national self-interest.<sup>23</sup>

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<sup>18</sup> Thomson & Langman (n 16) 206.

<sup>19</sup> US Department of Justice, 'Agreement Between US and Canada', <<http://www.justice.gov/atr/public/international/docs/205732.htm>> accessed 31 March 2012.

<sup>20</sup> Elisabeth Malkin, 'Mexico's Antitrust Chief Seeks Stronger Laws' *NY Times* (Mexico City, 11 November 2011) <<http://www.nytimes.com/2004/11/11/business/worldbusiness/11antitrust.html>> accessed 31 March 2012.

<sup>21</sup> Marc Sheer, 'Chapter 20 Dispute Resolution under NAFTA: Fact or Fiction?' (2003) 35 *Geo Wash Int'l L Rev* 1001.

<sup>22</sup> NAFTA art. 1904.2, art 190.

<sup>23</sup> Roster members shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. They need not be lawyers, however lawyers must constitute a majority of each panel. NAFTA annex 1901.2.

Decisions of Chapter 19 panels are directly binding on the national agencies that issued the determination under review.<sup>24</sup> The Panels are supposed to finish up a proceeding within 315 days from the date on which the request for a panel was made.<sup>25</sup> Panels operate under procedures similar to court rules. They can only affirm agency decisions or remand (return) them with instructions to revise them; they have no power to alter the decisions themselves.<sup>26</sup> If a country alleges that a panel is biased or exceeded its authority, it can appeal the panel's decision before a three-person Extraordinary Challenge Committee.<sup>27</sup>

## Chapter 19 in Operation

In practice we see that in the U.S., nearly every decision of the ITC to apply AD/CVD duties has resulted in an appeal to the Chapter 19 panel instead of the U.S. Court of International Trade (CIT). They have all but replaced the resort to domestic courts of law in AD and CVD cases, not only in the U.S., but also in Canada and Mexico.

There is an impression in the minds of the people that the Chapter 19 provisions tend to be interventionist, which is not a correct notion. Most AD duties are not controversial except where their quantum is large. CVD decisions on the other hand tend to create more tension between the NAFTA governments because they tend to challenge government actions as distinct from private parties.<sup>28</sup> These differences arise most glaringly in the cases of *Softwood Lumber* and *Pork*, both involving high volumes of trade.<sup>29</sup> Of the 26 reviews of Commerce Department determinations completed under the FTA and the NAFTA through May 2002, only five AD cases were upheld without a remand. Every Commerce Department

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<sup>24</sup> NAFTA art 1904.9.

<sup>25</sup> NAFTA art 1904.14.

<sup>26</sup> However, panels have achieved this result by remanding to the agency with specific directions to issue a negative determination. See *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (Lumber III), Second Panel Decision, December 17, 1993 and *Fresh, Chilled or Frozen Pork from Canada*, USA-89-1904-11, Second Panel Decision, January 22, 1991 (Pork I).

<sup>27</sup> The ECC may be invoked if a Party finds the NAFTA Chapter 19 tribunal decision was influenced by acts that threatened the integrity of the bi-national panel review process. These actions include a panellist who is guilty of gross misconduct, bias or a serious conflict of interest, or otherwise materially violated the rules of conduct. Other reasons for an ECC action include a panel seriously departing from a fundamental rule of procedure, or if a panel manifestly exceeds its powers, authority or jurisdiction set out in this Article by failing to apply the appropriate standard of review. NAFTA art 1904.13.

<sup>28</sup> Patrick Macrory (n 8).

<sup>29</sup> John Mercury, 'Chapter 19 of the United States Canada Free Trade Agreement 1989-95: A Check on Administered Protection?' 15 *Northwestern J Int'l L & Business* 525-605.

decision in a CVD case was remanded. Regarding the 18 cases of Canadian imports 12 resulted in reduction of duties and one in rescission of the order and elimination of the duties altogether.<sup>30</sup>

Data analysed by various writers show that AD/CVD investigations by the NAFTA parties has decreased since the coming in force of Chapter 19. Between 1985 and 1994 Canada initiated 51 AD/CVD investigations against U.S. and Mexico but only 18 from 1995 to 2006.<sup>31</sup> The figure for U.S. and Mexico are 72 and 65 from 1985 to 1994 dropping down to just 43 and 21 from 1995 to 2006 respectively.<sup>32</sup> One study suggests that binational panel review may reduce the likelihood that a panel will uphold an agency finding of material injury and thus indirectly discourages filing of AD/CVD petitions.<sup>33</sup> Some studies also propose that in general the bi-national panels tend to show less deference to the U.S. agencies than the domestic courts in the U.S. and overturn the determinations.<sup>34</sup> This is in stark contrast to the deference shown to the Canadian agency determinations which is very high presumably due to the less onerous standard of review in Canada.<sup>35</sup> In Canada, the investigating authority must only make a '*reasonable interpretation*'<sup>36</sup> of the evidence.<sup>37</sup> In the United States there must be '*substantial evidence*' which is defined as that which a reasonable mind might accept as adequate to support a conclusion.<sup>38</sup> Out of the 29 cases in which the panels issued a decision, in 14 cases (48%) domestic agencies determination were upheld and 15 cases (52%) were remanded for further consideration.<sup>39</sup> The panels reviewing U.S.

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<sup>30</sup> Patrick Macrory (n 8).

<sup>31</sup> Stephen J Powell, 'Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?' (2010) 16 L & Bus Rev Am 217. (Stephen Powell).

<sup>32</sup> *ibid.*

<sup>33</sup> Patrick Macrory (n 8).

<sup>34</sup> Juscelino F Colares, 'Alternative Methods of Appellate Review in Trade Remedy Cases: Examining Results of U.S. Judicial and NAFTA Binational Review of U.S. Agency Decisions from 1989 to 2005', *Journal of Empirical Legal Studies*, Forthcoming <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=920144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920144)> accessed 31 March 2012.

<sup>35</sup> Juscelino F Colares & John W Bohn, 'NAFTA's Double Standards of Review' (2007) 42 Wake Forest L Rev 199, 202.

<sup>36</sup> Kenneth J Pippin, 'An Examination Of The Developments in Chapter 19 Antidumping Decisions Under The North American Free Trade Agreement: The Implications and Suggestions For Reform for the Next Century Based On The Experience Of NAFTA After The First Five Years', 21 Mich J Int'l L 115.

<sup>37</sup> Final Determination of Dumping Regarding Certain Refined Sugar, Refined From Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America, CDA-95-1904-04, at 9 (Oct. 9, 1996).

<sup>38</sup> Porcelain-on-Steel Cookware from Mexico, USA-95-1904-01, at 6 (Apr. 30, 1996).

<sup>39</sup> Beatriz Leycegui & Mario Ruiz Cornejo, 'Trading Remedies to Remedy Trade: The NAFTA Experience' 10 Sw JL & Trade Am 30 (Leycegui & Cornejo).



and Canada cases frequently deferred to the investigating authorities with 38% and 80% of the cases, respectively, being upheld.<sup>40</sup>

## Challenges to Chapter 19

In this chapter the researcher will examine some of the defects and problems which Chapter 19 has often been accused of suffering from. The researcher agrees that there are lacunas in the provision but to what extent are they justified will be analysed.

### Timeline

Although the panels were envisaged as being as fast track substitute to the domestic court system of the countries and finish the proceedings within 315 days<sup>41</sup> from the request of the establishments of panels, the reality has been far from it.<sup>42</sup> There have been delays in assembling the panels.<sup>43</sup> A blatant example of this has been the in the *Fructose Case*<sup>44</sup>, the U.S. industry's request for a panel in February 1998, was delayed for a variety of unusual trade reasons, with the result that the NAFTA panel was not even formed until August 2000, several months after the first WTO panel to address the issue had already issued its report finding against Mexico.<sup>45</sup>

As of 2009, the NAFTA Chapter 19 panels on average decided cases within 533 days against the U.S.<sup>46</sup>, while the CIT and Court of Appeal in the Federal Circuit (CAFC) took 1166 days for entertaining appeals.<sup>47</sup> This clearly shows that one of the mandates due to which Chapter 19 was enacted failed to perform as originally envisaged under the 315 days rule. The delay

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<sup>40</sup> *ibid.*

<sup>41</sup> NAFTA art 1904.14.

<sup>42</sup> Eric J Pan, 'Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication', 40 Harv Int'l LJ 421 (Eric Pan).

<sup>43</sup> Susan G Esserman, 'Canada and U.S. Approaches to Free Trade Agreement' (2005) 31 Can.-US LJ 11, 20.

<sup>44</sup> MEX-USA-98-1904-01.

<sup>45</sup> Stephen Powel (n 31).

<sup>46</sup> Leycegui & Cornejo (n 39) 33.

<sup>47</sup> Elliot J Feldman, 'NAFTA Chapters 11, 19 and 20: Time to Start Over' Canada-United States Law Institute Annual Conference (2009).

can be attributed to a myriad of reasons but majorly attributed to the delay in the formation of panels. In addition The United States extended Chapter 19 into extraordinary challenges almost every time it lost a panel decision, predictably losing every ECC appeal too.<sup>48</sup> But the researcher admits that a petitioner choosing between the CIT and the bi-national panel can be confident that the dispute will be resolved faster in the Chapter 19 panel even after the delays.

## National Bias and Conflict of Interest

Although this was not a troublesome factor till too long ago, national bias is one of the possible defects of Chapter 19 which might prove to cause trouble in the near future. The case that best explains this phenomenon is the *Softwood Lumber Dispute*. A section of writers feel that due to the possible U.S. frustration with the ECC and Certain *Softwood Lumber Products*,<sup>49</sup> the bi-national panel system is prone to conflicts of interest and therefore does not provide an impartial forum to review U.S. agency determinations.<sup>50</sup>

Panel decisions, though typically unanimous in other contexts till now,<sup>51</sup> have shown a tendency to split along national lines as was shown in the issues concerning *Softwood Lumber*.<sup>52</sup> Conflicts of interests tainted several softwood panel decisions.<sup>53</sup> ECC proceedings that convened in June 2005 to review an earlier *Softwood* Panel decision became a forum

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<sup>48</sup> *ibid.*

<sup>49</sup> Both the five-member panel and the three-member Extraordinary Challenge Committee were composed of a majority of Canadians who all found in favor of Canadian industry, and essentially overturned the U.S. agency determinations. The two Americans on the panel, and the sole American on the Extraordinary Challenge Committee, Judge Wilkey, supported the agency determinations in dissent. See Charles M Gastle & Jean G Castel, 'Should the North American Free Trade Agreement Dispute Settlement Mechanism in Anti-dumping and Countervailing Duty Cases be Reformed in the Light of *Softwood Lumber III*?' (1995) 26 *Law & Pol'y Int'l Bus* 823, 829. (Charles Gastle & Jean Castel).

<sup>50</sup> NAFTA Membership for Chile: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 104th Cong., 76 (1995) (testimony of Malcolm R. Wilkey, former United States Circuit Judge and former Ambassador of the United States)

<sup>51</sup> Leycegui & Cornejo (n 39) 35.

<sup>52</sup> Jennifer Danner Riccardi, 'The Failure of Chapter 19 in Design and Practice: An Opportunity for Reform' (2002) 28 *Ohio NU L Rev* 735; Charles Gastle & Jean Castel (n 49) 823, 824.

<sup>53</sup> *ibid.*

for attacks on the conduct of one panel member.<sup>54</sup> Some writers blame that the ECC process has been little more than a platform for indulging in personal attacks on the panelists.<sup>55</sup>

Also due to the qualifications required under NAFTA and the small number of qualified panelists there are instances when the panelists can easily encounter conflicts of interest. In fact, individuals who participate as panelists in bi-national reviews are often also the same attorneys who performed the investigations before the investigating authorities; the panelists are essentially reviewing their own work.<sup>56</sup> Also the low remuneration<sup>57</sup> offered, the increasing time commitments required of panelists and real or perceived conflicts of interest may also be another reason for the small number of willing people to serve as panelists.<sup>58</sup>

But it is heartening to know that statistics show that out of the 29 decisions rendered by bi-national panels, 25 of them were adopted unanimously (86%) and 4 of which had a majority vote. None of these later cases involved a split according to nationality.<sup>59</sup> It is interesting to note that all cases involving Canadian investigating authorities were unanimously decided. Also it is important to note here that differences in views of panelists in reasoning about the law and facts are influenced by their legal education, and different legal systems in the three countries. This does not, however, suggest national prejudice.

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<sup>54</sup> NAFTA Extraordinary Challenge Comm., *Certain Softwood Lumber Products from Canada* at 2, ECC-2004-1904-01USA (Aug. 10, 2005).

<sup>55</sup> Two members of the *Softwood Lumber* binational panel were accused of not disclosing a lawyer-client relationship with one of the interested parties in the dispute. Both panelists had personally provided services to the Canadian government and were partners in law firms that represented several of the Canadian lumber and forest product companies. The ECC refused to find a conflict of interest. See Robert E Burke & Brian F Walsh, 'NAFTA Bi-national Panel Review: Should It Be Continued, Eliminated or Substantially Changed?' (1995) 20 Brook. J Int'l L. 529, 556-57.

<sup>56</sup> Leycegui & Cornejo (n 39) 33.

<sup>57</sup> The panelists are paid \$ 600 a day, an amount which private practitioners make in an hour.

<sup>58</sup> Long absence from practice and limited financial support for legal assistance for research is also a hindrance. Lawrence L Herman, *Making NAFTA Better Comments on the Evolution of Chapter 19* (Centre for Trade Policy and Law, University of Ottawa 2005).

<sup>59</sup> Leycegui & Cornejo (n 39) 31.

## Non- conformity Due To The Ad Hoc Nature

Panels have had some difficulty in controlling the actions of agencies, which have broad discretion in applying domestic AD/CVD laws.<sup>60</sup> Hostile attitude of the agencies and resistance have forced the NAFTA panels to occasionally handle multiple remands on the same issue.<sup>61</sup>

The ad hoc nature of the panels also does not prevent the agencies from repeating the same practices against which are against the previously the panel had issued remand instructions. Agencies after complying with the instructions at the primary stage offer varied excuses for subsequent compliances on the grounds that other factors have intervened, such as new laws or judicial determinations.<sup>62</sup> In case of such non-conformity, a new panel will have to be assembled charged with dealing with a fact pattern that is identical in almost all respects other than for the period of review. The expenses for constituting such a panel rise and also cause delays in the proceedings.

Although it is not common, Chapter 19 by itself does not preclude countries from amending their AD/CVD laws to circumvent panel rulings.<sup>63</sup> If faced with a negative ruling, a country can take the simple step of amending its domestic AD/CVD laws and thus very tactfully maneuver away, in such a case the bi-national panels can only recommend to the country to fall in conformity.<sup>64</sup> Also, since the panel considers only the questions of domestic law of the country before it, its hands are tied as the domestic law itself has been modified.<sup>65</sup> The only reason that this does not happen too frequently is because amending one's AD/CVD law so as to frustrate and protract a panel proceeding will be against the object and purposes of the Agreement and Chapter 19.<sup>66</sup>

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<sup>60</sup> Charles Gastle & Jean Castel (n 49) 882.

<sup>61</sup> Homer E Moyer, 'Chapter 19 of the NAFTA: Bi-national Panels as the Trade Courts of Last Resort' in Judith H Bello, Alan F Holmer & Joseph J Norton (eds), *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* (Chicago: The American Bar Association 1994).

<sup>62</sup> Corrosion-Resistant Carbon Flat Steel Products from Canada, USA-97-1904-3 (Decision of the Panel on the Determination on Remand, January 20, 1999.); Corrosion-Resistant Carbon Steel Flat Products from Canada, USA-ADA-98- 1904-1.

<sup>63</sup> J G Castel & C M Gastle, 'Deep Economic Integration between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform' 7 *Minn J Global Trade* 1, 37.

<sup>64</sup> NAFTA art 1903(3).

<sup>65</sup> Charles Gastle & Jean Castel (n 49) 882.

<sup>66</sup> NAFTA art 1902.

## Others

The multiplicity of litigation<sup>67</sup> that cropped up during *Softwood Lumber IV* and included NAFTA panels reviewing three different agency determinations and giving orders for multiple remands, Chapter 11 proceedings, challenges in the domestic courts and concurrent litigation in the WTO<sup>68</sup> dragged on the proceedings and helped push Canada to abandon its Chapter 19 case.<sup>69</sup> The whole point of a fast track system is lost if there are so many legal challenges being launched at so many different levels albeit different legal questions. Thankfully, *Lumber IV* was an exception to the rule and normally this ‘hydra’ of litigation is not seen in cases which don’t involve such large amounts in dispute.

Also there is the fear among some writers that the bi-national panel system will encourage the formation of an independent AD/CVD jurisprudence through decisions that do not faithfully apply the domestic AD/CVD law.<sup>70</sup> This is not the case as the panels have previously been held not to develop a separate jurisprudence in antidumping cases from the jurisprudence developed by local tribunals for such cases.<sup>71</sup>

The situation may still arise in the case of U.S. in CIT and CAFC, this is because these were only established in 1980 and 1982. They have not been present for sufficient long time to establish enough case laws and jurisprudence that the Chapter 19 panels can rely on.<sup>72</sup> Thus when faced with a previously unanswered question of law, the Chapter 19 panels can follow the interpretation followed by a previous Chapter 19 panel or act as a sole bi-national panel and only look toward CIT and CAFC decisions for authoritative interpretation, which might produce an inconsistency of decisions in case of unclear/ambiguous laws. In the former case, a separate jurisprudence of Chapter 19 panels may develop. Authors feel that even

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<sup>67</sup> Chi Carmody: *Softwood Lumber* (n 3).

<sup>68</sup> Joost Pauwelyn, ‘Adding Sweeteners to Softwood Lumber: The WTO-NAFTA ‘Spaghetti Bowl’ is Cooking’ 9 J Int’l Econ L 197; John H Knox, ‘The 2005 Activity of the NAFTA Tribunals’ 100 Am J Int’l L 429, 436.

<sup>69</sup> Steven Chase, ‘U.S. Firms Pushing Provinces Back to Table’, *Globe & Mail*, (May 10, 2004) B1.

<sup>70</sup> Eric Pan (n 42).

<sup>71</sup> Imports of Cut-to-Length Plate Products from the United States of America, MEX-94-1904-02, at 16 (August 30, 1995); United States General Accounting Office, ‘United States-Canada Free Trade Agreement: Factors Contributing to Controversy and the Appeal of Trade Remedy Cases to Bi-National Panels’, (GAO/GGD-95-175 BR), Washington, D.C., 83 (June 16, 1995).

<sup>72</sup> Eric Pan (n 42) 406

though a panel decision has no formal precedential value,<sup>73</sup> a current panel should still consider the decisions of previous panels in its deliberations as such application of previous decisions is clearly within the realm of reasonableness for a U.S. court.<sup>74</sup> Also the willingness of the bi-national panels to deviate from U.S. law in order to pursue consistency is not the same as developing an independent jurisprudence.<sup>75</sup> An independent jurisprudence implies the development of legal doctrines that run parallel to or contradict U.S. law. The researcher believes that the bi-national panels have not done so and there is little evidence to prove otherwise.

## **Important Cases under Chapter 19 NAFTA**

### **Fresh, Chilled, or Frozen Pork from Canada<sup>76</sup>**

*Pork I* involved an appeal from the ITC on a CVD issue. The ITC had decided by a 3-2 majority that it was justified to levy CVD as it was predicted that there would be an increase in the production of pork in Canada which would be exported to the U.S. In the first decision<sup>77</sup> the Panel did not agree with the ITC because the evidence it relied on to predict an increase in production was basically a statistical error caused by a change in the method of accounting.<sup>78</sup> This fact had already been pointed out by the U.S. Department of Agriculture to the ITC.<sup>79</sup> On remand the ITC came up with an alternative mechanism to justify the CVD. According to the majority, there were several agricultural subsidy programs offering specific benefits to the hog industry and by extension the pork processing industry.<sup>80</sup> The Panel in true remand style dismissed this theory of the ITC calling it '*mere conjecture*' because there was evidence present before the panel in which it was seen the number of hogs exported to the U.S. had actually risen after the subsidy. The panel then proceeded to issue a negative determination to the agency because it felt that the Department did not provide adequate

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<sup>73</sup> Important to note here that the principle of stare decisis is not mentioned anywhere in Chapter 19.

<sup>74</sup> Michael H Greenberg, 'Chapter 19 of the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the Court of International Trade' 25 Law & Pol'y Int'l Bus 37, 48.

<sup>75</sup> Eric Pan (n 42) 389.

<sup>76</sup> ECC-91-1904-01 USA (1991) (Pork I).

<sup>77</sup> Aug. 24, 1990.

<sup>78</sup> Pork, USA-89-1904-11, decision of August 24, 1990, p. 36.

<sup>79</sup> Patrick Macrory (n 8).

<sup>80</sup> Decision of the Binational Panel, Fresh, Chilled, and Frozen Pork, USA-89-1904-06 (Sept. 28, 1990), in James R. Holbein & Donald J. Musch, (eds) 1 *North American Free Trade Agreements: Dispute Settlement* B.10A (1992).

reasons for why the 'Tripartite Benefit Program' of the Canadian Government should be considered a specific subsidy.

The United States filed an Extraordinary Challenge, claiming that the panel had improperly reached its own judgment on the evidence, instead of simply determining whether the record contained enough evidence to support the ITC's decision. The ECC unanimously rejected the U.S. claim, it observed that the Extraordinary Challenge process was not designed to function as a routine appeal but was intended simply as a safeguard against an impropriety or gross error that could threaten the integrity of the bi-national panel review process.<sup>81</sup> An interesting point to note here is that after remand and on second review, the bi-national panel upheld the Commerce Department determination of a duty.<sup>82</sup>

### Live Swine from Canada<sup>83</sup>

This case raised a number of important issues in the CVD law of the U.S. To understand this case some background on CVD law is required. The government in its normal course of running provides a number of general subsidies to industry such as education, police and highway construction. These are domestic subsidies which are not linked to exports. A countervailing duty can only be applied in their case when provided to a '*specific enterprise or industry, or a group of enterprises and industries*'<sup>84</sup>

In making a specificity determination, the Commerce Department has stated that it will look at four factors codified in the 1996 amendments<sup>85</sup>. The subsidy is specific if one or more of the following factors exist:

- a) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
- b) An enterprise or industry is a predominant user of the subsidy.

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<sup>81</sup> ECC-91-1904-01 USA (1991).

<sup>82</sup> This is because it found the Department's showing that the pork processors were receiving a disproportionate amount of the subsidies as sufficient reasoning to support a finding of specificity subsidy.

<sup>83</sup> ECC-93-1904-01 USA (Swine EC).

<sup>84</sup> § 1677(5)(A)(ii).

<sup>85</sup> The Commerce Department maintained that the proper application of the Proposed Regulation was to go down the list of factors sequentially and stop as soon as one of the factors was met.

- c) An enterprise or industry receives a disproportionately large amount of the subsidy.
- d) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favoured over others.<sup>86</sup>

Commerce Department found that two agriculture programs were specific and a duty could be levied. That finding was based solely on the fact that the actual number of recipients of benefits under the programs was small compared to the universe of potential beneficiaries. Chapter 19 panel rejected the reasoning of the Commerce Department saying that in finding out whether a particular program was specific all the four above mentioned factors had to be present in the assistance provided and that the specificity test<sup>87</sup> cannot be reduced to a '*precise mathematical formula*'.<sup>88</sup> It is important to note here that U.S. panellist dissented from the majority on this point and recorded that the Panel was '*advancing its own opinion*'.

The U.S. filed an ECC but to no avail. The ECC reiterated that the Extraordinary Challenge procedure was not a normal appeal process but a '*safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the bi-national panel process*'.<sup>89</sup> Strangely enough towards the end of its opinion the ECC recorded that although it felt the panel might have erred, it was not persuaded that the panel had failed to apply the properly articulated standard of review.<sup>90</sup>

## Softwood Lumber Dispute

The principal issue in all the softwood decisions was whether stumpage fees charged by Canadian provincial governments to private companies for the right to cut timber on

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<sup>86</sup> 19 USCA § 1677(5A) (D)(iii) (West Supp 1998).

<sup>87</sup> The panel also pointed out that the specificity referred to a distinct class of recipients and not merely a small number of recipients.

<sup>88</sup> Swine USA-91-1904-3, decision of August 19, 1992, p. 18.

<sup>89</sup> Swine EC, p. 8.

<sup>90</sup> *ibid.*



provincial land were too low and therefore constituted a subsidy.<sup>91</sup> Majority of the grievance in the U.S. has been brought about by the Coalition for Fair Lumber Imports.

*Patrick Macrory*<sup>92</sup> has made a quick reference summary of the *Softwood Lumber Dispute* and the researcher examines some of the main issues that were controversial in the lumber disputes.

### Lumber I <sup>93</sup>

The U.S. Department of Commerce issued a decision that provincial stumpage was not a subsidy because it was not provided to 'a specific enterprise or industry, or group of enterprises or industries' as required by the CVD law and because the stumpage systems did not provide goods at preferential rates, as also required by the CVD law at that time.<sup>94</sup>

### Lumber II <sup>95</sup>

The Commerce Department issued a preliminary determination that provincial stumpage was a subsidy and found a 15 percent subsidy, despite the lack of any material change in the nature of the stumpage systems or the number and type of industries using stumpage from *Lumber I*.<sup>96</sup> The Canada-U.S. memorandum of understanding as negotiated under which Canada imposed a 15 percent duty on exports to the United States. The result was Canada imposed an export tax having the same effect as a CVD but at least the revenue stayed in Canada's hand.<sup>97</sup>

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<sup>91</sup> Chi Carmody: *Softwood Lumber* (n3) 666. In Canada, the provincial governments own most standing timber; in the US by contrast, the majority is privately owned. In Canada the lumber producers pay no fees to lease the land.

<sup>92</sup> Patrick Macrory (n 8).

<sup>93</sup> Certain Softwood Lumber Products from Canada, 48 Fed Reg 24, 159 [1993] (Lumber I).

<sup>94</sup> The department found that stumpage was used by many companies operating within three groups of industries.

<sup>95</sup> Certain Softwood Lumber Products from Canada, 51 Fed Reg 37, 483 (1986) (Lumber II).

<sup>96</sup> Charles Gastle & Jean Castel (n 49) 846.

<sup>97</sup> The Canadian parties did not have the opportunity to test the legality of the Commerce Department's decision on appeal because the Canadian government settled the case by negotiating the memorandum of understanding. Preliminary subsidy determinations cannot be appealed to the CIT. Lumber II (n 99).

### Lumber III <sup>98</sup>

The Commerce Department self initiated the investigation<sup>99</sup> and found that provincial stumpage and log export restraints in British Columbia were subsidies as those restrictions purportedly lowered the cost of logs to lumber producers in the province. The finding was reversed by a Chapter 19 panel: *Certain Softwood Lumber Products from Canada*. In the second panel remand to the department the two U.S. panelists although generally agreeing with the majority stated that they were bound to defer to the Commerce Department's interpretation of the facts and the law because the Panel had clarified the appropriate standard for judicial review of agency determinations after the first remand.<sup>100</sup> Thus we can see that cracks began to appear in the Panel.<sup>101</sup> The U.S. filed an Extraordinary Challenge.<sup>102</sup> The ECC was also split along national lines with Malcolm Wilkey, a former judge of the U.S. Court of filling a lengthy and strongly worded dissent<sup>103</sup> that attacked not only the majority decision of the panel but also the entire Chapter 19 process.<sup>104</sup> Ultimately the panel decision was upheld by an ECC: *Certain Softwood Lumber Products from Canada*.<sup>105</sup> Negotiations between Canada and the U.S. resulted in Softwood Lumber Agreement of May 1996.

### Lumber IV

The expiration of the SLA of *Lumber III* in May 2006 led to the Coalition filing of petition with the DOC to initiate investigations. DOC imposed antidumping or countervailing duties of

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<sup>98</sup> *Certain Softwood Lumber Products from Canada*, 57 Fed Reg 22, 570 (1992) (Lumber III)

<sup>99</sup> Although the department has authority to self-initiate AD and CVD investigations, it normally initiates investigations only upon petition by a domestic industry. Its decision to self-initiate in *Lumber III* was the first such action in a CVD case. Canada brought a GATT challenge to the self initiation, as well as to the imposition of temporary duties (United States - Measures Affecting the Export of Softwood Lumber from Canada (II), BISD 40S/358). The GATT panel held that the self initiation was valid, but that the imposition of temporary duties was not.

<sup>100</sup> USA-92-1904-01 (1993)

<sup>101</sup> J G Castel & C M Gastle, 'Deep Economic Integration between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform', 7 Minn J Global Trade 1, 37.

