



University of Glasgow Law Postgraduate Conference 2018

Working papers

A collection of working papers based on presentations from GLPGC2018 in the areas of International Law, Conflict & Security, Law Reform & Public Policy and Legal Theory.

Contact:

Joanna Wilson: joanna.wilson.2@glasgow.ac.uk (International Law, Conflict & Security)

Felicity Belton: felicity.belton@glasgow.ac.uk (Law Reform & Public Policy)

Donald Buglass: donald.buglass@glasgow.ac.uk (Legal Theory)

w: <https://www.gla.ac.uk/schools/law/postgraduateresearch/glpgc/>

University of Glasgow Law Postgraduate Conference 2018

Working Papers

Table of Contents

International Law

Parcel of rogues in a nation: the story of the Darien Company and the role of Grotius in Scots legal approaches to the 'new world'

GC McBain.....4-36

Legal right to have access to social rights or just market concept – questions about recognition of EU citizenship in practice

Kamila Anna Feddek.....37-55

Does Telling Tales Post Bellum Suffice for the Redress of Gross Human Rights Violations? Reviewing Truth Commissions

Nomfundo Ndlwana.....56-71

Law Reform and Public Policy

Fathers and immigration detention: A pilot study

Kate Alexander.....72-86

Adequacy of the Legal Safeguards for the Patients' Right of Confidentiality under the Saudi Arabian Legal System	
<i>Abba Amsami Elgujja and Nicolas Kang-Riou</i>	87-110
The Aspirational Shortcomings of the Irish Legislative Proposals in Assisted Human Reproduction	
<i>Claire O'Connell</i>	111-129
Child Rights Protection, Federalism and Culture: Irreconcilable Goals?	
<i>Lekan Ogunde</i>	130-145
Frame, Legal Consciousness and Participation: A Case Study of Immigration Bail Hearings	
<i>Susannah Paul</i>	146-159
 Legal Theory	
Political Positivism, Judicial Moral Reasoning and Judicial Power(s)	
<i>Ana Cannilla</i>	160-173
Ethical value pluralism: Some implications for the UK's legal sovereignty	
<i>Leanne Cochrane</i>	174-189
The Power-generative Potential of Scotland's Public Sphere	
<i>Iain Hunter</i>	190-201

Parcel of Rogues in a Nation: The Story of the Darien Company and the role of Grotius in Scots Legal Approaches to the ‘New World’

G.C. McBain*

Key Words: *History of International Law, Colonialism, Scots Law, Hugo Grotius, Acquisition of Territory*

This paper considers the historical relationship between international law and colonialism; specifically, it discusses an often forgotten story in the history of British colonialism: the Darien Scheme. This expedition was a corporate venture to establish the then-Kingdom of Scotland's first colony on the Isthmus of Panama in 1698-1699. Its being overlooked in legal literature probably stems from its unmitigated failure and disastrous financial consequences for Scotland. Yet, the scheme's failure led to the creation of two significant financial and political institutions that remain with us to this day, they being the Royal Bank of Scotland and the Union between the Kingdoms of Scotland and England. Given the significance of both institutions to the creation of the British Empire, not giving the Scheme a fuller treatment in international legal history appears somewhat premature.

Like other European colonial ventures, the Darien Scheme was heavily imagined and justified through legal constructs. To explore this, the paper is divided into two main sections. The first explains what the Darien Scheme was, discusses the origins of the company that pursued the Scheme, and considers the socio-political context of the Scheme in late 17th century Scotland. The second section examines the legal arguments advanced to justify the Scheme. These proceeded along two tracks: (1) in Scots law - through the conferral of a monopoly upon the Company of Scotland Trading to Africa and the Indies; and (2) in the law of nations – through the acquisition of title in territory on the Isthmus. It is submitted these arguments evidence an essentially Grotian understanding of the law of nations, one that was very likely prescient in the minds of those who controlled the Scottish Company. The paper concludes with some musings on the legacy of the Darien Scheme legally and politically as well as offers some thoughts as to reasons why the Scheme might have been framed in the vernacular of Hugo Grotius.

I. A Brief History of the Darien Scheme

As is well known, Scotland and England's monarchies were joined long before each kingdom consented to the union in 1707. This transpired with James VI's ascension to the throne of England after the death of Elizabeth I. He had been King in Scotland since the forced abdication of his mother, Mary, in 1567.¹ The bloody history of 17th century Britain is also well known. James' successor, Charles I, was a tyrant who lost the throne (and his head) during England's Civil Wars. Following Cromwell's brief Commonwealth, Charles II was eventually able to re-secure the throne for the Stuart dynasty only to have that lineage be cut short when his successor (and brother), James VII, was expelled in the Glorious Revolution of 1688.² This led to James' son-in-law, William of Orange, assuming power.³ William would be the King to oversee the ill-fated Darien expedition, though he never visited Scotland during his reign and had a High Commissioner represent him in Edinburgh instead.⁴

All of this is important in order to emphasise that while Scotland and England had shared a monarch throughout the 17th century, except for when monarchs were out of fashion, they were still separate kingdoms. They had separate parliaments, separate legal systems and, most importantly in the context of the Darien Scheme, separate foreign policies.

England had been at war with France for some time immediately prior to the Darien expedition. James VII had been on cordial terms with France, Louis XIV being his cousin and eventual supporter when James entered exile.⁵ By the time the Darien Scheme was proposed, William's wars with France had drastically affected Scottish commerce and Scotland remained prohibited from trading with England's American colonies as all European trade with the colonies had to transit through England first (where they would be subject to inspection and tax).⁶ The cumulative effect was to make Scotland heavily dependent on the goodwill of England both

¹ He ruled with several regents until 1581.

² D.M. Walker, *A Legal History of Scotland (Volume IV): The Seventeenth Century* (T & T Clark, 1996), 88.

³ He became William III of England and William II of Scotland.

⁴ J.R. Young, 'The Scottish Parliament and the Politics of Empire: Parliament and the Darien Project, 1695-1707' (2007) 27(1) *Parliament, Estates and Representation* 175, 179.

⁵ T.M. Devine, *The Scottish Nation 1700-2007* (Penguin Books, 2000), 7, 17, 36.

⁶ Devine (n 5), 5; the Navigation Act 1663 is what enacted the specific condition that all European vessels trading with English colonies in America would need to bring the goods through England in order to collect tax, etc. It was an attempt to put the theory of mercantilism into practice. It was not until the Union of 1707 that Scotland would be conferred the same privileges.

economically and politically, something that was fraught with difficulty despite there being a shared monarch.

To break this dependency, the Scottish Parliament in an Act of 1695 created the ‘Company of Scotland Trading to Africa and the Indies’,⁷ also known as the Scottish Company.⁸ Parliament created the Company for the purpose of:

*...carrying on of trade, as to any subject of goods or merchandise, to whatsoever kingdoms, countries or parts of the world not being in war with his majesty, where trade is in use to be, or may be followed, and particularly beside the kingdoms and countries of Europe, to the East and West Indies, the Straights, and to trade in the Mediterranean, or upon the coast of Africa, or in the northern parts, or elsewhere as above...*⁹

Once the Act had passed, individuals named in it were empowered to take the necessary measures to secure capital to fund the venture to Darien,¹⁰ and they began to seek subscriptions from Edinburgh, London and the then-Free Imperial City of Hamburg. However, the English Parliament had become aware of the Scottish Company’s intentions through the jealousy of the then-English East India Company.¹¹ Both the Houses of Lords and Commons initiated investigations, much to the vexation of the Scottish Parliament,¹² with the Lords specifically seeking evidence from England’s chartered companies on the impact of the Scottish Company on English commerce.¹³

⁷ ‘Act for a company trading to Africa and the Indies’ in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1695/5/104. Date accessed: 6 January 2018. (herein ‘1695 Act’)

⁸ For a text of the Act, see Appendix 2.

⁹ 1695 Act (*italics my emphasis*).

¹⁰ 1695 Act.

¹¹ G.P. Insh, ‘The Founding of the Company of Scotland Trading to Africa and the Indies’ (1924) 21(84) *The Scottish Historical Review* 288, 291; the English East India Company is the same joint-stock company that would eventually become the British East India Company that would become synonymous with British imperialism, particularly in the Indian subcontinent.

¹² The parliament’s address to the king concerning Caledonia’ in Brown (n 7), 1700/10/185. Date accessed: 5 January 2018 (herein Parliament’s Address to the King concerning Caledonia’).

¹³ H. Bingham, ‘The Early History of the Scots Darien Company: The English Investigation’ (1906) 3(12) *The Scottish Historical Review* 437, 438.

In this respect, the East India Company and the Royal African Company both submitted memorials outlining their concerns to the Lords' investigation. These concerns were numerous. The companies were of the view they could not compete with the Scottish Company given the extent and generosity of its privileges, with the African Company even declaring that trade with the African continent would be permanently lost to Scotland under such conditions.¹⁴ This was because the Scottish Company was exempt from all taxes and duties but for a minor duty on tobacco imports to be paid to the King, while as the East India and Royal African Companies were subject to a different taxation regime that required more be paid. There was also a concern on the part of the East India Company that goods imported to Scotland (exempt from any tax in England) would be smuggled south via land, circumventing the 1663 Navigation Act, and thereby undercut English commerce.¹⁵

These economic trepidations were also complimented by concern relating to the respective foreign policies of England and Scotland. The Scottish Company had been granted the power to commit reprisals for interference with its property,¹⁶ something denied to both English companies at that stage.¹⁷ The 1695 Act also created duties on the part of the King, duties that obliged him to first protect the rights of the Scottish Company and seek restitution on their behalf (especially if military force was required) or, in the alternative, compensate the Company from the public purse for any losses due to seizure or damage.¹⁸ These conditions were problematic for England because it shared its sovereign with Scotland. The concern was essentially that, should Scotland become embroiled in a conflict with another European power due to the Scottish Company's activities, English monies and arms would be used to press the rights of Scotland and its Company because William's strength emanated from his English throne (not his Scottish one).¹⁹ This concern was heightened because the first proposed venture

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ This power is created at the point in the text where the 1695 Act states: '...to make reprisals and to seek and take reparation of damage done by sea or by land, and to make and conclude treaties of peace and commerce with the sovereigns, princes, estates, rulers, governors or proprietors of the foresaid lands, islands, countries or places in Asia, Africa or America...'

¹⁷ Bingham (n 13), 438.

¹⁸ H. Bingham, 'The Early History of the Scots Darien Company' (1906) 3(10) *Scottish Historical Review* 210, 216; the specific text of the 1695 Act where this duty is created is: '...if contrary to the said rights, liberties, privileges, exemptions, grants or agreements, any of the ships, goods, merchandise, persons or other effects whatsoever belonging to the said company shall be stopped, detained, embezzled or away taken, or in any sort prejudiced or damnified, his majesty promises to interpose his authority to have restitution, reparation and satisfaction made for the damage done, and that upon the public charge, which his majesty shall cause disburse, and lay out for that effect'.

¹⁹ Bingham (n 18), 216.

of the Scottish Company (i.e. Darien) would enter territory Spain claimed for itself and William had at that point been relying heavily on Spain in his war against Louis IV.²⁰

The Lord's investigations 'succeeded in frightening the [Scottish] Company out of England' and because of the chilling effect of its hostility towards any English participation in the scheme, no capital would be forthcoming from London.²¹ The English Government also frustrated the attempts of the Scottish Company to secure adequate finance in Hamburg. The account of the Company's representatives was that the English resident in Hamburg and William's English envoy at the court of nearby Lüneburg not only protested the Company's efforts to the Senate of Hamburg but also presented a memorial in William's name conveying a message. That message explained to Hamburg's authorities that to treat with William's citizens without proper credentials, as the men alleged the Scottish Company's representatives to be, would cause damage to relations with William and England.²² The Company's Council General petitioned William in response, arguing that the actions of the two English representatives had violated the privileges of the Company.²³ William responded, stating he would prevent his English agents from making use of his authority in such a manner,²⁴ but nevertheless it appears from further correspondence between the Company and the King that those agents would continue to deny they had received such an order from his Majesty.²⁵

In any case, the damage had been done.²⁶ The chilling effect of England's efforts to frustrate the scheme had succeeded and left subscribers in Edinburgh to shoulder the risk entirely. The Edinburgh contingent encountered significant difficulty in raising sufficient capital for the venture and was only being able to muster liquidity of less than £170,000.²⁷ Yet, most of the

²⁰ Devine (n 5), 6.

²¹ Bingham (n 13), 447.

²² Parliament's Address to the King concerning Caledonia (n 12).

²³ 'To the King's most Excellent Majesty, The Humble Address of the Council General of the Company of Scotland, trading to Africa and the Indies' quoted within Anon., *An Enquiry into the Causes of the Miscarriage of the Scots Colony at Darien, Or an Answer to the Libel entitled 'A Defence of the Scots Abdicating Darien'*, Submitted to the Consideration of the Good People of England (Glasgow, 1700) (on file with author), 22-24.

²⁴ 'The King's Answer to the above Written Address' quoted in Anon., *An Enquiry into the Causes of the Miscarriage of the Scots Colony at Darien* (n 23), 25.

²⁵ Anon., *An Enquiry into the Causes of the Miscarriage of the Scots Colony at Darien* (n 23), 26 and sequentially.

²⁶ 'Address to the King in behalfe of the African Company' in Brown (n 7), 1698/7/52. Date accessed: 14 May 2018.

²⁷ W.R. Scott, 'The Fiscal Policy of Scotland before the Union' (1904) 1(2) *The Scottish Historical Review* 173, 182.

floating capital in Scotland and much of its available credit had become embroiled in the Scheme.²⁸ By comparison, the East India Company commanded liquidity of approximately £1.5 Million, with a further £2 Million being raised in a 1698 Charter.²⁹ This should have been indication enough of how financially precarious the Darien venture was and how meagre Scotland's finances were compared to that of England.

Two separate expeditions were made to the Darien Isthmus, the first in 1698.³⁰ After reaching its destination, which it renamed 'Caledonia', that expedition was within a year plagued by disease, scarcity of resources as well as the capture of one of its ships, the *Dolphin*, by the nearby Spanish.³¹ Before long, the settlement was abandoned with one ship of the original five, the *Caledonia*, and less than a quarter of the original settlers returning to Scotland. With no knowledge of the ill fortune of the first expedition, a second was mounted in 1699 and reached the peninsula to find the enclave of 'Caledonia' abandoned and in disrepair. However, the settlers sought to resurrect the colony amidst increased Spanish pressure and eventually attempted to deter Spanish assault by launching a pre-emptive attack with assistance of natives of the Isthmus.³² This only provoked a greater Spanish response, one that drove the Scots from Darien for good.