<sup>102</sup> The US claimed that two Canadian panellists had violated the rules of conduct by failing to disclose information indicating at least the appearance of bias and, in one case a conflict of interest.

<sup>103</sup> Lumber III, dissenting ECC opinion.

<sup>104</sup> Judge Wilkey sarcastically asked why panel members should be expected to defer to administrative agency action when they are the experts who "*know better than the lowly paid experts over in the Commerce Department.*" He also observed that neither panel members nor Canadian judges sitting on ECCs understood the intricacies of US administrative law and, therefore, would not be capable of applying the proper standard of review. In his view, the Chapter 19 review system was so riddled with problems that it could not be fixed.

<sup>105</sup> ECC-94- 1904-01USA (1994).

8.43% and 18.97% respectively averaging 27% on Canadian export of softwood lumber to the U.S.<sup>106</sup> The ITC also completed its own investigation with respect to material injury, concluding that while Canadian imports were not causing material injury, they posed a *threat* of material injury to the U.S.<sup>107</sup>

Canada challenged these determinations in the WTO Agreement and NAFTA. The researcher for the ease of convenience will be dealing with them under three separate headings.

### *Dumping*

Both the WTO and Chapter 19 panel upheld some determination of the DOC's dumping determination. However, the WTO Appellate Body<sup>108</sup> held that the DOC's practice of 'zeroing'<sup>109</sup> was inconsistent with the Anti-Dumping Agreement. The NAFTA panel<sup>110</sup> that had previously held 'zeroing' to be permissible was forced to revisit the issue in light of the WTO decision. The panel found that, given the non statutory basis of zeroing under U.S. law, the '*Charming Betsy Doctrine*'<sup>111</sup> could lead to retrospective effect for the WTO decision in the NAFTA challenge. The panel therefore directed the DOC to apply non zeroing methodology. DOC then employed transaction- to-transaction methodology<sup>112</sup> to calculate new rates for Canadian exporters.<sup>113</sup> Canada once again challenged this in the WTO consistency of this method. The compliance panel upheld the U.S. approach because there

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<sup>106</sup> 67 Fed Reg 36,069 (May 22, 2002)

<sup>107</sup> Chi Carmody: Softwood Lumber (n 3).

<sup>108</sup> Appellate Body Report, United States- Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004).

<sup>109</sup> An investigation that employed a zeroing methodology, amounts by which the export price exceeded the normal value would simply be counted as zero. In an antidumping investigation that uses that methodology, some export prices for certain transactions are treated as if they were less than what they actually are, thereby potentially depressing the average export price and increasing the rate of dumping.

<sup>110</sup> In re Certain Softwood Lumber Products from Canada, Final Affirmative Antidumping Determination, USA-CDA-2002-1904-02 (NAFTA Panel July 17, 2003, Mar. 5, 2004, & June 9, 2005)

<sup>111</sup> The doctrine requires the Court to interpret US law where possible consistently with its international obligation. *Murray v Schooner Charming Betsy* 6 U.S. (2 Cranch) 64 (1804)

<sup>112</sup> The DOC summed up amounts by which, on individual transactions, the export price was less than the normal value, but did not include amounts by which the export price exceeded the normal value.

<sup>113</sup> Article 2.4.2 of the Antidumping Agreement: the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. See Notice of Determination under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada, 70 Fed Reg 22,636 (May 2, 2005).

was no further definition of the phrase '*margin of dumping*' in the WTO antidumping Agreement.<sup>114</sup>

### *Subsidy*

Canada had more success in subsidy determinations. In a series of successive panel remands, the panel asked the DOC to recalculate and revise duty which caused the subsidy rate to fall from 18.79% to 0.8% an amount that under U.S. law is considered *de minimus* and therefore not a subsidy.<sup>115</sup> Though the panel did not reject the finding of subsidy, it remarked the DOC did not determine the benefit flowing from the subsidy. The panel agreed that the DOC had proven financial contribution and benefit based on U.S. benchmarks, although it expressed some skepticism about the choice of U.S. rather than Canadian benchmarks.<sup>116</sup> The WTO Appellate Body<sup>117</sup> held that stumpage could constitute subsidy but there was insufficient evidence to decide whether the DOC had properly determined the existence and amount of benefit flowing from the subsidy. The WTO Appellate Body rejected the subsidy determination for failing to conduct a "*pass through analysis*"<sup>118</sup>. Afterwards, a WTO Appellate Body<sup>119</sup> constituted to see over the compliance, held that the DOC pass through analysis was inadequate and in breach of its WTO obligation.

### *Material Injury*

The NAFTA panel<sup>120</sup> could not find support in the ITC's determination that there was likely to be an increase in the imports in the future or that imports were entering at a price that was likely to have an impact on the domestic prices. The Panel held that ITC's determination was based on speculation and that there was lack of analysis. In a series of remands, the

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<sup>114</sup> Panel Report, United States Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, WT/DS264/RW, para 5.28 (April 3, 2006).

<sup>115</sup> In re Certain Softwood Lumber Products from Canada (Final Affirmative Countervailing Duty Determination), USA-CDA-2002-1904-03 (NAFTA Panel Aug 13, 2003, June 7, 2004, Dec. 1, 2004, May 23, 2005, Oct 5, 2005, & Mar 17, 2006)

<sup>116</sup> Chi Carmody: Softwood Lumber (n 3) 670.

<sup>117</sup> Appellate Body Report, United States- Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R (Jan. 19, 2004)

<sup>118</sup> A pass through analysis determines whether the original subsidy to timber harvesters passes through to downstream softwood lumber producers.

<sup>119</sup> Appellate Body Report, United States *Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, Recourse by Canada to Article 21.5, WT/DS257/AB/RW, para 96 (Dec. 5, 2005).

<sup>120</sup> In re Certain Softwood Lumber Products from Canada, Final Affirmative Threat of Injury Determination, USA-CDA-2002-1904-07 (NAFTA Ch. 19 Binational (US-Can) Panel Sept. 5, 2003, Apr. 19, 2004, & Aug 31, 2004)

NAFTA panel directed the ITC to reanalyze its injury determination and remarked that the ITC's behavior amounted to “*unwillingness to accept the Panel's review authority which obviates the impartiality of the decision-making process and severely undermines the entire Chapter 19 panel review process*” and explicitly instructed the ITC to make a determination consistent with the determination of this Panel.<sup>121</sup> The panel's decision was subject to an Extraordinary Challenge by the United States, which was subsequently dismissed on August 10, 2005.<sup>122</sup>

A WTO panel on March 22, 2004 rejected the determination of the threat of injury of the ITC as it could not have been reached by an “*objective and unbiased authority*”. To comply with this decision the ITC issued a revised threat of injury determination which elongated but did not change the previous analysis. Stressing the need for deference to domestic agency decision making, the compliance panel upheld the redetermination.<sup>123</sup> That conclusion was later overturned by the Appellate Body, which asserted that the compliance panel had articulated and applied an improper standard of review, but due to disputed evidence the Appellate Body did not complete the analysis.<sup>124</sup>

### *Domestic Courts*

In *Tembec v. United States Consol*<sup>125</sup> Canada challenged the DOC's implementation of the NAFTA decision in *United States Investigation of the International Trade Commission in Softwood Lumber from Canada* and claimed that negative determination by the ITC can only lead to the revocation of the AD/CVD not to submit a new one in its place. Canada also challenged distributions of countervailing duties collected from Canadian entities under the Byrd Amendment<sup>126</sup>, asserting that those distributions violated NAFTA Article 1902(2). This case was later abandoned.

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<sup>121</sup> *ibid.*

<sup>122</sup> In re Certain Softwood Lumber Products from Canada, Order, ECC-2004-1904-01USA (NAFTA Ch. 19 Extraordinary Challenge Comm. Aug. 10, 2005)

<sup>123</sup> Panel Report, United States Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, WT/DS277/RW (Nov. 15, 2005).

<sup>124</sup> Appellate Body Report, United States Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, WT/DS277/AB/RW, para. 138 (April 13, 2006).

<sup>125</sup> Ct. No. 05-00028 (Ct Int'l Trade)

<sup>126</sup> The Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. §1675c (also known as the ‘Byrd Amendment’) came into effect in October 2000. It provided that duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 were to be distributed on an annual basis to ‘affected domestic

In 2005, the Coalition for Fair Lumber Imports sought a declaration that the NAFTA Chapter 19 bi-national panel system was unconstitutional and violated the due process rights of the principal group of American lumber producers.<sup>127</sup> The case was later suspended.

On April 28, 2006 the US and Canada reached a proposed agreement resolving the *Lumber IV* dispute. U.S. was to revoke its AD/CVD on Canadian Softwood Lumber and Canada would establish a scheme of border measures to limit the export of Canadian softwood lumber to the United States, including export measures, third-country triggers, and a surge mechanism, with the particular choice of export measure left to the provinces. Additionally U.S. was to return \$ 4 billion that it collected in duty deposits and retain \$ 1 billion. The agreement was to run for 7 years and had the provision for settlement by arbitration in the London Court of International Arbitration. This brought a provisional end to the *Lumber IV* dispute as all the disagreements had to be settled through arbitration in the London Court of International Arbitration.

## Chapter 19 and the WTO

The relationship between Chapter 19 and the WTO is an interesting one. The mechanisms in Chapter 19 and WTO differ in fundamental ways, and because of this the analysis will not lead to a decision about which is the 'better' of the two. Instead, it is more concerned with how the two systems can coexist.<sup>128</sup>

It is seen that Chapter 19 provides no substantive law to deal with AD and CVD law unlike those contained in Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures. Chapter 19 is simply a procedural mechanism for the parties to appeal and ultimately rely on the domestic law of the country which is levying the duty. The

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producers' for 'qualifying expenditures.' In January 2003 the WTO Appellate Body determined that the law violated the WTO Agreement. In November 2004 the WTO authorized suspension of concessions by several countries in response. Congress partly repealed the law in December 2005, with full repeal scheduled in October 2007. Chi Carmody: *Softwood Lumber* (n 3) 671.

<sup>127</sup> 'Lumber Coalition Files NAFTA Chapter 19 Constitutional Challenge', Inside US Trade, 16 September 2005.

<sup>128</sup> Michael S Valihora, 'NAFTA Chapter 19 or the WTO's Dispute Settlement Body: A Hobson's Choice for Canada?' 30 *Case W Res J Int'l L* 447.

only way to challenge the domestic AD/CVD law of another country is through WTO Dispute Resolution, where it is examined whether the domestic AD/CVD law of a country is in compliance with the WTO requirement. This is in contrast to a Chapter 19 panel that only examines whether an agency complies with a domestic law. Thus WTO Dispute Resolution and Chapter 19 are not alternatives but both paths can be pursued simultaneously. The distinction here lies in the fact that a Chapter 19 claim can be pursued by a private party, while the Government challenges the same claim at WTO Dispute Resolution (assuming that the domestic law is in contravention of WTO law). A private party cannot bring a claim in WTO, it has to persuade its Government to do so. That means that the party would require a lot of political support and lobbying. The Government may also refuse if the volume of trade is small. Also, the Government may not argue the case to the full satisfaction of the private party.<sup>129</sup> Thus to sum up, WTO Agreement establishes a regime of international law whereas Chapter 19 deals with a country's domestic law.

There are also distinctions in the treatment of evidence, the standard of review, and evolving self understandings of what panels are supposed to do in each of the systems. The WTO panels are supposed to make '*an objective assessment of the matter*', a standard that has been held to lie somewhere between *deference* and *de novo* review.<sup>130</sup> Chapter 19 panels on the other hand take the place of judicial review and are required to apply the same standard of review as in the domestic law of the country whose AD/CVD is being challenged.<sup>131</sup> This allows them to use the case law and doctrines which have already been established and developed under the domestic law.<sup>132</sup>

Also, there is little to define what panels can do or, conversely what national agency must do in response.<sup>133</sup> In several NAFTA cases, panels direct the DOC and the ITC to do certain

<sup>129</sup> For example, the United States reportedly refused to raise a 'like product' argument favoured by the domestic industry in a WTO challenge to a Mexican AD finding against high fructose corn syrup from the United States because the US practice in this respect was very similar to the Mexican practice that the industry wished to challenge. See Fructose Case (n 44).

<sup>130</sup> The applicable standard is neither *de novo* review as such, nor total deference, but rather the objective assessment of facts. Appellate Body Report, European Communities Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, para 117 (Jan. 16, 1998)

<sup>131</sup> In case of Softwood Lumber the Standard of Review of US is given under the Tariff Act of 1930, which requires review panels to "hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

<sup>132</sup> See *eg* Application of the Charming Betsy Doctrine in Softwood Lumber Dispute IV.

<sup>133</sup> Chi Carmody: Softwood Lumber (n 3).

things and this leads to specific results. This is in contrast to the WTO where under the DSU Article 19.1 panels finding a violation must recommend that a country bring its laws '*into conformity*' with a WTO Agreement, a vague term which is open to meaning and interpretation, so that the country involved may do take plethora of actions legally permissible but generally inconclusive. There is an absence of the power to remand the cases.

The Chapter 19 procedures require a panel decision to be issued within 315 days of the filing of the appeal (in practice however a Chapter 19 panel takes more time as discussed earlier) whereas WTO dispute resolution normally takes 15 to 17 months for a decision, and a further 15 months for implementation. Unlike NAFTA, WTO proceeding can be initiated before the initiation or even conclusion of the agency proceedings.<sup>134</sup>

There is always the scenario when both Chapter 19 panels and the WTO DSU review the same administrative finding and therefore could raise problems of confusion and estoppels.<sup>135</sup> This is answered to some extent in the case of *Mexico Soft Drinks*<sup>136</sup>, where the Appellate Body sidestepped the issue of potential conflict between the WTO Agreement and NAFTA by treating it as a matter of jurisdiction.<sup>137</sup> Its attitude contrasts with NAFTA decisions in *High Fructose Corn Syrup*<sup>138</sup> and *Lumber IV*, where bi-national panels have been relatively receptive to WTO decision making.

Some writers<sup>139</sup> feel it is prudent to incorporate the *doctrine of exhaustion of local remedies* meaning that resort to the DSU should be foreclosed until all domestic review proceedings challenging a national investigating authority's imposition of antidumping or countervailing

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<sup>134</sup> In effect, Members of the WTO can bring an 'as such' challenge to a domestic law on the ground that it contravenes the WTO, even though that domestic law may never been applied in fact. A Member can challenge a contravening domestic law that mandatorily requires conduct that is inconsistent with the WTO. United States Measures Treating Export Restraints as Subsidies, WT/DS194 (2001).

<sup>135</sup> Chi Carmody: Softwood Lumber (n 3). 'Canadian Appeal of WTO Lumber Decision to focus on Standard of Review', Inside U.S. Trade (18 Nov 2005).

<sup>136</sup> Appellate Body Report, Mexico Tax Measures on Soft Drinks and Other Beverages, WT/DS308/AB/R (Mar. 6, 2006).

<sup>137</sup> The Appellate Body expressed the view that a decision to decline to adjudicate due to conflict with another dispute settlement mechanism would appear to diminish the right of a country to seek redress under the WTO Agreement. At the same time the Appellate Body also disclaimed any basis in the DSU for panels and the Appellate Body to adjudicate non WTO disputes.

<sup>138</sup> Fructose Case (n 44).

<sup>139</sup> Kevin C. Kennedy, 'Parallel Proceedings at the WTO and under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?' 39 Geo Wash Int'l L Rev 47. (Kennedy)



duties are exhausted.<sup>140</sup> The exhaustion doctrine should apply *a fortiori*, thus barring one NAFTA Party from bringing a complaint to the WTO against another NAFTA Party alleging a violation of the WTO AD or SCM Agreement until the NAFTA Chapter 19 process has run its course.<sup>141</sup> This will curb the tendency of the parties to undertake in forum shopping.

## Review of Literature

Some writers have studied and compiled data from the Chapter 19 panel decisions. It will be useful at this stage to review their conclusions about the same. *Patick Macrory*<sup>142</sup> found that since 1980, exports from Canada to the United States have been subject to more than 60 investigations, resulting in more than 20 orders, although as a result of revocations only 6 are now in effect, in most cases, the value of imports affected is low, and the current rate of duty assessed quite small. An almost identical number of investigations against imports from Mexico have resulted in 23 orders of which only nine are now in effect.<sup>143</sup> He concludes that were it not for *Softwood Lumber*, Canada would not have much to complain about the way in which it is now being affected by the U.S. antidumping or countervailing laws and should take advantage of the Chapter 19 process.

Writers (*Harry Clark and John Magnus*)<sup>144</sup> on the other hand claim that chapter 19 is not the dispute settlement mechanism for NAFTA which Chapter 20 is. Chapter 20 provides for rulings on the meaning of NAFTA itself. Chapter 19, by contrast, introduces an additional and unnecessary dispute settlement mechanism as it replaces judicial review of each country's unfair trade rulings. Their argument is that in the absence of Chapter 20, there no means of deciding true NAFTA disputes whereas without Chapter 19, there would be judicial review by domestic courts. Eliminating Chapter 19 would leave no hole in the agreement.<sup>145</sup>

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<sup>140</sup> Some writers feel the phenomenon of parallel WTO and NAFTA Chapter 19 proceedings, in which the exhaustion doctrine has not played a role, illustrates how domestic political pressure can force resort to every available international forum in order to win a trade remedy case. It simultaneously illuminates the frustration evident with the NAFTA Chapter 19 process by the parties that negotiated it, as well as the lack of firm commitment to this process.

<sup>141</sup> Kennedy (n 139).

<sup>142</sup> Patrick Macrory (n 8).

<sup>143</sup> *ibid.*

<sup>144</sup> Harry L Clark and John R Magnus, Editorial/Opinion: Fix NAFTA's Dispute System <<http://www.tradewinsllc.net/publi/Ch-19-JOC-9-95.pdf>> accessed 31 March 2012.

<sup>145</sup> *ibid.*

Suggestions for improving the flaws in the NAFTA Chapter 19 include having a small, permanent and professional NAFTA set of panelists. Professional training in case handling, the capacity to unify panel procedures, and greater consistency in the treatment of similar cases may be the answer to many of the questions posed above. A permanent panel may also answer the question of conflict of interest which continues to pose problems. While the appointment of professional panelists may limit concerns about national bias, it is unlikely to eliminate it.<sup>146</sup> Also, suggestion for completing Chapter 19 proceeding in 315 days entail putting time limits on formation of a panel by the Parties, with a default of appointment of panelists from the Roster at random by the Secretariat. This approach is similar to the system used by the WTO.<sup>147</sup>

The problem with enacting the above mentioned suggestions is that it is open to the possibility of a constitutional challenge in the United States on Article III<sup>148</sup>, the Appointments Clause<sup>149</sup>, and the Due Process Clause<sup>150</sup>.

*Gary Horlick*<sup>151</sup> has suggested a variety of changes to North American antidumping laws with which the researcher agrees vehemently. Most of his proposed changes to the NAFTA countries' laws or practices have to do with initiating issues (pre-initiation consultations and higher standards for initiating cases) and injury issues (higher preliminary injury standard, meeting competition defense, causation standard, de minimis market share/negligible imports, threat of material injury). Although these suggestions were made back in 1996, the

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<sup>146</sup> *ibid.*

<sup>147</sup> WTO DSU art 8.

<sup>148</sup> The purpose of the US Government duty is to restore balance to the private relationship between the cross-border economic competitors, which demands Article III judicial review. Under the NAFTA panel scheme, however, there can be no federal judicial oversight of the review process or the panels' substantive holdings, as the very mobilization of the NAFTA machine by an involved party necessarily wrests all jurisdictional power from the domestic judiciary.

<sup>149</sup> An Appointments Clause violation is when persons who are not appointed under the Appointments Clause are permitted to overrule federal officials who are officers of the United States. See Alan B Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement* (1992) 49 Wash & Lee L Rev 1299.

<sup>150</sup> Firstly, Chapter Nineteen opens the door to the possibility of judicial bias without providing an adequate level of built in procedural protection. Secondly, Chapter Nineteen bars Article III review and thereby permits potentially damaging misapplications of domestic law which, despite an error, may nevertheless go unchecked and be binding on the United States. Finally, the miscarriage of justice causes injury to members of the relevant domestic industry because U.S. federal law grants domestic producers the right to petition the Trade Representative to investigate unfair trade practices, they have a protected interest in the lawful determination of any resulting duties. Zachary Jacobs, 'One of These Things is not Like the Other: U.S. Participation in International Tribunals and Why Chapter Nineteen of NAFTA Does Not Fit' (2007) 45 Colum J Transnat'l L 868.

<sup>151</sup> Gary Horlick & Eleanor Shea (n 10).

researcher feels that these stand vindicated even in today's world. It's a sad state that little or no changes have been made to Chapter 19 over the course of years since its inception.

## Conclusion

The researcher feels the *Softwood Lumber* disputes over the years have shown the asymmetry in the two economies and the fact that Canada is vitally dependent on access to the U.S. market, whereas the reverse is simply not true. That is why retaliation under WTO is not a viable option for Canada. Does the settlement between U.S. and Canada undermine the credibility of finality Chapter 19 decisions?<sup>152</sup> The deal hands one billion dollars to U.S. interests that, according to multiple NAFTA panels, was erroneously collected and lawfully belongs to the Canadian lumber industry<sup>153</sup> because the U.S. refused to comply with the Panel decision. This raises the question of whether this can be blamed on the stronger bargaining power of a nation and its wilful neglect of the Chapter 19 decisions or the failure of the whole of Chapter 19. The researcher feels in order to counter questions like these a stronger enforcement mechanism needs to be evolved which lays more stress on strict compliance with the panel decisions. It might be useful in this regard to examine the enforcement mechanisms of the WTO and learn some lessons.

This dissertation suggests that the success that Chapter 19 has enjoyed is likely more a product of the politics underlying each dispute and less a result of the strength of the Chapter 19 mechanism. If the parties are intractably divided, deferring to the panels is unlikely to produce an outcome with which both parties will comply.<sup>154</sup> It is important to acknowledge the fact that while the Chapter 19 process failed to produce a binding outcome, it nonetheless helped frame the dispute in a way that indirectly led to an eventual agreement (eg. *Lumber III & Lumber IV*). Therefore even though Chapter 19 panels could not

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<sup>152</sup> Elliot Feldman, a trade lawyer who represented the Canadian lumber industry during the NAFTA panel process, told the Canadian House of Commons that '*I can tell you right now most Canadian lawyers are saying do not use Chapter 19 in the States. Don't do it. What's the point? You don't get your money back first of all. And you are going to get into this unbelievable business of people insulting each other in public.*' Simon V Potter, 'Canada and U.S. Approaches to Free Trade Agreements' (2005) Canadian Speaker, 31 Can-US LJ 23, 32.

<sup>153</sup> NAFTA Bi-national Panel Discussion, Certain Softwood Lumber from Canada: Final Affirmative Threat of Material Injury Determination, USA-CDA-2002-1904-07 (Aug. 31, 2004).

<sup>154</sup> Daniel N Adams, 'Back To Basics: The Predestined Failure of NAFTA Chapter 19 and its lessons for the Design Of International Trade Regimes' (2008) 22 Emory Int'l L Rev 20.

directly lead to the settlement of the disputes they did indeed set up the platform where memorandum of understandings and agreements could be arrived at. As far as the politics of trade disputes goes, there is a political angle to all contemporary disputes which take place in the international scenario. It will be impossible to study international trade disputes in isolation. Thus it is unfair to say that Chapter 19 as a whole is a failure. The researcher agrees that it has its drawbacks as have been previously examined but nothing which can not be corrected or amended.

The researcher feels that the rules of the World Trade Organization do not mean that Chapter 19 is superfluous. This is because they both deal with different subject matters. While WTO deals strictly with the international trading regime (Agreement on Subsidies and Countervailing Measures) where Governments can bring in action, Chapter 19 gives a vent to private parties to justify the AD/ CVD according to the domestic law of the country. WTO procedures therefore do not satisfy the need for true international dispute settlement in trade remedy cases. Therefore WTO and Chapter 19 are parallel and mutually exclusive mechanisms and can co-exist.

Though difficult to articulate, the important characteristics which are looked for in an adjudicatory body include procedural and substantive fairness, credibility, efficiency, impartiality, consistency, transparency, and well-reasoned decisions, the belief that we need a special organ of society composed of trusted men and women expert in the law and logical reasoning, who treat like cases alike.<sup>155</sup> NAFTA Chapter 19 according to the researcher does deliver on most of these promises albeit with some drawbacks, which can be improved upon in the future. The researcher thus argues for the retention of Chapter 19 rather than its 'phasing out' as has been put forth by some other learned writers on the subject.

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<sup>155</sup> Eric Pan (n 42) 389.



**A Critical Analysis of the Legality of  
Unilateral Declaration of Independence in  
the Light of the Right to Self  
Determination**

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## Abstract

*In a recent opinion, the International Court of Justice has held that a unilateral declaration of independence is not prohibited under international law. However, the ambit of the judgment is very narrow as it does not correlate such declaration with right to self-determination and preservation of territorial integrity. Since all these go hand-in-hand, this article will be an analysis of the judgment, its applicability, as well as the existence of the right of self determination under international law. The conflict with territorial integrity will be outlined so as to bring about the clear extent of overlap and the existing grey area on the matter.*

*The legality of Unilateral Declaration of Independence has to be assessed in light of various factors. First, the background of the Advisory Opinion of International Court of Justice in Kosovo will be analyzed and whether such decision offers any precedential value, determined. Second, if the reasoning by the Court in Kosovo is relied upon, the question as to whether the unilateral declaration is in accordance with general international law will have to be answered. Third, whether the declaration can derive its validity under specific international laws laid down by the Security Council Resolutions, in light of the Kosovo case. Fourth, the right to self-determination under international law or under the provisions of Colonial Resolution will be assessed and its correlation with unilateral declaration of independence illustrated. Fifth, the existing state practice will be chronologically examined, along with the precedents of successful secession till date. Finally, the criteria for statehood, which forms a basis for unilateral secession, will be outlined, and a pervasive examination done as to when the right to self-determination becomes so over-reaching that unilateral declaration of independence can be allowed.*

*“Self-determination could mean independence, confederacy, federal and autonomy.”*

- *Jalal Tabalani, President, Republic of Iraq*

## Introduction

The International Court of Justice<sup>1</sup> has held its recent opinion<sup>2</sup> that unilateral declaration of independence by Kosovo is not prohibited by international law. This opinion is indeed narrow as the Court has failed to look into the background which surrounds most unilateral declarations of independence. The Court has only contained its analysis to whether or not the declaration of Independence is prohibited under international law, instead of expanding its scope and including whether such declaration, keeping in mind the right to self-determination is in violation of international law. The author in this article seeks to argue that most unilateral declarations of independence are accompanied by a right to self-determination, and an analysis of such declaration and its validity has to take into focus the over-reaching right of self-determination. Though the focus of this article indeed is the legality of the Unilateral Declaration of Independence, such scope of legality will be argued keeping in mind the context and *erga omnes* obligation to facilitate self-determination.

The legality of Unilateral Declaration of Independence has to be assessed in light of various factors. *First*, the background of the Advisory Opinion of International Court of Justice in Kosovo will be analyzed and whether such decision offers any precedential value, determined. *Second*, if the reasoning by the Court in Kosovo is relied upon, the question as to whether the unilateral declaration is in accordance with general international law will have to be answered. *Third*, whether the declaration can derive its validity under specific international laws laid down by the Security Council Resolutions, in light of the Kosovo case. *Fourth*, the right to self-determination under international law or under the provisions of Colonial Resolution will be assessed and its correlation with unilateral declaration of independence illustrated. *Fifth*, the existing state practice will be chronologically examined, along with the precedents of successful secession till date. *Finally*, the criteria for statehood,

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<sup>1</sup> Hereinafter the ICJ.

<sup>2</sup> Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), ICJ Judgement dated 22 July, 2010. [Kosovo]

which forms a basis for unilateral secession, will be outlined, and a pervasive examination done as to when the right to self-determination becomes so over-reaching that unilateral declaration of independence can be allowed.

## **The Advisory Opinion of the International Court of Justice has no Binding Value**

The Advisory Opinion of the International Court of Justice does not have binding value on later decisions of this Court. Such a position can be established by Article 59 of the ICJ Statute.<sup>3</sup> Thus, the Advisory Opinion rendered by the Court in the *Kosovo case* has no precedential value on other cases. This reasoning is further supported by the statement of the Court regarding procedure before rendering its advisory opinion in the *Kosovo case*.<sup>4</sup> It can, however, be argued that even though Advisory Opinions are not binding, the reasoning followed by the Court can reflect customary international law. The possible effect of such argument and its relevance will be considered in course of this article.

## **The Validity of Unilateral Declaration of Independence is under General and Customary International law**

### **Condemnation of Certain Declarations of Independence by the Security Council**

In Kosovo, an ethnically separate part of Serbia was allowed unilateral secession, and such unilateral declaration of Independence was declared to be valid by the International Court under general and customary international law.<sup>5</sup> In the Advisory Opinion by the International Court of Justice,<sup>6</sup> the Court noted that in Kosovo, there was neither any

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<sup>3</sup> Statute of the International Court of Justice, June 26, 1945, 33 UNTS 993, Article 59, Article 68. [ICJ Statute]

<sup>4</sup> Press Release No. 2008/34, International Court of Justice, October 10, 2008, Procedure.

<sup>5</sup> Alexander Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2006) Max Planck UNYB 12

<[http://www.mpil.de/shared/data/pdf/pdfmpunyb/01\\_orakhel\\_12.pdf](http://www.mpil.de/shared/data/pdf/pdfmpunyb/01_orakhel_12.pdf)> accessed February 29, 2012.

<sup>6</sup> Kosovo (n2).



determination by the Security Council with respect to the situation existing at the time that the declaration was made, nor any examination regarding illegality attached to the declarations of independence on the basis of any unlawful use of force or any violations of norms of general international law, or *jus cogens*.<sup>7</sup> Thus, it can be concluded that there did not exist any situation in Kosovo which demanded such Security Council intervention, as has been the case in, *Southern Rhodesia*,<sup>8</sup> *northern Cyprus*,<sup>9</sup> and *Srpska*,<sup>10</sup> which condemn particular declarations of independence on the basis of the exceptional circumstances accompanying them.<sup>11</sup> In other scenarios where a situation accompanied by unlawful threat or use of force, which is usually the case, will have sufficient ground to fall under the ambit of exceptional circumstances as determined by the Court in Kosovo. Neither did the situation in Kosovo allow the ICJ to determine the case otherwise, nor was there any conflict with general international law.<sup>12</sup> Even if one agrees with the Kosovo judgement that there indeed is no prohibition on declaration of independence, the surrounding background facts of other cases can easily show that there is a clear illegality in such unilateral declaration, which has been acknowledged by the Security Council in the above resolutions as well as by the ICJ in Kosovo.<sup>13</sup> As the Court said in Kosovo, the international law of self-determination has developed massively, and now creates a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.<sup>14</sup>

However, though this decision has said that there is no prohibition of unilateral declaration of independence under general international law, such decision has come under immense criticism and scrutiny from various sources. The judgement, as seen above, has omitted the

<sup>7</sup> Kosovo (n2), para. 81; Stephan Talmon, 'Kosovo: The ICJ Opinion- What Next?' Opening Remarks, Summary of International Law Discussion Group meeting, Chatham House, September 21, 2010 < [http://users.ox.ac.uk/~sann2029/ChathamH\\_kosovo\\_ICJ\\_Paper.pdf](http://users.ox.ac.uk/~sann2029/ChathamH_kosovo_ICJ_Paper.pdf) > accessed February 29, 2012.

<sup>8</sup> Question concerning the situation in Southern Rhodesia, UN Security Council, Resolution 217 (1965), 20 November 1965, S/RES/217 (1965); Question concerning the situation in Southern Rhodesia, UN Security Council, Resolution 216 (1965), 12 November 1965, S/RES/216 (1965).

<sup>9</sup> Cyprus, UN Security Council, Resolution 514(1983), 18 November 1983, S/RES/514 (1983).

<sup>10</sup> Bosnia and Herzegovina, UN Security Council, Resolution 787(1992), 16 November 1992, S/RES/787 (1992).

<sup>11</sup> Kosovo (n2), para. 81.

<sup>12</sup> Kosovo (n2), para 81.

<sup>13</sup> Kosovo (n2), para 81.

<sup>14</sup> Kosovo (n2), para 81; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 31-32, paras. 52-53 [Namibia]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), para. 88. [Palestinian Wall]; Amardeep Singh, 'The Right of Self-Determination: Is East Timor a Viable Model for Kashmir?' 8(3) Hum. Rts. Brief 9 (2001); Talmon (n7).

scrutiny of certain Security Council Resolutions, simply and without justification on the basis that those resolutions concerned illegal declarations of independence, or them being accompanied by use of force or being of an exceptional nature.<sup>15</sup> Also, the interpretation of the Court itself answering the question posed whether such declaration is '*in accordance*' with international law as the lack of prohibition is debatable.

## The judgement of the Court involved a very cursory examination of general international law

This Court held that since international law does not contain any rule specifically prohibiting declarations of independence, any such declaration does not violate general international law.<sup>16</sup> However, it is submitted that such observation by the Court is based upon a very cursory examination of general international law and without assessment of the background or the authors of the declaration.<sup>17</sup> Judge Simma, who has criticised the Court's *modus operandi*,<sup>18</sup> says that the Court has limited the scope of its analysis, and did not enter into a deep assessment of both prohibitive and permissive rules of international law regarding declarations of independence as well as attempted acts of secession.<sup>19</sup> Interpreting the question posed by the General Assembly which asked whether such declaration was '*in accordance with international law*'<sup>20</sup> and as to whether there is any specific prohibition under international law, without looking into the background of the case, should not have been the Court's *modus operandi*, and thus the conclusion that if there is no such prohibition, then the declaration is *ipso facto* in accordance with international law is flawed. Such position was reiterated by the separate opinions of Judge Sepúlveda-Amor and Judge Yusuf.<sup>21</sup>

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<sup>15</sup> Kosovo (n2), para. 78.

<sup>16</sup> Kosovo (n2).

<sup>17</sup> Kosovo (n2); Dissenting opinion of Judge Bennouna, para. 31; Mushfig Mammadov, 'Traditional Gap: In The ICJ's Advisory Opinion On Kosovo' 4 (4) Caucasian Review of International Affairs (Autumn 2010) <[http://www.cria-online.org/Journal/13/Done\\_Traditional\\_Gap\\_in\\_the\\_Advisory\\_Opinion\\_of\\_the\\_ICJ\\_by\\_Mushfig\\_Mammadov.pdf](http://www.cria-online.org/Journal/13/Done_Traditional_Gap_in_the_Advisory_Opinion_of_the_ICJ_by_Mushfig_Mammadov.pdf)> accessed February 29, 2012.

<sup>18</sup> Kosovo (n2), Declaration by Judge Simma, para. 7.

<sup>19</sup> Ibid.

<sup>20</sup> Kosovo (n2), para. 49.

<sup>21</sup> Kosovo (n2), Separate opinion of Judge Sepúlveda-Amor; Kosovo (n2), Separate opinion of Judge Yusuf.

## The Validity of such Declaration under Specific International Law

In *Kosovo*, the Court held that Security Council Resolutions pertaining to the situation in Kosovo form the basis for international law as well.<sup>22</sup> Thus, the SC Res 1244 and the validity of such a declaration under the specific framework has to be examined in this case,, apart from verifying whether such declaration is in accordance with the provisions of the UN Charter<sup>23</sup> and the Helsinki Final Act.<sup>24</sup>

### Validity of Unilateral Declaration of Independence under the provisions of the UN Charter or the Helsinki Final Act

Nothing in the UN Charter anticipates the taking of territory from one State and awarding it to a new one. In fact, Article 2 (2) affirms the ‘*sovereign equality*’ of all UN members,<sup>25</sup> while Article 2 (4) stipulates that ‘*all members shall refrain ... from the threat or use of force against the territorial integrity or political independence of any State*’.<sup>26</sup> Irrespective of the fact whether the newly formed state has or has not sought UN Membership, it is bound by these principles which have evolved into peremptory norms of customary international law.<sup>27</sup> Also, since it is a sovereign, the original state is entitled to jurisdiction over the territory and permanent population of seceding state,<sup>28</sup> and to expect that no other State intrudes on this territory.<sup>29</sup> The seceding state, in a way, will also be acting contrary to the provisions of the *Helsinki Final Act*, Article 1 of which states that “*the participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty*”.<sup>30</sup>

<sup>22</sup> Kosovo (n2), para. 85.

<sup>23</sup> Charter of the United Nations, 15 U.N.C.I.O. 335 (Jun. 26, 1945) [UN Charter].

<sup>24</sup> The Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 [Helsinki Final Act].

<sup>25</sup> UN Charter (n23), Article 2(2).

<sup>26</sup> UN Charter (n23), Article 2(4).

<sup>27</sup> Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) ICJ Reports 1986, para. 189 and 202 [Nicaragua]. Lee M. Caplan, ‘State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory’ 97 The American Journal of International Law 741 (2003) <<http://www.asil.org/ajil/caplan.pdf>> accessed February 29, 2012.

<sup>28</sup> Ian Brownlie, *Principles of Public International Law* (5th ed, Clarendon Press Oxford, 1998), 289.

<sup>29</sup> Antonio Cassese, *International Law* (Oxford University Press, 2001) 89.

<sup>30</sup> Helsinki Final Act (n24), Article 1.

However, in General Assembly resolution 2625,<sup>31</sup> which reflects customary international law,<sup>32</sup> the General Assembly reiterated *'the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'*. This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. Thus, the scope of the principle of territorial integrity, reading into the above Resolution as well as the UN Charter and the Helsinki Final Act is confined to the sphere of relations between States and States only, which was noted by this Court in *Kosovo*.<sup>33</sup> In the case of newly seceding body of people, such an analogy cannot be applied as it is still not an official State, till it has made its unilateral declaration of independence. So there cannot be any violation of territorial integrity by such action, and therefore such Unilateral Declaration of Independence cannot be said to be violating the framework of the UN Charter or the other covenants establishing peremptory norms.

### The provision for Unilateral Declaration of Independence under specific law

Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law.<sup>34</sup> The Resolution 1244 contemplated only the formal retention of sovereignty by Serbia during the period of UN administration and clearly contemplated some other sovereign arrangement for Kosovo's final status, for which support can be drawn from the annexes of the resolution which called for the establishment of an *"interim administration to provide transitional administration while establishing ...provisional democratic self-governing institutions"*<sup>35</sup> Resolution 1244 lays down a provision for the establishment of an *"interim political framework agreement providing for a substantial self-government for Kosovo"* while taking into account the territorial integrity of

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<sup>31</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States (G.A. Res. 2625 (XXV)), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028. [Friendly Relations Declaration]

<sup>32</sup> Nicaragua (n27) paras. 191-193.

<sup>33</sup> Kosovo (n2), para. 80.

<sup>34</sup> UN Charter (n23), Articles 24 and 25.

<sup>35</sup> Resolution 1244, S/RES/1224 (1999) adopted on 10 June, 1999, Annex 2(5).

FRY.<sup>36</sup> The Court's various judgments have added to the customary nature of these resolutions and hence such resolutions can be interpreted to have authoritative value, and establish obligations under international law.<sup>37</sup> The adoption of Resolution 1244 (1999) by the Security Council was determined by the Court in Kosovo as clearly imposing international legal obligations.<sup>38</sup>

Moreover, Security Council resolutions can be binding on all Member States,<sup>39</sup> irrespective of whether they played any part in their formulation.<sup>40</sup> This was reaffirmed by the Court in *Kosovo*.<sup>41</sup> Further, to interpret the text of the Security Council resolutions, the Court laid down that one had to look through the terms of the resolution, the discussion leading to it, the Charter provisions invoked, as well as the surrounding circumstances governing the adoption of the Security Council resolution.<sup>42</sup> Such a scheme is also envisaged in the *Vienna Convention on the Law of Treaties*, wherein it is mentioned that one needs to not only look through the treaty in good faith but also ordinary meaning should be given to the treaty in their context and in light of its object and purpose.<sup>43</sup>

If under specific international law, as illustrated above, there is a clear mention of the objective of establishing substantial autonomy and meaningful self-administration, it can be argued that the drafters clearly envisaged a system of self-administration and self-government in the seceding state, in the manner acknowledged by the Security Council in Res 1244.<sup>44</sup> Resolution 1244 was a capacity building endeavour by the international community focused at the transition of power to the hands of the people of Kosovo for effective self-governance, and put forth a provisional framework, and international civil and

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<sup>36</sup> Resolution 1244 (n35), Annex 1.

<sup>37</sup> Serbia and Montenegro were first formed as a federation called the Federal Republic of Yugoslavia (FRY), following the breakup of Yugoslavia in 1992. Namibia (n14), p. 16; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 15, paras. 39-41; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127, paras. 42-44.

<sup>38</sup> Kosovo (n2), para. 85.

<sup>39</sup> Namibia (n14), para. 116.

<sup>40</sup> Ibid., para. 53.

<sup>41</sup> Kosovo (n2), para. 94.

<sup>42</sup> Kosovo (n2), para. 94.

<sup>43</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31. [VCLT]

<sup>44</sup> Resolution 1244, Article 1.

military presence in the form of UNMIK, who oversaw the steady transfer of power towards the self-governments in Kosovo.

The resolution 1244 must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, as in the resolution itself, the Security Council: *"1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2."* In Annex 1, the general principles sought to defuse the situation in Kosovo, first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A longer-term solution was also envisaged, in the form of *"a political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo."*<sup>45</sup>

It is important to note that even the Court in Kosovo observed that Security Council resolution 1244 (1999) was essentially designed to create an interim regime for Kosovo, with a view to channelling the long-term political process to establish its final status, and that it did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement. The Resolution did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

### The authority of the authors to pass such declaration

In Kosovo, an issue before the Court was whether the authors of the declaration derived their authority to unilaterally declare independence from the Security Council Resolution. The Court in *Kosovo* held that the authority for declaration of Independence did not arise out of the Assembly of Kosovo acting under the ambit of SC Res 1244, but as individual characters whose objective was not to act within the ambit of the limited scope of Res 1244,

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<sup>45</sup> Resolution 1244, Annex 2, para. 8.

but was to act beyond that order.<sup>46</sup> The authors as determined by the Court were acting in a different capacity, and the declaration of independence was authored irrespective of the provisional framework. Hence, if it can be shown that there was a link between the substantive actions of the authors and that of the existing Provisional Assembly, such a declaration must be rendered invalid.

## The Rights to Self-Determination under International Law

### Self-determination under international law

Self-determination is the right of people to '*freely determine their political status*'<sup>47</sup> and includes the option to become an independent state or freely associate or integrate with an independent state.<sup>48</sup> State practice and *opinio juris* since 1945 recognise a customary norm of self-determination.<sup>49</sup> The term finds mention in the UN Charter,<sup>50</sup> the Security Council's work relating to non-self-governing territories,<sup>51</sup> and the General Assembly's recognition of self-determination as a fundamental human right.<sup>52</sup> The right is also incorporated in the *International Covenant on Civil and Political Rights*<sup>53</sup> and the *International Covenant on Economic, Social and Cultural Rights*,<sup>54</sup> Further, this Court has recognised the customary nature of the right to self-determination.<sup>55</sup> All of the above, which clearly establish customary norms on self-determination, derived from the language of the General

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<sup>46</sup> Kosovo (n2), para. 105.

<sup>47</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1960) 66, Article 2. [Colonial Declaration]

<sup>48</sup> Friendly Relations Declaration (n31), 121, 124.

<sup>49</sup> North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, para. 77. [Continental Shelf]; James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> ed. (Oxford: Clarendon Press, 2006) 108-121; Antonio. Cassese, *Self-Determination of Peoples* (Cambridge: Cambridge University Press, 1995).

<sup>50</sup> UN Charter (n25), Articles 1(2), 55, 73(b), 76(b).

<sup>51</sup> Question Relating to Angola, SC Res. 163, UN SCOR, 16th Sess., Supp. April-June, UN Doc. S/4835 (1961), 7.

<sup>52</sup> Draft International Covenant on Human Rights and Measures of Implementation, GA Res. 421(V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 (1950) 42, 43.

<sup>53</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171. Hereinafter ICCPR.

<sup>54</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3. Hereinafter ICESCR.

<sup>55</sup> Namibia (n14), para 31; Western Sahara, Advisory Opinion, [1975] ICJ Reports 12, para. 31-33, [Western Sahara]; Case concerning East Timor (Portugal v. Australia), [1995] ICJ Reports 90, para.102. [East Timor]

Assembly Resolutions.<sup>56</sup> They clarify the scope and application of self-determination, as their widespread adoption is indicative of state practice and *opinio juris*.<sup>57</sup>

The right to self-determination for non-self governing territories flows from GA Res 1514<sup>58</sup> and 2626. The use of the words '*self-determination*' in the UN Charter clearly determines the universality of this right.<sup>59</sup> The ICJ has established the right of self-determination in a multitude of cases. In *Namibia*, the Court emphasized that the right of self-determination is a fundamental principle of international human rights law.<sup>60</sup> With respect to decolonization, the issue of self-determination came up in the *Western Sahara case*, where the Court determined that self-determination was essential for '*subsequent development of international law in regard to non-self governing territories*',<sup>61</sup> and established that Resolution 1514 had provided the basis for decolonisation and self-determination.<sup>62</sup> In the *Construction of A Wall* case, the Court observed that the current development in '*international law in regard to non self governing territories, as enshrined in the Charter of the United Nations, made the principle of self determination applicable to all.*'<sup>63</sup> The Court found that such construction impedes the exercise of the right of self-determination by the Palestinian people, and therefore is a breach of Israel's obligation to respect that right. Further, in the *East Timor case*, the ICJ recognised that the right of peoples to self-determination has an *erga omnes* character and is one of the essential principles of contemporary international law.<sup>64</sup>

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<sup>56</sup> Friendly Relations Declaration (n31); Colonial Declaration, (n26); Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Res. 1541(XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1960) 29, [Res. 1541].

<sup>57</sup> Nicaragua (n9), 101.

<sup>58</sup> Colonial Declaration (n47).

<sup>59</sup> UN Charter (n23), Article 55.

<sup>60</sup> Namibia (n14), paras. 52-53.

<sup>61</sup> Western Sahara (n47), para. 31.

<sup>62</sup> Ibid.

<sup>63</sup> Palestinian Wall (n14), para. 181.

<sup>64</sup> East Timor (n55), para. 102.



## ‘People’ or minority having the right to self-determination

The notion of self-determination is mentioned under the UN Charter, but it is debatable whether such mention is indicative of creating legal obligations.<sup>65</sup> However, subsequent General Assembly Resolutions have acknowledged that ‘*all peoples have the right to self-determination*’.<sup>66</sup> Though Common Article 1 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights 1966 state that ‘*all peoples have the right to self-determination*’,<sup>67</sup> ‘*peoples*’ is not defined, while minorities are afforded specific protection under Article 27 of the ICCPR.<sup>68</sup> The seceding state has to show that they fall under the category of ‘*peoples*’ entitled to independence under the principle of self-determination,<sup>69</sup> as even if the population is interpreted as minorities, they cannot be held to have the right of self-determination under international covenants.<sup>70</sup> For instance, while considering the *Aaland Islands question*, the League of Nations Special Rapporteurs found that the Swedish population in the Aaland Islands were no more than a Finnish minority without a right to independence from Finland.<sup>71</sup> Similarly, in the case of Gibraltar, over which Spain had sovereignty, the GA rejected the right of independence on the part of the population of Gibraltar, which comprised imported settlers from Britain, the colonizing power.<sup>72</sup>

On the other hand, the population can exercise the right to self-determination, in accordance with the definition of ‘*people*’ in the *Quebec case*, where it was established that people may include only a portion of the population of an existing state.<sup>73</sup> Apart from this, a right with respect to self-determination also flows from GA Res 1514, which establishes that

<sup>65</sup> UN Charter (n23) Article 1 (2), Article 55; Malcolm Shaw, *International Law* (5th ed, Cambridge University Press, 2003) 226; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995), 42.

<sup>66</sup> Colonial Declaration (n47), Article 2 stipulates that “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

<sup>67</sup> ICCPR (n53), Common Article 1; ICESCR (n54), Common Article 1.

<sup>68</sup> Article 27 ICCPR states that “In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

<sup>69</sup> UN Charter (n23) Article 1 (2), Article 55; ICCPR (n53), Article 1(1).

<sup>70</sup> ICCPR (n53).

<sup>71</sup> Aaland Islands Question, Report by the Commission of Rapporteurs, League of Nations Council Document B7 21/68/106, 318 (1921). [Aaland Islands Question]

<sup>72</sup> Question of Gibraltar, 68 G.A. Res. 2353 (XXII), U.N. Doc. A/6716 (Dec. 19, 1967). [Gibraltar Declaration]

<sup>73</sup> Reference re Secession of Quebec [1998] 2 S C R 217; 37 ILM, 1998, 1342, at para 124. [Quebec]

steps have to be taken, *'to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy autonomy and freedom.'*<sup>74</sup> So in keeping with *Western Sahara, Namibia and Construction of a Wall* cases, self-determination of seceding state has to be determined in accordance with GA Res 1514. Thus, the declaration of independence has to be established as valid in exercise of the right of self-determination. The GA Res 742 further allows *'emergence as a sovereign independent state'*<sup>75</sup> as an option for non-self-governing territories that have exercised the right of self-determination.

## There can be no violation of the territorial integrity of another State

The GA Resolutions which support self-determination, also lay down clearly that that no attempt can be made which is *'aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations'*.<sup>76</sup> Such position is furthered by similar clauses in the *Friendly Relations Declaration*<sup>77</sup> as well as the *1993 Vienna Declaration*,<sup>78</sup> which allow people to freely determine their political status, and thus encourages self-determination, yet discourages actions which impair the territorial integrity or political unity of sovereign and independent States.<sup>79</sup> Thus, we see that though self-determination has been recognized as a peremptory norm under international law,<sup>80</sup> such right has to be exercised *'within the framework of existing sovereign states and consistently with the maintenance of territorial integrity'*.<sup>81</sup> This, read with the previously stated peremptory norms under the UN Charter, exemplify that the highest regard must be given to the preservation of territorial integrity.

<sup>74</sup> Colonial Declaration (n47), Article 5.

<sup>75</sup> Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, GA Res. 742(VIII), UN GAOR, 8th Sess., Supp. No. 17, UN Doc. A/2630 (1953) 21, Article 6; Res.1541 (n35) Annex Principle VI.

<sup>76</sup> Colonial Declaration (n47), Article 6.

<sup>77</sup> Friendly Relations Declaration (n31).

<sup>78</sup> 1993 Vienna Declaration and Programme of Action, World Conference on Human Rights (1993) 32 ILM 1661, 1663 (25 June 1993).

<sup>79</sup> Friendly Relations Declaration, (n31) Principle 5, para 7; Vienna Declaration (n78), Principle 2, paragraph 3.

<sup>80</sup> East Timor (n55), para 102.

<sup>81</sup> Quebec (n73), para 122.

The right of secession in the form of self-determination has been usually confined to the context of decolonisation. While recognizing of the secession of *Western Sahara*<sup>82</sup> and *East Timor*<sup>83</sup> it has to be kept in mind that there was no infringement of territorial integrity of the occupying nations, as both the states had been decolonised and then invaded by neighbouring states, thus giving them the right to exercise the right to self-determination, in accordance with GA Resolution 1514. In the absence of any clear right to secession outside the colonial context, or an explicit recognition of the right within any of the above international conventions or resolutions or under the specific GA Resolutions, unilateral declaration of independence cannot be construed as an exercise of a legally valid exercise of the right of self-determination, as the territorial integrity of original state is clearly violated by such action.

### Valid exercise of the right of self-determination even if it violates territorial integrity

The only exception to the territorial integrity principle is when the government fails to *'represent the whole people belonging to the territory without distinction [and] without discrimination on grounds of race, creed or colour'*.<sup>84</sup> Secession *'can only be considered as an altogether exceptional solution, a last resort'*,<sup>85</sup> where the parent State committed widespread and systematic violations of human rights.

Although a state's territorial integrity is protected by international law,<sup>86</sup> as well as the framework under the right of self-determination cannot be overridden by the competing territorial claims of third states.<sup>87</sup> The Friendly Relations Declaration, which built up on the

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<sup>82</sup> Western Sahara (n55).

<sup>83</sup> East Timor (n55).

<sup>84</sup> Friendly Relations Declaration (n31), principle 5, para.7; James Crawford, the Creation of States in *International Law* 118 (2nd ed.2006); Quebec (n73), para.126.

<sup>85</sup> Aaland Islands Question (n71), 318.

<sup>86</sup> Colonial Declaration (n47), Principle 6; Friendly Relations Declaration (n31), Principle 5(7).

<sup>87</sup> Western Sahara (n55), at para. 36.

Colonial Declaration, brought about an important distinction, as it suggested that people had a right to secede from an established state, if the government does not '*represent the whole people belonging to the territory without distinction [and] without discrimination on grounds of race, creed or colour*'.<sup>88</sup> In the Vienna Declaration, the right was expanded against any government that is unrepresentative of people who are defined by characteristics not limited to race, creed or colour.<sup>89</sup> Secession can only be considered as an altogether exceptional solution, a last resort,<sup>90</sup> like the situation in Bangladesh, where the parent State committed widespread and systematic violations of human rights.<sup>91</sup> The decision regarding unilateral declaration of independence must be considered keeping in mind '*grave violations of human rights*'. The main features which can obstruct the exercise of territorial integrity, as they show a discrimination on the part of the government are all applicable in this case, namely, 1) low degree of representation and a total blockage of the population from a meaningful realisation of its political, economic, social and cultural development; 2) systematic discrimination and the commitment of gross human right violations; 3) the commitment of acts seriously attacking the physical existence and integrity of the population; and 4) the declaration of independence made as a last resort.

While the first three have to be determined on a case to case basis, distinguished scholars have introduced a general principle on self-determination outside the colonial context, whereby a territory could secede if '1) all peaceful methods of resolving the dispute between the government and the group claiming an unjust denial of internal self-determination have been exhausted; (2) a demonstration that the persons making the group's self-determination claim represent the will of the majority of that group; and (3) a resort to the use of force and a claim to independence is taken only as a means of last resort.'<sup>92</sup> If a seceding population meets all of these requirements, because its people exhausted all peaceful methods to gain self-determination, and the final declaration can be accorded a representation of the will of the people, the action can be declared as a means

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<sup>88</sup> Friendly Relations Declaration (n31).

<sup>89</sup> 1993 Vienna Declaration and Programme of Action, World Conference on Human Rights (1993) 32 ILM 1661, 1663 (25 June 1993).

<sup>90</sup> Aaland Islands Question (n71), 318.

<sup>91</sup> David Raic, *Statehood and The Law of Self-Determination* 332-372 (2002).

<sup>92</sup> Charney, Jonathan I. 'Self-Determination: Chechnya, Kosovo, and East Timor' (2001) 34Vanderbilt Journal of Transnational Law 445.

of last resort. The opinion in Quebec further supports this, as it recognizes self-determination in a non-colonial context and it states that the right to secession is recognized when '*a people is blocked from the meaningful exercise of self-determination internally*.'<sup>93</sup> The above observations clearly show that the territorial integrity principle can be altered, and self-determination can have priority in light of the exceptional circumstances cited above.

## **State Practice Does Not Show Any Right to unilateral Declaration of Independence**

The secessions till date do not also provide any ground for justifications of the right to unilateral declaration of independence. The Bangladesh secession can be distinguished because of geographical separation and military operations by West Pakistan<sup>94</sup> which involved widespread violations of human rights and the deaths of over one million Bengalis.<sup>95</sup> The Katanga secession from Republic of Congo was declared illegal by the Security Council.<sup>96</sup> The Biafran claim for independence was also rejected by the UN and the Organization of African Unity.<sup>97</sup> The declaration of independence by the Baltic States from USSR can be regarded as instances of revived statehood, as opposed to cases of unilateral secession.<sup>98</sup> As the Badinter Arbitration Commission's clearly declared that the SFRY was '*in the process of dissolution*',<sup>99</sup> the independence of Croatia, Slovenia, Macedonia and Bosnia-Herzegovina cannot be regarded as assertions of a general right of secession.<sup>100</sup> The creation of the Czech Republic and Slovakia in 1993 is also based on a process of consensual dissolution, achieved under the Constitution Act of 1992.<sup>101</sup> The secession of Montenegro from the Union of Serbia and Montenegro occurred after a majority voted in favour of

<sup>93</sup> Quebec (n73), 217.

<sup>94</sup> David Raic, *Statehood and The Law of Self-Determination* 339 (2002).

<sup>95</sup> Ibid.

<sup>96</sup> The Congo Question, UN Security Council, Resolution 169 (1961), 24 November 1961, S/RES/169 (1961).

<sup>97</sup> OAU Document AHG/Res 51(VI), Organization for African Unity; Raic (n71), 334.

<sup>98</sup> Rein Mullerson, 'The Continuity and Succession of States, by Reference to the Former Ussr and Yugoslavia', 42 *International and Comparative Law Quarterly* (1993), 65.