The resultant loss of resources and capital was devastating to the Scottish economy. Contemporary estimates put the Company's losses at £153,000,³³ a sum that effectively bankrupted both the Company and the Kingdom. Yet, despite surety on the part of the Scots of their justification in law, William would not provide the necessary support for the Company to seek restitution. The Duke of Queensberry (the King's cousin and High Commissioner in Edinburgh) in a speech before Parliament in 1700, stated:

It is with regret the king tells you that he cannot agree to assert the right of the Indian and African Company's colony in Darien. He perfectly knows the earnest desire of those

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ J. Prebble, *The Darien Disaster* (Mainstream Publishing Co, 1978), 174.

³¹ J.C. Ramsay, *The Darien Scheme and the Church of Scotland* (PhD Thesis, Faculty of Divinity, University of Edinburgh, May 1949), 34.

³² J.S. Barbour, *A History of William Paterson and the Darien Company* (Blackwood, 1907), 170-180, 256-264.

³³ Devine (n 5), 49.

concerned in it, and of many others of his good subjects, and does his servants justice in that matter.

His majesty would certainly have granted what was so pressingly desired had he not known that his yielding that point must have disturbed the peace of Europe and engaged us in a war in which he could expect no support.³⁴

William accepted the existence of the right of the Company to be compensated for the Spanish attack on Caledonia; indeed this is evident in his letter of the same session, where he stated:

It is truly our regret that *we could not agree to the asserting of the right of the company's colony in Darien* [my emphasis] and you may be very confident if it had not been for invincible reasons, the pressing desires of all our ministers, with the inclination of our good subjects therein concerned, had undoubtedly prevailed. But since we were and are fully satisfied that our yielding in that matter would have infallibly disturbed the general peace of Christendom and brought inevitably upon that our ancient kingdom a heavy war, wherein we could expect no assistance, and that now the state of that affair is quite altered, we doubt not but you will rest satisfied with these plain reasons.³⁵

What is questionable from the text above and the remainder of the letter is whether William recognised the duty incumbent upon him, as a result of the 1695 Act, to press that right upon the Spanish. In any case, he chose not to perform it. It is clear from William's attitude, however, as much as it from the Company's plea for remedies, that questions of legality and justice were prescient in the minds of those involved in the Scheme. The Darien Expedition, like most European colonial ventures, was justified and advanced through mechanisms of law, and it is to those issues I now turn.

³⁴ 'The speech of James [Douglas], duke of Queensberry, etc., his majesty's high commissioner to the parliament of Scotland, on Tuesday 29 October 1700' in Brown (n 7), A1700/10/1. Date accessed: 6 January 2018 (herein 'Speech of the Duke of Queensberry').

³⁵ 'The King's Letter to Parliament' (29 October 1700) in Brown (n 7), A1700/10/10. Date accessed: 18 May 2018.

II. Scotland's 'Right' to Pursue a Colony in Darien

The Law of Scotland in the 17th century was composed of three primary sources, the law of nature, the law of nations and the civil law.³⁶ Within this framework, the legal mechanisms used to advance the Darien Scheme operated on two levels: first, within Scots law, to justify the creation of the Scottish Company and its monopoly; and second, within the Law of Nations, to justify the specific act of obtaining territory on the Darien Peninsula and the empowering the Company to treat with foreign bodies. Each will be addressed in turn in this section.

The 1695 Act that created the Company conferred upon it three things: i) a monopoly that covered the East Indies, Africa and other unspecified territories (so long as not in possession of another European sovereign); ii) the necessary letters patent that conferred authority to treat with foreign powers as necessary; and iii) a right to enlist the King in pursuit of restitution should they suffer wrong.³⁷ In effect, the Parliament conferred upon the Company the capacity to possess territory, make treaties, and utilise force of arms. In a way, the Company was conferred the capacity to exercise part of the monarch's prerogative – despite William's refusal to provide support when Spain encroached upon these rights – something that had long been envisaged as flowing from the law of nature.³⁸ The Parliament cited conformity to the law of nations as the basis for this conferral and its justification for the settlement of Darien. For example, in a resolve [resolution] concerning the venture, it unanimously stated:

‘...that our Indian and African Company's colony of Caledonia in Darien in the continent of America... *was and is legal and rightful* [my emphasis], and that the settlement was made conforming to the act of parliament and letters patent...’³⁹

and that ‘...this act and patent did contain nothing save what is *agreeable to the law of nations* [my emphasis] and to the use and custom everywhere in the like cases...’.⁴⁰

³⁶ Walker, *Legal History Vol IV* (n 2), 13.

³⁷ See the 1695 Act and Appendix 2.

³⁸ For an overview of this in the context of England, see, e.g., Martti Koskenniemi, ‘Sovereignty, Property, Empire: Early Modern English Contexts’ (2017) 18 *Theoretical Inquiries in Law* 355.

³⁹ ‘Resolve concerning Caledonia’ in Brown (n 7), 1700/10/175. Date accessed: 7 January 2018.

⁴⁰ ‘The Parliament's address to the King concerning Caledonia’ in Brown (n 7), 1700/10/175. Date accessed: 7 January 2018.

Two bits of evidence available suggest the legal discourse surrounding the Darien Expedition was likely situated within an understanding of the law of nations similar to that of Hugo Grotius. First, an avid follower of the debate about the venture and the Regent of Philosophy at the University of Edinburgh, William Scott, offered a public defence of the Darien Expedition at a 1699 graduation and did so in essentially *Grotian* terms. He averred the Spanish had no claim because i) they had not exercised possession over the territory (discovery alone being insufficient); ii) they had no just cause to deprive the natives of the land (from whom the Company had obtained consent to settle); and iii) the Pope had no more authority to confer title than a regular man (i.e. he had no authority).⁴¹ Scott effectively mirrored the same arguments made in Grotius' *Mare Liberum*, which were made in defence of the Dutch East India Company against Portuguese interference.⁴²

For example, Scott states that 'the law clearly demonstrates that, in establishing a claim of ownership, only discovery is valid which is accompanied with possession; viz. where moveable property is seized, or fixed property is fenced off and guarded: [this] certainly does not apply to this case, as the Spaniards had not a single garrison in that place'.⁴³ While as Grotius makes the case that 'no one is owner of a thing which has never been taken into his possession either by his own direct action or by another party acting his name',⁴⁴ arguing the Portuguese were only ever visitors in the Indies because the native population then had (and always had) their own rulers.⁴⁵ Scott raised the same point when he averred that if the Spanish had ever been to Darien then they had no just cause for depriving the natives of possession and dominion over their property.⁴⁶ Indeed, both men arrive at the same conclusion vis-à-vis Spanish and Portuguese claims to discovery. Discovery itself was an insufficient legal ground to establish

⁴¹ W. Scott, *Excudebant Haeredes Andreae Anderson, Regis, Civitatis & Academiae Typographi Anno Dom. MDCXCIX* (C.P. Finlayson trans) quoted in C.P. Finlayson 'Edinburgh University and the Darien scheme' (1955) 34(118) *The Scottish Historical Review* 97, 101-102, theses XIX-XX; see also Appendix 3.

⁴² H. Grotius, *Mare Liberum: 1609-2009* (R.Feenstra ed, Brill, 2009), Ch.II-V.

⁴³ Scott (n 41), Theses XIX.

⁴⁴ Grotius, *Mare Liberum* (n 42), 5.

⁴⁵ *ibid.*

⁴⁶ Scott (n 41), Theses XIX.

dominium without possession and, in any case, the territory was not ‘discovered’ because the native population already exercised dominion.⁴⁷

Grotius and Scott are also both dismissive of Portugal and Spain’s respective claims to have been granted title by the Pope in the Treaty of Tordesillas. Grotius argued that Pope Alexander VI cannot have intended to confer almost one third of the World’s territory upon each nation and the Pope was merely settling the dispute between the pair as agreed in their relevant arbitral agreement.⁴⁸ It had no application to other nations as far as Grotius was concerned. However, even if dividing the globe had been the intention of Alexander VI, Grotius argued that this would still require the Portuguese to exercise possession over the gift (i.e. the Indies) and, further still, the Pope had no such power (even amongst Catholics) to exercise such jurisdiction/authority over the world. Scott went as far as to say such a claim ‘amounted to nothing’, and demonstrated a ‘...marvellous arrogance on the part of the Pope of Rome to lay unjust claims to property, when it is a fact that Christ the Lord renounced all earthly empire...’.⁴⁹ Indeed, his language comes very close to Grotius on this last point, given the Dutchmen [citing Vitoria] also averred that ‘Christ the Lord renounced all earthly sovereignty’ and, even if Christ had not, it cannot have passed to the Pope because there was no factual basis to assert Papal authority extended across the whole earth.⁵⁰ Therefore, as Grotius put it, the Spanish and Portuguese claims must fail because the Pope ‘ought to be content with his spiritual jurisdiction’.⁵¹

The manner in which Scott’s defence traces similar themes to Grotius’ *Mare Liberum*, even mirroring specific phraseology, suggests a Grotian understanding of the law of nations may have been prescient in the Company’s approach to the Darien. This is because, as C.P. Finlayson once observed ‘...the Lord Provost and Baillie Cunningham [who attended the graduation and may have suggested the defence]⁵² were councillors of the Company and the majority of the others present at the graduation are on the subscription list [of the Company] of 1696’. Further, Scott needed little prompting for the defence because besides being having

⁴⁷ *ibid*; Grotius, *Mare Liberum* (n 42), 6. In this respect, Grotius specifically averred that discovery imparts no legal right save in the case of things which were ownerless prior to the act of discovery’.

⁴⁸ *ibid*.

⁴⁹ Scott (n 41), Theses XIX.

⁵⁰ Grotius, *Mare Liberum* (n 42), 8-9.

⁵¹ *ibid*, 9.

⁵² My insertion to capture Finlayson’s broader point.

himself invested £100 in the Scheme; Scott would not miss the opportunity to demonstrate practical utility of Grotius to the Company's affairs.⁵³ This takes on another dimension when we consider wider response to Spain's protestations to William issued in 1699.

The Spanish memorial issued to William was received on March 3rd, several months before Scott's speech (26th June), leaving plenty of time for Scottish civil society to digest its contents. Charles II (of Spain) complained the 'Colony of Caledonia was an insult to his kingdom, an invasion of his domains in America, and a violation of the treaties between himself and his cousin of England'.⁵⁴ This memorial prompted much consternation within Scotland, so much so that in addition to Scott's defence, it prompted three anonymously authored (but widely read) pamphlets, one addressed to the King defending the Darien Scheme's pursuit, one defending the Colony's abandonment,⁵⁵ and a third accusing the pamphlet defending the Colony's abandonment of libel.⁵⁶ Indeed, so aggravating was this defence of the abandonment to members of the public, Parliament passed a resolve commanding all copies be burned.⁵⁷

The pamphlet defending the scheme has been linked to three potential authors. George Ridpath – a journalist who translated a work of Thomas Craig's into Scots and was listed amongst the graduates in philosophy on the very day Scott gave his defence of the Darien expedition;⁵⁸ John Hamilton, the 2nd Lord Belhaven - a prominent politician and significant investor in the Scottish Company; and Andrew Fletcher – an anti-Union Commissioner (legislator) in the Scottish Parliament during the reign of William II. All three evidence a potential connection to the affairs of the Scottish Company and the Scheme, perhaps indicating that elements of the defence were synonymous with thinking within the Company or at very least the Parliament. As the author is unknown, this can never be answered for certain.

⁵³ Finlayson (n 41), 99.

⁵⁴ Prebble (n 30), 336.

⁵⁵ Philo-Caledon, *A Defence of the Scots Settlement at Darien with an answer to the Spanish Memorial against it* (1699) (on file with author); Britanno sed Dunensi, *A Defence of the Scots abdicating Darien: Including an Answer to the Defence of the Scots Settlement there* (1700) (on file with author).

⁵⁶ Anon., 'An Enquiry into the Causes of the Miscarriage of the Scots Colony at Darien, Or an Answer to the Libel entitled "A Defence of the Scots Abdicating Darien"', Submitted to the Consideration of the Good People of England' (Glasgow, 1700) (on file with author).

⁵⁷ 'Order for burning some pamphlets' in K Brown (n 7), 1700/10/52. Date accessed: 10 January 2018.

⁵⁸ *A Catalogue of the Graduates of the Faculties of Arts, Divinity and Law of the University of Edinburgh since It's Foundation* (Neill & Co, 1858), 162-163.

However, in the pamphlet defending the expedition, we see a familiar pattern of argument in that it reflects the structure of argument made in *Mare Liberum* and Scott's defence of the same year. It begins by denying Spanish title. It argues the native population did not invite the Spanish to possess the territory, and that they have engaged in recurrent hostilities. Philo-Caledon (the author's pseudonym) also avers that, in contrast, the Scots have been invited to possess the small pocket of territory that makes up the settlement.⁵⁹ He, like Scott, effectively denies any Spanish pretension to *dominium* on the basis the Spanish have made no effort to possess the territory in question, even conceding territory to other European nations in the area;⁶⁰ a line of reasoning which we know Scott derived from Grotius,⁶¹ and we know Grotius derived from Vitoria.⁶²

This leaves the claim the Pope conferred title to Spain in the Treaty of Tordesillas. Labelling the Pope's claim to bestow title as 'ridiculous' amongst Protestants and 'precarious' amongst Catholics,⁶³ Philo-Caledon averred the Papacy has no such power within the law of nations and, in any case, such a grant must have been conditional on proselytisation and conversation of the natives, which Spain had failed to honour through their attacks upon them. It had thus forfeited the disputed right.⁶⁴ It is here we can observe a slight divergence between the pamphlet and Scott's defence, one that actually brings the pamphlet more into line with Grotius' claims in *Mare Liberum*. Scott, as noted above, raised the argument the Pope had no authority to convey territory in the manner alleged in the Tordesillas Treaty. However, he is silent on the issue of spreading the gospel.

In contrast, within *Mare Liberum* this consideration is woven into the discussion about hostilities between the visiting power and the native population. Grotius (following Aquinas) averred that religious faith (i.e. the absence of Christianity) is insufficient to 'cancel the natural or human law from which ownership has been derived'.⁶⁵ It was nevertheless acceptable to

⁵⁹ Philo-Caledon, *A Defence* (n 55), 4, 10.

⁶⁰ *ibid*, 7.

⁶¹ See Finlayson (n 41).

⁶² Grotius, *Mare Liberum* (n 42), 5.

⁶³ Philo-Caledon, *A Defence* (n 55), 5.

⁶⁴ *ibid*.