<sup>99</sup> Opinion No. 1, Conference on Yugoslavia, Arbitration Commission, 29 November 1991, 92 ILR 162; The Socialist Federal Republic of Yugoslavia (SFRY) was the Yugoslav state that existed post abolition of the Yugoslav monarchy till 1992.

<sup>100</sup> Christian Tomuschat, *Secession and self-determination in SECESSION: INTERNATIONAL LAW PERSPECTIVES* (Marcelo G. Kohen ed., Cambridge University Press, 2006), 32.

<sup>101</sup> Constitutional Act. No. 542/1992 Col. on the dissolution of the Czech and Slovak Federative Republic.

independence,<sup>102</sup> as a part of the Belgrade Agreement.<sup>103</sup> The Eritrean independence also happened as a plebiscite under UN observation, with the consent of the Ethiopian government. East Timor's declaration of independence cannot be regarded as a case of secession, given that East Timor's incorporation into Indonesia was a direct result of the 1975 unlawful invasions and annexation of this former non-self governing territory.<sup>104</sup>

The international community has favoured the sovereignty and territorial integrity of the parent state, for instance, Chechnya, the Republika Srpska, Biafra and Katanga. There cannot be any *right* to unilateral secession in international law, and must be determined on a case by case analysis under customary international law. In the *North Sea Continental Shelf Case*, the ICJ stipulated that in order to prove the existence of a norm of customary international law, 'state practice, including those States whose interests are specifically affected, should have been both extensive and virtually uniform...and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved' (*opinio juris*).<sup>105</sup> However, as we see state practice in itself is totally lacking as far as the suggested rule is concerned. With respect to *opinio juris*, we can conclude that apart from the exceptional case of Bangladesh, there has been no other case of unilateral secession which shows intent on the part of the state to secede without the consent of the parent state. Consequently, customary international law does not explicitly recognise a right for the population of the seceding state to secede unilaterally.

## The Criteria of Statement

### The criteria of being a state

To consider whether a population has the makings of a territory that could be an independent country, the criteria listed in the *Montevideo Convention on Rights and Duties of States*,<sup>106</sup> which codifies the four requirements that are considered the customary

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<sup>102</sup> Rick Fawn, 'The Kosovo –and Montenegro – effect' (2008) 84 (2) International Affairs 269, 276.

<sup>103</sup> Agreement on Principles of Relations between Serbia and Montenegro within the State Union (2002).

<sup>104</sup> East Timor (n55).

<sup>105</sup> North Sea Continental Shelf case, ICJ Reports (1969), para. 74.

<sup>106</sup> Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19. [Montevideo Convention]

characteristics of statehood.<sup>107</sup> The requirements are: (1) a permanent population; (2) a defined territory; (3) a government; and (4) a capacity to enter into relations with other States.<sup>108</sup> Only if the above four criteria are met can a state claim the right to form a state.

## The doctrine of *uti possidetis juris* and its importance in the context of self-determination

The theory of *uti possidetis juris* prescribes that borders of new states follow the administrative boundaries of the antecedent colonial power.<sup>109</sup> This Court in *Frontier Dispute* defined *uti possidetis juris* as ‘a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers’,<sup>110</sup> and that *uti possidetis juris* is ‘a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs’.<sup>111</sup> As a former colony which has acquired independence from a colonizer, a seceding population can claim sovereignty over the territory under *uti possidetis juris*. The occupation of the territory by another state does not obstruct the operation of *uti possidetis juris*. This Court declared in *Frontier Dispute* that, under the principle of *uti possessionis juris*, ‘where the territory...is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title’.<sup>112</sup> Such prevalence of legal right is further authorised by the Court when it says that the purposes of such a doctrine is to secure ‘respect for the territorial boundaries at the moment when independence is achieved’<sup>113</sup> and preventing the usurpation and renewal of colonization in the territories of new States.<sup>114</sup> The basis for such a doctrine, as made clear by the Court is to prevent such re-colonization of a weaker country by a

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<sup>107</sup> Written Statement of the United States of America, Concerning the Request of the UN General Assembly for an Advisory Opinion on the Question of the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Apr. 17, 2009); D.J. Harris, (ed), *Cases and Materials on International Law* 99 (6th Ed., Sweet and Maxwell, London, 2004).

<sup>108</sup> Montevideo Convention (n106).

<sup>109</sup> Case Concerning the Frontier Dispute (Burkina-Faso v. Mali), [1986] I.C.J. Rep. 554, 565. [Frontier Dispute]

<sup>110</sup> Frontier Dispute (n110), para. 23.

<sup>111</sup> Frontier Dispute (n110), para.20; Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nica. v. Hond.), Judgment of Oct. 8 2007, para.151.

<sup>112</sup> Frontier Dispute (n110), para.63.

<sup>113</sup> Frontier Dispute (n110), para. 20, 23.

<sup>114</sup> Frontier Dispute (n110), para.23; Malcolm Shaw, ‘Peoples, Territorialism and Boundaries’ 8 *European Journal of International Law* 478, 492 (1997).

powerful one. However, there has been no recognition of this principle under customary international law.<sup>115</sup>

## The defence of acquisitive prescription

Even if a seceding state derived title *uti possidetis juris*, such title could have passed to another state through acquisitive prescription. Prescription arises where possession is initially wrongful, but the legal title holder fails to assert their rights.<sup>116</sup> This Court has on several occasions held that title can be lost by long and uninterrupted possession by another.<sup>117</sup> It is a norm of customary international law.<sup>118</sup> To acquire title by prescription, possession must be *first*, exercised *à titre de souverain*; *second*, peaceful and uninterrupted; *third*, persist for a reasonable period; and *fourth*, be public.<sup>119</sup>

Further, possession must be *à titre de souverain*, which means that they were performed as a function of state authority.<sup>120</sup> Possession must be peaceful and uninterrupted, and hardly challenged by other states.<sup>121</sup> The lack of definite objections can prove tacit acquiescence, and rival claims to sovereignty.<sup>122</sup> Silence for even 31 years has been held to be acquiescence.<sup>123</sup> Diplomatic protests can be rendered insufficient if there is a competent international body before which it could bring its claim,<sup>124</sup> and acquiescence should be presumed. Also, possession persisted for a reasonable period. Possession must persist for a period such that there develops a '*general conviction that the present condition of things is in conformity with international order*'.<sup>125</sup> Possession for periods of 64 years, 60 years, and 50 years to be reasonable periods for acquiring sovereignty.<sup>126</sup>

<sup>115</sup> Case Concerning the Territorial Dispute (Libya v. Chad), [1994] I.C.J. Rep. 6, 89 (Separate Opinion of Judge Ajibola).

<sup>116</sup> D. H. N. Johnson, 'Acquisitive Prescription in International Law' (1950) 27 BYIL 332, 337.

<sup>117</sup> Fisheries (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18), 139 [Fisheries]; Kasikili/Sedudu Island (Botswana/Namibia) Judgement, ICJ Reports 1999, p. 1105. [Kasikili]

<sup>118</sup> Kasikili (n117), para. 94, 96; The Island of Palmas case (United States of America/ Netherlands), (Permanent Court of Arbitration, 1928), 2 UN Reports of International Arbitral 829, 839, 846. [Palmas]

<sup>119</sup> Kasikili (n117), para. 94.

<sup>120</sup> Kasikili (n117), para. 94.

<sup>121</sup> Palmas (n118), 867.

<sup>122</sup> Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan (India v. Pakistan) (1968), 17 R.I.A.A. 1, 75.

<sup>123</sup> Libya-Chad (n115) Separate Opinion of Judge Ajibola.

<sup>124</sup> The Chamizal Case (Mex. v. U.S.) 11 R.I.A.A. 309 (Int'l Boundary Comm. 1911), 328. [Chamizal Arbitration]

<sup>125</sup> L. Oppenheim, *International Law* (9th ed., Longman, 1992), 707.



As we have seen above, acquisitive prescription can arise due to the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another.<sup>127</sup> A State can only establish prescriptive title when contesting States acquiesce in its adverse possession of the territory.<sup>128</sup> Acquiescence can only be inferred when these States have remained '*silent without good reason in the face of acts in derogation of their rights*'.<sup>129</sup> In the *Chamizal* arbitration, the United States could not acquire prescriptive title over El Chamizal because Mexico had persistently made diplomatic protests against the adverse possession of the territory.<sup>130</sup> Continuous protesting against unlawful occupation cannot usurp the rightful sovereignty of the territory on the basis of acquisitive prescription.

## Conclusion

The above analysis shows us that the question pertaining to legality of unilateral declaration of independence under international law has to be constructed keeping in mind the right to self-determination. There are several modes of interpretation of this right, but none of them had been recognized by the International Court of Justice in its Advisory Opinion regarding Kosovo. While the background of the existing situation in Kosovo has not been outlined in detail, special regard has been given to those parts which are essential for establishing a right to self-determination in the form of unilateral declaration of independence. The right is definitely present under customary international law, but such right gets curbed in the light of exceptional circumstances or when it infringes on the territorial integrity of the original state. The failure to properly define 'people' and its distinction from minorities has proved to be of great hassle in the modern day.

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<sup>126</sup> Fisheries (n117); Libya-Chad (n115).

<sup>127</sup> Palmas (n118) 829, 839, 846; Fisheries (n117), 139; Kasikili (n117) p. 1105.

<sup>128</sup> Kasikili (n117); D.H.N. Johnson, 'Acquisitive Prescription in International Law' 27 British Yearbook of International Law 332, 346 (1950).

<sup>129</sup> Ian MacGibbon, 'The Scope of Acquiescence in International Law' 31 British Yearbook of International Law 143.

<sup>130</sup> Ibid at 323, 329.

The Court has restricted its ambit to simple existence of no prohibition of unilateral declaration under international law. It has not specially tackled the question of whether at all such declaration is valid under international law, correlating it with the right to self-determination and territorial integrity. The state practise till date, apart from exceptional cases, does not provide much substance allowing unilateral declaration of independence. In some specific cases, the right to self-determination can assume priority, especially in the colonial context, whereby the doctrine of *uti posseditis juris* takes a frontal stand. Unless such right is squandered by acquisitive prescription, such right allows a state to unilaterally secede.

The above observations go a long way to prove that in analysing a declaration of independence or unilateral secession, due regard must be placed on the right of self-determination and the *erga omnes* obligation to protect it. The means and ambit of such conjoined reading of the two rights has been elaborated above as it is clear that one cannot discuss the former without an analysis of the latter, and self-determination itself is guarded by the fort of territorial integrity, which is infringed by the act of unilateral secession.



# **The Interpretation of the Doctrine of Piercing the Corporate Veil by the UK Courts is More Successful Than By the US Courts**

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## Abstract

*This article takes a deeper look at the doctrine of piercing the corporate veil in corporate law and the way in which it has been interpreted by the UK and the US courts. This doctrine has been applied in order to balance the interests of shareholders and creditors and to prevent externalities. The main thread of the argument is that although the doctrine's elucidation remains inadequate in both jurisdictions, the UK courts have been more successful in construing it than the US courts. The UK courts have rejected various arguments that are often mistakenly seen as examples of piercing the corporate veil.*

## Introduction

Limited liability means that shareholders of a corporation are not personally liable for debts incurred or torts committed by the firm. If the firm fails, shareholders losses thus are limited to the amount the shareholders invested in the firm - i.e., the amount the shareholders initially paid to purchase their stock.<sup>1</sup> It means that regardless of how risky the company's investments are, and regardless of the losses they generate, the most the shareholders can lose is the value of their equity investment.<sup>2</sup>

The initial rationale for limited liability in the nineteenth century was that limited liability would facilitate the investment by members of the public, who were not professional investors, of their surplus funds in the many large capital projects which companies were being set up to carry on at that time, in particular the construction of a national network of railways.<sup>3</sup> Members of the public, whose primary activity and expertise did not lie with the running of companies, would be much less likely to be willing to buy shares in such companies, if the full range of their personal assets were to be put at risk.<sup>4</sup>

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<sup>1</sup> Bainbridge, *Corporate Law* (2nd ed., Foundation Press 2009), p. 48.

<sup>2</sup> Kershaw, *Company Law in Context* (OUP 2009), p. 708.

<sup>3</sup> Davies, Gower and Davies' *Principles of Modern Company Law* (8th ed., Sweet & Maxwell 2008), p.194.

<sup>4</sup> *ibid.*

The rationale for limited liability expanded later to include that it decreases the need to monitor agents. To protect themselves, investors could monitor their agents more closely; the more risk they bear the more they will monitor. Further, limited liability reduces the costs of monitoring other shareholders. Under unlimited liability, there is a need to monitor other shareholders, as the greater their wealth, the lower the probability that any one shareholder's assets will be needed to pay a judgment.<sup>5</sup> Limited liability also gives managers incentives to act efficiently by promoting free transfer of shares, makes it possible for market prices to reflect additional information about the value of firms and allows for more efficient diversification. Investors can cut risk by owning a diversified portfolio of assets.<sup>6</sup>

However, from the creditors' perspective, their claims are limited to the assets of the company and cannot be asserted against the shareholders' assets. There is an apparent disparity in the risks and rewards which are allocated to shareholders: they benefit, through limited liability, from a cap of their downside risk, whereas the chance of up-side gain is unlimited (Davies, p. 193). Limited liability does not eliminate ruin, and someone must bear losses when firms fail. The benefit to stockholders from limited liability is exactly offset by the detriment to creditors.<sup>7</sup>

Shareholders of a firm therefore reap all of the benefits of risky activities but do not bear all of the costs. There is externalisation of the risk that is in part borne by the creditors. Limited liability's greatest effect is on the probability that any given creditor will be paid *ex post*. Even if firms pay for engaging in risky activities, and thus take the right precautions, creditors of failed businesses are less likely to receive full compensation under a rule of limited liability.<sup>8</sup>

Limited shareholder liability also means that shareholders do not have to be concerned about possible losses arising from an investment that exceeds the value of the net assets of the business.<sup>9</sup> An investment with the scope for a good return may also involve a small

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<sup>5</sup> Easterbrook and Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991), p.41-43.

<sup>6</sup> *ibid.*

<sup>7</sup> n 2 above.

<sup>8</sup> Easterbrook and Fischel, *The Economic Structure of Corporate Law* (Harvard University Press 1991), p.50.

<sup>9</sup> Kershaw, *Company Law in Context* (OUP 2009), p. 710.

possibility of disastrous loss in excess of the value of the investment of the company. Because of limited liability, in calculating the expected return for shareholders associated with such an investment the calculation can ignore such expected losses to the extent they fall below the value of the company.<sup>10</sup>

## **The Need for the Doctrine**

In order to balance the interests of shareholders and creditors and to prevent externalities, one suitable mechanism that is employed is 'piercing the corporate veil.' Under this remedy, personal liability may be involuntarily thrust upon a shareholder for the company's debts. Limited liability entails negative externalities:-it allows shareholders to externalise part of the costs of their investment onto other corporate constituencies and, in a sense, to society at large. In appropriate cases, the veil piercing rules allow those injured by the corporation's shareholders to internalise the harm committed by the firm (Bainbridge, p.48).

The legal basis for this is obscure (Davies, p.195) regardless of the jurisdiction, whether in the UK or in the US. Judicial opinions in this area tend to open with vague generalities and close with concluded statements, with little or no concrete analysis in between. There are simply no bright line rules for deciding when courts will pierce the corporate veil.<sup>11</sup> However in the analysis that follows, it seems that the interpretation of the concept by UK courts is arguably more successful than that by courts in the US.

## **Rejection of General Arguments**

Challenges to the doctrine of separate legal personality and limited liability at common law tend to raise more fundamental challenges to these doctrines, because they are formulated on the basis of general reasons for not applying them such as fraud, that the company is the agent of the shareholder, that the companies are part of a "single economic unit" or even

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<sup>10</sup> *ibid.*

<sup>11</sup> Bainbridge, *Corporate Law* (2nd ed., Foundation Press 2009), p. 64.

that the “interests of justice” require this result.<sup>12</sup> In the UK, courts seem more reluctant to accept general arguments and the agency argument, the single economic unit argument and the fraud argument have not been regarded as instances of piercing the corporate veil.

The leading case is *Adams v Cape*<sup>13</sup> that concerned liability within a group of companies and the purpose of the claim is to ignore the separate legal personality of the subsidiary and make the parent liable for the obligations of the subsidiary towards involuntary tort victims (Kershaw, p.710). In this case, the court discusses the single economic argument and rejects it based on the *Salomon v Salomon and Co Ltd*<sup>14</sup> principle that courts cannot disregard the separate legal existence of the company of the subsidiary to enforce creditors’ rights against the group. It was thus indisputable that each of Cape, Capasco, N.A.A.C and C.P.C were in law separate legal entities. Nevertheless it was accepted that the wording of a particular statute or document may justify the court in interpreting it so that a parent and subsidiary are treated as one unit at any rate for some purposes. However, beyond that it was unwilling to go.<sup>15</sup>

Similarly in *DHN Food Distributors Ltd. v Tower Hamlets London Borough Council*<sup>16</sup> the court was unwilling to disregard limited liability in the group context. In this case, the parent company, D.H.N conducted business on the premises owned by a wholly owned subsidiary, whereas the vehicles of the business were owned by a second wholly owned subsidiary. When the business premises were compulsorily purchased, D.H.N was awarded compensation for disturbance of business, although it formally had no interest in the land. The three companies were treated as one undertaking but for the purpose of allowing D.H.N to claim compensation and avoid a bizarre result. However, the single economic argument is only to allow the courts to take into account the economic realities in relation to the companies concerned and cannot really be considered as piercing the corporate veil.

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<sup>12</sup> Davies, Gower and Davies’ *Principles of Modern Company Law* (8th ed., Sweet & Maxwell 2008), p. 202.

<sup>13</sup> [1990] Ch. 433.

<sup>14</sup> [1897] AC 22

<sup>15</sup> Davies, Gower and Davies’ *Principles of Modern Company Law* (8th ed., Sweet & Maxwell 2008), p. 202

<sup>16</sup> [1976] 1 WLR 852.

In the US, on the other hand, there seems to be an argument similar to the economic unit argument known as enterprise liability. Under *Pan Pacific Sash & Door Co. v Greendale Park, Inc.*<sup>17</sup> the basic standard for invoking enterprise liability requires a two-pronged test showing: 1) such a high degree of interest between the two entities that their separate existence had de facto ceased and 2) that treating the two entities as separate would promote injustice.<sup>18</sup> There is substantial overlap between the factors considered in such enterprise liability cases and the veil piercing cases. Indeed, while the remedies are conceptually distinct, in practice the line between them tends to blur. In many cases, much the same set of facts could be invoked to justify either or both remedies.<sup>19</sup> In the US, there is a need to more clearly distinguish the two remedies as there as seen in *Walkovszky v Carlton*<sup>20</sup> where the court used the same justification to reject the veil piercing and enterprise liability arguments.

In *Cape*<sup>21</sup>, the UK court also rejected the agency argument. It stated that there is no presumption of any agency relationship between the company and shareholders and in the absence of an express agreement between the parties; it would be very difficult to establish one.<sup>22</sup> In *Smith, Stone and Knight v Birmingham Corporation*<sup>23</sup>, the courts stated that only in rare cases can we confer that the company has acted as agent in the legal sense. It requires that the company has either express or ostensible authority to act as agent. Therefore the agency argument is more about applying proper agency law principles than piercing the corporate veil.

In the US, *Walkovszky's*<sup>24</sup> version of the alter ego doctrine treats limited liability as an expression of agency principles. Where the shareholders treat the corporation as their "alter ego", the firm is treated as their agent and the shareholders may be held vicariously

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<sup>17</sup> [1958] 166 Cal.App 3d 1220.

<sup>18</sup> Bainbridge, *Corporate Law* (2nd ed., Foundation Press 2009), p. 64.

<sup>19</sup> *ibid.*

<sup>20</sup> 18 N.Y.2d 414 (New York Court of Appeals, 1966).

<sup>21</sup> *ibid* 433.

<sup>22</sup> Davies, Gower and Davies' *Principles of Modern Company Law* (8th ed., Sweet & Maxwell 2008), p. 206.

<sup>23</sup> [1939] 4 All ER 116.

<sup>24</sup> *ibid* 414



liable for the corporation's actions. This formulation introduces a number of unfortunate doctrinal complications and, indeed, errors into limited liability law.<sup>25</sup>

The 'sham' or 'fraud' argument is also rejected by UK courts and distinguished from the concept of piercing the corporate veil. In *Jones v Lipman*<sup>26</sup>, the defendant tried to frustrate his obligation to transfer title in real property to the plaintiff by contributing the land to the company formed for that specific purpose. This is an instance of evading an existing legal obligation or fraudulent behaviour and not an instance of piercing the corporate veil. It was similarly held in *Guilford Motor Co. Ltd v Horne*<sup>27</sup> where the defendant used a company to circumvent restrictions on trading activities he had agreed to with his former employer. An injunction was granted not only against the defendant but also against the company. The result can again be explained by fraudulent behaviour without recourse to the doctrine of lifting the veil. Such conceptual distinctions do make the UK court interpretation of this doctrine superior to that by the US courts.

## The Real Piercing Argument

In *Cape*,<sup>28</sup> the court recognised that the real piercing argument lay in one exception-permitting disregard of the company when the corporate structure is a "mere façade concealing the true facts".<sup>29</sup> "Facade" or "sham" have been replaced an assortments of epithets which judges have employed in earlier cases such as "device", "creature", "stratagem", "mask", "puppet" and even "a little hut".<sup>30</sup> However, the court did acknowledge that it was left with a rather sparse guidance as to the principles which should determine the court in determining whether or not the arrangements of a corporate group involve a façade.<sup>31</sup> This means that though arguably the UK has had a better interpretation of the doctrine of piercing the veil, there is still a lot of uncertainty and a lack of a

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<sup>25</sup> Bainbridge, *Corporate Law* (2nd ed., Foundation Press 2009), p. 52.

<sup>26</sup> [1962] 1 WLR 852.

<sup>27</sup> [1933] Ch. 935.

<sup>28</sup> *ibid* 433.

<sup>29</sup> Davies, Gower and Davies' *Principles of Modern Company Law* (8th ed., Sweet & Maxwell 2008), p. 204.

<sup>30</sup> *ibid*.

<sup>31</sup> *ibid*.

comprehensive guidance of the principles to be followed when determining whether the company is a sham.

However, the court did not accept that it should lift the veil merely because the corporate structure has been used so as to ensure that the legal liability in respect of particular future activities of the group will fall on another member of the group rather than the defendant company.<sup>32</sup> The court was recognising that even though this may not seem moral, it is perfectly legal.

A director would be held personally liable where he misappropriates company assets but those assets were taken by a company formed by the director rather than the director personally. This would imply the company had been formed as a façade. In *Trustor AB v Smallbone and Others*<sup>33</sup>, the managing director of a Swedish company, Mr. Smallbone, misappropriated moneys which he transferred into the account of an English company, Introcom, controlled by him via a complicated trust structure. In his judgment, Sir Andre Morrit V-C held that the court was entitled to pierce the corporate veil and recognise the receipt of the company as that of the individual in control of it since it was used as a device or façade to conceal the true facts.

However, in the US, a different standard is used known the alter ego or instrumentality theory. In *Fletcher v Atex, Inc.*<sup>34</sup>, the plaintiffs filed suit against Atex, Inc., and its parent, Eastman Kodak Company ("Kodak"), to recover for repetitive stress injuries that they claimed were caused by their use of computer keyboards manufactured by Atex. The courts held that to prevail on an alter ego claim under Delaware law, a plaintiff must show 1) that the parent and subsidiary "operated as a single economic entity" and 2) that an "overall element of injustice is unfairness is present." There is therefore no requirement to prove fraud in order to pierce the corporate veil. The plaintiff's claim failed because they offered no evidence of the second prong of the alter ego analysis; they did not prove that there was an overall element of injustice or unfairness.

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<sup>32</sup> *ibid.*

<sup>33</sup> [2002] BCC 795.

<sup>34</sup> 68 F.3d 1451 (United States Court of Appeals for the Second Circuit, 1995).

US law has not developed any clear rules as to when the corporate veil may be pierced. Professor Powell formulated a three prong test that was restated in *Lowendahl v The Baltimore and Ohio Railroad Company*<sup>35</sup>. This was that when applying the so-called instrumentality rule, courts ought to require plaintiffs to show: 1) control of the corporation by defendant that is so complete as to amount to total domination of finances, policy and business practices such that the controlled corporation has no separate mind, will or existence; 2) such control is used to commit a fraud, wrong or other violation of plaintiff's rights; and 3) the control and breach of duty owed to plaintiffs was a proximate cause of the injury.<sup>36</sup>

When interpreting cases, courts refer to laundry lists as in *Associated Vendors, Inc. v Oakland Meat Co.*,<sup>37</sup> where the trial court disregarded the corporate entity based on a long list of factors among them: [1] Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorised diversion of corporate funds or assets to other than corporate uses; [2] the treatment by an individual of the assets of the corporation as his own; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same; [4] the holding out by an individual that he is personally liable for the debts of the corporation; [5] the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; [6] the identical equitable ownership in the two entities; [7] the identification of the equitable owners thereof with the domination and control of the two entities; [8] identification of the directors and officers of the two entities in the responsible supervision and management; [9] sole ownership of all stock in a corporation by one individual or the members of a family; [10] the use of the same office or business location; [11] the employment of the same employees and/or attorney; [12] the failure to adequately capitalise a corporation; [13] the total absence of corporate assets and undercapitalisation; [14] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; [15] the concealment and misrepresentation of the identity of the responsible

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<sup>35</sup> 247 A.D. 144 [Supreme Court of New York, 1936].

<sup>36</sup> Bainbridge, *Corporate Law* (2nd ed., Foundation Press 2009), p. 53.

<sup>37</sup> 26 Cal. Rptr. 806 (District Court of Appeal, 1962)

ownership, management and financial interest, or concealment of personal business activities; [16] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; [17] the use of the corporate entity to procure labour, services or merchandise for another person or entity; [18] the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; [19] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; [20] and the formation and use of a corporation to transfer to it the existing liability of another person or entity.

The resort to laundry lists is another instance of the vague interpretation of the doctrine by the US courts. There are no fewer than 20 separate (albeit overlapping) factors, many of which have multiple sub factors. Most of which are wholly unrelated to the policy concerns presented by limited liability. Worse yet, the courts fail to give any guidance as to how the factors should be weighed or balanced.<sup>38</sup> Factors such as the fact that there is identical equitable ownership in both corporations do not provide good reason to pierce the corporate veil. The criteria is therefore flawed.

Moreover, among the different state legal systems, there is a varied interpretation of the doctrine depending on the degree of emphasis placed on any one of the criteria set out in *Lowendahl*<sup>39</sup>. This makes the US interpretation of the doctrine even more problematic. In *Zaist v Olson*<sup>40</sup>, the court was clear that Delaware law permits a court to pierce the corporate veil of a company 'where there is fraud or where it is in fact a mere instrumentality or alter ego of its owner'. The facts established that Olson controlled East Haven and accordingly the first prong of the instrumentality test was satisfied. Unfortunately, as one of the dissenting judges pointed out, the plaintiff failed to show-and the majority did not require it to show-that the other two elements of the instrumentality standard had been satisfied.<sup>41</sup> The case was merely decided on the premise that Olson so

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<sup>38</sup> Bainbridge, *Corporate Law* (2nd ed., Foundation Press 2009), p. 58.

<sup>39</sup> *Ibid* 144.

<sup>40</sup> 227 A.2d 552 (Conn, 1967).

<sup>41</sup> *Ibid* 433.

completely controlled East Haven that that corporation had 'no separate mind, will or existence of its own.' without regard to the other criteria.

For this reason, House, Associate Justice, dissented:

"I have no quarrel with the statement of legal principles expounded in the majority opinion, but I do not agree that the facts found by the referee support a conclusion that the control which the defendants Martin Olson and Martin Olson, Inc., undoubtedly did exercise over The East Haven Homes, Inc., was used by them or either of them 'to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of' the plaintiffs' legal rights...' The referee who heard the evidence in this case did not find that this essential element had been proven, nor, in my opinion, do the facts found support a conclusion that it existed. Accordingly, I believe that there was error in the judgment and it should be reversed."

Other states, perhaps most notably California and Illinois, use a slightly different test which requires plaintiffs to meet two requirements: 1) the corporation was the controlling shareholder's alter ego; and 2) adherence to the limited liability rule would sanction a fraud or promote injustice.<sup>42</sup>

In *Dewitt Truck Brokers, Inc. v W.Ray Flemming Fruit Co.*<sup>43</sup>, the court held that 'in an appropriate case and in furtherance of the ends of justice', it would disregard the corporate form. The emphasis placed by the South Carolina court was on an element of injustice or fundamental unfairness. The corporate veil can be pierced in appropriate circumstances even in the absence of fraud or wrongdoing. The court remained adamant that the mere fact that all or almost all of the corporate stock is owned by one individual or a few individuals, will not afford sufficient grounds for disregarding the corporate entity.

It was only when the substantial ownership of all the stock is combined with other factors resulting in elements of injustice that the veil would be pierced. The court then went on to

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<sup>42</sup> *ibid.*

<sup>43</sup> 540 F.2d 681 (US Court of Appeals for the Fourth Circuit, 1976).

list examples of factors that when taken into account could lead to the corporate entity being disregarded such as the one-man or closely-held corporation being grossly undercapitalised, failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. It was a classic case of the US courts resulting to a laundry list to justify its decision.

Under Virginia law, a court must find 1) undue domination and control of the corporation by the defendant and 2) that the corporation was a device or shams used to disguise wrongs, perpetuate fraud or conceal crime.<sup>44</sup> In *Perpetual Real Estate Services, Inc. v Michaelson Properties, Inc.*<sup>45</sup> the Supreme Court of Virginia has specifically held that proof that a person dominates the corporation or is the alter ego is not enough to pierce the corporate veil. The second limb of the test must be present. However, even though the plaintiff failed to show that Michaelson had used the corporation to 'disguise wrongs', the jury of the lower court had stripped him of his protection against personal liability to which he was entitled under the corporate law of Virginia. Their basis was that the agreement resulted in a 'fundamental unfairness'. The Supreme Court overruled this stating that fairness is for the parties to the contract to evaluate.

The Supreme Court of Texas in *Castleberry v Branscum*<sup>46</sup> held that the court was entitled to disregard the corporate fiction even though corporate formalities have been observed and corporate and individual property have been kept separate if the corporate form has been used as 'an unfair device to achieve an inequitable result.' Later on, the court held that "to prove there has been a sham to perpetrate a fraud, tort claimants and contract creditors must show only constructive fraud. We distinguished constructive fraud from actual fraud in *Archer v Griffith*: Actual fraud usually involves dishonesty of purpose or intent to deceive, whereas constructive fraud is the breach of some legal or equitable duty which, irrespective

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<sup>44</sup> *ibid*

<sup>45</sup> 974 F.2d 545 (Fourth Circuit, 1992).

<sup>46</sup> 721 S.W.2d 270

of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests. ”

The criteria set out here is a dangerous one as it means that in Texas, the corporate form will be disregarded even where there was no actual fraud involved. It renders the whole economic rationale behind limited liability to be null and void.

These tests do not seem useful as ex ante guides to planning the capital structure and operation of a newly formed corporation. The generalised phrases ‘sanction a fraud or promote injustice’ are useless in predicting the outcome of a case.<sup>47</sup> The courts seem unclear as to where the boundaries may lie.

The US courts have also cited a number of factors that justify veil piercing in addition to their laundry lists. The courts give due regard to the nature of the claim. Courts are far less willing to disregard the corporate entity in contract cases than in tort cases. The rationale is that contract creditors can protect their interests by demanding a personal guaranty from the firm’s controlling shareholders (Bainbridge, p.57). In *Perpetual*<sup>48</sup>, it was stated that courts have been extraordinarily reluctant to lift the veil in contract cases where the ‘creditor has willingly transacted business’ with the corporation. This is because the party seeking relief in a contract case is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity and is expected to suffer the consequences of limited liability associated with the corporate business form. Thus in contract cases, where ‘each party has a clear and equal obligation to weigh the potential benefits and risks of the agreement’ courts have emphatically discouraged plaintiffs seeking to disregard the corporate form.

However, the logic employed here is flawed in cases where the shareholder caused the creditor’s failure to protect himself. Hence, for example, the veil should be pierced in contract cases if the corporation or the controlling shareholder misrepresented the firm’s

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<sup>47</sup> *ibid.*

<sup>48</sup> *ibid* 545.

financial condition to a prospective creditor.<sup>49</sup> The rationale for this distinction is that where corporations must pay for the risk faced by creditors as a result of limited liability, they are less likely to engage in activities with social costs that exceed their social benefits (Easterbrook and Fischel, p.58.) Contract creditors, in other words, are compensated ex ante for the increased risk of default ex post.<sup>50</sup> Tort creditors, by contrast are not compensated except to the extent that the prices of the firms' products adjust. For the costs of excessive risk taking to be fully internalised, creditors must be able to assess the risk of default accurately. If the creditor is led into believing that the risk of default is lower than it actually is, the creditor will not demand adequate compensation.<sup>51</sup>

A final factor emphasised by US courts in deciding whether to go beyond the corporation's assets is the extent of the firm's capitalization. The rationale is the lower the firm's capital, the greater the incentive to engage in excessively risky activities.<sup>52</sup> In *Walkovszky*<sup>53</sup>, according to Keating's dissent, the attempt to carry on a business in corporate form without providing sufficient financial base was an abuse of the corporate process justifying a piercing of the corporate veil (Bainbridge, p.61) He stated that:

"What I would merely hold is that a participating shareholder of a corporation vested with a public interest, organized with a capital insufficient to meet liabilities which are certain to arise in the ordinary course of the corporation's business, may be held personally responsible for such liabilities. Where corporate income is not sufficient to cover the cost of insurance premiums above the statutory minimum or where initially adequate finances dwindle under the pressure of competition, bad times or extraordinary and unexpected liability, obviously the shareholder will not be held liable."<sup>54</sup>

However, there is no statutory basis for treating undercapitalisation as grounds for piercing the veil. In most states, the corporation statute neither requires any initial contribution nor

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid 414.

<sup>54</sup> Ibid.



mandates the maintenance of any minimum capital.<sup>55</sup> Given that states do not require the maintenance of minimum capital, the US courts have a flawed logic in using this criteria to disregard the corporate entity.

There are practical considerations such as reduction of tax liability, lower risk of debt, limited funds available to founders of small businesses which will often lead responsible business owners to prefer debt finance over equity. Even large amounts of equity may be used to cover operating expenses and therefore offer no protection to future creditors. Therefore the connection between initial contribution and creditor protection is unclear.

Moreover, absent any misrepresentation, it is the voluntary creditor's fault that he did not obtain adequate protection or ex ante compensation for the additional risk arising from dealing with an undercapitalised company. In *Laya v Erin Homes, Inc.*,<sup>56</sup> the court stated:

"When, under the circumstances, it would be reasonable for that particular type of a party entering into the contract with the corporation, for example, a bank or other lending institution, to conduct an investigation of the credit of the corporation prior to entering into the contract, such party will be charged with the knowledge that a reasonable credit investigation would disclose. If such an investigation would disclose that the corporation is grossly undercapitalized, based upon the nature and the magnitude of the corporate undertaking, such party will be deemed to have assumed the risk of the gross undercapitalization and will not be permitted to pierce the corporate veil."

## Conclusion

In conclusion, both the UK and US Courts allow creditors to reach the assets of shareholders but the legal basis for this seems obscure. The nominal test used by courts, both in the UK and US-whether the corporation has a "separate mind", whether it is a "mere instrumentality" or a "facade"-are singularly unhelpful. The arbitrariness of these nominal

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<sup>55</sup> *ibid.*

<sup>56</sup> 343, 352 S.E.2d 93, 100 (W.Va., 1986).

tests implies lack of basis or function (Easterbrook and Fischel, p.54). However, the UK courts do seem to have interpreted this concept more successfully than the US courts due to their ability to isolate general arguments from the real piercing argument as well as other reasons elucidated above. There is a need to further analyse the doctrine so that the concept can gain greater clarity and therefore be a better tool for balancing the interests of shareholders and creditors and for preventing externalities.



**The Principle of Procedural Autonomy and  
the Principle of Effectiveness of the  
Judicial Protection in the Recent ECJ Case-  
Law: The Issue of Jurisdictional Rules**

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## Abstract

*This study explores the possible consequences of the application of the principle of effectiveness of judicial protection (now enshrined in art. 19(1) TEU) to the national jurisdictional rules. For this purpose, the normative framework and the case-law of the European Court of Justice, relating to the tension between the principles of effectiveness and of national procedural autonomy, are described and commented on. It is underlined that the effectiveness of the protection can be violated whereas the domestic legislation on jurisdiction is not clear enough and its application is not certain (because this makes it more difficult to bring proceedings for the protection of rights); it is then noted how legislation on jurisdiction is often confused and not systematic in several Member States, thus creating doubts on effectiveness of judicial protection of legal situations. It is concluded that the intervention of national legislators is a more feasible and desirable method for the solution of such effectiveness issues, than further interventions of the ECJ, and EU legislative 'standardization' of jurisdictional rules.*

## Preliminary Remarks and Scope of the Study

The concept of effectiveness has been the centre of several studies and is still today often investigated, from several and distinct points of view. Hence, it seems necessary to provide a preliminary definition of that principle and also to circumscribe the conceptual framework and the aim of the present study.

First of all, it shall be noted that the concept acquires in Community Law a quite specific significance, compared to the one it usually has in the common context. As it has been pointed out,<sup>1</sup> in fact, the common meaning of the word 'effectiveness' is 'the qualities of producing or being able to produce the desired effects', while a more 'legal' meaning is the

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<sup>1</sup> See M. Accetto and S. Zleptnig, *The Principle of Effectiveness: Rethinking Its Role in Community Law* [2005] 11(3) *European Public Law* 375-403. The Authors quoted in particular the *Oxford Compact English Dictionary*.

one provided by the *Encyclopaedia of Public International Law*,<sup>2</sup> which clarifies that the concept is both founded on the existence of legal authority and legal recognition. Therefore, effectiveness can be used in two different ways: on one hand, ‘as a notion whose task is to *ensure* (by its observance) that desired results *will* be achieved’ and, on the other hand, ‘as one whose task is to *assure* (by its existence) that desired results *can* be achieved’.<sup>3</sup>

In European Union Law, these two dimensions of the concept are even clearer and more strictly connected. As pointed out by the European Court of Justice (hereinafter ‘ECJ’), the principle of effectiveness plays a crucial role for the EU law, because its observance is a necessary requirement for the same existence of the authority of Community law.<sup>4</sup> In the same way, the principle of effectiveness plays a fundamental role in the effort of avoiding distortions of competition and guaranteeing the equality of all European citizens, because it ensures the uniform application of EU law in the Union.<sup>5</sup>

This is the reason why – as it will be investigated in the following paragraphs – the concept of effectiveness can be interpreted at least in two ways: on one hand, stressing its meaning as

<sup>2</sup> K. Doehring, ‘Effectiveness’ in R. Bernhardt (ed.) *Encyclopaedia of Public International Law*, Vol. II (Amsterdam and London, North-Holland, 1999).

<sup>3</sup> M. Accetto and S. Zleptnig, above note 1, 378-379. The same Authors observed (Id., 402-403) that there are various notions of effectiveness. When it is intended as a ‘governing principle, or primary obligation, of Community law’ it can never be ‘overridden by conflicting national legal orders’, while ‘more limited notions of effectiveness’ (including the limits of effectiveness and equivalence within the assessment of effective judicial protection) may be balanced against domestic interests, through the application of the principle of proportionality: ‘in order to prevail, the national interest must have systemic implications for the national legal order and must be grounded in a general legal principle recognised (...) by Community law’. This concept will be used in the following pages, in relation to the tension between effectiveness and procedural autonomy.

<sup>4</sup> In case C-213/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1990] E.C.R. I-02433, para. 20, the Court clarified that

‘any provision of a national legal system (...) might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent (...) Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law’.

In S. Tarullo, *Il giusto processo amministrativo: studio sull’effettività della tutela giurisdizionale nella prospettiva europea*, (Milano, Giuffrè, 2004), it is clarified that a system of protection of rights can only be considered as effective if some requirements are met: (i) the *enforceability* and the *right to judge*, without excessive restrictions; (ii) the *adequacy* of the system, compared to the situations to be protected, (iii) the *completeness* of the protection, (iv) the *promptness* and (v) the *compliance* with EU law; see (C-222/84, *M. Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] E.C.R. 1651 and C-222/86 *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Georges Heylens et al* [1987] E.C.R. 4097).

<sup>5</sup> This is in particular noted in W. Schroeder, *Nationale Maßnahmen zur Durchführung von EG-Recht und das Gebot der einheitlichen Wirkung. Existiert ein Prinzip der nationalen Verfahrensautonomie?* [2004] 129(1) *Archiv des öffentlichen Rechts* 15, where the Author studied the concrete possibility to still claim the existence of the principle of procedural autonomy of the Member States.

effective application of the Community law; on the other hand, underlining its significance as effective judicial protection of the individuals.<sup>6</sup>

Secondly, therefore, it shall be clarified that the concept of effectiveness and 'effective judicial protection' shall not be considered to be the same. As it will be mentioned, the two concepts are often used in a mixed way and they have been developed together in the jurisprudence of the ECJ; nonetheless, it is also argued that they should be kept distinguished.<sup>7</sup>

Thirdly, it shall be noted that the principle of effectiveness presents itself both on the side of substantial rules and on the one of procedural rules. Again, such assertion acquires even stronger significance when applied in the EU law, due to the circumstance that EU *substantial* law can only be fully effective when applied through the national *procedures, administrations and institutions*.<sup>8</sup> For this reason, it is submitted that the principle of effectiveness cannot be considered separately from that of loyalty (which shall be considered as its basis and as a fundamental principle of the EU law as a whole) and those of subsidiarity and proportionality.<sup>9</sup>

While the matter of the distinction between substantial and procedural rules will be analysed in the following pages, it is for the moment necessary to stress the importance of such peculiar functioning of the EU law (which produces its own rules but needs the

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<sup>6</sup> It can be observed that, until the mid 1980s, the ECJ seemed more focused on affirming the need for effectiveness of the Community law, than on the protection of the rights of individuals (see, in particular, C-45/76, *Comet BV v Productschap voor Siergewassen* [1976] E.C.R. 2043 and Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] E.C.R. 1989). In a following phase, anyway, the Court focused more and more on the effectiveness, interpreted as the need for protection of individuals (see for instance C-199/82, *Amministrazione delle Finanze dello Stato v San Giorgio S.p.A.* [1983] E.C.R. 3595. The same idea is also expressed by M. Protto, *L'effettività della tutela giurisdizionale nelle procedure di aggiudicazione dei pubblici appalti: studio sull'influsso dell'integrazione europea sulla tutela giurisdizionale* (Milano, Giuffrè, 1997), 11.

<sup>7</sup> See, e.g., P. Prechal, *EC Requirements for an Effective Remedy*, in J. Lonbay and A. Biondi (eds.), *Remedies for breach of EC law* (Chichester and New York, John Wiley, 1996), 3-4. According to M. Accetto and S. Zleptnig, above note 1, 388, 'effective judicial protection is only one feature of the overarching obligation on the Member States stemming from the requirement of effectiveness'. In the present study, the two concepts can be investigated jointly, considering the common features relevant here.

<sup>8</sup> According to M. Ross, *Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?* [2006] 31(4) *European Law Review* 478, it is not easy to argue the traditional 'hierarchy (...) between substance (EC law rights) and procedures (national rules)', which 'demands intervention in the latter as part of (...) co-operative duties imposed by art. 10 EC [now art. 4 TEU] upon national courts as organs of the Member States'. Furthermore, it is submitted in C. Harlow, *A Common European Law of Remedies*, in C. Kilpatrick, T. Novitz and P. Skidmore (eds.), *The Future of remedies in European law* (Oxford, Hart, 2000), 72, that the 'distinction between substance and procedure' is difficult in practice.

<sup>9</sup> M. Accetto and S. Zleptnig, above note 1, 382. In A. Von Bogdandy, *Artikel 10 EGV*, in E. Grabitz and M. Hilf (eds.), *Das Recht der Europäischen Union* (Munich, Beck, 2003) 49, the Author noted that effectiveness regulates the complex relationship between different 'partial constitutions', actors and legal orders, which interact within the European context.

domestic legal orders to implement and enforce them). Such 'separation', indeed, pushed the legal literature, concerning the present topic, towards the necessity to build clear categories and definitions: rights and substantial law, on one hand (which are part of the EU law in itself) and remedies and procedural law, on the other hand (which are the ones of the domestic legal orders).<sup>10</sup> It is nonetheless well known, now, that such distinction is not that easy anymore, since the EU substantive law is more and more influenced by national legal systems and, even more, since it is possible to say that a 'European procedural primacy' has now emerged.<sup>11</sup>

In conclusion, it is preliminarily necessary to underline that – while many eminent commentators<sup>12</sup> already studied the application of the principle of effective judicial protection to procedural rules in general (i.e. the rules governing the procedures for the judicial protection of legal situations)<sup>13</sup> – it is submitted here that a specific analysis of the effects of the same principle on the jurisdictional rules (i.e. the rules governing the sharing of appeals between judges, not on territorial grounds)<sup>14</sup> may be of a certain interest.<sup>15</sup>

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<sup>10</sup> As stated in C. Kakouris, *Do the Member States possess judicial procedural "autonomy"?* [1997] 34 *Common Market Law Review* 1389-1390, the procedural law of the Member States could only be considered as 'an ancillary body of law the function of which is to ensure the effective application of substantive Community law'. Such approach is, according to the idea of the same Authors (M. Accetto and S. Zleptnig, above note 1, 383) connected to the continental approach to the relation between substantial and procedural law (where the latter is 'in service' of the former). Such idea is anyway questionable now (see above note 8).

<sup>11</sup> J.S. Delicostopoulos, *Towards European Procedural Primacy in National Legal Systems* [2003] 9(5) *European Law Journal* 599. In M. Accetto and S. Zleptnig, above note 1, 384, it is underlined that one of the 'distinguishing features' of the EU legal order is the 'added interplay' between such order and the national ones, because the European substantive law influences the national procedural law. According to the Authors, 'a possible reason for this may be that the European substantive supremacy existentially depends on procedure, and the result may be European procedural primacy'. Moreover, according to the Authors, the scenario is further complicated by the fact that the jurisprudence of the ECJ, showing a much more common law approach (in which the courts is not only called to apply rules but also to create new ones), partially changed the role of the judiciary, thus also altering the relationship between the substantial and the procedural law.

<sup>12</sup> Many of them have already been cited in the previous paragraphs or will be in the following pages, such as M. Accetto and S. Zleptnig, A. Arnulf, J.S. Delicostopoulos, etc. A full excursus of the main issues relating to the influence of the principle of effectiveness on national law in relation to procedures is contained in K. Lenaerts, D. Arts and R. Bray, *Procedural law of the European Union* (London, Sweet & Maxwell, 1999), 57 ff.

<sup>13</sup> A quite exhaustive study on this aspect can be found in C. Boch, *EC law in the UK* (Harlow, Longman, 2000), 102 ff.

<sup>14</sup> A similar classification is also proposed by W. Van Gerven, *Of rights, remedies and procedures* [2000] 37 *Common Market Law Review* 502, where it was clarified that – apart from remedial and procedural rules *stricto sensu* – 'there are also jurisdictional rules, those are rules establishing the courts of law and delineating their competence which are (...) matters to be decided by Member States, provided that they provide an effective protection of Community rights'. It is also clarified that the two categories are strictly related, since procedural rules 'will differ very much amongst each other depending on the nature of the court of which they intend to regulate the proceedings'.

<sup>15</sup> One of the rare studies on that specific matter is nonetheless contained in C. Lewis, *Remedies and the enforcement of European Community Law* (London, Sweet & Maxwell, 1996), 71.

## Definition of the Concept

### The Normative Framework

Before the entry into force of the Lisbon Treaty, the principle was not enshrined in any Treaty provision. It was, therefore, recognized by the jurisprudence of the ECJ, which was mainly concerned with the necessity of guaranteeing an 'effective judicial protection',<sup>16</sup> and has generally been considered as one of the fundamental principles of Community law by many scholars.<sup>17</sup>

In any case, the principle was not a pure creation of the ECJ. Scholars had indicated provisions in the pre-Lisbon Treaty which already contained such principle in some way,<sup>18</sup> and in particular: previous art. 10 EC (now 4 TEU), which imposes to the authorities of the Member States the duty to ensure the full and efficient implementation of Community law (both in its positive and negative aspects); previous art. 220 EC, entrusting the Community Courts to police the observation of Community law; previous art. 234 EC (now art. 267 TFEU), which aims at ensuring a uniform and effective application of Community law, through the system of the preliminary reference.<sup>19</sup>

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<sup>16</sup> A quite clear example is the one of Case C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, [1984] E.C.R. 1891, where it was stated that the sanction challenged shall be 'such as to guarantee real and effective judicial protection'. In the same way, the Court decided in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Federal Republic of Germany* and *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1996] E.C.R. I-1029, where its main concern was the possibility that conditions imposed to the reparation of loss could have precluded the right of reparation itself. A similar approach was also expressed by the Advocate General Mancini in its Opinion rendered in Joined Cases 281, 283, 284, 285 and 287/85, *Germany and others v. Commission*, [1987] E.C.R. 3203 (paras. 16 and 18) and by Advocate General Jacobs in Case 301/87, *France v. Commission*, [1990] E.C.R. I-307 (para. 39), while in particular the latter interpreted the principle of effectiveness as '*effet utile*', thus as a rule aiming at 'ensuring the proper functioning of the common market'.

<sup>17</sup> See e.g. J. Usher, *General principles of EC law* (London and New York, Longman, 1998), 85, who holds the principles as a 'overarching procedural guarantee' and T. Tridimas, *The General Principles of EU law* (Oxford, Oxford University Press, 2006), where the effectiveness of judicial protection is considered to be a fundamental right in EU law.

<sup>18</sup> See, in particular, M. Accetto and S. Zleptnig, above note 1, 386-388. The Authors also note that the principle of effectiveness not only was contained in some of the Treaty provisions but, on the other side, it also 'brought about normative consequences'. Such consequences will be better analysed in the following paragraphs and it will be discussed whether such circumstance may be relevant for the present study.

<sup>19</sup> M. Accetto and S. Zleptnig, above note 1, 387-388, clarify that while previous art. 10 EC contained '*implementation and execution* aspect of the principle of effectiveness', together with the '*enforcement and compliance* aspect' of the same principle, previous art. 220 EC contained '*the control aspect*' of it. The article, written before the Lisbon Treaty, only referred to the provisions contained in the Draft Constitutional Treaty, which were considered by the Authors as simply reinforcing the importance of the principle of effectiveness, without altering its significance. It is submitted here, on the contrary, that the provision now contained in art. 19(1) TEU reinforced the need for effectiveness of judicial protection in the Member States.



After the entry into force of the Lisbon Treaty, an explicit provision has been inserted in the TEU, which states that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.<sup>20</sup> It cannot be entirely clear what changes (if any) this amendment will bring in relation to the application of the principle of effectiveness, and various ideas already arose on the matter.<sup>21</sup> For the purpose of the present study, anyway, it cannot be overlooked that the principle, already clearly and explicitly stated in the jurisprudence of the ECJ, acquires now an even more important role as a fundamental principle of EU law.

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<sup>20</sup> Art. 19(1) TEU.

<sup>21</sup> In A. Arnulf, *The principle of effective judicial protection in EU law: an unruly horse?* [2011] 36(1) *European Law Review* 51, it is suggested that the new article (which ‘partially enshrines the former principle’), ‘is likely to be the subject of references to the Court and perhaps even infringement actions against Member States whose remedies the commission deems inadequate’. In the future years, it will be possible to observe if this idea will be confirmed; for the moment, it is possible to note that such an outcome of the new provision would be a strong intrusion in the national procedural autonomy and would therefore probably cause equally strong reactions from national courts and legislators.

## The Evolution of the Interaction between the Principles of Effectiveness and of Procedural Autonomy in the Case Law of the ECJ<sup>22</sup>

It has been pointed out how the development of the case law of the ECJ in relation to the principle of effectiveness is mainly characterized by two phases.<sup>23</sup> At first, the Court demonstrated more deference towards the national choice of remedies, while in a second moment it began a much stricter scrutiny of the domestic judicial means, in the light of the respect of the principle of effective judicial protection.<sup>24</sup>

The first appearances of the principle in the case law of the ECJ occurred in the mid-1970s and were strictly connected to the statement of the principle of procedural autonomy of the

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<sup>22</sup> It is noted that the 'tension' between the two principles created one of the most complicate case-law of the ECJ; see A. Biondi and M. Farley, *The Right to Damages in European Law* (Austin, Tex., Wolters Kluwer, c2009), 9 and T. Tridimas, above note 17, 313. This tension is described as 'convergence/divergence debate' in T. Heukels and J. Tib, *Towards Homogeneity in the Field of Legal Remedies: Convergence and Divergence*, in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and divergence in European public law* (Oxford, Hart, 2001), 112. It is here only possible to briefly report the wide debate developed around such interaction and to say that, on one hand, some commentators have argued that national procedural autonomy has eroded (C. Harlow, *Voices of Difference in a Plural Community* [2000] 03/00 *Harvard Jean Monnet Working Paper* 18), while others have argued that no principle of procedural autonomy exists because 'national procedural law is there to serve Community law' (C. Kakouris, above note 10, 1408) and so there is no balancing between the principles of effectiveness and autonomy (a quite similar idea is expressed by J.S. Delicostopoulos, above note 11, 599, who believes that 'substantive EC supremacy leads to further procedural supremacy'). AG Van Gerven, on the other side, has suggested the replacement of the term 'procedural autonomy' with the term 'procedural competence' of the Member States, observing that procedure is mostly still regulated by national legislations (W. Van Gerven, above note 14, 502).

Other scholars have analysed the matter from the point of view of hierarchy (of norms and of competences) and have noted that national procedural autonomy may not be considered as a general principle on its own and it cannot therefore be balanced with the principle of effectiveness, if the national rule is not based on a Community principle. In the opinion of M. Accetto and S. Zleptnig, above note 1, 397, the domestic procedural rules shall be 'assessed against the Community law requirements in a case-by-case basis' and 'this balancing act is governed by the principle of effectiveness'. The same idea has been expressed by AG Jacobs, in his opinion in the Joined cases C-430/93 and C-431/93 *Van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995], E.C.R. I-4705, para. 27.

According to P. Prechal, *Community law in national courts: the lessons from Van Schijndel* [1998] 35(3) *Common Market Law Review* 690, procedural limitations and conditions exist in every national legal system and therefore 'should not be dismissed for the simple reason that they seriously hamper the application of Community law provisions'. The tension between the two principles shall be solved 'through a balancing exercise between the interests', in a sort of 'procedural rule of reason'.

It shall be pointed out, anyway, that there are commentators who deem that 'quite a lot' remains of the national procedural autonomy. See, e.g., J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of public law* (Groningen, Europa Law Publishing, 2007), 54, where it is submitted that the ECJ 'still applies the relatively mild *Rewe* test, based on the principles of equivalence and effectiveness, in addition to the more stringent test along *Simmenthal*/*Factortame* lines'.

It is submitted here that, beside the definition issues in relation to the concept of autonomy, it cannot be overlooked that a strong tension between the two principles still exists, and this is demonstrated by the cautious approach of the ECJ and of the EU legislator in their effort for procedural 'uniformity'.

<sup>23</sup> M. Accetto and S. Zleptnig, above note 1, 388-389. Other commentators expressed the same idea; see e.g. S. Prechal, above note 7, 4 ff. Some have also suggested that the principle of effectiveness, due to its peculiar evolution and systematization within the EC context, may be seen as a very 'unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law' (A. Arnulf, above note 21, 51).

<sup>24</sup> Please refer to what has been said above in relation to the different significance of the concepts of 'effectiveness' and of 'effective judicial protection'.

Member States.<sup>25</sup> The Court clarified that, due to the absence of EC procedural rules and remedies for the national protection of EC rights,

‘it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of EC law’

(with these words, the Court substantially affirmed the principle of procedural autonomy).<sup>26</sup> Already at this early stage, anyway, the Court pointed out that the principle of procedural autonomy so enunciated was subject to two main limitations or provisos: the conditions provided by the domestic procedural rules for the protection of EC rights i) may not ‘be less favourable than those relating to similar actions of a domestic nature’<sup>27</sup> (the so-called *principle of equivalence*) and ii) may not be applied if they would render ‘practically impossible or excessively difficult the exercise of rights conferred by EC law’ (the so-called *principle of effectiveness*).<sup>28</sup> As it has been underlined,<sup>29</sup> this approach of the ECJ was strictly linked to the principle of subsidiarity; in fact, it is derived from the deference paid by the Court towards the ‘cultural and ethical values’ contained in the procedural rules.<sup>30</sup>

<sup>25</sup> The inextricable relation between the principle of effectiveness, on one hand, and the principle of procedural autonomy, on the other, will be further investigated in the following paragraphs. Nonetheless, it is important to underline, for the moment, that the ECJ stated the former, while re-affirming the latter and that the appropriateness of the term used in describing the autonomy of the Member States has been put in question (see C. Kakouris, above note 10, 1389).