⁶⁵ Grotius, *Mare Liberum* (n 42), 6-7.

spread the true faith, it could not, however, justify acquiring *dominium*. Nor was rejection of faith a sufficient cause for war unless some other feature (like injury to the rights of the visiting power) was present.⁶⁶ Indeed, Grotius at this point quoted Spanish practice, observing that the ‘Senate in Spain’ and ‘the theologians (especially the Dominicans)’ had issued pronouncements to the effect that natives should not be forcibly converted through war and that ‘liberty taken from them on the pretext of conversion should be restored to them’.⁶⁷ Thus, as Philo-Caledon observed, Spain had not only forfeited any disputed right through proselytisation by making war upon the natives,⁶⁸ their claim to possession was ‘perfectly overturned by common practice, the Law of Nations, and their [Spain’s] own concessions in parallel cases’.⁶⁹

Yet, Philo-Caledon went further still by denying violation of the 1667 and 1670 treaties and counter-argued that it was in fact Spain who was in breach of the treaties of amity between Spain and William II. He argued the two treaties only provide for ‘mutual security for peaceable possession’ for what each Crown already possessed.⁷⁰ The Spanish, having never possessed the Darien, had no basis for claim. Further still, he averred that Spain had been the one to violate the treaties by attacking the Scots at sea and detaining those forced ashore by shipwreck at Cartagena. Philo-Caledon submitted Spain had breached the 3rd article of the 1667 treaty and the 10th and 11th articles of the 1670 treaty, each of which forbids reprisals except in the case of the denial or unreasonable delay of justice; neither of which had been the case in regard to the Scottish Company.⁷¹ The Company was consequently entitled to make reprisals upon the Spanish, which it petitioned the King to do on their behalf (albeit unsuccessfully) in 1700.

By now the Scheme had been abandoned, but this final failed petition would not be the last complaint about the Scheme’s failure, however, as it would resurface during the negotiations to create the union between Scotland and England. This is because, while William declined to advance the claim vis-à-vis the Spanish, investors in the Company continued to press for their rights accrued under the 1695 Act and the law of nations. Amidst the dire financial

⁶⁶ *ibid*, 11.

⁶⁷ *ibid*, 12.

⁶⁸ Philo-Caledon, *A Defence* (n 55), 5.

⁶⁹ *ibid*, 7.

⁷⁰ Philo-Caledon, *A Defence* (n 55), 8.

⁷¹ *ibid*, 8-9.

consequences for the rest of Scotland, ill feeling persisted for many years following the Colony's collapse and merged alongside existing anti-English/anti-Union sentiment. This reached boiling point in 1705 when the Captain and two crew members of the English vessel the *Worcester* were tried and executed in Edinburgh on questionable charges of piracy against the Darien fleet; an event that the reputable Scots historian T.M. Devine described as 'judicial murder, aided and abetted by the Edinburgh mob'.⁷²

III. Coda

As has been shown in the preceding section, the intellectual milieu from which defenders of the scheme built their claim for conquest (and restitution) drew from distinct themes within the work of Hugo Grotius. Given the interconnectedness between the Scottish Company and the few developed sources of juridical argument discussed in this paper, there is sufficient evidence to speculate that the Company took seriously the arguments of Grotius to advance its interests. However, little has been said so far in this paper as to why Scots jurists and philosophers would imagine their foreign relations in this way, or rather, little has been said as to how Grotius became prescient in Scots legal thought. In this final section, in lieu of a conclusion, I will suggest some reasons for why this might be the case.

Scotland's legal system prior to the 17th century arose from an amalgamation of sources. The first noteworthy treatment of Scots law as distinct field of inquiry was Thomas Craig's *Jus Feudale*,⁷³ which would for the first time situate Scots juridical thinking within a framework derived from *jus naturae et gentium* (the law of nature and nations).⁷⁴ After the Reformation, rather than being educated in Paris, such as Craig had been,⁷⁵ to seek a Protestant education most of the Faculty of Advocates took up their studies in the Netherlands, particularly at Leiden, Utrecht and Groningen.⁷⁶ At its peak, it was estimated that 13% of Leiden's students were

⁷² Devine (n 5), 9.

⁷³ T. Craig, *Jus Feudale Tribus Libris Comprehensum* (L. Dodd trans, Stair Society [1603], 2017).

⁷⁴ J.W. Cairns, 'Stoicism, Slavery, and Law: Grotian Jurisprudence and its Reception' in J.W. Cairns, *Enlightenment, Legal Education, and Critique* (Edinburgh University Press, 2015), 385; Walker, *Legal History Vol IV* (n 2), 343.

⁷⁵ T.D. Fergus and G. Maher, 'Sources Of Law (General And Historical)' in *Stair Memorial Encyclopaedia* (Reissue, Vol 22, 1986) ('SME'), para.605.

⁷⁶ J.W. Cairns, 'The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment' (2005) 11 *Fundamina* 32, 34; the systematic teaching of law in Scotland began in 1707 with endowment of a Regius chair in law at Edinburgh.

Scottish, with 60% of those studying law.⁷⁷ This is perhaps what motivated Walter Scott to dryly observe that '[we] only import our lawyers from Holland'.⁷⁸ As a result, most advocates had been exposed to the works of Grotius during their studies abroad. Indeed, it was generally expected that Scots studying in the Netherlands would take a '*collegium Grotianum*' with one of the professors whose classes they attended. In this respect, Professor Cairns has discovered students' first-hand accounts of taking such classes with scholars such as Philipp Reinhard Vitriarius at Leiden as well as Jean Barbeyrac at Groeninge.⁷⁹ Further still, the works of Grotius as well as other natural lawyers were kept in the Faculty of Advocates Library.

Grotius also featured heavily in the writing or teaching of several prominent Scots jurists throughout the 17th century. The first of these was William Welwood (1552-1624), who was Chair of Civil Law at the University of St Andrews at the end of the sixteenth century.⁸⁰ Throughout his career Welwood concerned himself with the laws pertaining to the seas surrounding Scotland. His *De Domino Maris* (1615) drew him into an engagement with Hugo Grotius, who had anonymously published his *Mare Liberum* in 1609 before a new edition bearing his name emerged in 1618. Both would end up advising their respective nations in the context of the Anglo-Dutch Fishing Dispute of 1618-1619; indeed, Queen Anne had commissioned Welwood to write *De Domino Maris* prior to the negotiations beginning.⁸¹ Welwood was the first to challenge Grotius's concept of the free seas, and would serve as an important influence on John Selden in his 1635 *Mare Clausum*. After the negotiations, Grotius was perturbed enough to make Welwood the only critic he ever referred to by name and drafted an otherwise unpublished response to Welwood's direct attack.⁸²

⁷⁷ K. Baston, *Charles Areskine's Library: Lawyers and Their Books at the Dawn of the Scottish Enlightenment* (Brill, 2016), 61.

⁷⁸ W. Scott, *Heart of Midlothian*, Ch.4.

⁷⁹ Cairns, 'Stoicism, Slavery and Law' (n 74), 384.

⁸⁰ D.M. Walker, *A Legal History of Scotland (Vol III): The Sixteenth Century* (T & T Clark, 1995), 377; J.W.Cairns, 'Academic Feud, Bloodfeud, and William Welwood in St Andrews, 1560-1611: Part II' (1998) 2 *Edinburgh Law Review* 255-287.

⁸¹ *Ibid.*

⁸² J.D Alsop, 'William Welwood, Anne of Denmark, and the Sovereignty of the Sea' (1980) 59(2) *Scottish Historical Review* 171, 171; incidentally, the text of this response was discovered in 1864 and is available in H.Grotius, *The Free Sea* (R. Hakluyt trans, Liberty Fund, 2004); see also M.J. van Ittersum, 'Mare Liberum Versus the Propriety of the Seas? The Debate between Hugo Grotius (1583-1645) and William Welwood (1552-1624) and its Impact on Anglo-Scotto-Dutch Fishery Disputes in the Second Decade of the Seventeenth Century' (2006) 10 *Edinburgh Law Review* 239, 249.

Similarly, Grotius was a source of constant engagement in Viscount Stair's (1619-1695) master treatise *Institutions of the Law of Scotland* (1681).⁸³ Stair was a parliamentarian, diplomat, and Lord President of the Court of Session (Scotland's highest judicial office). He graduated from Arts at University of Glasgow in 1637, before obtaining a commission in the Covenanter army.⁸⁴ Thereafter, having been a Regent at Glasgow, he gained admission to the Faculty of Advocates in 1648.⁸⁵

Institutions was once described by Neil MacCormick as 'one of the greatest legal works in the English language'.⁸⁶ Its model was Justinian's *Institutions*,⁸⁷ but the continental jurist Stair cited most often was Grotius, particularly his *De Jure Belli ac Pacis*.⁸⁸ Much like Grotius, Stair was determined to not only expound the law, but also concretise it as a 'rational discipline'.⁸⁹ The two authors shared a number of common influences, Thomas Aquinas amongst them.⁹⁰ Indeed, David Walker once argued that Stair's views were not that original;⁹¹ going as far to say that it may 'seem strange that Stair, a strong Presbyterian and Protestant, should have been acquainted with the work of Aquinas, Molina and Suarez..',⁹² but nevertheless it is in these men Stair, like Grotius, found much to his liking. A point has also been made of similarity between Pufendorf and Stair. Given they were writing at a similar time, although *Institutions* was not published until many years after its completion, it is likely they shared a common influence, potentially Grotius.⁹³ This would explain why, for example, we find references to Grotius but not Pufendorf on the subject of conventional obligations in Stair's *Institutions*.⁹⁴

⁸³ Viscount Stair, *The Institutions of the Law of Scotland* (D.M Walker eds, University Presses of Edinburgh and Glasgow, [1681 & 1693] 1981); see also, Cairns, 'Stoicism, Slavery, and Law' (n 74), 385.

⁸⁴ Stair, introduction, 1; He is thought to have fought against Charles I until 1641, when his commission ended.

⁸⁵ *ibid*, 2; notably, he did so without formal education in law as none was to be had in Scotland at the time. It is thought Stair prepared by private study during his tenure as Regent; for an interesting account of the training of Scots lawyers abroad (particularly in France and the Low Countries), see J.W. Cairns, 'The Law, the Advocates and the Universities in Late Sixteenth-Century Scotland' (1994) 73(2) *The Scottish Historical Review* 171-190.

⁸⁶ N. MacCormick, *Practical Reason in Law and Morality* (2008), 100.

⁸⁷ Stair, *Institutions*, introduction, 17.

⁸⁸ *Ibid*.

⁸⁹ *Ibid*, I. I.17.

⁹⁰ A distinguishing feature between the two, however, was Stair's Calvinist theology. Indeed, one of the more interesting aspects of Stair's work is the tension it exhibits between Calvinist doctrine and his received Aristotelian philosophy with Thomistic ethics. For more on this, see D. Reid, 'Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29 *Journal of Legal History* 190-214.

⁹¹ Walker, *Legal History Vol IV* (n 2), 346.

⁹² *ibid*, 366.

⁹³ On this, see T. Richter, 'Did Stair know Pufendorf?' (2003) 7 *Edinburgh Law Review* 367-378.

⁹⁴ Stair, *Institutions*, I.10.4.

Stair understood the law of nations as the customs of most ‘civil nations’, customs which were derived from the same dictates of natural reason as the law of nature.⁹⁵ This law was supported by positive laws consented to by civil nations. Underlying this framework was Stair’s conception of equity (rights), denial of which may be vindicated by force (similar to Grotius).⁹⁶ Stair’s account of the law on slavery, absent in Scots law, but applicable in the law of nations, was derived from Grotius and became of central importance in the first cases to challenge slavery in Scotland.⁹⁷ Stair also devotes some attention to private war and the seizure of prizes under the heading ‘Reprisals’.⁹⁸ But here he appears not so much concerned with addressing the law of nations, effectively re-stating what he assumed was commonly understood, rather he devoted his attention to outlining an approach for its consolidation within the intellectual framework of Scots Law.

Considering the significance of *Institutions* as a source of law in Scotland alongside the continental education of virtually all of its advocates, it seems likely that most of those learned in the law in late 17th century Scotland would have been familiar with the utility of Grotius’ thought to foreign affairs. Perhaps none more so than William Scott (1672-1735), whom we know was a Regent of Philosophy at Edinburgh University from 1695-1708 and offered a defence of the Darien Expedition in explicitly Grotian terms. We also know Scott was an investor in the Company along with most of the participants in the 1699 graduation ceremony. Moreover, Scott’s writing and teaching before and after the Scheme suggest Grotius was a focal point of his curriculum at Edinburgh. Scott’s course on Grotius consisted ‘in the main of his annual introductory lecture ([which was titled] *pratiuncula quam in Auditorio privato habui ad ipsos Juvenes, cum Grotianas inchoarem praelectiones*)’, but this also suggested he was able to devote an entire academic session to the study of one author.⁹⁹ He also published the first compendium on Grotius available in Scotland in 1707,¹⁰⁰ some time after the Darien Scheme’s failure certainly, but the compendium appears to have consisted of the lectures he had been giving at Edinburgh since 1695.¹⁰¹

⁹⁵ *ibid*, I.I.11.

⁹⁶ Stair, *Institutions*, I.I.11.

⁹⁷ See Cairns, ‘Stoicism, Slavery, and Law’ (n 74), 385 and sequentially.

⁹⁸ *Ibid*, II.2.1-II.2-8.

⁹⁹ Finlayson (n 41), 100.

¹⁰⁰ Cairns, First Edinburgh Chair in Law (n 76), 35.

¹⁰¹ Finlayson (n 41), 100.

A formal chair in law, the first in Scotland and titled the Regius Chair in Public Law and the Law of Nature and Nations, was endowed at Edinburgh in 1707.¹⁰² Scott's mastery of Grotius would not be sufficient to make him the first holder of the chair; instead the first incumbent would be Charles Erskine. Scott would instead take up the Chair of Greek before assuming the Chair in Moral Philosophy in 1729.¹⁰³ There is no indication whether or not he continued to teach his course on Grotius. For a brief moment, however, he was in a position to sum up the intellectual and general mood at a graduation ceremony in 1699. It allowed him, according to Finlayson, to show the Spanish defiance and 'excoriate the Roman Pontiff' with 'due academic dignity'.¹⁰⁴ Given his connection to the Scottish Company, as well as the connection of many of those who watched the defence and had attended his lectures, there is ample reason to speculate such thinking informed the choice of the Scottish Company to settle on contested territory in the Isthmus of Darien. However, unbeknownst to Scott and his audience, 'Caledonia' had been abandoned just one week prior; this setback would be the beginning of the end for the Darien Scheme, the Scottish Company, as well as Scotland's long-held status as an independent nation.

In this respect, the Darien Scheme's failure acted as a catalyst in the creation of two institutions that remain with us today and exist largely because of that expedition – they being the Royal Bank of Scotland, which arose from the ashes of the Scottish Company,¹⁰⁵ and the Union between the Kingdoms of Scotland and England. The latter was not easily secured however, as negotiations in 1703-1704 broke down because of Scottish resentment over England's role in the Darien Expedition's failure.¹⁰⁶ This was only righted by the reparation of the losses suffered by the Scottish Company, which had been first mooted by Queen Anne in 1702,¹⁰⁷ but not confirmed until the passage of article XV of the Treaty of Union.¹⁰⁸ Although resentment persisted, especially as there was no 'legal' resolution to the claims against the Spanish (or the

¹⁰² Finlayson (n 41), 100.

¹⁰³ University of Edinburgh, William Scott (Primus) (Online, Our History Blog, 2016) <[http://ourhistory.is.ed.ac.uk/index.php/William_Scott_%22primus%22_\(1672-1735\)>](http://ourhistory.is.ed.ac.uk/index.php/William_Scott_%22primus%22_(1672-1735)>).

¹⁰⁴ Finlayson (n 41), 100.

¹⁰⁵ The Company was dissolved by the Treaty of Union, its creditors preserved the money to set up the 'new' bank in 1724.

¹⁰⁶ Young (n 4), 186.

¹⁰⁷ *ibid*, 185.

¹⁰⁸ Treaty of Union 1707, art.XV.

English government for that matter), the Union provided something of a political settlement where money was restored, trade guaranteed, and the outstanding claims extinguished.

What the foregoing discussion makes apparent, however, is how seriously persons within and around the Scottish Company and Parliament considered justifying the Darien project in law. Facilitating the Darien Scheme required two forms of legitimating action: the creation of the Company according to the parameters of Scots law (i.e. with the incorporeal constructs of monopoly and letters patent); and the justification of the Company's right to exercise and defend effective *dominium* in the Darien. The former was a crucial element of this colonial experiment, as such methods continued to be after the 1707 Union and emergence of the British Empire. The latter action was also at the forefront of the minds of the Scottish Parliament, the Company, and those commenting on the scheme within Scottish society. This is because justification of imperial expansion was often not only motivated by a belief such actions must be legal and just amongst sovereigns, but also because it was the natural duty or mission of European nations to be expansionist, universalising and 'civilising'.¹⁰⁹ This is implicit, for example, in Philo-Caledon's concession that the Pope's grant of title may have been lawful if Spain had been converting the natives to the Christian religion.¹¹⁰

However, as Professor David Armitage has pointed out, it is likely the Scots had no such civilising aspirations at Darien.¹¹¹ Indeed, evidence of this is available in their cordial relations with the native population, with whom they allied with against the Spanish in the Battle of Toubacanti.¹¹² The motivation behind the Scheme was primarily economic necessity; a depressed economy, fears of subjugation by England and difficulty navigating a composite monarchy when that monarch had no concern for Scotland, drove the ill thought through Darien Scheme;¹¹³ although, this lack of concern for the civilising mission would not last. While the Scottish Company had failed to compete with the East India Company, following the Union many Scots took about infiltrating the Company's upper echelons.¹¹⁴ This would be the beginning of many efforts by Scots to give effect to the English (and now British) colonial

¹⁰⁹ L. Obregón, 'The Civilised and the Uncivilised' in A. Peters and B. Fassbender, *The Oxford Handbook on the History of International Law* (OUP, 2012), 933.

¹¹⁰ Philo-Caledon, *A Defence* (n 55), 5.

¹¹¹ D. Armitage, *The Ideological Origins of the British Empire* (CUP, 2004), 158-162.

¹¹² Barbour, *William Paterson* (n 32), 170-180, 256-264.

¹¹³ Armitage (n 111), 158-162.

¹¹⁴ Devine (n 5), 26.

project. Yet, for all the critical views taken of the British Empire in contemporary Scottish political discourse, it is perhaps useful to remind some that Scotland tried and failed in its own imperial project before ever signing up to the auld Empire.

Bibliography

Scottish Parliamentary Materials:

Act for a company trading to Africa and the Indies' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1695/5/104. Date accessed: 6 January 2018

Address to the King in behalfe of the African Company' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1695/5/104. Date accessed: 14 May 2018

'The parliament's address to the king concerning Caledonia' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1700/10/185. Date accessed: 5 January 2018

'The speech of James [Douglas], duke of Queensberry, etc., his majesty's high commissioner to the parliament of Scotland, on Tuesday 29 October 1700' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), A1700/10/1. Date accessed: 6 January 2018

'The King's Letter to Parliament' (29 October 1700) in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), A1700/10/10. Date accessed: 14 May 2018

'Resolve concerning Caledonia' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1700/10/175. Date accessed: 7 January 2018

'The Parliament's address to the King concerning Caledonia' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1700/10/175. Date accessed: 7 January 2018

'Order for burning some pamphlets' in K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018), 1700/10/52. Date accessed: 10 January 2018

Treaty of Union 1707

Other Statutes:

Navigation Act 1663

Catalogues:

A Catalogue of the Graduates of the Faculties of Arts, Divinity and Law of the University of Edinburgh since It's Foundation (Neill & Co, 1858)

University of Edinburgh, William Scott (Primus) (Online, Our History Catalogue, 2016) <[http://ourhistory.is.ed.ac.uk/index.php/William_Scott_%22primus%22_\(1672-1735\)>](http://ourhistory.is.ed.ac.uk/index.php/William_Scott_%22primus%22_(1672-1735)>)

Books:

- D. Armitage, *The Ideological Origins of the British Empire* (CUP, 2004)
- J.S. Barbour, *A History of William Paterson and the Darien Company* (Blackwood, 1907)
- K. Baston, *Charles Areskine's Library: Lawyers and Their Books at the Dawn of the Scottish Enlightenment* (Brill, 2016)
- K.M. Brown et al (eds) *The Records of the Parliaments of Scotland to 1707* (St Andrews, 2007-2018)
- T. Craig, *Jus Feudale Tribus Libris Comprehensum* (Leslie Dodd trans, the Stair Society [1603], 2017)
- T.M. Devine, *The Scottish Nation 1700-2007* (Penguin Books, 2000)
- T.D. Fergus and G. Maher, 'Sources Of Law (General And Historical)' in *Stair Memorial Encyclopaedia* (Reissue, Vol 22, 1986)
- H. Grotius, *The Free Sea* (R. Hakluyt trans, Liberty Fund, 2004)
- H. Grotius, *Mare Liberum: 1609-2009* (R. Feenstra ed, Brill, 2009)
- N. MacCormick, *Practical Reason in Law and Morality* (2008)
- J. Prebble, *The Darien Disaster* (Mainstream Publishing Co, 1978)
- Viscount Stair, *The Institutions of the Law of Scotland* (D.M. Walker eds, University Presses of Edinburgh and Glasgow, [1681 & 1693] 1981)
- D.M. Walker, *A Legal History of Scotland (Vol III): The Sixteenth Century* (T & T Clark, 1995)
- D.M. Walker, *A Legal History of Scotland (Volume IV): The Seventeenth Century* (T & T Clark, 1996)

Book Chapters:

- John Cairns, 'Stoicism, Slavery, and Law: Grotian Jurisprudence and its Reception' in John Cairns, *Enlightenment, Legal Education, and Critique* (Edinburgh University Press, 2015)
- L. Obregón, 'The Civilised and the Uncivilised' in A. Peters and B. Fassbender, *The Oxford Handbook on the History of International Law* (OUP, 2012)

Articles:

- J.D Alsop, 'William Welwood, Anne of Denmark, and the Sovereignty of the Sea' (1980) 59(2) *Scottish Historical Review* 171
- H. Bingham, 'The Early History of the Scots Darien Company' (1906) 3(10) *Scottish Historical Review* 210
- H. Bingham, 'The Early History of the Scots Darien Company: The English Investigation' (1906) 3(12) *The Scottish Historical Review* 437

- J.W. Cairns, 'The Law, the Advocates and the Universities in Late Sixteenth-Century Scotland' (1994) 73(2) *The Scottish Historical Review* 171
- J.W. Cairns, 'Academic Feud, Bloodfeud, and William Welwood in St Andrews, 1560-1611: Part II' (1998) 2 *Edinburgh Law Review* 255
- J.W. Cairns, 'The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment' (2005) 11 *Fundamina* 32
- C.P. Finlayson 'Edinburgh University and the Darien scheme' (1955) 34(118) *The Scottish Historical Review* 97
- G.P. Insh, 'The Founding of the Company of Scotland Trading to Africa and the Indies' (1924) 21(84) *The Scottish Historical Review* 288
- Martti Koskeniemi, 'Sovereignty, Property, Empire: Early Modern English Contexts' (2017) 18 *Theoretical Inquiries in Law* 355
- D. Reid, 'Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense' (2008) 29 *Journal of Legal History* 190
- T. Richter, 'Did Stair know Pufendorf?' (2003) 7 *Edinburgh Law Review* 367
- W.R. Scott, 'The Fiscal Policy of Scotland before the Union' (1904) 1(2) *The Scottish Historical Review* 173
- M.J. van Ittersum, 'Mare Liberum Versus the Propriety of the Seas? The Debate between Hugo Grotius (1583-1645) and William Welwood (1552-1624) and its Impact on Anglo-Scotto-Dutch Fishery Disputes in the Second Decade of the Seventeenth Century' (2006) 10 *Edinburgh Law Review* 239
- J.R. Young, 'The Scottish Parliament and the Politics of Empire: Parliament and the Darien Project, 1695-1707' (2007) 27(1) *Parliament, Estates and Representation* 175

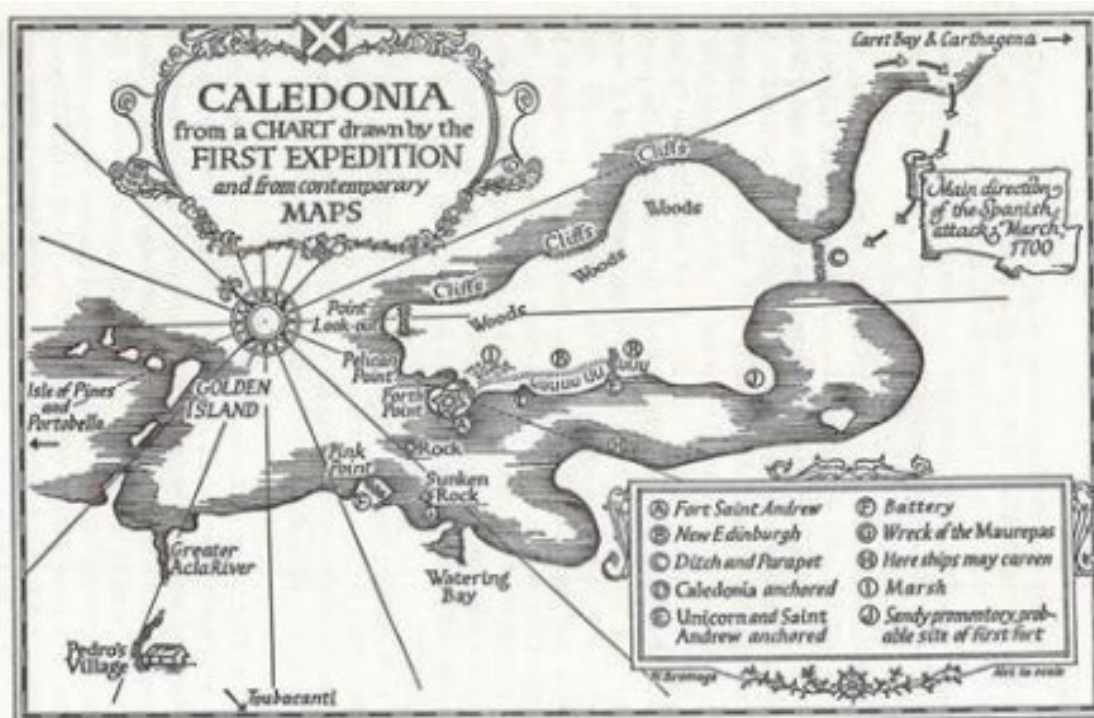
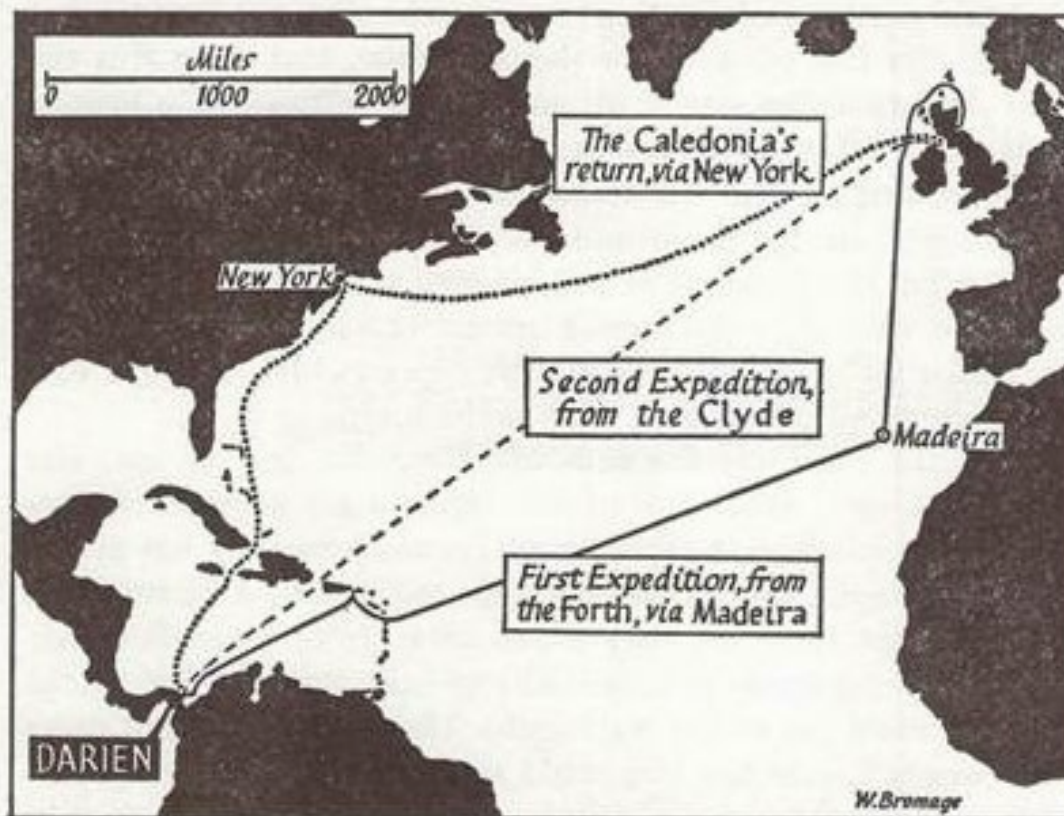
Theses:

- J.C. Ramsay Snr, *The Darien Scheme and the Church of Scotland* (PhD Thesis, Faculty of Divinity, University of Edinburgh, May 1949)
- W. Scott, *Excudebant Haeredes Andreae Anderson, Regis, Civitatis & Academiae Typographi Anno Dom. MDCXCIX* (C.P. Finlayson trans)

Pamphlets:

- Philo-Caledon, *A Defence of the Scots Settlement at Darien with an answer to the Spanish Memorial against it* (1699) (on file with author)
- Britanno sed Dunensi, *A Defence of the Scots abdicating Darien: Including an Answer to the Defence of the Scots Settlement there* (1700) (on file with author)
- Anon., *An Enquiry into the Causes of the Miscarriage of the Scots Colony at Darien, Or an Answer to the Libel entitled 'A Defence of the Scots Abdicating Darien', Submitted to the Consideration of the Good People of England* (Glasgow, 1700) (on file with author)

Appendix 1: Maps pertaining to the Darien Expeditions



Maps sourced from J. Prebble, *The Darien Disaster* (Mainstream Publishing Co, 1978).