<sup>26</sup> *Rewe* [1976], para. 5. It shall be noted that the ECJ constantly decided that the Member States, due to the application of the principle of procedural autonomy, have the right to provide. e.g., for deadline for the bringing of proceedings, provided that they are reasonable and provided that the principles of equivalence and effectiveness are respected. It shall be noted, anyway, that the wording of the Court, on this specific aspect, did not change too much in the years: see, e.g., Case C-445/06, *Danske Slagterier v Bundesrepublik Deutschland*, [2009] E.C.R., I-2119, where it is stated that ‘in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings’.

<sup>27</sup> Case C-33/76, *Rewe* [1976], para. 5.

<sup>28</sup> The two principles have been recently further clarified; see e.g. in Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, [2007] E.C.R. I-2271, para. 43, where it is stated that the procedural rules governing the actions for the protection of the rights of individuals under Community law ‘must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)’.

<sup>29</sup> A. Arnulf, above note 21, 51 ff.

<sup>30</sup> A. Arnulf, *The European Union and its Court of Justice* (Oxford, Oxford University Press, 2006), Chapter 9, and more recently Arnulf, above note 21, 51 ff., where it is stressed that the Court was in this first stage using deference towards the procedural autonomy of the Member States and pressing the legislature of the Union in the direction of the harmonization of the national procedural rules.

M. Accetto and S. Zleptnig, above note 1, 390 and 395, noted that (i) the principles of effectiveness is intended to resolve the tension existing between the need of uniformity in the application of EU law and the fact that EU law itself is mainly enforced and applied by national bodies, while (ii) the principle of procedural autonomy derives from the concern that the harmonization at European level could ‘illegitimately (and unnecessarily) intrude into domestic procedures which have strong cultural and historical roots in their legal systems’.

The Court partially changed its approach during the 1980s and at the beginning of the 1990s, when it started attributing a relatively more important role to the protection of Union law rights, with 'muscular' interventions.<sup>31</sup> In some cases in particular<sup>32</sup>, such protection prevailed over the deference to the national procedural autonomy, thus leading the Court to the affirmation of the principle that it was responsibility of the Member States to establish 'a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'.<sup>33</sup>

Obviously, this 'challenge' toward the principle of national procedural autonomy could not last too long. The Court, in fact, had to face quite negative reactions to some of its decisions in this direction<sup>34</sup> and had to mitigate its approach. In fact, in a third phase of case law starting in the 1990s, it reassessed the importance of the role of the principle of procedural autonomy. Such new stage leads to the decision in *Fantask*<sup>35</sup>, where the ECJ began a much less intrusive approach and confined its interventions on such procedural matters only to the cases where it deemed it to be strictly necessary.<sup>36</sup>

More recently, the Court provided a quite clearer definition of its current approach to the relationship between the principle of effectiveness and the one of national procedural autonomy. Such case law – which could be considered as a fourth phase of the jurisprudence of the ECJ – plays an even more important role in the present study, because it directly and explicitly faced the issue of rules concerning the separation of jurisdiction among national judges.

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<sup>31</sup> A. Arnall, above note 21, 51 ff.

<sup>32</sup> It shall be made reference, in particular, to Cases C-208/90 *Emmott v. Minister for Social Welfare* [1991] E.C.R. I-4269, C-213/89 *R. v Secretary of State for Transport ex parte Factortame* [1990] E.C.R. I-2433, C-6/90 and C-9/90 *Francovich* [1991] E.C.R. I-5357.

<sup>33</sup> Case C-50/00 P *UPA* [2002] E.C.R. I-6677, para. 41. As also noted in A. Arnall, above note 21, 51 ff., such principle is now enshrined in art. 19(1) TEU, but could have been better placed at the end of art. 4(3) TEU, considering that art. 19 is included in the title 'Provisions on the Institutions' and is mainly dedicated to the ECJ.

<sup>34</sup> See in particular Case C-208/90 *Emmott* [1991] E.C.R. I-4269, where the Court had stated that a national limitation period could not be used by a Member State as a defence in a claim brought by an individual, until the directive on which the claim was based had been properly implemented. Such decision opened the door to the risk for the States to face claims dating back years and was therefore criticized for having pushed too much against the principle of procedural autonomy.

<sup>35</sup> Case C-188/95 *Fantask A/S v Industriministeriet* [1997] E.C.R. I-6783.

<sup>36</sup> On such aspect, see A. Arnall, *The European Union and its Court of Justice*, above note 30.

In *Unibet*,<sup>37</sup> the Court reaffirmed the role of fundamental principle of the principle of effective judicial protection (which is also derived by the ECJ from the wording of art. 47 of the Charter of Fundamental Rights). It clarified again that, in the absence of EU rules on the matter, it was a competence of the domestic legislature to establish a set of legal remedies and procedures for the protection of EU rights and, above all, to designate the judges competent to decide the single claims. Quite obviously, the Court stated that the procedural rules introduced by the national legislature had to meet the requirements contained in the already mentioned principles of effectiveness and equivalence; more interestingly, the ECJ imposed to the national courts the duty of ‘consistent interpretation’ of such rules. In other words, the national judges had to interpret the domestic procedural rules in a way that enabled them to be ‘implemented in such a manner as to contribute to the attainment of the objective (...) of ensuring effective judicial protection’ of the rights that Union law attributed to individuals.<sup>38</sup>

Such judgement can be read (i) as clarifying the relationship between the principle of effectiveness and the one of effective judicial protection and (ii) as broadening the duty of consistent interpretation.<sup>39</sup> The judgment substantially confirmed the idea that the principle of effective judicial protection could lead, in exceptional circumstances, to the creation of new national remedies.<sup>40</sup>

Similarly, the Court stated in *Uniplex*,<sup>41</sup> (substantially following the Opinion of the AG Kokott) the duty of interpretation consistent with the EU law of the national norms (relating

<sup>37</sup> Case C-432/05 *Unibet* [2007] E.C.R. I-2271.

<sup>38</sup> *Unibet* [2007], para. 44.

<sup>39</sup> In A. Arnall, above note 21, 51 ff., it is submitted that ‘the national procedural autonomy was but an aspect of the broader principle of effective judicial protection’ and that the idea expressed by the A.G. Kokott (who wrote that the principle of effective judicial protection was a ‘specific expression of the principle of effectiveness’) was ‘inconsistent with the judgment in *Unibet*’. See above note 7.

<sup>40</sup> It is submitted that, after the entry into force of the Lisbon Treaty, such duty of consistent interpretation ‘supports – and may help to avoid braches of – the duty imposed on Member States by art. 19(1) TEU’ (A. Arnall, above note 21, 51 ff.). The Author also suggested that the Court was probably convinced to change its previous opinion (i.e. that the Treaty was not intended in order to create new national remedies) by the insertion of the provision later included in art. 19(1) TEU in the Draft Constitutional Treaty.

As it will be said, in the following judgment in the *Impact* case, the Court further developed such principle by clarifying that individuals shall be put in the position of being able to claim protection of their rights without any unacceptable procedural complication imposed by the national legislation (C-268/06 *Impact v Minister for Agriculture and Food* [2008] E.C.R. I-2483). This case will be further analysed in the following paragraph, being strictly relating to the effectiveness of jurisdictional rules.

<sup>41</sup> C-406/08, *Uniplex (UK) Ltd v NHS Business Services Authority* [2010] E.C.R. I-0000.

to the deadlines for the bringing of a proceeding<sup>42</sup>) even if EU law did not provide any specific rule on the matter.<sup>43</sup> According to the Court, the national procedural norm in breach of the principle of effective judicial protection is therefore 'substituted' by another norm, which is able to guarantee the respect of such principle.<sup>44</sup> Whereas such consistent interpretation is not possible (e.g. because the national norm does not lend itself to such an interpretative activity) the national judge would have the duty to disapply the national rule, in order to fully apply EU law and guarantee the rights that it recognizes to individuals.<sup>45</sup> Therefore, according to the ECJ, the principle of effectiveness is able to prevail on the national norms, which make the exercise of EU rights impossible or excessively difficult,<sup>46</sup> in order to make such attribution actual and effective.<sup>47</sup>

The ECJ did not provide a general criterion or means for the assessment of the effectiveness of a legal system for the protection of rights. On the contrary, the jurisprudence of the Court is quite heterogeneous on the matter.<sup>48</sup> Nonetheless, it

<sup>42</sup> AG Kokott concluded her Opinion in the case *Uniplex* by submitting that the principle of effective judicial protection, applied to the procedural norms, imposes that the national judges has the duty to disapply the domestic norm whereas its consistent interpretation is not possible or not sufficient to guarantee an effective protection (para. 73 of the Opinion). It is submitted here that, as noted by Accetto and Zleptnig, above note 1, 391, anyway, the application of the principle of effectiveness often requires 'additional legislative action' by the Member States, when applying EC law and disapplying national provisions is not sufficient (on this aspect the Court, in C-91/02 *Hannl + Holfstetter* [2003] E.C.R. I-12077, para. 17).

<sup>43</sup> *Uniplex* [2010] para. 26.

<sup>44</sup> *Uniplex* [2010] paras. 47-50. In the *Uniplex* case, this meant for the Court that

'[i]f the national provisions at issue do not lend themselves to such a [consistent] interpretation, that court is bound (...) to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules' (para. 48).

<sup>45</sup> *Uniplex* [2010] para. 49. On the same issue, see also C-327/00 *Santex SpA v Unita' Socio Sanitaria Locale n. 42 di Pavia* [2003], E.C.R. I-1877, para. 64, and C-241/06 *Lämmerzahl GmbH v Freie Hansestadt Bremen* [2007], E.C.R. I-8415, para. 63.

<sup>46</sup> It is here possible only to briefly note that such issue is strictly related to the *primauté* of EU law on national law, as will be investigated later. It seems difficult, anyway, to submit that the legislation relating to the sharing of jurisdiction could be considered as a fundamental principle of national legal systems.

<sup>47</sup> See AG Maduro in his Opinion in case C-222/05 *J. van der Weerd et al v Minister van Landbouw, Natuur en Voedselkwaliteit* [2007], E.C.R. I-04233, para. 16; Opinion of AG Jacobs, in case C-50/00 P *Unión de Pequeños Agricultores/Consiglio* [2002], para. 38 and the Court itself in *Factortame* [1990], para. 19.

<sup>48</sup> AG Maduro in the same Opinion noted that the assessment of the effectiveness of a procedure for the protection of a right can be a matter of interpretation and that the ECJ decided differently on very similar cases (e.g. C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgium* [1995], E.C.R. I-4599 and *Van Schijndel and Van Veen*, which were decided on the same day) (para. 23 of the Opinion). S. Prechal, above note 7, 9, noted that one of the problems in relation to the conditions to assess the duty of a Member State to grant a remedy is that the ECJ 'is, in some cases, satisfied with a simple reference to the national conditions, subject to the two minimum requirements, while in other cases the Luxembourg judges formulate all or at least some of the conditions themselves'. For the Author, it was therefore not clear 'how far the Court of Justice will go, as there is also disagreement about how far it can go and should go' (Id., 12). It is clear that these ideas were expressed more than ten years ago and, probably, the trend of the case law of the Court is now somehow clearer; it is probably not more actual to say that 'the standard of *effectiveness* for remedies is problematic in that, as yet, it is not clear what the Court exactly seeks with the requirement of effectiveness' (Id. 12). Nonetheless, it is certainly true that the future evolution of the jurisprudence of the Court is still now very difficult to foresee.

In addition, as noted in J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, above note 22, 58, the main question remains 'how far should Community intervention and especially decisions of the Court of Justice go?'.

clarified that such assessment shall be carried out by considering the legal context of the norm, the role it plays within the procedure and the peculiarities of that procedure before the different national judges.<sup>49</sup> Therefore: it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.<sup>50</sup>

### *The Application of the Principle of Effectiveness to Jurisdictional Rules*

Having so described the evolution of the case-law of the ECJ on the interplay between the principle of effectiveness and the one of procedural autonomy, it is now necessary to investigate how this interplay operates with reference to the national jurisdictional rules, which is the specific aim of the present study.

As it has been previously said, the Court had already clarified in *Rewe*<sup>51</sup> that it was up to the national legal systems to decide which court has jurisdiction on a specific claim. The ECJ further developed the principle in *Dorsch Consult*,<sup>52</sup> where it stressed the fact that it cannot be called to intervene on the national sharing of jurisdiction between different courts, in relation to the protection of rights deriving from the EU law. Furthermore, the Court

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<sup>49</sup> *Van der Weerd* [2007], para. 33.

<sup>50</sup> *Van der Weerd* [2007], para. 33. See also C-312/93 *Peterbroeck* [1995] para. 14 and *Van Schijndel e van Veen*, para. 19. AG Sharpston noted in his Opinion in *Unibet* [2007], para. 49, that in application of the principle of procedural autonomy, the matter is not whether the procedure is difficult (claims for compensation are usually very difficult) but whether the principles of effectiveness and equivalence are respected.

On the use of the principle of legal certainty for the assessment of effectiveness of the judicial protection, see A. Biondi, *The European Court of Justice and Certain national Procedural limitations: not such a tough relationship*, [1999] 36(6) *Common Market Law Review* 1271. The role of the principle of legal certainty in the effectiveness assessment is further specified by the Court in C-63/08 *Virginie Pontin/T-Comalux SA* [2009] E.C.R. I-10467, where it is used to 'justify' national provisions in the light of the principle of effectiveness. In the present study, it is submitted that the same principle could be used *vice versa* to challenge the validity of a domestic sharing of competences among judges, which does not grant an effective protection because it is unclear and not legally certain.

The principle of legal certainty is also analysed in U. Bernitz and J. Nergelius (eds.), *General principles of European community law: reports from a conference in Malmö, 27-28, August 1999, organised by the Swedish Network for European Legal Studies and the Faculty of Law, University of Lund* (The Hague and Boston, Kluwer Law International, 2000), 164 ff. It shall be noted, anyway, that the Authors only seem to concentrate on the application of the principle to substantial law issue, while it is submitted here that its application to jurisdictional rules may evidence important harms to the effectiveness of the protection of rights.

<sup>51</sup> *Rewe* [1976], para. 5.

<sup>52</sup> C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* [1997] E.C.R. I-04961.

clarified that its 'lack of competence' included the resolution of jurisdictional issues, originated by national classifications of the legal situations.<sup>53</sup>

Therefore, it could seem – *prima facie* – that the jurisdictional matters shall be considered as 'protected' by the principle of procedural autonomy and therefore excluded from the intervention of the Court. Nonetheless, it shall be underlined that the jurisprudence of the ECJ also stated that the principle of effectiveness shall be applied to such jurisdictional rules. Therefore it is submitted here that, even if the ECJ in all its judgments on the matter carefully balanced the principle of procedural autonomy and the one of effective judicial protection, it has also suggested that national legislations concerning the sharing of jurisdiction may lead to a breach of the principle of effectiveness itself.<sup>54</sup>

It will now be necessary to analyse the case law that is deemed as suggesting this assertion and then assess what consequences it may have for the subject of the present study.

In the already mentioned judgment in case *Impact*,<sup>55</sup> the Court clarified that the principle of effectiveness (together with the one of equivalence) shall also be applied to the designation of the – ordinary or special<sup>56</sup> – courts with jurisdiction on the claims filed for the protection

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<sup>53</sup> *Dorsch Consult* [1997] para. 40, where it is clarified that, first of all 'it must be stated (...) that it is for the legal system of each Member State to determine which court or tribunal has jurisdiction to hear disputes involving individual rights derived from Community law'. In any case, 'it is the Member States' responsibility to ensure that those rights are effectively protected in each case'. Therefore, 'subject to that reservation', it is not a competence of the Court 'to involve itself in the resolution of questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system'.

Such principle is consolidated in the case law: see the Opinion of AG Tesouro in the same case and several judgments of the Court, such as the ones in the cases C-179/84 *Piercarlo Bozzetti v Invernizzi SpA and Ministro del tesoro* [1985], para. 17; C-446/93 *SEIM - Sociedade de Exportação e Importação de Materiais Lda v Subdirector-Geral das Alfândegas* [1996]; C-462/99 *Connect Austria Gesellschaft für Telekommunikation GmbH v Telekom-Control-Kommission* [2003], paras. 34 and 35; C-258/97 *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Landeskrankenanstalten-Betriebsgesellschaft* [1999], para. 22; C-76/97 *Walter Tögel v Niederösterreichische Gebietskrankenkasse* [1998], para. 22. This specific aspect is particularly relevant for the application of the principle in Italy where, as it will be said in the following pages, the sharing of judicial competences between the ordinary courts and the administrative tribunals is based on the distinction between two different legal situations for which the protection could be sought. It shall be noted anyway that the Court never wanted to intervene on the Italian jurisdictional rules and, when it has been expressly requested to do so by the national courts, it preferred to deny the existence of any legal situation to protect (see C-380/87 *Enichem Base et al v Comune di Cinisello Balsamo* [1989] E.C.R. 02491 and in C-236/92 *Comitato di coordinamento per la difesa della Cava c. Regione Lombardia et al* [1994] E.C.R. I-00483).

<sup>54</sup> This idea is also expressed in the Opinion of AG Trstenjak, in the case *Pontin* [2009] para. 62.

<sup>55</sup> C-268/06 *Impact v Minister for Agriculture and Food* [2008] E.C.R. I-2483.

<sup>56</sup> There are several examples of the existence of special courts in various Member States, e.g. the ones on administrative law and employment law. The present study mainly focuses on the sharing of competences between civil and administrative courts, because it is the division that seems to create more problems from the point of view of the effectiveness of the protection.



of EU rights.<sup>57</sup> In other words, according to the Court, the principle of effective judicial protection can be breached not only through a 'bad' procedural system in general but also specifically through a 'bad' set of provisions relating to the designation of the competent judge.<sup>58</sup> In particular, the ECJ found a lack of effectiveness of these jurisdictional rules when there are 'procedural disadvantages for those individuals, in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving' from EU law.<sup>59</sup> Quite interestingly, the Court stated the duty of consistent interpretation of such norms for the national courts, which are hence called to interpret the jurisdictional rules in a way able to guarantee the respect of the principle of effectiveness.<sup>60</sup>

The AG Kokott in the same *Impact* case has expressed this idea in an even clearer way, where she wrote that the rights of individuals are protected in an effective way only when appropriate access to the domestic court is given to those individuals. According to the same AG, such access is only effective when clear rules on the competences of the judges exist for each judicial remedy, because 'there is no material difference between the rules governing jurisdiction and those governing procedure'. Therefore, AG Kokott concludes, 'unfavourable procedural arrangements can be as much of an obstacle to an individual's access to the domestic courts as unfavourable jurisdictional rules'.<sup>61</sup>

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<sup>57</sup> *Impact* [2008], para. 47.

<sup>58</sup> *Impact* [2008], para. 48.

<sup>59</sup> *Impact* [2008], para. 51.

<sup>60</sup> *Impact* [2008], paras. 98 ff. According to the Court, 'national courts are bound to interpret that law [of directives], so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by it'. This duty of consistent interpretation is, for the ECJ, 'inherent in the system of the EC Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them'. For these reasons, national courts are required 'to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law'.

<sup>61</sup> Opinion of AG Kokott in *Impact* [2008], para. 50. It is interesting to note that the official translation of the paragraph is, in Italian, more direct on the point, as it reads 'una cattiva gestione del procedimento (...) può rendere molto gravoso l'accesso del singolo alle giurisdizioni nazionali tanto quanto una cattiva normativa sulla competenza' (which could be translated: 'a bad procedural legislation (...) can make difficult the access of the individual to the national judges as much as a bad legislation on the competence'). According to the AG Kokott (para. 51 of the Opinion) and according to the mentioned jurisprudence of the Court, the procedural rules are not to be considered as guaranteeing an effective protection when they make it 'practically impossible or excessively difficult'. The AG anyway recognizes that the existence of special courts in national legal systems is not *per se* a breach of the principle of effectiveness (para. 55 of the Opinion) and that it is not for the ECJ to intervene directly on such jurisdictional matters (para. 62 of the Opinion). Nonetheless, she underlines that such jurisdictional rules, when they are not adequately structured, could weaken the effectiveness of the EU law (para. 65 of the Opinion).

Similarly, in the *Pontin* case, the Court imposed to the national court the duty to interpret the domestic jurisdictional rules 'in such way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection'.<sup>62</sup>

In conclusion of this excursus of the ECJ case law on the relationship between the two principles, it can be argued that, even if the 'intrusiveness' of the Court has varied during the years, it has stated that the principle of effective judicial protection is hierarchically superior to that of national procedural autonomy and that it is part of the primary law of the EU, thus enjoying 'constitutional status'.<sup>63</sup>

## Possible Violations of the Principle of Effectiveness through Jurisdictional Rules

As it has been demonstrated so far, the principle of effectiveness of the judicial protection of EU rights<sup>64</sup> could be breached through jurisdictional rules that make such protection

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<sup>62</sup> *Pontin* [2009], para. 75.

<sup>63</sup> A. Arnulf, above note 21, 51 ff. As it has already been said, it is opinion of that Author that new art. 19(1) TEU is likely to be at the centre of several references to the Court and infringement actions, in the cases in which the Commission will deem inadequate the remedies of certain Member States. On the status of the principle of effectiveness, please refer to C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council* [2008] E.C.R. I-6351 and to C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] E.C.R. I-10567. In *Kadi*, in particular, the Court stated that such principle applied not only to the national remedies but also to those provided by the Treaty itself and found that the adoption of the contested regulation infringed the principle of effective judicial protection, because the ECJ was not in the position to review its lawfulness.

It shall be noted, anyway, that the principle of effectiveness in general, together with supremacy and uniformity 'have long been declared by the Court of Justice to be central constitutional principles of EC law'; see G. De Burca, *National Procedural Rules and Remedies: the Changing Approach of the Court of Justice*, in J. Lonbay and A. Biondi (eds.), *Remedies for breach of EC law* (Chichester and New York, John Wiley, 1996), 37.

AG Jacobs observed, on the other side, the principle of effectiveness imposes that EC law shall be applied properly but this 'does not mean that there can be no limits on its application': F. Jacobs, *Enforcing Community Rights and Obligations in National Courts: Striking the Balance*, in J. Lonbay and A. Biondi (eds.), *Remedies for breach of EC law* (Chichester and New York, John Wiley, 1996), 27.

The 'primacy of effectiveness' is moreover recognized also by those commentators who do not 'necessarily support it', because it is 'an amorphous and easily misapplied concept', whose respect is very difficult to monitor (see M. Ross, above note 8, 498).

<sup>64</sup> It shall be noted that while the ECJ case law generally refers to rights recognized by EU law, similar considerations shall be made for nationally originated legal situations, considering that the two categories cannot be easily separated from the point of view of their protection. See J. Schwarze, *European Administrative Law* (London, Sweet & Maxwell, 2006), ccii, where it is noted that

'such a situation not only puts significant strains on the personnel working for the administration who, at least partly, need to apply European and national administrative law simultaneously, but it would also be increasingly difficult to explain such a strict separation to the citizens of the EU who are subject to these separate regimes'

(see also, on the same point, M.L. Fernandez Esteban, *National Judges and Community law: The Paradox of the Two Paradigms of Law* [1997] *Maastricht Journal of European and Comparative Law*, 143). The effect of this peculiar situation is usually referred to as the 'spill-over effect'; see M. Protto, above note 6, 5.

excessively difficult or impossible. It is submitted here that the existence of an inadequate legislation on the sharing of competences among different judges in various Member States could become more and more problematic in the future (especially considering that the Treaty of Lisbon has codified such principle).

It shall be noted, first of all, that the EU legal system does not even contain a sharing of competences between ordinary and administrative courts, differently from several Member States.<sup>65</sup> Secondly, the EU constitutional and political orders refer to a quite peculiar way of interpreting the relationship between the public authority and the individuals (or at least it can appear as being peculiar to European civil lawyers).<sup>66</sup>

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It is noted in T. Heukels and J. Tib, above note 22, 128, that, while the EU law does not oppose to the 'reverse discrimination' of national law rights, it is very difficult that individuals accept that such rights have a minor protection than the one granted for EU law rights.

In addition, it shall be noted that W. Van Gerven, above note 14, 534, also underlined that '*adequate relief* will lead to a higher level of protection' and 'national courts will feel the need to undo such 'reverse discrimination' in favour of Community rights, by improving judicial protection given to purely national rights'.

For the reasons above, it has here been decided not to differentiate between the protection of EU and national law rights, in relation to the effectiveness of their protection.

<sup>65</sup> The ECJ operates both as ordinary and administrative court. For a full description of the ECJ judicial review as a 'Administrative Tribunal', see J. Schwarze, *Judicial Review of European Administrative Procedure* [2004] 68 *Law and Contemp. Problems* 85-105.

Nonetheless, it shall be noted that the need for specialization has arisen also in the EU judicial context. See the case of the Civil Service Tribunal, which has jurisdiction at first instance on disputes between the European Union and its servants. It has to be noted that the judgment of the Tribunal can be appealed before the General Court: for this reason it cannot be considered as a special Court (such as the administrative Tribunals in Italy or France) but rather as a specialized Court (i.e. part of the same order of judges).

A debate on the advantages and disadvantages of specialized Courts can be found in particular in the papers of R. Grass and P. Mahoney, published in *Celebration of the fifth anniversary of the Civil Service Tribunal*, 1<sup>st</sup> October 2010, available on <http://curia.europa.eu>. On the growth of the need for specialization of the EU judiciary, see also A. Dashwood and A.C. Johnston (eds.), *The future of the judicial system of the European Union* (Oxford, Hart, 2001), 72 ff and British Institute of International and Comparative Law (ed.), *The role and future of the European Court of Justice: a report by members of the EC Section of the British Institute's Advisory Board chaired by the Rt. Hon. the Lord Slynn of Hadley* (London, British Institute of International and Comparative Law, 1996), Chapter on Solutions involving a new judicial structure, par. 4, where also various disadvantages are mentioned in relation to the creation of new specialized tribunals.

<sup>66</sup> See E. Picozza, *Alcune riflessioni circa la rilevanza del diritto comunitario sui principi del diritto amministrativo italiano*, in *Studi in memoria di Franco Piga* (Milano, Giuffrè, 1992), 730, where it is underlined that in the EU law there is no presumption of primacy of the administration (which is looked at as a service, more than as a power) over the individuals, as it happens in some national systems (such as the Italian one), except the cases where public authorities are created with imperative powers.

In relation to the differences regarding the evolution of the idea of public administration in common and civil law countries, see G. Amato and L. Laudati, *The Protection of Public Interests and Regulation of Economic Activities*, in F. Snyder (ed.), *The Europeanisation of law: the legal effects of European integration* (Oxford, Hart, 2000), where it is noted that, despite the long evolution of administrative law in all legal systems, 'the original paradigms that grew around the initial administrative law survive in the culture of scholars, of courts and of (...) regulatory institutions'.

Anyway, a 'change of paradigm' has been noted by G. della Cananea, *Beyond the State: the Europeanization and Globalization of Procedural Administrative Law* [2003] 9(4) *European Public Law* 576, who underlines that 'the new, transnational administrative law needs a proper theoretical foundation, which cannot be that of the State'. It is also submitted here that this situation is a consequence of the mutual contamination of legal systems and ideas of public administration.

These two elements, anyway, are not *per se* sufficient to argue that the principle of effectiveness and therefore EU law are necessarily violated by domestic legislations, which provide for a sharing of competences or for a different way of seeing at the public authority/individuals relationship. Such difference between European Law and national legislations could be easily 'justified' by the principle of procedural autonomy and the cultural and historical peculiarities that this principle aims at protecting. On one hand, the legitimacy of the existence of a 'special judge' is generally recognized,<sup>67</sup> while on the other hand many national scholars have argued that the existence of special legal situations in their own legal systems demonstrate the accuracy of the national doctrine in Administrative Law (compared to a certain alleged 'simplicity' of EU law on the same matters).<sup>68</sup>

Nonetheless, and notwithstanding the fact that the ECJ has in various occasions repeated its 'non-intervention' approach on the specific issue, it cannot be denied that it also suggested requirements, which are necessary in order to consider a specific system of protection as effective. Although, it always demonstrated a very careful approach to such a (politically and legally) sensitive issue, it clarified: (i) that the principle of effectiveness shall be respected by the Member States also in the definition of the competences of judges; (ii) that such principle shall be respected, notwithstanding the peculiar national classification of legal situations; (iii) that the application of such principle could require the setting aside of a national rule, whereas it is not in line with the principle itself; (iv) that the legal certainty granted by the single system of judicial protection is one of the criteria for the assessment of its effectiveness.<sup>69</sup>

It is therefore possible to argue that the development of the principle within the case law of the Court and its codification in the Lisbon Treaty suggest a deeper and more careful assessment of the effectiveness of the judicial protection in the Member States' legal

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<sup>67</sup> See AG Kokott in *Impact* [2008], para. 55, where it is recognized that the specialization of the judges can be considered as a way of improving the efficiency of the legal protection.