Appendix 2: Act for a company trading to Africa and the Indies

*Pertinent sections highlighted for the sake of convenience.

Our sovereign lord, taking into his consideration that by an act passed in this present parliament, entitled, act for encouraging of foreign trade, his majesty, for the improvement thereof did, with advice and consent of the estates of parliament, statute and declare that merchants, more or fewer, may contract and enter into such societies and companies for carrying on of trade, as to any subject of goods or merchandise, to whatsoever kingdoms, countries or parts of the world not being in war with his majesty, where trade is in use to be, or may be followed, and particularly beside the kingdoms and countries of Europe, to the East and West Indies, the Straights, and to trade in the Mediterranean, or upon the coast of Africa, or in the northern parts, or elsewhere as above; which societies and companies, being contracted and entered into, upon the terms and in the usual manner as such companies are set up, and in use in other parts, consistent always with the laws of this kingdom, his majesty, with consent foresaid, did allow and approve, giving and granting to them, and each of them, all powers, rights and privileges as to their persons and rules and orders that, by the laws, are given to companies allowed to be erected for manufactories. And his majesty, for their greater encouragement, did promise to give to these companies and each of them his letters patent, under the great seal, confirming to them the whole foresaid powers and privileges, with what other encouragement his majesty should judge needful, as the foresaid act of parliament at more length bears. And his majesty, understanding that several persons, as well foreigners as natives of this kingdom, are willing to engage themselves with great sums of money in an American, African and Indian trade to be exercised in and from this kingdom if enabled and encouraged thereinto by the concessions,

powers and privileges, needful and usual in such cases, therefore, and in pursuance of the foresaid act of parliament, his majesty, with advice and consent of the said estates of parliament, does hereby make and constitute John [_Hamilton_], lord Belhaven, Adam Cockburn of Ormiston, lord justice clerk, Mr Francis Montgomery of Giffen, Sir John Maxwell of Pollok, Sir Robert Chiesley [_of Bonnington_], present provost of Edinburgh, John Swinton of that ilk, George Clark, late bailie of Edinburgh, Mr Robert Blackwood, and James Balfour, merchants in Edinburgh and John Corse, merchant in Glasgow, William Paterson, esquire, James Foulis, David Nairn, esquires, Thomas Deans, esquire, James Chiesley, John Smith, Thomas Coutts, Hugh Fraser, Joseph Cowan, Davis Ovedo and Walter Stewart, merchants in London, with such others as shall join with them within the space of twelve months after 1 August next, and all others whom the foresaid persons and those joined with them, or majority of them being assembled, shall admit and join into their joint stock and trade, who shall all be reputed, as if herein originally inserted, to be one body incorporated, and a free incorporation with perpetual succession, by the name of the Company of Scotland Trading to Africa and the Indies, providing always, likewise it is hereby in the first place provided, that of the fund or capital stock that shall be agreed to be advanced and employed by the foresaid undertakers and their co-partners the half at least shall be appointed and allotted for Scottish men within this kingdom, who shall enter and subscribe to the said company before 1 August 1696. And if it shall happen that Scotsmen living within this kingdom shall not, between now and the foresaid term, subscribe for and make up the equal half of the said fund or capital stock, then and in that case only, it shall be, and is hereby allowed to Scotsmen residing abroad, or to foreigners, to come in to subscribe and be assumed for the surplus of the said half, and not otherwise. Likewise, the quota of every man's part of the said stock whereupon he shall be capable to enter into the said company, whether he be native or foreigner, shall be for the least £100 sterling, and for the highest or greatest £3,000 pound sterling, and no more directly nor indirectly in any sort, with power to the said company to have a common seal and to alter and renew the same at their pleasure, with advice always of the lyon king at arms. As also, to plead and sue, and

be sued, and to purchase, acquire, possess and enjoy lordships, lands, tenements or other estates, real or personal, of whatsoever nature or quality and to dispose upon and alienate the same, or any part thereof at their pleasure, and that by transfers and assignment, made and entered in their books and records, without any other formality of law, providing always, that such shares as are first subscribed for by Scotsmen within this kingdom, shall not be alienable to any other than Scotsmen living within this kingdom, that the foresaid transfers and conveyances as to lands and other real estate (when made of these only and a part) be perfected according to the laws of this kingdom anent the conveyances of lands and real rights. With power likewise to the foresaid company, by subscription or otherwise as they shall think fit, for to raise a joint stock or capital fund of such a sum or sums of money, and under and subject to such rules, conditions and qualifications, as by the foresaid company, or majority of them when assembled, shall be limited and appointed to begin, carry on and support their intended trade of navigation, and whatever may contribute to the advancement thereof. And, it is hereby declared, that the said joint stock or capital fund, or any part thereof, or any estate, real or personal, ships, goods or other effects of and belonging to the said company, shall not be liable to any manner of confiscation, seizure, forfeiture, attachment, arrest or restraint, for and by reason of any embargo, breach of peace, letters of mark or reprisal, declaration of war with any foreign prince, potentate or state, or upon any other account or pretence whatsoever, but shall only be transferrable, assignable or alienable in such way and manner, and in such parts and portions, and under such restrictions, rules and conditions, as the said company shall by writing in and upon their books, records and registers directly and approved. And these transfers and assignments only, and no other, shall convey the right and property in and to the said joint stock and capital fund and effects thereof above-mentioned, or any part of the same, excepting always as is above-excepted. And that the creditors of any particular member of the company may, by their real diligence, affect the share of the profit falling and pertaining to the debtor, without having any further right or power of the debtors' part and interest in the stock

or capital fund, otherwise than is above-appointed, and with this express provision, that whatever charges the company may be put to by the contending of any of their members deceased, or of their assignees, creditors or any other persons in their rights, the company shall have retention of their charges and expenses in the first place. And the books, records and registers of the said company, or authentic abstracts or extracts out of the same, are hereby declared to be good and sufficient for evidence in all courts of judicatory, and elsewhere. And his majesty, with advice foresaid, further statutes and declares that the said John, lord Belhaven, Adam Cockburn of Ormiston, lord justice clerk, Mr Francis Montgomery of Giffen, Sir John Maxwell of Pollok, Sir Robert Chiesley, present provost of Edinburgh, John Swinton of that ilk, George Clark, late bailie of Edinburgh, Mr Robert Blackwood, and James Balfour, merchants in Edinburgh, and John Corse, merchant in Glasgow, William Paterson, esquire, James Foulis and David Nairn, esquires, Thomas Deans, esquire, James Chiesley, John Smith, Thomas Coutts, Hugh Fraser, Joseph Cowan, Davis Ovedo and Walter Stewart, merchants in London, and others to be joined with or assumed by them, in manner above-mentioned, and their successors or majority of them assembled in the said company, shall and may in all time coming, by the plurality of votes, agree, make, constitute and ordain all such other rules, ordinances and constitutions as may be needful for the better government and improvement of their joint stock or capital fund, in all matters and things relating thereinto. To which rules, ordinances and constitutions, all persons belonging to the said company, as well directors as members thereof, governors or other officers civil or military, or others whatsoever, shall be subject, and hereby concluded; as also, to administer and take oaths of good faith, and others requisite to the management of the foresaid stock and company. And the said company is hereby empowered to equip, fit, set out, freight and navigate their own or hired ships in such manner as they shall think fit, and that for the space of ten years from the date hereof, notwithstanding of the act of parliament of 1661, entitled, act for encouraging of shipping and navigation, wherewith his majesty, with consent foresaid, dispenses for the said time only in favour of the said company, and that from any of the ports or

places of this kingdom, or from any other ports or places in amity, or not in hostility with his majesty, in warlike or other manner, to any lands, islands, countries or places in Asia, Africa or America, and there to plant colonies, build cities, towns or forts,[2] in or upon the places not inhabited, or in or upon any other place, by consent of the natives or inhabitants thereof and not possessed by any European sovereign, potentate, prince or state, and to provide and furnish the foresaid places, cities, towns or forts, with magazines, ordinances, arms, weapons, ammunition and stores of war, and by force of arms to defend their trade and navigation, colonies, cities, towns, forts and plantations, and other effects whatsoever. As also, to make reprisals and to seek and take reparation of damage done by sea or by land, and to make and conclude treaties of peace and commerce with the sovereigns, princes, estates, rulers, governors or proprietors of the foresaid lands, islands, countries or places in Asia, Africa or America, providing always, such as it is hereby specially provided, that all ships employed by them shall return to this kingdom with their effects, under the pain of confiscation, forfeiture and seizure of the ship and goods, in case of breaking of bulk before their return, excepting the case of necessity for preserving the ship, company and loading only. And his majesty, with consent foresaid, does further statute and ordain that none of the lieges of this kingdom shall or may trade or navigate to any lands, islands, countries or places in Asia or Africa in any time hereafter, or in America, for and during the space of thirty-one years, to be counted from the passing of this present act, without license and permission in writing from the said company; certifying all such as shall do in the contrary hereof, that they shall forfeit and amit the third part of the ship or ships, and of the cargo or cargos therein employed, or the value thereof, the one half to his majesty as escheat, and the other half to the use and benefit of the said company, and for the effectual execution whereof it shall be lawful to the said company, or any employed by them, to seize the said ships and goods, in any place of Asia or Africa, or at sea upon the coasts of Asia or Africa, upon the transgression foresaid, by force of arms, and at their own hand, and that without the hazard of incurring any crime or delinquency whatsoever on account of the

said seizure, or anything necessarily done in prosecution thereof, excepting always, and without prejudice to any of the subjects of this kingdom to trade and navigate during the said space to any part of America, where the colonies, plantations or possessions of the said company shall not be settled. And it is further hereby enacted that the said company shall have the free and absolute right and property only relieving and holding of his majesty and his successors in sovereignty, for the only acknowledgement of their allegiance and paying yearly a hogshead of tobacco, in name of blench duty, if required only, in and to all such lands, islands, colonies, cities, towns, forts and plantations, that they shall come to establish or possess in manner foresaid. As also, to all manner of treasures, wealth, riches, profits, mines, minerals, fishings, with the whole product and benefit thereof, as well under as above the ground, and as well in rivers and seas, as in the lands thereto belonging, or from or by reason of the same in any sort, together with the right of government and admiralty thereof. And that the said company may, by virtue hereof, grant and delegate such rights, properties, powers and immunities, and permit and allow such sort of trade, commerce and navigation into their plantations, colonies, cities, towns or places of their possession, as the said company from time to time shall judge fit and convenient; with power to them to impose and exact such customs and other duties, upon and from themselves, and others trading with and coming to the said plantations, cities, towns, places and ports and harbours thereof, as the company shall think needful for the maintenance and other public uses of the same, holding always, and to hold the whole matter of his majesty, and his successors kings of Scotland, as sovereigns thereof, and paying only for the same their acknowledgement and allegiance, with a hogshead of tobacco yearly, in name of blench duty, if required, for all other duty, service, claim or demand whatsoever. With power and liberty to the said company to treat for and to procure and purchases such rights, liberties, privileges, exemptions and other grants as may be convenient for supporting, promoting and enlarging their trade and navigation from any foreign potentate or prince whatsoever in amity with his majesty, for which the general treaties of peace and commerce between his majesty and such potentates, princes or

states shall serve for sufficient security, warrant and authority. And if contrary to the said rights, liberties, privileges, exemptions, grants or agreements, any of the ships, goods, merchandise, persons or other effects whatsoever belonging to the said company shall be stopped, detained, embezzled or away taken, or in any sort prejudiced or damnified, his majesty promises to interpose his authority to have restitution, reparation and satisfaction made for the damage done, and that upon the public charge, which his majesty shall cause disburse, and lay out for that effect. And further, it is hereby statute that all ships, vessels, merchandise, goods and other effects whatsoever belonging to the said company shall be free of all manner of restraints or prohibitions, and of all customs, taxes, cesses, supplies or other duties imposed, or to be imposed by act of parliament, or otherwise, for and during the space of twenty-one years, excepting always the whole duties of tobacco and sugar that are not of the growth of the plantations of the said company. And further, it is enacted that the said company, by commission under their common seal, or otherwise as they shall appoint, may make and constitute all and every their directors, governors and commanders in chief, and other officers civil or military, by sea, or by land. As likewise, that the said company may enlist, enroll, hire and retain all such persons subjects of this kingdom, or others whatsoever, as shall be willing and consent to enter in their service or pay, providing always that they uplift or levy none within this kingdom to be soldiers without leave and warrant first obtained from his majesty, or the lords of his privy council, over which directors, governors, commanders in chief or other officers civil or military, and others whatsoever in their service and pay, the company shall have the power, command and disposition both by sea and land. And it is further statute, that no officer civil or military, or other person whatsoever within this kingdom, shall impress, entertain, stop or detain any of the members, officers, servants or others whatsoever, of or belonging to the said company. And, in case the said company, their officers or agents, shall find or understand any of their members, officers, servants or others aforesaid, to be impressed, stopped or detained, they are hereby authorised and allowed to take hold of and release the foresaid person impressed or

stopped in any part of this kingdom, either by land or water. And all magistrates and others of his majesty's officers civil and military, and all others, are hereby required in their respective stations to be aiding and assisting to the said company, under the pain of being liable to all the loss, damage and detriment of the said company, by reason of the foresaid persons their neglect. And further, that the said company, whole members, officers, servants or others belonging thereto, shall be free both in their persons, estates and goods, employed in the said stock and trade, from all manner of taxes, cesses, supplies, excises, quartering of soldiers, transient or local, or levying of soldiers, or other impositions whatsoever, and that for and during the space of twenty-one years. And lastly, all persons concerned or to be concerned in this company, are hereby declared to be free denizens of this kingdom, and that they, with all that shall settle to inhabit, or be born in any of the foresaid plantations, colonies, cities, towns, factories and other places that shall be purchased and possessed by the said company, shall be reputed as natives of this kingdom, and have the privileges thereof. And generally, without prejudice of the specialities foresaid, his majesty, with consent foresaid, gives and grants to the said company all power, rights and privileges, as to their persons, rules, orders, estates, goods and effects whatsoever, that by the laws are given to companies allowed to be erected for manufactories, or that are usually given in any other civil kingdom or commonwealth, to any company there erected for trade and commerce. And for the better establishment and greater solemnity of this act and gift in favour of the said company, his majesty does further ordain letters patent to be expedited hereupon, containing the whole details, under the great seal of this kingdom, for doing whereof all at once this act shall be sufficient warrant both to the director and chancellor, or keeper of the great seal, as use is in like cases.

Appendix 3: Williams Scott's Defence of Darien, Theses XIX & XX

XIX

Since the universal topic of discussion at present is our Colony, after an auspicious voyage has quite recently been successfully planted on the Isthmus of Darien, and since there are many who ask with what or absence of right, this was done, we are not afraid to state publicly deliberately that our people had the best possible right to take possession the said place. And the Spaniards show little sense of fairness in complaining about us on this score, since the reasons and arguments on which base their right to our New Caledonia are either non-existent or of the flimsiest. For if they say that those places fell to them as the prize discovery, there is neither right nor truth in their claim; in as much to discover is not to take in visually, but to take hold of. Why, the law clearly demonstrates that, in establishing a claim of ownership, only discovery is valid which is accompanied with possession; viz. where moveable property is seized, or fixed property is fenced off and guarded: certainly does not apply to this case, as the Spaniards had not a single garrison in that place. Indeed, it is a fact that our people did not even encounter anyone from *Hispaniola* there. Furthermore, discovery confers no right except to what, before the discovery, belonged to no one. But the natives of that place when the Spaniards arrived (if, indeed, they ever were there) had, though infidels, possession of and dominion over their property, which could not be wrested from them without just cause; for it is unfair and heretical to assert that infidels as such are not masters of their own property, and to rob them of their possessions, merely for being such, is theft and rapine no less than if the same treatment were meted out to Christians. Finally, if the Spaniards base their title on a Papal gift, it will be more than sufficiently evident that this amounts to nothing, if we observe the gift to be of a sort diametrically opposed to the right of property both divine and human. And indeed it is marvellous arrogance on the part of the Pope of Rome to lay unjust claims to property, when it is a fact that Christ the Lord renounced all earthly empire; when He was man He did not hold dominion over the whole world, nor even supposing He had, could that by any argument have been made to support the assertion that this privilege had passed by vicarage to Peter or to the Roman Church.

XX

On these grounds, therefore, we give it as our verdict that the Isthmus of Darien is ours by well-merited right. And if the Spaniards attempt to support their unjust and unreasonable claim by military operations, we shall feel at liberty to repel their force with force. Nor have we any doubt under the auspices of our serene and invincible king, this Colony will be able to stand four-square against the unjust attacks of them any others, for Scots today, even as of old, are as brave in defence of gains as in the making of them.

Legal right to have access to social rights or just market concept – questions about recognition of EU citizenship in practice

Kamila Anna Feddek

Keywords: *EU – citizenship – social – economic – dimension*

European citizenship has been introduced by the Maastricht Treaty, and awarded to a person who holds the nationality of the EU's Member State. However, it is already known from the Treaty establishing the European Economic Community that any person holding nationality of a Member State of the European Union is, concurrently a citizen of the European Union, enjoying rights listed in the Treaty provisions. The right for the Union citizens to move and reside freely within the territory of Member States is enshrined in Article 21 TFEU and in Article 45 of the Charter of Fundamental Rights of the European Union and is not exclusively dependent on economic activity of the individual.

The paper first discusses EU citizenship concept based on primary and secondary law and some academic sources. Second, it provides normative discourse on social and economic dimension of EU citizenship in the case law of the Court of Justice of the European Union. Finally, it looks at the UK right to reside test and its implications on EU citizens exercising their free movement rights, in particular right to social security, to answer question about the legal value of EU citizenship in practice.

I. Introduction

European Union citizenship has been introduced by EU law to give to its holders economic, social and political rights, regardless of which EU country they reside¹. Certain fundamental rights conferred by EU citizenship have their source in the four freedoms that stand at the foundation of the common single market, primarily established by the Treaty of Rome, namely free movement of persons, goods, services and capitals. In this context, EU citizenship can be understood as an economic concept foreseen for prosperity of single market, where, in priority,

¹¹ R. C. A. White, "Free movement, equal treatment and citizenship of the Union" (2005) 54 ICLQ 885-906; R. C.A. White, "Citizenship of the Union, Governance and Equality", 29 Fordham Int'l L.J. 790 (2006); K. Hailbronner, "Union citizenship and access to social benefits", (2005) 42(5), C.M.L. Rev. 1245-1267; S. Giubboni, "Free movement of persons and European solidarity" (2007) 13 (3) European Law Journal, 360-79; M. Dougan "The Constitutional dimension to the case law on Union citizenship" (2006), 31 (5), E.L. Rev. 613-641.

economically active persons holding nationality of one of Member States, exercise their free movement rights.

In this regard, European citizenship plays fundamental role for the European Union since its inception and is seen as “the abolition, as between Member States, of obstacles to the free movement of ...persons”² and one of the core objectives and safeguard of successful performance of the Union.

On the other hand, Article 21 TFEU and Art 45 of Charter of Fundamental Rights of the European Union, provides all EU citizens, including those who are non-inactive economically, with the right to free movement and reside in another Member State. Moreover, the “Union citizenship is destined to be fundamental status of nationals of Member States,”³ as emphasised by the Court of Justice on many occasions. In this more social aspect, EU citizens can be seen as persons with the right to move and reside in any Member State without any need of being economically active.

The paper first discusses the social and economic dimension of EU citizenship concept based on primary and secondary law and some academic sources. Second, it provides normative discourse on social and economic dimension of EU citizenship in the case law of the Court of Justice of the European Union. Finally, it looks at the UK right to reside test and its implications on EU citizens exercising their free movement rights, particularly right to social security, to answer question about the legal value of EU citizenship in practice.

II. Concept of European Union citizenship

European citizenship has been introduced in the Maastricht Treaty, and awarded to a person who holds the nationality of the EU’s Member State⁴. However, it has been already known from the Treaty establishing the European Economic Community that any person holding

²The Treaty establishing the European Economic Community signed in Rome in 1957.

³Case C-184/99 Grzelczyk [2001] ECR I-6193, Case C-413/99 Baumbast and R v Secretary of State for the Home Department [2002] ECR I-7091, Case C-34/09 Zambrano [2011].

⁴Article 9 of the Treaty on European Union provides that: “Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”.

nationality of a Member State of the European Union⁵ is, concurrently a citizen of the European Union, enjoying rights listed in the Treaty provisions. Its significant importance has been regularly commented in literature.⁶

It is seen as a concept that should be applied equally to all members of society. The citizenship status reinforces individuals' belongingness to a given community, which comes with sets of rights and obligations.⁷ As emphasized by the European Commission stated, it is 'both a source of legitimation of the process of European integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity'.⁸ In this context, EU citizenship creates a European identification, which gives its holder equal status, anywhere within the European Union.

Acquired EU citizenship gives persons the right to free movement, settlement and employment across the EU, the right to vote in European elections, and also the right to consular protection from other EU states' embassies when abroad.

⁵ At time – European Community.

⁶ See e.g. J. Shaw, I. Stiks, *Citizenship Rights*, (Ashgate Publishing, 2013); J. Shaw, N. Miller, M. Fletcher, *Getting to Grips with EU Citizenship: Understanding the Friction between UK Immigration Law and EU Free Movement Law*, (Edinburgh Law School Citizenship Studies, 2013) ; A. Epiney, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', *European Law Journal* 5 (2007); T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: between Past and Future*, 1st edn (Manchester: Manchester University Press, 2001); Reich, Norbert, 'Union Citizenship – Yesterday, Today and Tomorrow!', in RGSL WP, 3, Riga, 2001; Schrauwen, Annette, 'Sink or Swim Together? Developments in European Citizenship', in *Fordham Int'l L.J.*, 2000; Kostakopoulou, Thodora, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity', in 5 *Columb. J. Eur. L.*, 1999; Wiener, Antje, 'European' Citizenship Practice, *Building Institutions of a Non-State*, Oxford: Westview Press, 1998; O'Leary, Síofra, *The Evolving Concept of Community Citizenship, From Free Movement of Persons to Community Citizenship*, The Hague: Kluwer Law International, 1996; Kostakopoulou, Theodora, 'Towards a Theory of Constructive Citizenship in Europe', in *J. Pol. Phil.* 4, 1996; Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States', in 32 *CMLRev.*, 1995; O'Keeffe, David, 'Union Citizenship', in O'Keeffe, David & Twomey, Patrick M., *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, 1994; Closa, Carlos, 'Citizenship of the Union and Nationality of the Member States' in O'Keeffe, David & Twomey, Patrick M. (eds.), *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, 1994; Meehan, Elizabeth, *Citizenship and the European Community*, London: SAGE, 1993; Closa, Carlos, 'The Concept of Citizenship in the Treaty of European Union', in 29 *CMLRev.*, 1992; D. Kochenov, 'The European Citizenship Concept and Enlargement of the Union', in 3 *Rom. J. Pol. Sci.*, 2, 2003.

⁷ D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *Columbia Journal of European Law* 2 (2009).

⁸ COM (2001) 506 final.

Rights of EU citizen are listed in primary EU law and have been developed substantially in secondary legislation.

In constitutional law, there are several accents to this principle. For instance, Article 20 TFEU stresses that the concept of EU citizenship is automatically afforded to EU nationals and supplements the national citizenship of “every person holding the nationality of a Member State” and as per its wording: “Citizens of the Union shall enjoy rights, and shall be subject to the duties provided by the Treaties”. In this meaning, EU citizenship rights and duties specified in European law do not replace the rights and duties stipulated in national laws of Member States, but complement them, in the exercise of the statute of “European citizen”, conferred following the accession and integration of the respective national state to the European Union⁹.

The right of EU citizens to move and reside freely within the territory of the Union is emphasised in Article 21 TFEU and further enshrined in the Charter of Fundamental Rights of the EU, which notes in Preamble that the EU “places the individual at the heart of its activities, by establishing a citizenship of the Union and by creating an area of freedom, security and justice” and Art 45 stating that “Every citizen of the Union has the right to move and reside freely within the territory of the Member States”. Article 15(2) of the Charter provides that “every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State” and Article 34 states that “everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages”. In this meaning, EU citizenship is a concept giving an access to legal rights to all EU ‘free movers’.

In this regard, the Court of Justice of the European Union is predominantly responsible for ‘giving meaning, specificity, and value to citizenship, thereby establishing new institutional norms that will impact on and modify national legal cultures.’¹⁰ Thus, the Court’s interpretation of fundamental rights flowing from EU citizenship will be briefly recalled in the next sections.

⁹Anne Pieter van der Mei, *Free Movement of Persons Within the European Community: Cross-border Access to Public Benefit*, Hart Publishing, 2003.

¹⁰ D. Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, *The Modern Law Review* 2 (2005); Case C-85/96, *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-269; D. Kochenov,

III. EU citizenship as a route to access the social rights regardless of the economic activity

As noted above, the right for the Union citizens to move and reside freely within the territory of Member States is enshrined in Article 21 TFEU and in Article 45 of the Charter of Fundamental Rights of the European Union and its wording can suggest that it is not dependent on economic activity of the citizen.

The Court of Justice of the EU has recognised the direct effect of Article 21 TFEU and confirmed that this right is conferred directly on every citizen of the Union by a clear and precise provision of the Treaty.¹¹ The Court of Justice has also observed that citizenship of the Union gives each EU citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by Union law. Yet, limitations and conditions laid down in EU law must be interpreted restrictively and must be applied in accordance with the principle of proportionality.¹² According to the Court, provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly and gives its holders full enjoyment of rights.¹³

For instance, in case Sala¹⁴- which opened the wave of cases based on legal recognition of the citizenship status while accessing social security rights or Baumbast,¹⁵ the Court of Justice focused on the status of being a EU citizen, as sufficient ground to confer residence rights to EU citizens in another Member State, by virtue of its direct application in Article 21(1) TFEU.¹⁶ The court has seen Union citizen as a person exercising their rights and demanded from Member States the case by case assessment where the migrant was placed at the centre of interests¹⁷.

‘A Real European Citizenship; a New Jurisdiction Test; a Novel Chapter in the Development of the Union in Europe’, *Columbia Journal of European Law* 1 (2012).

¹¹ Case C-413/99 Baumbast ECR [2001] I- 7091, para 84.

¹² Ibid, para 91; Case C- 162/09 Lassal [2001] I- 9217, paras 29-31.

¹³ Case C-408/03 Commission v. Belgium [2006] I- 2647, para 40; Case C-200/02 Zhu and Chen [2004] I-9925, para 31.

¹⁴ Case C-85/96 M M Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

¹⁵ Case Baumbast.

¹⁶ Formerly Article 18(1) EC.

¹⁷ M Dougan, ‘The Constitutional dimension to the case law on Union citizenship’ (2006) 31 *ELRev* 613.

The Court emphasized on numerous occasions¹⁸ that EU citizenship is destined to be the fundamental status of Member States' nationals, enabling those who find themselves in the same situation to enjoy, within the scope of the Treaty, the same treatment in law, irrespective of their nationality. Accordingly, EU citizenship has widened individual rights significantly. The Court has ruled that citizens are entitled to reside in another Member State purely as citizens of the Union, what was at the same time a recognition of EU citizenship as a source of free movement rights¹⁹, including right to social security.

An extended legal meaning of citizenship institution can be observed in case *Zambrano*.²⁰ The Court of Justice held in that case that Article 20 TFEU was to be interpreted as meaning that it precluded a Member State from refusing a third country national and therefore, his children, who were Belgian and hence European Union citizens, who were dependent on claimant, a right of residence in Belgium as the Member State of residence and nationality of those children, and from refusing to grant a Belgian work permit to that third country national, in so far as such decisions deprived those children of the genuine enjoyment of the substance of the rights attached to their status as European Union citizens. Thus, the Court interpreted EU citizenship right set out in Article 20(2)(a) TFEU 'to move and reside freely within the territory of the Member States' as conferring — as a matter of EU law — on each and every EU citizen a primary right of residence within the Member State, of which EU citizen was also a national, and from which EU citizen's relatives could also derive secondary rights of residence, within that State without need for any prior exercise of EU free movement rights to other Member States.²¹ The Court stated that 'Citizenship of the Union is intended to be the fundamental status of nationals of the Member States. ... In these circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.'