<sup>68</sup> See, for example and for the case of Italy, M. Mazzamuto, *Il riparto di giurisdizione (apologia del diritto amministrativo e del suo giudice)* (Napoli, Editoriale Scientifica, 2008).

<sup>69</sup> See the previous paragraphs in relation to the case law of the ECJ containing such principles. It is also interesting to note that the connection between the principle of legal certainty and the effectiveness of the protection of legal situations has also been put forward in relation to the standing (in domestic law) for the EC challenges in R. Gordon, *EC law in judicial review* (Oxford and New York, Oxford University Press, 2007), 84 ff, where it is noted that 'in this context legal certainty is, perhaps, but an aspect of the principle of effectiveness'.

systems, from the point of view of the jurisdictional rules.<sup>70</sup> As it is well known, the need for more effectiveness has already in the past influenced the evolution of some national procedural systems.<sup>71</sup>

Without aiming at providing an exhaustive comparative analysis, it is here possible to briefly refer to some elements of various legal systems of the Member States, in order to suggest that jurisdictional rules may cause similar effectiveness problems in various national orders.<sup>72</sup>

One of these is certainly the case of Italy, where the sharing of judicial competences between the ordinary courts and the administrative tribunals is based on the distinction between two different legal situations for which the protection could be sought: the ordinary judges decide disputes where rights, '*diritti soggettivi*', are alleged to have been breached, while the administrative courts decide disputes where legitimate interests, '*interessi legittimi*', are alleged to have been violated.<sup>73</sup> It is submitted here that the principle of effectiveness is likely to be infringed, because such criterion is not even clear to scholars and judges.

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<sup>70</sup> See on the point W. Van Gerven, *Of rights, remedies and procedures* [2000], above note 14, 502-504, who uses his classification of the concepts of 'rights' (i.e. 'legal positions which a person ... may have'), 'remedies' (i.e. 'classes of action, intended to make good infringements of the rights concerned') and 'procedures, governing the exercise of such classes of action', to argue the existence of different levels in the assessment of effectiveness and therefore the existence of a 'requirement of *minimum effectiveness* (...) limited to the area of procedural rules, while the area of remedial rules is to be governed by the principle of *adequate judicial protection*'. According to the classification of the Author, jurisdictional rules are part of the category of procedural rules and are therefore only to be assessed against the requirement of minimum effectiveness.

<sup>71</sup> See, on the point, J. Schwarze, *The Europeanization of National Administrative Law*, in J. Schwarze (ed.), *Administrative law under European influence: on the convergence of the administrative laws of the EU Member States* (Baden-Baden, Nomos and London, Sweet & Maxwell, 1996), 789 ff.

As noted in C.W.A. Timmermans, *Application of Community Law by national courts: (limits to) direct effect and supremacy*, in R.H.M. Jansen, D.A.C. Koster and R.F.B. van Zutphen (eds.), *European ambitions of the national judiciary* (The Hague and Boston, Kluwer Law International, Kluwer Deventer, c1997), 31 ff., the logic of the ECJ has traditionally been '*uni ius, ibi remedium*', and this has influenced national legislations.

<sup>72</sup> This seems to be true even leaving aside the fact that each Member State has its own different rules in relation to the access to administrative courts: in some Countries, such as the Netherlands until 2005, 'any person' is entitled to bring an action, while in other systems it is necessary to demonstrate an interest affected by the decision appealed (see J.H. Jans, R. de Lange, S. Prechal and R.J.G.M. Widdershoven, above note 22, 62). Furthermore, the legal orders are also usually divided into two different categories (monist and dualist systems), depending on the existence of one or two orders of judges, with jurisdiction on administrative law disputes.

<sup>73</sup> See M. Chiti, *Italian Report*, in J. Schwarze (ed.), *Administrative law under European influence*, above note 71, 229 ff.

The concept of legitimate interest itself has never been defined in a final and agreed way, even if authoritative attempts have been put forward.<sup>74</sup> It is submitted here that this causes an infringement of the legal certainty of the rule and, finally, makes it impossible or very difficult for individuals to seek and obtain the judicial protection of their rights or interests (because it is often not clear which judge is competent).<sup>75</sup> The particular procedural system, for the assessment of the judge, which has jurisdiction on the case, may require various years, only to have a final judgement on the jurisdiction being issued. After that, the proceeding for the assessment of the existence and violation of the legal situation may require several additional years, thus making it very likely that the right of the individual will be protected when it is too late.<sup>76</sup>

Similar problems have been faced in the United Kingdom, where, despite the totally different evolution process of the administrative justice,<sup>77</sup> it has also been necessary to

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<sup>74</sup> A. Biondi, *The Corte di Cassazione and the proper implementation of Community law* [1996] 21 *European Law Review* 485 ff, suggested that the subjective right is defined 'as the power to act for the satisfaction of an individual interest which is recognised and protected by the law', while the protected interest 'is closely connected with a public interest and its protection consists of the claim that the administration should exercise its power fairly in accordance with the law which regulates the exercise of that power'.

<sup>75</sup> In other words it is submitted here that the legal uncertainty of the jurisdictional rules may make very difficult or impossible the access to justice and, therefore, the protection of legal situations.

In order to understand the importance of the problem in Italy, it is sufficient to consider that the *Corte di Cassazione* (i.e. the Supreme Court competent to take the final decision in relation to the attribution of a specific appeal to ordinary or administrative judges) issued 2.136 orders only between years 2006 and 2009 (source: official website of the *Corte di Cassazione*, [www.cortedicassazione.it](http://www.cortedicassazione.it)).

It shall also be noted that this kind of situations could constitute a violation of art. 6 of the European Convention of Human Rights, which expressly states that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Furthermore, it can also create problems from the point of view of the realization of the due process principles, which are evidently connected with the effectiveness of the protection.

<sup>76</sup> It may be noted that the Italian legislator tried in several occasions to make the criterion simpler, e.g. by dividing ordinary and administrative jurisdiction on the basis of specific legislative provisions. The Constitutional Court, anyway, decided with its Judgment n. 204 of 2004, that these attempts were in breach of the Italian Constitution, which expressly bases the distinction of jurisdiction on the legal situation, whose violation is claimed in each case.

In relation to the peculiar Italian situation, it shall be recalled that in the case C-13/68, *S.p.A. Salgoil v Ministero del commercio con l'estero della Repubblica italiana* [1968], the Court explicitly underlined that the complexity of a specific situation in a national legal system and the specific relation existing in that system between the legal positions of the individuals and the interests of the public authority cannot jeopardize the effective protection of EU law rights (Id., para. 2).

<sup>77</sup> Considering that UK is not defined as an 'administrative State', the measures adopted by the administration are indeed capable of unilaterally influencing the legal situations of the individuals and are exercised on the basis of norms attributing powers, but have the same effects of acts carried out by private parties. Hence, traditionally there are no differences from the point of view of jurisdictional rules and judicial means of protection, towards the measures of public authority and the ones of private.

Nonetheless, the traditional British diffidence towards 'special administrative judges' (considered as a means of shielding the administration and covering up its responsibilities, against the principle of rule of law) has been eroded in the last decades, considering that some European dualistic systems have proven their capability of granting a stricter control on the activity of the administration; see E. Marotta, *La giustizia amministrativa in Inghilterra*, in G. Recchia (ed.), *Ordinamenti europei di giustizia amministrativa*, in G. Santaniello (ed.), *Trattato di Diritto Amministrativo* (Padova, Cedam, 1996) 659. For a complete analysis, see J. Jowell and P. Birkinshaw, *English Report*, in J. Schwarze (ed.), *Administrative law under European influence*, above note 71, 273 and C. Lewis, above note 15, 143 ff. An explanation of the evolution and of the

mitigate the absolute centrality of the ordinary courts, through the creation of Tribunals (i.e. special bodies of administrative judicial review) and through the creation of quasi-judicial administrative procedures (the *inquiries*).<sup>78</sup> Nowadays, also in the British legal order, a wide and comprehensive reform is felt as urgent, in relation to the system regulating the access to administrative tribunals. There is in fact a set of bodies, whose work is supervised by the Council on Tribunals, with a heterogeneous set of peculiar procedures, which create a certain degree of confusion.<sup>79</sup>

The German *Grundgesetz* classifies five orders of jurisdiction, and the attribution of appeals is based on the public or private nature of the controversy<sup>80</sup> and on the presumption of competence of the ordinary judges.<sup>81</sup> While such system may appear as clear, it nonetheless causes problems similar to the ones existing in other Member States, because the debate on the location of the dividing line between the two sectors (private and public law) is one of the more complex in the whole German public law.<sup>82</sup>

The French sharing of competences between ordinary and administrative courts appears to be even more complex,<sup>83</sup> considering that no general rule is codified in any constitutional<sup>84</sup>

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functioning of administrative justice in the UK is provided in M. Supperstone and L. Knapman (eds.), *Administrative court practice* (Oxford, Oxford University Press, 2008), 5 ff, where it is clarified how the 'Bowman Report concluded that there is a continuing need for a specialist court as part of the High Court to deal with public and administrative law cases'.

<sup>78</sup> It shall be noted, anyway, that the *Tribunals* are created for specific subjects and cannot be considered as administrative courts with general jurisdiction (differently from the Italian or French systems). Marotta E., above note 77, 661, notes that the existence of such courts only derives from the need for specialization in given fields and not from a separation of jurisdiction between public and private subjects, which is not even feasible in the British legal order.

<sup>79</sup> C. Blake, *Modernising Civil Justice in England and Wales*, in M. Fabri and P.M. Langbroek (eds.), *The challenge of change for judicial systems: developing a public administration perspective* (Amsterdam, IOS Press, Ohmsha, c2000), 44, where the Author underlines that 'there is a bewildering system of appeals usually to second tier bodies, interrelated to internal reviews and supervision by the courts by way of judicial review'. It is also noted that the so-called Woolf Reforms (in year 1999) left untouched such aspect and that the Government does not see it as a priority, despite '[f]ar more people have dealings with tribunals than with the courts and this is likely to continue'.

<sup>80</sup> See the law on the administrative procedure, dated 21 January 1960, art. 13 of the Law 27 January 1877 (the GVG) and art. 40 of the *VwGO*.

<sup>81</sup> Art. 29 of the *Grundgesetz*.

<sup>82</sup> See R. Bifulco, *La giustizia amministrativa nella Repubblica federale di Germania*, in Recchia G. (ed.), above note 77, 269, who notes that there are at least two different theories on the issue: the 'subjective theory', which underlines the fact the only public subjects are regulated by public law, and the 'two levels theory', according to which the decisions of the administration are regulated by public law, while the modalities of its activities are regulated by private law. Other theories exist (e.g. the 'subordination theory') in relation to contracts, but present several application problems and often need to be integrated with one of the main theories.

<sup>83</sup> For a complete analysis see J. F. Flauss, *Rapport français*, in J. Schwarze (ed.), *Administrative law under European influence*, above note 71, 31 ff.

<sup>84</sup> The French Constitution of 1958 only regulated the functions of the Council of State (artt. 37, 38 and 39).

Some commentators noted that the historical reason for this situation is connected to the way the French administration developed, i.e. through continuous changes, and not through sudden legal interventions; see G. Vedel, *Discontinuité du droit constitutionnel et continuité du droit administratif*, in *Mélanges Waline* (Paris 1974, II), 773 ff.

or legislative instrument.<sup>85</sup> The *Conseil constitutionnel* only stated – in 1987 – that the administrative tribunals have exclusive competence in the annulment or modification of administrative measures (due to the principle of separation of powers), without clarifying how the separation between the two jurisdictional sectors operates in practice.<sup>86</sup>

As a general preposition, it is possible to observe that the main criterion for the separation is, again, the distinction between public and private law, which shall be integrated through the application of further and various principles, which have been affirmed across years in the jurisprudence of the *Tribunal des conflits*, of the *Conseil d'Etat* and of the *Cour de cassation*.<sup>87</sup> The result is, once more, a very complex situation with doctrinal debate without clear-cut solutions.

In Spain, the jurisdictional separation between ordinary and administrative judges is regulated by the Law of 27 December 1956, as amended by the Law n. 10 of 17 March 1973, which provides a subjective criterion: the administrative courts decide the disputes involving the public administration. Such principle is, anyway, not easy to be applied, considering that the concept itself of public administration is not entirely clear, because of the uncertainty of the nature of several public and quasi-public subjects.<sup>88</sup>

The Belgian legal order contains a heterogeneous set of administrative judicial bodies, only sharing the characteristic of deciding disputes involving the public administration.<sup>89</sup> The Constitution states (at artt. 92 and 93) that the ordinary Courts and Tribunals have jurisdiction on civil and political rights, but the legislator has discretion in creating

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<sup>85</sup> It has been noted, anyway, that this is due to the fact that the legislator traditionally included jurisdictional norms in the laws regulating the different sectors. See D. Amirante and F. Rosi, *La giustizia amministrativa in Francia*, in Recchia G. (ed.), above note 77, 120.

<sup>86</sup> The *Conseil d'Etat* clarified, anyway, that the legislator has the exclusive power of determining the dividing line between the two jurisdictions (Judgement of 30 March 1962, case *Association Nationale de la meunerie*, in *Rec.* 233).

<sup>87</sup> Such case-law has been traditionally focused on the notion of *service publique*, followed by the criterion of the nature (public or private) of the norm which has to be applied in the controversy and, afterwards, by the notion of 'public power' (according to which the administrative courts have jurisdiction on all the cases in which the public authority have made use of their prerogatives).

<sup>88</sup> R. Rodio, *La giustizia amministrativa in Spagna*, in Recchia G. (ed.), above note 77, 426.

<sup>89</sup> See M. Boes and J. Stuyck, in *Belgian Report*, in J. Schwarze (ed.), *Administrative law under European influence*, above note 71, 333 ff.



administrative courts and in attributing certain categories of appeals to them,<sup>90</sup> without being bound to a general criterion of separation.

Therefore, it is possible to note that the sharing of jurisdiction among different orders of judges is often very confused, in the legal systems of many Member States. It is submitted here that this may cause a violation of the principle of effective judicial protection, because an inadequate, unclear or uncertain legislation on the jurisdiction of judges may make it very difficult (when not even impossible) for individuals to seek and obtain judicial protection for their rights.<sup>91</sup>

### **The need for a viable and adequate solution: the intervention of the national legislators**

It is now necessary to face the issue relating to the concrete possible consequences of that assertion. In other words, even if it is accepted that a possible breach of the principle occurs, it shall be investigated how this may affect the domestic jurisdictional rules and whether any further intervention of the ECJ or of the EU legislator<sup>92</sup> may be desirable or feasible.

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<sup>90</sup> I. Loiodice, *La giustizia amministrativa in Belgio*, in Recchia G. (ed.), above note 77, 532.

<sup>91</sup> In particular, it is submitted here that, when the national legal system provides that a court will decide which judge has jurisdiction on a particular dispute, this could even increase the risk of violation of the principle of effectiveness, when the jurisdictional rules are not certain and clear. A similar idea has been affirmed, by the Court, in relation to the compatibility of the national legislation with the EU law: 'it cannot be required to wait for a ruling ...from some other court, such as a constitutional court, as to the compatibility of Community law with national legislation' (C. Lewis, above note 15, 71-72, where the Author mentioned the case C-106/77, *Amministrazione delle finanze dello Stato v Simmenthal SpA* [1978] E.C.R. 629, paras. 20-26).

<sup>92</sup> It shall be noted, anyway, that the first and main issue would be the identification of the correct legal basis for such procedural harmonization. See, on the point, M. Eliantonio, *The Future of National Procedural Law in Europe: Harmonisation vs. Judge-made Standards in the Field of Administrative Justice* [2009] 13(3) *Electronic Journal of Comparative Law*, on <http://www.ejcl.org>.

As noted also by A. Arnall, *The European Union and its Court of Justice*, above note 30, 276, Treaty provisions seemed to be found in the Treaty if the remedy differences existing in the Member States 'are likely to distort or harm the functioning of the Common Market'. The Author also noted that, despite the ECJ stated several times that legislation was necessary, it had no particular results on the Community legislature; see for instance C-130/79, *Express Dairy Foods Limited v Intervention Board for Agricultural Produce* [1980] E.C.R. 1887, para. 12, where it is clarified that 'in the regrettable absence of community provisions harmonizing procedure and time-limits the court finds that this situation entails differences in treatment on a community scale'. In any case, it is also stated that '[i]t is not for the Court to issue general rules of substance or procedural provisions which only the competent institutions may adopt'.

It is noted in P. Nebbia, *Do the rules on state aids have a life of their own? National procedural autonomy and effectiveness in the Lucchini case* [2008] 33(3) *European Law Review* 427 ff., that 'it was argued that the Community lacks competence to elaborate detailed procedural rules overriding national procedural law; and if it is not for the legislator to adopt such rules, the ECJ cannot certainly replace him'.

Beside the problems relating to the resistances opposed by national legal orders, and somehow supported by the application of the principle of procedural autonomy, it could also be argued (i) that a 'standardization' of the procedural rules, in general, and of the jurisdictional rules, in particular, would not be possible and (ii) that it would not be desirable.<sup>93</sup>

From the first point of view, it shall be underlined that, while most of the case law mentioned referred to single procedural issues, it is here analysed the possible breach of the principle of effective judicial protection through national jurisdictional rules. Therefore, it is argued here that some of the solutions adopted in the cases would not be feasible in the present situation or they would at least be very complicate. For instance, the duty of consistent interpretation imposed to national judges in relation to the deadlines for the filing of appeals,<sup>94</sup> would be difficult to be realized in practice, in relation to jurisdictional rules. In fact, whereas an individual filed an appeal before – for example – an administrative court and there are doubts in relation to the jurisdiction, it is very difficult for that judge to interpret the jurisdictional rules in a way consistent with the principle of effectiveness; it could be argued that the judge would not be allowed to decide the case (without having jurisdiction on it) only in order to guarantee the compliance with the principle of effective judicial protection.<sup>95</sup> In the same way, it seems at least very difficult to imagine how a national judge – without jurisdiction on a controversy – could disapply the national rule,

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As underlined in T. Heukels and J. Tib, above note 22, 122, the approach of Community legislator in the harmonization of procedural law of Member States has always been very cautious.

As it has been said, anyway, also the approach of the ECJ has been quite cautious in affirming the principle of effectiveness over the one of procedural autonomy. In fact, in almost all the judgements on the issue, it specified that the principle of autonomy was still in force and, secondly, that it had been requested by national courts to decide on the specific matter (see, *ex plurimis*, *Bozzetti* [1985] para. 17 and C-224/01, *Gerhard Köbler v Republik Österreich* [2003] E.C.R. I-10239).

<sup>93</sup> The issue of the progressive convergence of procedural laws in the EU is analysed in E. Werlauff, *Common European procedural law: European law requirements imposed on national administration of justice* (Copenhagen, DJØF Pub., 1999) 267 ff.

<sup>94</sup> *Uniplex* [2010], para. 26.

<sup>95</sup> This is considered here to be true even if the ECJ and AGs went quite further in assessing the prevalence of EU law on national rules on competence. See, in particular, the already mentioned judgement that the Court issued in *Impact* [2008], para. 55, where it stated that the principle of effectiveness imposes that a specialised court called to decide on the infringements of a Directive 'must ...have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force'. This is required, according to the ECJ, if it is 'established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights'. The Court concludes by affirming that '[i]t is for the national court to undertake the necessary checks in that regard'.

It has already been underlined that the Court itself noted that in some cases legislative actions are necessary (*Hannl + Holfstetter* [2003], para. 17).

which attributes the jurisdiction to another judge. Furthermore, it is anyway quite clear that, even if it were possible, it would not solve the problem of lack of legal certainty (and therefore of effectiveness) of the jurisdictional rules (whose application would maybe be even less predictable, if left to the assessment of judges).

In view of the above, it is therefore possible to argue that the most feasible solution in order to face violations of the principle of effectiveness – caused by inadequate jurisdictional rules – would be legislative interventions of the single Member States.<sup>96</sup> The constant reference by the ECJ to the importance of the effectiveness of judicial protection, together with the explicit codification of the principle within the text of the Lisbon Treaty, suggest a more careful codification of the sharing of jurisdiction among different orders of judges, especially in the legal systems where the application of such rules may appear particularly unclear.<sup>97</sup>

A quite separate issue is whether a form of harmonization of the procedural rules (in general) would be effectively desirable.<sup>98</sup> The desirability of such harmonization – which is already ongoing<sup>99</sup> – has been advocated on various grounds, such as the need for uniformity of Community rules, which would be jeopardized by the existence of different procedural

<sup>96</sup> Furthermore, it has to be added that a legislative intervention would grant a much higher degree of legal certainty, compared to the case in which the solution to the effectiveness issue was left to the intervention of judges.

Already in 1993, in F. Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques* [1993] 56(1) *Modern Law Review*, 41, 'structural reforms' were considered to be a very desirable method to ensure the effectiveness of Community law.

Furthermore, the solution cannot be to let the ECJ as the exclusive subject in the role of solving the mentioned problems of effectiveness of procedural rules. M. Elia Antonio, above note 92, 7, noted that 'codified rules for the enforcement of Community law in national courts may be perceived as being more 'legitimate' than the principles developed on a case-by-case basis by the European Court of Justice'. It is also submitted that 'it cannot be overlooked that the ECJ's intervention can only be of a case-by-case nature' and 'that such an approach is dependent on the capacity of the litigants to obtain access to the national courts and on the willingness of the latter to cooperate'.

In T. Heukels and J. Tib, above note 22, 128, it is suggested to 'take up the difficult challenge' to debate on the feasibility of a more general – and not occasional – harmonization of national procedural law.

Nonetheless, it shall be clarified that the Court is absolutely not criticized in the present study for its 'judicial activism' in relation to the respect of the principle of effectiveness. See House of Lords, *Twenty-First Report from the European Communities Committee* (1995-1996), para. 256, where it is recognized the important role of the Court 'in the consolidation of democratic structures and upholding the rule of law in the European Community', because it was able to make 'Community law effective against defaulting Member States at the instance of individuals seeking to enforce their rights'.

<sup>97</sup> In R.M. D'Sa, *European Community law and civil remedies in England and Wales* (London, Sweet & Maxwell, 1994), 184, it is analysed the power to compel amendment to national legislation, as enforcement of the principle of effectiveness.

<sup>98</sup> C. Harlow, above note 8, 81, notes – in relation to the unification of procedural rules – that 'uniformity is largely a symbolic concept, part of a wider integrationist project to *make Europe more relevant to its citizens*'. It is therefore concluded that 'law and legal procedure are not readily transferable technology' and so 'the way forward is to trust national courts, best fitted to understand the national context' (Id., 82-83). It is submitted here, on the contrary, that in relation to jurisdictional rules, the intervention of domestic legislators or constitutional amendments seem more adequate to face effectiveness gaps of national legal systems.

<sup>99</sup> As noted in J. Schwarze, *The Europeanization*, above note 71, 808.

systems,<sup>100</sup> the risk of disturbances of competition and of distortion of the free movement of goods and persons<sup>101</sup> or the necessity of a more complete realization of the principles of legal certainty and transparency.<sup>102</sup>

It is submitted here that this kind of arguments, while they are valid for the harmonization of procedural rules in general, shall not be applied to jurisdictional rules in particular. As it has been previously said, in fact, the principle of effective judicial protection seems to be violated through an inadequate legislation on the sharing of jurisdiction in different legal systems; it does not seem, on the other hand, that particular problems are created – from the EU law point of view – by the differences of such systems.

## Conclusions

It does not seem that the existence of different rules governing the attribution of appeals to one order of judges or to another may cause a distortion of competition or a violation of the non-discrimination principle. Such disturbances, on the other hand, may be caused by the existence, in some Member States, of a 'good' legislation on jurisdiction – which therefore is capable of granting a higher standard of protection of rights – while in other Member States the legislation is much more difficult to be applied – thus granting a lower standard of effectiveness of protection. Therefore, it is submitted that the main problem is related to the 'quality' of the jurisdictional rules and not to the differences existing between one State and another.<sup>103</sup>

In addition, it cannot be overlooked that the jurisdictional rules are often 'cornerstones' of the entire legal system. It seems therefore impossible to think of an 'external' input relating to their content, which goes further than a mere 'pressure' in relation to the effectiveness

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<sup>100</sup> W. Van Gerven, *Bridging the Gap between Community and National Laws: towards a Principle of Homogeneity in the Field of Legal Remedies?* [1995] *Common Market Law Review* 690. See also M.P. Chiti, *Towards a unified judicial protection in Europe?* [1997] 9 *European Review of Public Law* 555.

<sup>101</sup> J. Schwarze, *Deutscher Landesbericht*, in J. Schwarze (ed.), *Administrative law under European influence*, above note 71, 221.

<sup>102</sup> T. Heukels and J. Tib, above note 22, 128.

<sup>103</sup> Quite obviously, anyway, the existence of several different jurisdictional systems in the various Member States does not help much in the effort of granting legal certainty of rules.

of the protection. For instance, in the Italian legal system, the notions of the legal situations of rights and legitimate interests (which are the grounds for the separation of jurisdiction between ordinary and administrative courts) have been created over the years by commentators, jurisprudence and legislation. It is, therefore, an important element of the whole legal order and is a consequence of the Italian idea of the relationship between the citizens and the public authority. If we compare such idea and notions to the ones – completely different – used in the United Kingdom, or even in the EU legal order, we realize how much historical and constitutional distances are reflected in those peculiarities.

It seems, therefore, not possible and not desirable that these differences are eliminated. On the contrary, what is desirable is a higher effort by the national legislators to define more clearly the jurisdictional rules, making them more certain and, therefore, effective.<sup>104</sup> If the Member States will not put an additional effort in this direction, the ECJ will have to take the full responsibility in the application of the principle of effective judicial protection, in relation to the national jurisdictional rules. This would probably create the mentioned problems, from the point of view of legal certainty (and therefore of effectiveness of the protection) and from the point of view of the procedural autonomy of the Member States.

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<sup>104</sup> Several commentators recognized the need for the intervention of legislators to face the need of a more procedural uniformity. See, e.g., A. Arnulf, *The European Union and its Court of Justice*, above note 30, 276.



**Case Note:**  
**Sedjic And Finci v. Bosnia And Herzegovina**

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## Facts

In *Sedjic and Finci v Bosnia and Herzegovina*<sup>1</sup> the Grand Chamber of the European Court of Human Rights was asked to decide whether the voting provisions in the Constitution of Bosnia-Herzegovina (henceforth, BiH) were discriminatory and therefore in violation of the right to vote (Art.3 of Prot.1 of the European Convention on Human Rights), and the right to be free from discrimination under Article 14 of the Convention and Article 1 of Protocol 12. In a judgement delivered on 22 December 2009, the majority of the Grand Chamber found the voting provisions in question to be in violation of the European Convention. The Constitution of BiH is part of the Dayton Agreement, the peace agreement that ended the war in Bosnia in 1995. The Court's decision is therefore significant because it shows its willingness to hear cases that could lead to the amendment of the peace agreement, and as a result directly influence the attempts to build a peaceful BiH. However, the decision is also disappointing because it lacks a well-reasoned judgment; the Court failed to take into account the fragile situation that still exists in the country today and the unique legal issues this gives rise to.

Article 4 of the BiH Constitution states that only Bosniacs, Croats and Serbs – collectively known as the 'constituent peoples' – are eligible to become members of the House of Peoples, one of the two Chambers of the Legislative Assembly. Similarly, Article 5 of the Constitution includes the same eligibility requirement for the Presidency of the country. This means that the Constitution purposively excludes the citizens of BiH who are not members of one of the three constituent groups, the 'others', from exercising their right to be voted into one of these positions. The case arose because of a complaint from two citizens of BiH, a Roma and a Jew, who despite their experience in politics, were not allowed to run for office because they did not want to declare themselves as members of one of the constituent groups.

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<sup>1</sup> *Sedjic and Finci v Bosnia and Herzegovina* App nos 27996/06 and 34836/06 (ECtHR, 22 December 2009).