¹⁸See, for instance, Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case *Baumbast and R* [2002] ECR I-7091; Case C-224/98 *M N D'Hoop v Office national d'emploi* [2002] ECR I-6191; Case C-209/03 *Bidat* [2005] ECR I-2119.

¹⁹For instance, Case *Baumbast*, paragraph 84 and Case *Zhu and Chen* [2004] ECR I-9925, paragraph 26.

²⁰Case C-34/09 *Zambrano v Office national de l'emploi (ONEm)* 8 March [2011] ECR I-nyr (at paragraphs 41-2).

²¹In Case C256/11 *Murat Dereci and others v. Bundesministerium für Inneres* 15 November [2011] which concerned the situation of five applicants all third country nationals wishing to reside in Austria with his/her Austrian family member. None of the applicants' family members had exercised their right to free movement within the EU. See: para 68.

Article 21(2) TFEU gives the legal basis for the EU legislature 'to adopt provisions with a view to facilitating the exercise' of the right 'to move and reside freely within the territory of the Member States'.²²

Thus, Zambrano case illustrated that Union citizenship is designed to be the fundamental status of nationals of the Member States, and access to national citizenship of a Member State guarantees access to Union citizenship.

In other words, EU law precludes national measures, which have the effect of depriving citizens of the Union of their genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union. This specifically concerns those EU citizens exercising free movement rights.

Case Dereci added the criterion relating to denial of 'genuine enjoyment' of the substance of EU rights. It refers to such situations where a Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national, but also the territory of the Union as a whole.²³ EU citizenship entails direct effective rights that are enforceable in national courts. These rights, in particular residence rights, may only be restricted subject to the principle of proportionality.²⁴ The national measures need to fully respect EU citizenship, and the national authorities cannot refuse the admittance or deport EU citizens who do not present any 'genuine, threat or affect one of the fundamental interests of society'. The citizen cannot be automatically removed from the country of his residence on the basis of being dependant on social security, especially in circumstances, where he is greatly integrated into the hosting country. National measures need to fit into EU law reflecting European citizenship and should give every opportunity to its holders for 'genuine enjoyment' of free movement rights, including right to social security. At the same time, this treatment would enable those nationals, who find themselves in the same situation, to enjoy the same treatment in law within the area of application, rationale and material of the Treaty, irrespective of their nationality, subject to

²² On the other hand in Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department 5 May, [2011] ECR I-nyr, the CJEU held that Article 21 TFEU is not applicable to a Union citizen who has never exercised his/her right of free movement.

²³ Ibid, para 66.

²⁴ Case C-413/99 Baumbast [2002] ECR I-7091.

such exceptions as are expressly provided for in that regard.²⁵ In this meaning, the citizenship principle strictly connects with the prohibition of discrimination and equal treatment of its holders.

IV. EU citizenship and its market-orientated value

The rhetoric of the Court of Justice of the European Union has shifted from the citizenship in the meaning presented in Sala case, where the legal status of European Union citizenship guaranteed the fundamental rights and freedoms to the market-orientated concept.

As noted above, the single market citizen has been already known since the Treaty of Rome. However, that Treaty regulated the freedom of movement of workers only. At that time, the economically active migrant had his rights to social and tax advantages protected and interpreted broadly to encourage the movement of workers for prosperity of the single market.²⁶ The economic dimension of EU citizenship in the Court's case law has been codified in Directive 2004/38/EC²⁷.

European citizenship in the meaning of this instrument can be seen as only declaratory concept and non-active citizens, in many cases, would not be able to benefit from their status.

Citizenship Directive divides all EU nationals for those, who are economically active citizens, namely workers, self-employed persons, students, and those who are not falling within the scope of any other category prescribed. This results in division of rights and entitlements, especially the social assistance payments that are very controversial matter in every Member State as they are fully funded from the public funds. Selectivity based on such notions

²⁵Joined Cases C-76/05 & C-318/05 Schwarz and another v Finanzamt Bergisch Gladbach; European Commission v Germany [2007] ECR I-6849; C-184/99 Grzelczyk v Centre Public d'aide sociale d'Ottignies – Louvain-la-Neuve [2001] ECR-6193; C-413/99 Baumbast and R. v Secretary of State for the Home Department ECR I-7091; C-224/98[2002] D'Hopp v Office national de l'emploi ECR I – 6191.

²⁶ See: Case 32/75 Cristini v SNCF [1975] ECR 1985; Case 59/85 Reed [1986] ECR 1283; Case C-370/90 Singh [1992] ECR I-4265

²⁷ Directive 2004/38 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77

undermines EU citizenship as a concept giving equal status and belongingness to the same territory.

On the basis of the Citizenship Directive, the Court has managed to reject the social security or social assistance rights in the recent cases.

In *Dano*,²⁸ the Court has simply stated that economically non-active claimant, who does not have sufficient resources, cannot claim a right of residence in Germany under the Directive on free movement of EU citizens. Therefore, the claimant could not invoke the principle of non-discrimination laid down by the directive and by the regulation on the coordination of social security systems.²⁹

Furthermore, in *Alimanovic*³⁰, the CJEU confirmed that a worker who has been involuntary unemployed after having worked for less than a year and has registered as a job-seeker with the relevant employment office, retains the status of worker, and the right of residence for no less than six months. During that period, he can rely on the principle of equal treatment and is entitled to social assistance.

In circumstances, where an EU citizen has not worked in the host Member State or where the period of six months expired, a job-seeker cannot be expelled from that Member State for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. However, in this case the host Member State may refuse to grant any social assistance. However, in every case, as confirmed in *Dano* or *Brey*, the relevant national authorities have the obligation to carry out an individual assessment based on Article 7(1) (b).

The above cases represent very strict economic approach of the Court of Justice, which has contradicted its own previous rulings, in which the ‘free movers were able to rely on their status

²⁸ Case C- 333/13, *Elisabeta Dano v Jobcenter Leipzig*.

²⁹ *Ibid*, para 81.

³⁰ Case C-67/14, *Alimanovic*.

as beneficiaries of Union citizenship to secure their rights. More recently, the Court focuses on protection of citizens who are fitting in one of the statuses noted in the Citizenship Directive, in priority: workers, self-employed persons, students or self-sufficient with comprehensive health insurance. This approach is leaving behind EU citizens who are not able to (longer) contribute to the system due to illness or age, for instance. In other words, the approach protects those who are able to support themselves independent of the hosting country's social security system, mainly economically active citizens.

V. The UK right to reside test and its implications on EU citizens exercising the right to free movement of persons

This economic dimension of EU citizenship or rather dismissal of its legal value can be observed in fairly recent case *Commission v the UK*,³¹ in which the Court looked at the UK's right to reside test that is applied before the social payments are allowed to EU migrants³².

It is worth noting that all non-contributory social benefits in the UK are conditional to satisfaction of the presence and residence tests, including habitual residency.

The Habitual Residence Test has been introduced in 1994 as a measure preventing "benefits tourism" and is applied to all people unless they are exempt³³, including returning British nationals who have recently arrived in the country, and who claim certain means-tested social security benefits.³⁴

On the accession of 10 new Member States to the EU in May 2004, the United Kingdom was one of the few countries, which decided not to impose any restriction on free movement of workers from the new Member States. However, the British government has introduced an additional criterion – the "right to reside" test – to be considered as habitually resident. Since

³¹ Case C- 308/14 *Commission v United Kingdom* [2016].

³² To be specific, EEA nationals, but EU nationals holding EU citizenship only are discussed in this paper.

³³ Welfare benefits and tax credits handbook, CPAG, 2016, p. 1524.

³⁴ M. Adler 'The Habitual Residence Test: a Critical Analysis', (1995) 2 *Journal of Social Security Law* 179; S. Roberts, "A strong and legitimate link' The Habitual Residence Test in the United Kingdom", in R. Langer and M. Sakslin, (eds.) *Co-ordinating Work-based and Residence-based Social Security*, University of Helsinki, 2004, pp. 67-92.

then, a person cannot be ‘habitually resident’ unless they have the ‘right to reside’ in the Common Travel Area.³⁵

The right to reside in the UK for EEA nationals is governed by the Immigration (European Economic Area) Regulations 2006³⁶, which transposed Directive 2004/38/EC on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States. Under the 2006 Regulations, EEA nationals who are exercising Treaty rights are ‘qualified persons’ if they fall within one of five categories, namely: jobseekers, workers, self-employed persons, self-sufficient persons, or students. Only a ‘qualified person’ or a permanent resident, and family members of ‘qualified person’ or permanent resident have a right to reside in the UK.

The right to reside test has been regularly challenged at the national and EU level.

For instance, in case *Patmalniece*³⁷, the UK Supreme Court upheld the lawfulness of making entitlement to “state pension credit” (a means tested non-contributory benefit for pensioners) dependent on a right to reside in the UK.

In this case, the court said that, that although the right to reside test is a form of indirect nationality discrimination, it has a legitimate purpose of ensuring that only those who were economically or socially integrated within the UK should have access to the UK’s social assistance system.

The European Commission disagreed with the outcome, and on 29 September 2011 issued a “reasoned opinion” giving the UK two months to abolish the “right to reside in the UK” test, keeping only the EU’s “habitual residence” test, and specifically noted:

³⁵ The United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

³⁶ Amended few times and now Regulations 2016 are force.

³⁷ *Patmalniece v Secretary of State for Work and Pensions* [2011] 1 WLR 783.

“The concept of habitual residence has been defined at EU level as the place where the habitual centre of interests of a person is located. The Commission considers that the criteria for assessing habitual residence are strict and thus ensure that only those persons who have actually moved their centre of interest to a Member State are considered habitually resident there. This is a powerful tool for Member States to make sure that social security benefits are only granted to those genuinely residing habitually within their territory.”³⁸

Due to no action taken in relation to the above, the Commission has decided to take the United Kingdom to the Court of Justice as EU nationals who reside in the UK could not claim specific social security benefits, such as Income Support, child benefit or child tax credit.³⁹

The case *Commission v UK* ⁴⁰ has been finalized just before Brexit referendum in 2016, where the Court has been looking at the right to reside for Child Benefit and Child Tax Credit purposes only.⁴¹

The Court noted that the UK is indirectly discriminating EEA nationals, but this can be justified on grounds of need for protection of public funds, but no request was made to evidence threat to public finances, for this aim to be accepted as legitimate. Moreover, the Court of Justice did not ask whether the test applied to family benefits was proportionate or appropriate itself, but instead, it asked whether the checks conducted as part of the test were proportionate.

The Court called Child Benefit ‘a social benefit’ and identified the child tax credit as ‘a social security benefit’. The Court cited Brey’s findings that ‘there is ‘nothing to prevent, in principle, the granting of social benefits to Union citizens, who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right

³⁸European Commission - IP/11/1118 (29/09/2011) Social security coordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits.

³⁹European Commission – IP/13/475 (30/05/2013).

⁴⁰Action brought on 27 June 2014 – *European Commission v United Kingdom of Great Britain and Northern Ireland*, Case C-308/14.

⁴¹Similar proceedings were planned to challenge the right to reside for Income Support purposes, however the UK has managed to shift the Income Support under the list of social assistance benefits in 2012. See: Eleonor Sibley, Marieke Widmann (ed.), *Welfare benefits for marginalised EU migrants: special non-contributory benefits in the UK, the Republik of Ireland and the Netherlands*.

of residence in the host Member State',⁴² and based on this sentence, it decided that discriminatory treatment can be applied to all benefits. However, the case Brey strictly related to social assistance benefit, which was analysed by the Court as this kind of benefit.

Moreover, the Court in *Commission v the UK* undermined the value of Regulation 883/04/EC, which has been presented as a 'conflict rule' instrument that deals with competence only rather than entitlement to benefits.

It is hard to accept this point of view as the Regulation provides the eligibility criteria for social security benefits, including the equal treatment in Article 4.

Family benefits, which were discussed in case *Commission v UK*, are 'pure' social security benefits within the material scope of Regulation 883/04/EC, which aims to assure that social security payment is made to EU citizens by their country of habitual residence, as comprehensively explained by the Court in case *Swaddling*⁴³.

However, this time the Court ruled that the Directive can adopt a wider definition of social assistance, but the equal treatment provision in Regulation 883/2004 is bound by limitations of Directive 2004/38. Moreover, the Court imported the personal scope of Directive 2004/38 into Regulation 883/2004, which has much wider personal scope.⁴⁴ This means that many EU citizens would be left with no benefit entitlement. The Court has considered this scenario and admitted that person would have a competent (potentially national)⁴⁵ State, but possibly no right for payment. This kind of approach, if regularly applied, would hugely contradict the EU citizenship concept, and also core EU fundamentals, including the free movement of persons and equality principle.

⁴² Brey, para 44.

⁴³ Case *Swaddling* C- 90/97 [1999], para 29. "The phrase 'the Member State in which they reside' in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances."

⁴⁴ See: Case *Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse*, Case C-543/03 [2005].

⁴⁵ Emphasis added.

As per current EU legislation, there are no provisions for non-compliance with Art 18 TFEU in social security benefits or that they fall within ‘social assistance’ under the Directive.

The Court of Justice has gone even further than in cases *Dano* or *Alimanovic*. It accepted the dismissal of the benefits for children, knowing that their parents - EU citizens who are long-term UK residents, but for instance, not (longer) economically active would not be able to claim their right to social family benefits in the UK, and also at the country of origin due to lost ‘real links’ with the national State.

It is worth reminding that the aim of the Regulation 883/04/EC is not only to prevent overlapping of benefits, but also to prevent the situation where a person is not covered by any Member State’s social security system of habitual residence due to exercise of the free movement rights. Member States at EU level unanimously reaffirmed this condition, and the criteria for the determination of habitual residence in 2009 as part of an update of the EU’s rules on social security coordination. Thus, the Court’s reasoning is contradicting the existing law in this area.

Whereas EU law on free movement of Union citizens does allow Member States to limit an access to social assistance⁴⁶, it does not permit the restrictions on ‘pure’ social security benefit for EU nationals that are workers, direct family members of workers or habitually residents in the hosting Member State⁴⁷.

Thus, the outcome in the case is rather hard to understand and this ruling is just another proof of economic approach of the Court towards EU citizens’ rights.

VI. Conclusions

This paper acknowledges great challenges in effective recognition of EU citizenship due to social and economic tensions in EU law.

⁴⁶ Directive 2004/38/EC.

⁴⁷ Regulation 883/04/EC.