## **Decision**

The Court held, without much difficulty, that the facts of the case fall within the ambit of the right to vote. Going on to consider that the power to exercise the right was exclusively dependent on considerations of a person's ethnicity, the ECHR found a violation of Article 14 in conjunction with Article 3 of Protocol 1 and, for the first time in its history, of Article 1 of Protocol 12. The Court avoided answering the question of whether the provisions were trying to achieve a legitimate aim, in this case the protection of peace and stability, and dove straight into a proportionality analysis. It concluded that there were other, less discriminatory methods of ensuring the equal participation of the constituent people in the decision-making and thus held that the provisions were disproportionate.

## **Analysis of the Majority's Decision**

While the majority's conclusion should be welcomed, the reasoning that preceded it is underdeveloped and surprisingly flippant as to the important issues that were being litigated in the case. By failing to engage with the question of whether the provisions were trying to achieve a legitimate aim, the Court clouded its own reasoning, which is disappointing for three distinct reasons. Firstly, there are strong arguments both for and against the protection of group rights in peace agreements and the failure of the Court to even acknowledge the existence of such arguments makes its conclusion harder to accept. Secondly, the ECHR's previous case law concerning both the right to vote and the legitimate aim of maintaining peace and stability suggested a wide use of the margin of appreciation. However, the majority's murky reasoning fails to explain its departure from this practice. Finally, the last problem with the Court's analysis is that it missed the opportunity to explain what is required from a human rights perspective in post-conflict agreements and therefore, to influence the negotiations taking place in other Council of Europe countries, such as Cyprus.

Numerous academic opinions have been expressed about the adequacy of protecting individual rights in post-conflict agreements, with added emphasis on freedom from



discrimination, or whether the protection of ethnic groups as a whole is also necessary. In the case of BiH, a group rights approach seems to have been preferred, since the Constitution was designed to protect the rights of Bosniacs, Slovaks and Serbs as members of constituent groups, rather than Bosnian-Herzegovinians as citizens of the country as a whole. As the facts of the case show, the group rights approach is not without its problems. However, it is not without its supporters either<sup>2</sup> and the Court's superficial analysis of the respondent State's submissions (which were largely based on the group rights argument) makes its final conclusions less persuasive. As Judge Bonello put it in his strong dissenting opinion, the Court preferred 'to embrace its own sanitised state of denial, rather than open its door to the scruffy world outside'.

The voting provisions in question were added to the Constitution because they were the only way to persuade the different parties to the conflict to accept the Dayton Agreement and stop the war<sup>3</sup>. The provisions provided a guarantee that what led to the last war could not be repeated again and that the interests of each constituent group would be safeguarded by the Constitution itself. The respondent government's submission that the law was trying to maintain stability in the country is supported by the fact that most of the parties that operate in BiH are mono-ethnic, suggesting that the people themselves are still not ready to trust members of other ethnic groups. It is therefore at least arguable that had the Constitution not protected group rights to such an extent, the constituent people's continued feelings of mistrust towards each other could have been expressed in more violent ways and they might have reverted back to fighting.

However, there are also strong arguments against the existence of group rights, such as the fact that they can feed the nationalism and mistrust between the different ethnic groups that led to the war in the first place. By granting special treatment to the 'constituent peoples' solely because of their ethnicity, the divisions within the State are institutionalised and the differences are perpetuated indefinitely. Especially in post conflict situations where any excuse could lead to the abandonment of the peace process, group rights can lead to

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<sup>2</sup> For example, see W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995).

<sup>3</sup> G Nystuen, *Achieving Peace or Protecting Human Rights: Conflicts between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Martinus Nijhoff Publishers, 2005) p192.

even more racism and less willingness to cooperate between the communities. For example, if one of the criteria for the election of a candidate is his ethnicity, the implication fostered by the Constitution itself is that one of his jobs is to protect 'his people' from the rest. Voters are therefore likely to believe that the best person for the job is the one with the strongest nationalist beliefs, the one who is less likely to 'give in' to the demands of the other constituent groups. Whether those demands are reasonable and to the benefit of the State, rather than to the constituent group proposing them, becomes irrelevant and as nationalism becomes a more helpful tool for aspiring politicians, the distinction between 'giving in' and accepting necessary compromises for the running of the State might be lost. It therefore becomes clear that there are strong arguments both for and against the usefulness of group rights in post-conflict agreements and in a more complete reasoning, the Court should have alluded to the importance of this debate.

Even if imperfect at best and seriously problematic at worse, the Dayton Agreement is a carefully balanced compromise between the interests of the three constituent groups which 16 years ago killed between them 100,000 people and left homeless 28% of the country's population<sup>4</sup>. The situation in BiH is still unstable today: a number of countries advise their citizens to avoid travelling there due to threats to their own security<sup>5</sup>, and it is widely accepted that the fragile running of the country is heavily dependent on the continued presence of the High Representative<sup>6</sup>. The foregoing analysis illustrates that it is unclear whether group rights in general, and the specific voting provisions in particular, are the cure or the cause of the on-going problems in BiH. It thus becomes even more disappointing that the Court did not consider it necessary to delve into an analysis of the two sides and offer persuasive arguments for its rejection of the group rights approach to peace agreements.

The second reason why the Court's murky reasoning is disappointing is because it fails to explain its decision not to use the margin of appreciation. The maintenance of a State's peace and stability are tremendously sensitive issues and in such cases the Court usually

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<sup>4</sup> Partly Concurring and Partly Dissenting Opinion of Judge Mijovic, joined by Judge Hajiyeu.

<sup>5</sup> Ibid

<sup>6</sup> Venice Commission, '*Opinion of the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*', [2005] CDL-AD(2005)004. The Opinion states in para 29: 'The system has more or less functioned due to the paramount role of the [UN] High Representative.'

allows the State to use its discretion<sup>7</sup>. In this case, this did not happen and in the slightly exaggerated words of Judge Bonello, the majority's rigid approach demanded from BiH 'to sabotage the very system that saved its democratic existence'. In this sense, the Court's decision was surprising and therefore should have been justified more completely. The judgment lists a number of international bodies that have criticised the voting provisions in BiH as discriminatory<sup>8</sup>, which provides evidence that the ECHR is not alone in thinking that the law in question should be revised and that the use of the margin of appreciation should be avoided. However, this should not serve as a substitute to a proper reasoning as to why a violation was found. A second factor which suggested that the Court should have allowed BiH to use its discretion is the fact that Article 3 of Protocol 1 is a right that has attracted a generous use of the margin of appreciation – Judge Bonello lists no less than 14 cases in which this was used. Finally, the Court has explicitly stated that in relation to the right to vote, domestic authorities should be given sufficient latitude to assess the needs of their society in building confidence in the new democratic institutions<sup>9</sup>. The Court's bold decision not to use the margin of appreciation is not in itself unwelcome; what is problematic is its failure to adequately justify this decision, especially in such a particularly controversial case. Not only did this result in a less persuasive ruling, but also in a missed opportunity to clarify the Court's much-criticised approach in relation to the margin of appreciation in general<sup>10</sup>.

A third reason for why the Court should have made its reasoning clearer is because the *Sedjic and Finci* case may have important implications for other member States of the Council of Europe. For example, some of the proposals that are being negotiated in relation to Cyprus sound dangerously similar to the provisions the Court rejected in *Sedjic*<sup>11</sup>. In this case, the court illustrated its willingness to get involved in the controversial remit of peace

<sup>7</sup> For example, see *Yumak and Sadak v Turkey* App no 10226/03 (ECtHR, 2008) para 125-126

<sup>8</sup> In particular, it cited extracts from the opinions of the Committee on the Elimination of Racial Discrimination, the Human Rights Committee, the European Commission for Democracy through Law (Venice Commission), the Parliamentary Assembly of the Council of Europe, the European Commission against Racism and Intolerance and the Organisation for Security and Cooperation in Europe.

<sup>9</sup> *Ždanoka v Latvia*, App no 58278/00, (ECtHR, 16 March 2004) p134.

<sup>10</sup> One of the most thorough criticisms against the application of the margin of appreciation is offered by George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007).

<sup>11</sup> I am mostly referring to the rotating presidency suggestion that is on the negotiating table at the moment. Depending on the way the suggestion is actually phrased, it could lead to a human rights violation: for example, if the rotating presidency means that a Greek and Turkish Cypriot politician will be president for given periods of time, then by implication it discriminates against other minority groups who are prevented from running for office. However, if the provision is phrased to suggest that the President and Vice-President will be coming from the Greek and Turkish Cypriot constituencies, then the case *could* be distinguished from *Sedjic and Finci*.

negotiation agreements, and thus marked its jurisprudence as an important factor to be taken into account by Greek and Turkish Cypriots during the on-going negotiations. However, the absence of a detailed justification for the finding of a violation makes it less likely that the reasoning of the Court will influence the negotiations to a significant extent.

The effect of demanding that States comply with the European Convention when drafting peace agreements, combined with the lack of proper guidelines from the Court as to what these obligations actually entail, makes it likely that the Court will intervene to amend a future Cypriot Constitution. However, direct involvement of the Court in such politically volatile contexts should only be a measure of last resort. It would have been preferable if the Court provided guidance through this judgment and left the Cypriot politicians to apply the general principles to the specific facts of the ground. In this way, human rights considerations could become more influential in post-conflict agreements, but their existence would be legitimised by the fact that they were negotiated by the leaders and democratically accepted by the people, rather than being imposed by an international Court in a subsequent decision. Furthermore, it is more likely that compliance with human rights will be achieved if the negotiating parties are influenced by ECHR jurisprudence before the signing of the peace agreement, rather than being forced to amend it later. This is reflected in the fact that even though *Sedjic and Finci* was decided in 2009, nothing has happened so far to amend the problematic provisions in the Constitution.

Despite these criticisms of the majority's reasoning, its conclusion should be welcomed because the provisions in question were neither necessary nor proportionate means to achieve peace and stability in the country. The BiH Constitution provides a plethora of mechanisms to ensure that the three constituent groups are equally powerful. These include provisions such as a strong preference stated in the Constitution for all decisions to be taken unanimously<sup>12</sup> and a power given to representatives of ethnic groups to veto decisions that might compromise their 'vital interests'<sup>13</sup>. Importantly, the Constitution does not define what is meant by 'vital interests', leaving the ethnic groups to interpret it in an excessively broad way. It has been argued that the effect of the 'vital interests' veto should

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<sup>12</sup> Constitution of BiH, Article IV(3)

<sup>13</sup> *Sedjic and Finci*, para 7: Constitution of BiH, Article IV(3)(c).

not be over-exaggerated since it has not been used frequently so far. However, as the Venice Commission<sup>14</sup>, the Council of Europe's advisory body on constitutional matters, put it in an Opinion on the constitutional situation in BiH: 'The main problem with veto powers is not their use but their preventive effect. [...] Due to the existence of the veto, a delegation taking a particularly intransigent position and refusing to compromise is in a strong position.'<sup>15</sup> It therefore seems clear that the existence of another mechanism – the requirement of belonging to a constituent group to run for office - is unnecessary and potentially dangerous.

### Analysis of the Minority's Opinion

While the majority's analysis leaves much to be desired, the minority's reasoning and ultimate conclusions are also problematic. Both Judges Mijovic and Hajiyeve on one hand and Judge Bonello on the other criticised the majority for being too activist and for trespassing in a sensitive policy area. However, at the same time, and in a rather contradictory manner, both judgments chastised the Court for failing to offer an alternative suggestion to the voting provisions in question, which would protect the constituent peoples' interests and simultaneously allowing the 'others' to get involved in government.

The criticism that the majority was overstepping its boundaries is unpersuasive because it did exactly what the Court was designed to do: it stepped in to protect human rights when the political representatives of the people were hesitant to do so. In other words it protected the minority from the 'tyranny of the majority'<sup>16</sup>. Despite the obvious differences in the facts of the cases, the Court's approach in *Sedjic and Finci* is analogous to its unanimous (and universally applauded) decision of *Hirst v UK*<sup>17</sup>, a prisoners' voting rights case. In *Hirst*, the intervention of the Court was welcome because even though the issue was a sensitive one touching upon policy considerations, the politicians were unlikely to amend the discriminatory law because it was popular with the majority of the voters. For

<sup>14</sup> The full name of the Venice Commission is the Commission European Commission for Democracy through Law.

<sup>15</sup> Venice Commission Report (n 6), para 32.

<sup>16</sup> Alexis de Tocqueville, '*Democracy in America*' (1835) Chapter 15.

<sup>17</sup> [Hirst v UK \(No 2\) \[2005\] ECHR 681](#).

similar reasons in this case, the issue was unlikely to be dealt with by the elected representatives in BiH and therefore if a change was going to take place, it had to be initiated by the Court.

Judge Mijovic himself points out in his dissenting opinion that previous attempts to change the voting provisions in question had led nowhere. He also highlights that the use of nationalist rhetoric in BiH has been on the increase in the last years and that the country continues to be divided along ethnic lines<sup>18</sup>. Additionally, the 2006 election confirms that most voters still prefer nationalist rule because they feel safer being led by their 'own people'<sup>19</sup>. With this political climate in mind, the likelihood of the nationalist elected representatives stepping in to reduce their own chances of getting re-elected by taking power away from the constituent groups is slim indeed. The choice before the Court was not to decide whether to act or step back and let the politicians remedy the discrimination, but whether to act or step back and allow the discrimination to continue for the foreseeable future. One therefore has to disagree with the minority that the use of the margin of appreciation in this case would have been prudent; rather, it would merely have allowed nationalist and discriminatory feelings to develop unimpeded.

Moreover, the second criticism in the dissenting judgements is again misguided because to suggest an alternative solution to the election law would be indeed for the Court to overstep its boundaries. A number of suggestions could be considered and tailored to the needs of BiH, such as maintaining the system of directly electing two members of the Presidency from the Federation of Bosnia and Herzegovina (where the majority of Bosniacs and Croats live) and one from Republika Srpska (where the majority of Serbs live), but without mentioning any ethnic criteria. A second suggestion would be to replace the current President voting procedures with a more complicated system of indirect elections<sup>20</sup>. While the Court makes reference to both suggestions, it appropriately does not express a preference between the two. The solution to this problem should be devised by the people

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<sup>18</sup> This is confirmed by an Amnesty International Report, '*Human Rights in Bosnia-Herzegovina, Report 2011*' [2009] <<http://www.amnesty.org/en/region/bosnia-herzegovina/report-2009>>.

<sup>19</sup> Partly Concurring and Partly Dissenting Opinion of Judge Mijovic, joined by Judge Hajiyev.

<sup>20</sup> Both proposals have been examined by the Venice Commission (see document in Supra note 6). The Commission concluded that both proposals had their advantages and disadvantages, but recommended the adoption of indirect elections.

of BiH themselves, with the guidance of a specialist body such as the Venice Commission which has in fact contributed to this debate in the past<sup>21</sup>, rather than the unelected European Court. The Court was correct in pointing out that the electoral provisions in question are problematic and in need of reconsideration, but it was also right to step back and leave more legitimate bodies to find a solution.

## Conclusion

In conclusion, while the majority's analysis is not as detailed as it should have been, its conclusion should be preferred to that of the minority's. Had the Court not intervened, the discriminatory provisions would remain in the Constitution of BiH. This would probably have further poisoned the relationship between the different ethnic groups in the country, thus having a counter-productive effect to the one it was trying to achieve. Disappointingly, the Court's failure to provide a reasoning does not provide any guidance to Greek and Turkish Cypriot politicians who are negotiating similar, if not identical issues to the ones discussed during the Dayton Agreements<sup>22</sup>. Perhaps the only conclusion one can draw from the majority's approach is that the Court will not hesitate to intervene in order to ensure the human rights compatibility of a potential Cypriot peace agreement. With that in mind, it would be prudent of Cypriot politicians to take human rights seriously and actively take steps to ensure that any compromises made by either side to the negotiations also comply with the requirements of the European Convention on Human Rights.

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<sup>21</sup> Ibid.

<sup>22</sup> This is supported by Bose Sumantra, in *Contested lands: Israel-Palestine, Kashmir, Bosnia, Cyprus and Sri Lanka* (Harvard University Press, 2007), who describes the Dayton Peace Agreement as 'remarkably similar' to the Annan Plan (p100).



**Book Review:**

**Francis N. Botchway (ed.), *Natural  
Resource Investment and Africa's  
Development***

(Cheltenham: Edward Elgar, 2011) ISBN  
9781848446793, 544 pp. Price: £150

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There is huge excitement about the natural resource potential of Africa. The continent is not only rich of traditional resource items such as gold, diamond, oil and gas, but also endowed with abundant resources that are crucial to the high-tech and other industries. Africa's natural resources have become even more critical due to emerging market's growing need for the supply of such resources.

The book *Natural Resource Investment and Africa's Development* edited by Francis N. Botchway is one of the most recent and interesting contributions in the very specific field of investment law in Africa. This book explores the niche area of natural resource investment in Africa in a multidisciplinary manner. It consists of fourteen chapters which are divided into three parts.

Part I of the book deals with the governance and political economy in Africa. Chapter one by Rhuks Ako and Nilopar Uddin discusses the working of the principles of good governance (i.e. rule of law, democracy, transparency and accountability) in the context of resource management in Angola, Botswana, Chad and Nigeria. The authors assert that the adherence to those principles is indispensable for the proper management of natural resources. The second chapter, by Abba Kolo, deals with dispute settlement and sustainable development. Kolo puts forward that an effective judiciary and reliable access to judicial redress can essentially prevent conflicts that are likely to affect resource development projects. Chapter three by Rhuks Ako concerns resource exploitation and environmental justice in Nigeria. Ako illustrates the fact that the African conception of environmental justice differs substantially from the Western interpretation with the example of the environmental destruction in the Niger Delta. Not only do the residents in that region lack adequate environmental protection from the adverse effects caused by the oil industry, they also lack sufficient judicial redress.

Part II of the book concerns commercial and financial relations in Africa. Chapter four by Emmanuel Laryea studies contractual arrangements for resource investment. He concludes that many African countries managed to attract foreign direct investment (FDI), but these

investments benefitted those countries less than could have been achieved. The fifth chapter, by Gavin Hilson, critically analyses the relationship between artisanal, mainly local or indigenous, and large-scale, primarily multinational, gold mining. The former is an important source of income for the unemployed, and is constantly expanding all over sub-Saharan Africa. Yet, in most African countries' reform processes of their mining industry, artisanal miners have been and continue to be neglected in favour of the multinational gold mining operators. Chapter six by Francis N. Botchway looks at mergers and acquisitions (M&A) in the resource industry, and evaluates the implications for Africa. In the African resource business efficiency gains through M&A do not embrace benefits from reduced prices, consumer choice and welfare benefits, but rather reductions in expenditures on externalities and tax payments to governments. According to Botchway this 'is one reason why, notwithstanding expansion in investment, resource-rich African countries see very little return on the exploitation of their finite resources.' The seventh chapter, by Evaristus Oshionebo, evaluates fiscal regimes for natural resource extraction. In order to encourage more FDI in the extractive industry, African countries offer fiscal regimes with far too generous stabilisation clauses and guarantees to foreign mining companies. As a result, the returns to African countries from the increased FDI are minimal. In Chapter eight, Benjamin Richardson describes Africa's gradual transformation from being a pure object of socially responsible investment (SRI) to also being an agent thereof. Africa's role as an object of SRI was illustrated, for example, by the Darfur divestment campaign. Microfinance for sustainable livelihoods is the most important form of SRI in Africa and exemplifies that Africa can also be an agent of SRI.

Part III of the book deals with the international context of African resource exploitation. The ninth chapter, by Emmanuel Laryea, concerns the evolution of international investment law in Africa. It discusses the advantages and disadvantages of various international investment law regimes for Africa, and mainly its extractive industry. In Chapter 10, Billy Melo Araujo examines Africa's dependency on commodity exports and the role of commodity agreements in stabilising international commodity markets. It is argued that African countries face the challenge of having to balance the need to mitigate the impact of commodity-dependence and the need to sustain adequate levels of investment in the national economy. Chapter 11, by Francis N. Botchway, looks at the economic relations

between China and Africa. According to Botchway there is a considerable difference in the policies and attitudes of China on the one hand, and the United States and Europe on the other hand, towards Africa. Sino-African relations are essentially characterised by cooperation and mutual dependence which is the central thrust of regime theory. In Chapter 12, Ibironke Odumosu addresses the settlement of investor-State oil and gas disputes. He focuses particularly on the role of international adjudication norms in Nigeria and Angola, the two largest oil exporting countries in Africa. Chapter 13, by Regina Rauxloh, deals with the role of international criminal law in environmental protection. Rauxloh argues that criminal sanctions should be imposed to the most severe violations of environmental law. The final chapter, by David Dzidzornu, rounds off this volume by looking at economic development and environmental protection in Africa from a constitutional, conventional and institutional perspective.

This is a thought-out and well organised book. Despite the multidisciplinary approach, the editor, Francis N. Botchway, managed to select the contributions to this book in such a way that certain concepts reiterate throughout the book. One of these concepts is the so-called 'resource curse' which refers to the paradox that countries with an abundance of natural resources often grow more slowly than countries with fewer resources. Another concept is the 'Dutch disease', a phenomenon whereby the increase in the real exchange rate and wages resulting from higher prices for natural resource exports lowers a country's competitiveness, and draws resources away from, less profitable economic sectors. Two themes that run through the entire book are transparency and equity. This book is highly recommendable for anyone interested in natural resource investment, especially with respect to Africa. Its multidisciplinaryity makes it a valuable resource, especially for academics interested in law and economics and socio-legal studies.



**Book Review:**

**Andrew D. Mitchell, Legal Principles in  
WTO Disputes**

(Cambridge: CUP, 2011) ISBN 9781107401631  
(paperback), 364 pp. Price: £23.99

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Principles in the WTO context are a controversial topic, as there are many different opinions about the exact use of these principles within academic works. Nevertheless, in *Legal Principles in WTO Disputes*, Professor Andrew D. Mitchell manages to show different perspectives on those principles, and he is not afraid of expressing his own views on this difficult topic. Traditionally, the Appellate Body has been conservative in its interpretation of the WTO agreements. It uses a strict textual approach usually starting with the ordinary meaning and the dictionary definition of the terms. Acknowledging that the WTO is so complex that every issue or dispute cannot be solved solely by using a textual approach, Mitchell tries to clarify to what extent the Appellate Body utilises these principles in its interpretation and how it uses the principles both explicitly and implicitly. In this book, Mitchell explores the justification for using principles within the WTO system, and to do this in a persuasive manner he seeks to find a legal framework, which fits these principles, by looking at principles of customary international law and general principles of law. This book was first released in 2008, and has now been published in a paperback version.

In the introduction, Mitchell explains the nature of legal principles and the need for using them in WTO disputes. He puts the WTO into the bigger framework of public international law, which is useful to take into account throughout the book. The structure of the book consists of two parts: the first part seeks to establish a framework for the use of principles in WTO disputes, while the second part relies on this framework in examining four specific examples of principles.

In Part I, Chapter two sets out to define three categories of principles that may be of particular relevance to WTO disputes. These three categories are: principles of WTO law, principles of customary international law and general principles of law. In each of these categories Mitchell points at several examples of principles, which are within the respective category. For instance, in relation to the WTO he points at trade liberalisation, non-discrimination and reciprocity, stating that trade liberalisation and reciprocity are unlikely to stand up as independent principles in WTO disputes and that the use of the non-discrimination principle should depend on the wording in the specific provision instead of as

a broad principle. Some principles, which are discussed, fall into several categories. This chapter is helpful in order to gain a better understanding of the subsequent discussion in Part II of the book. As it is important to be aware of the vagueness of principles in general, Mitchell is able to present some of the relevant principles in an accessible way. To further ensure that the reader is able to follow the discussion in Part II, Chapter three is devoted to the legal basis underlying the use of principles in WTO disputes.

In the book there is a quotation from Professor Georges Abi-Saab, a former Appellate Body member, asking: '[C]an we refer to a rule of general international law such as good faith? Can we have a legal system without the rule of good faith? . . . Can there be any system of law that can work without a reasonable concept of proportionality?' These questions are, *inter alia*, answered in Part II. In this Part, Mitchell examines four selective principles namely the principles of good faith, due process, proportionality, and special and differential treatment. Each principle is examined not only in the WTO context, but also in regards to public international law outside the WTO. It is fruitful to read the parts about good faith and due process, since these principles can sometimes be hard to distinguish. As is explained in the book, it even appears that the Appellate Body in *US – Hot-Rolled Steel* has confused the due process obligation with the principle of good faith. It is therefore impressive that Mitchell manages to explain and distinguish them in an eloquent way.

Even though not all scholars will necessarily agree with Mitchell, his arguments are persuasive. In the overwhelming amount of literature about the WTO, this book stands out since it successfully seeks to go into the use of principles, which is an important factor in any international agreement. To have a book like this is crucial for any student, academic or practitioner who tries to navigate around the WTO law conundrum. This book is also recommendable as a textbook on public international law as it well elaborates the general use of the principles.



**Book Review:**

**Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102***  
(Oxford: OUP, 2011) ISBN 9780199226153, 488  
pp. Price: £70

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The prohibition of the abuse of a dominant position under Article 102 of the Treaty on the Functioning of the European Union (hereafter, 'Article 102') is a cornerstone of EU competition law. However, the scope and objective of this prohibition are undefined. The application of Article 102 in practice has been controversial, with a variety of possible objectives such as the preservation of an undistorted competitive process, the protection of economic freedom, the maximisation of consumer welfare, social welfare, or economic efficiency. The disagreement about the goal(s) of Article 102 raises questions about how a dominant position and abuse should be assessed. Only once the objective has been identified can the tests for dominance and abuse be understood and further developed.

Dr. Renato Nazzini's *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* endeavours to lay out a coherent analytical framework for the application of Article 102. Therefore Nazzini first undertakes to clarify the normative and legal foundations of EU competition law, and then sets out to develop an approach to the assessment of conduct that may be abusive under Article 102. Nazzini claims that the analysis in this book is carried out in a way that is different from the previous approaches to Article 102. It adopts an integrated and holistic approach to the analysis of the objectives and the tests of Article 102. Moreover, this book adopts an interdisciplinary approach and analyses Article 102 not only from a legal perspective but also under the lens of economics. Economics can provide key insights to understanding the law on dominance and can certainly be enlightening for those reading the book with a background predominantly legal background.

The book is divided into five parts. In Part I, Chapter two is devoted to a normative analysis of the objective of competition law and distinguishes between non-welfare objectives (the competitive process; economic freedom; fairness; protection of competition and small and medium-sized enterprises; market integration; market liberalisation; and consumer choice) and social welfare. Nazzini concludes that long-term social welfare is the ultimate objective of competition law and that this objective is theoretically superior to any other objective of competition law. While Part I mainly deals with the normative foundations of competition law in general, Part II focuses on the legal foundations. Chapter four tries to identify the



objective of Article 102 itself through a process of literal and teleological interpretation combined with examining the *travaux préparatoires* of the Treaty of Rome, the case law on Articles 101 and 102 and the EU Merger regime. Nazzini again concludes, in line with the conclusion in Part I, that the objective of Article 102 is the maximisation of long-term social welfare. Part III deals with the different tests of abuse: tests of intent (Chapter six), the efficient competitor test (Chapter seven) and the consumer harm test (Chapter eight). The different tests apply to establish a *prima facie* case of abuse. Such conduct is prohibited unless the dominant undertaking raises a defence, dealt with in Chapter nine, which is capable of displacing this presumption. The first chapter in Part IV (Chapter 10) discusses the concept of dominance and Nazzini aims to demonstrate that under Article 102 dominance is the ability to harm competition. After defining dominance, the chapter goes on to examine the alleged three necessary elements of dominance test: substantial and durable market power, the presence of dynamic barriers to entry, and the absence of countervailing buyer power. Part IV (Chapter 11) also discusses the concept of collective dominance, which has given rise to a considerable degree of complexity in the development of legal tests.

The normative and legal analysis in these different chapters is extensive and can be complex. If the reader stops reading at the end of Chapter 11, he or she might be lost in the different concepts surrounding dominance and abuse of dominance. This is pre-empted by Nazzini. The final chapter is written in the form of a general conclusion and retraces the reasoning undertaken in the book in a very comprehensive analytical framework (Part B). Also very helpful for the reader is Part C, in which the author lists and summarises the different objectives, tests and principles used throughout the book and constituting the legal framework of Article 102.

A reader who wants to find straightforward guidance to a “real-life” Article 102 case will not find any clear answers in this book. This is not the aim of this book. Nazzini’s contribution is what the title says it is: an extensive work on the principles and objectives of Article 102, which is one of the foundations of European Union competition law. And even though this book deals with objectives, principles, normative foundations etc. it is very accessible and understandable, even for readers with a minimal background in EU competition law,

without making any concessions to the quality of the book. Dr. Renato Nazzini makes a very useful and appreciated contribution to the literature on Article 102.