In couple cases recalled above, we can observe confusing messages flowing from the rulings of the Court or Justice. In some decisions, the Court highlighted the fundamental status of EU citizens who were able to rely on their status to access legal rights, and in others, more recent ones with market-orientated dimension, it contradicts its own statement by excluding EU citizens from social rights, completely undermining the value of EU citizenship concept itself. These variations can be understood as a compromise that the Court is trying to achieve by finding the balance between the protection of the interests of individual (hosting) Member States which are in charge of their own social security systems, and EU citizens who are attempting to make use of their free movement rights, including right to social security.

This remaining conflict in recognition of EU citizenship as a legally valued status points to the limits of solidarity within the Union,⁴⁸ which has resulted in critical reactions from academia.⁴⁹ Some are critical of citizenship as being too expansive principle, while others see it as an advantage of the European Union citizenship by extending aspects of life beyond the national borders, where those who take the risk as a result of moving the country of residence, should also have a chance to enjoy the full free movement rights, in accordance with the Treaties provisions.

Jo Shaw has noted that citizenship is rather an integrative than constitutive value, which demands a 'certain degree of solidarity between the Member States'.⁵⁰ This point can be verified in the recent case law of the Court.

While on the one hand, full access to social security and assistance for those who have not contributed or no longer contribute to the economic system of their country of residency is viewed as risk, is leading to financial pressure and conflict of interests between and within countries; on the other hand, the citizenship concept has proven to be a very active instrument

⁴⁸ Citizenship and the Principle of Solidarity', in: M. Dougan/E. Spaventa, *Social Welfare and EU Law*, 2005.

⁴⁹ H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012; S O'Leary 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 *ELRev* 68; E. Spaventa 'The Constitutional Effect of Union Citizenship' in: U. Neergard, R. Nielsen, L. Roseberry (eds) *The Role of the Courts in Developing a European Social Model - Theoretical and Methodological Perspective* (2010 Copenhagen DOJ Publishing); R. Bellamy, D. Castiglione, J. Shaw(ed.), *Making European Citizens. Civic inclusion in a transnational context*, Palgrave, 2006.

⁵⁰J.Shaw, "Citizenship: Contrasting dynamics at the interference of integration and constitutionalism", in P.Craig and G. de Burca(eds) "The evolution of EU law(Oxford University press, 2011), 575-609.





in the hands of the Court to guarantee both free movement and equal protection of EU citizens beyond the national laws. The case law, however, lacks consistency and determination of the Court in making EU citizenship a legally valid status in practice.

To end, the free movement of persons, goods, services and capital, as well as the freedom of residence are guaranteed by the Treaty provisions, banning any discrimination on grounds of nationality. Both at the national and European levels, the rights and freedoms of the citizens of Member States as European citizens, are meant to be exercised in good faith without violating the rights and liberties of others. This suggests more social approach towards EU citizenship. Recent cases of CJEU however suggests more market-orientated approach towards recognition of economically active ‘free movers’ as EU citizens.

Thus, the way forward on the EU level is required to reflect the needs of extensively moving society. Moreover, further action would need to readdress social and economic tensions in EU law, which then have direct implications on its implementation on national levels, often resulting in creating extra barriers in accessing free movement rights by EU citizens who are often trapped between two (or more) social security systems.

And finally, the answer to the question in the title in this paper: whether Union citizenship is a concept giving an access to social rights or is just market - orientated concept remains rather confusing. Perhaps, its legal value lies somewhere in between.

Bibliography

Cited sources

M. Adler ‘The Habitual Residence Test: a Critical Analysis’, (1995) 2 Journal of Social Security Law 179

R. Bellamy, D. Castiglione, J. Shaw(ed.), Making European Citizens. Civic inclusion in a transnational context, Palgrave, 2006

C. Closa, ‘The Concept of Citizenship in the Treaty of European Union’, in 29 CMLRev., 1992

C Closa, ‘Citizenship of the Union and Nationality of the Member States’, in 32 CMLRev., 1995

- M. Dougan, 'The Constitutional dimension to the case law on Union citizenship' (2006) 31 ELRev 613
- M. Dougan "The Constitutional dimension to the case law on Union citizenship" (2006), 31 (5), E.L. Rev. 613-641
- M. Dougan/E. Spaventa, *Social Welfare and EU Law*, 2005
- A. Epiney, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', *European Law Journal* 5 (2007)
- S. Giubboni, "Free movement of persons and European solidarity" (2007) 13 (3) *European Law Journal*, 360-79
- K. Hailbronner, "Union citizenship and access to social benefits", (2005) 42(5), C.M.L. Rev. 1245-1267
- D. Kochenov, 'The European Citizenship Concept and Enlargement of the Union', in 3 *Rom. J. Pol. Sci.*, 2, 2003
- D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *Columbia Journal of European Law* 2 (2009)
- D. Kochenov, 'A Real European Citizenship; a New Jurisdiction Test; a Novel Chapter in the Development of the Union in Europe', *Columbia Journal of European Law* 1 (2012)
- D. Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', *The Modern Law Review* 2 (2005)
- T. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', in *J. Pol. Phil.* 4, 1996
- T. Kostakopoulou, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity', in 5 *Columb. J. Eur. L.*, 1999
- T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: between Past and Future*, 1st edn (Manchester: Manchester University Press, 2001)
- E. Meehan, *Citizenship and the European Community*, London: SAGE, 1993
- A. Pieter van der Mei, *Free Movement of Persons Within the European Community: Cross-border Access to Public Benefit*, Hart Publishing, 2003
- H. Micklitz/B. De Witte (eds.), *The European Court of Justice and the Autonomy of Member States*, 2012
- D. O'Keeffe, 'Union Citizenship', in O'Keeffe, David & Twomey, Patrick M., *Legal Issues of the Maastricht Treaty*, London: Wiley Chancery Law, 1994
- S O'Leary 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 ELRev 68
- S. O'Leary, *The Evolving Concept of Community Citizenship, From Free Movement of Persons to Community Citizenship*, The Hague: Kluwer Law International, 1996
- N. Reich, 'Union Citizenship – Yesterday, Today and Tomorrow!', in *RGSL WP*, 3, Riga, 2001
- S. Roberts, "A strong and legitimate link' The Habitual Residence Test in the United Kingdom", in R. Langer and M. Sakslin, (eds.) *Co-ordinating Work-based and Residence-based Social Security*, University of Helsinki, 2004, pp. 67-92

A. Schrauwen, 'Sink or Swim Together? Developments in European Citizenship', in Fordham Int'l L.J., 2000

J. Shaw, "Citizenship: Contrasting dynamics at the interference of integration and constitutionalism", in P. Craig and G. de Burca (eds) "The evolution of EU law" (Oxford University Press, 2011), 575-609

J. Shaw, I. Stiks, Citizenship Rights, (Ashgate Publishing, 2013)

J. Shaw, N. Miller, M. Fletcher, Getting to Grips with EU Citizenship: Understanding the Friction between UK Immigration Law and EU Free Movement Law, (Edinburgh Law School Citizenship Studies, 2013)

E. Sibley, M. Widmann (ed.), Welfare benefits for marginalised EU migrants: special non-contributory benefits in the UK, the Republic of Ireland and the Netherlands

E. Spaventa 'The Constitutional Effect of Union Citizenship' in: U. Neergard, R. Nielsen, L. Roseberry (eds) The Role of the Courts in Developing a European Social Model - Theoretical and Methodological Perspective (2010 Copenhagen DOJ Publishing)

R. C. A. White, "Free movement, equal treatment and citizenship of the Union" (2005) 54 ICLQ 885-906

R. C.A. White, Citizenship of the Union, Governance and Equality, 29 Fordham Int'l L.J. 790 (2006)

A. Wiener, 'European' Citizenship Practice, Building Institutions of a Non-State, Oxford: Westview Press, 1998

Case law

Case C-67/14 Alimanovic [2015]

Case C-413/99 Baumbast, R v. Secretary of State for the Home Department [2002] ECR I-7091

Case C-209/03 Bidar [2005] ECR I-2119

Case C-140/12 Brey [2013]

Case C-408/03 Commission v. Belgium [2006] I- 2647

C-503/04 European Commission v Germany [2007] ECR I-6849

Case C- 308/14 Commission v United Kingdom [2016]

Case 32/75 Cristini v SNCF [1975] ECR 1985

Case C- 333/13 Elisabeta Dano v Jobcenter Leipzig [2014]

Case C256/11 Murat Dereci and others v. Bundesministerium für Inneres [2011]

Case C-543/03 Christine Dodl and Petra Oberhollenzer v Tiroler Gebietskrankenkasse [2005]

Case C-224/98 M N D'Hoop v Office national d'emploi [2002] ECR I-6191

C-184/99 Grzelczyk v Centre Public d'aide sociale d'Ottignies – Louvain-la-Neuve [2001] ECR-6193

Case C- 162/09 Lassal [2001] ECR I- 9217

Case C-434/09 Shirley McCarthy v Secretary of State for the Home Department 5 May, [2011] ECR I-nyr,

Case 59/85 Reed [1986] ECR 1283

Case C-85/96 M M Martínez Sala v Freistaat Bayern [1998] ECR I-2691.

Cases C-76/05 & C-318/05 Schwarz and another v Finanzamt Bergisch Gladbach

Case C-370/90 Singh [1992] ECR I-4265

Case C-90/97 Swaddling [1999] ECR 1075

Case C-34/09 Zambrano v Office national de l'emploi (ONEm) [2011] ECR I-nyr

Case C-200/02 Zhu and Chen [2004] ECR I-9925

Does Telling Tales *Post Bellum* Suffice for the Redress of Gross Human Rights Violations? Reviewing Truth Commissions

Nomfundo Ndlwana

Keywords: gross human rights violations, amnesties, truth commissions, criminal prosecutions

Truth Commissions fall within a paradigm of Transitional Justice, which aims to reconcile post-conflict societies, as well as institute remedial measures against gross human rights violations. This paper posits that while there is a definite political significance of such non-judicial processes as the Truth Commissions, when countries address human rights crimes committed by an outgoing repressive regime, judicial processes should also be afforded a role. That is, the prosecution of perpetrators, which is in compliance with authoritative legal frameworks that are instructive against human rights abuses. For instance, a right to an effective remedy for acts violating fundamental rights is enshrined in both international and regional human rights treaties, including being developed through caselaw. As such, Truth Commissions could potentially suppress the legal obligations that treaty law and caselaw impose on States.

This argumentative paper seeks to establish if States that select Truth Commissions as a sole Transitional Justice mechanism could be construed as breaching International Law.

Introduction

Article 8 of the Universal Declaration of Human Rights (UDHR) states “Everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.¹ Although not imposing any obligations as an instrument, the UDHR contents are binding under customary international law, and are manifest general principles of law.² There is a salient emphasis of this right by other international and regional human rights treaties,³ which has culminated in the strengthening of

¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR), art. 8.

² Christopher C. Joyner, ‘Redressing Impunity for Gross Human Rights Violations: The Universal Declaration and the Search for Accountability’ (1998) *Journal of International Law & Policy* 26(4) 591.

³ Article 2(3)(a) of the International Covenant on Civil and Political Rights (16 December 1966) UNTS vol. 999, p. 171, Article 6(1) of the European Convention of Human Rights and Fundamental Rights, as amended by

international criminal justice system which aims at preventing commission of gross human rights violation (GHRV)⁴ with impunity.⁵ Consequently, this has led to favourable outcomes of the enactment of this right by global domestic legal systems, thus increasing its awareness and knowledge to the population at large.⁶ For these reasons, the process of criminal accountability helps societies deal with the legacies of human rights abuses by granting justice and, arguably, catharsis to the victims.⁷ It is thus fair to posit that Article 8 of UDHR is unassailable in eradicating impunity for such crimes, as it implicitly render prosecutions a legally prescriptive right .

Evidence in support of this position was the establishment of the International Criminal Court (ICC)⁸ in 2002 which, as a permanent international judicial institution, complements national judicial systems which are unable or unwilling to prosecute perpetrators.⁹ Criminalisation of domestic and international human rights violations has yielded revolutionary advances like prosecution of violent armed groups members and their individual leaders at an international level.¹⁰ Additionally, that tyrannical leaders have also not evaded judicial processes for their criminal activities raises the hope for the decimation of commission of human rights violations with impunity.¹¹ Hence the prevalent and perceptible shift from the historic “restrictive culture of sovereign impunity” to a modern culture of international accountability.¹²

Protocolos Nos. 11 and 14 (4 November 1950) ETS 5, Article 25(1) of the American Convention on Human Rights, “*Pact of San Jose*” (22 November 1969), and Article 7(a) of the African Charter on Human and Peoples' Rights “*The Banjul Charter*” (adopted 27 June 1981) 21 ILM 58.

⁴ Human rights scholars describe gross human rights violations as those acts that violate the rights of an individual to life and or physical and mental integrity, such as killings, disappearances and torture. See Diane F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100(8) Yale L.J. 2537. They comprise the elements of the major international crimes such as genocide, war crimes, and crimes against humanity.

⁵ The establishment of the *ad hoc* criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal of Rwanda, as well as the only international permanent criminal court, the International Criminal Court.

⁶ Nora Sveaass, ‘Gross Human Rights Violations and Reparation Under International Law: Approaching Rehabilitation as a Form of Reparation’ (2013) 4(17191) European Journal of Psychotraumatology 1.

⁷ Brandon Hamber, *Transforming Societies After Political Violence. Truth, Reconciliation, and Mental Health* (New York 2009), pages 153 - 157.

⁸ UNGA, ‘Rome Statute of the International Criminal Court’ (signed 17 July 1988) 2187 UNTS 3.

⁹ *ibid*, art. 17.

¹⁰ Steven R. Rath and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon, 1997).

¹¹ Despot leaders such as Charles Taylor of Liberia, Hissen Habre of Chad, Slobodan Milosevic of Serbia and August Pinochet of Chile have all experienced the shift in the landscape of international criminal justice.

¹² Thakur Ramesh and Popovski Vesselin, ‘The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity’ (2007) The Global Community Yearbook of International Law and Jurisprudence 1, page 54.

This cultural shift was evidenced by the judgement in the *Velasquez Rodriguez Case* before the Inter-American Court of Human Rights involving an unresolved disappearance of a student activist in the Honduras.¹³ The Court expressly stated the American Convention of Human Rights (ACHR) authorises each state party:

“[a] legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a series of investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.¹⁴

The Human Rights Committee in Geneva has also stressed the urgency of subjecting the perpetrators of GHRV to justice by officially taking an antagonistic stance to amnesties.¹⁵

As established by transitional justice scholars, amnesties¹⁶ partly constitute the dual rival alternatives facing transitional societies, which either institute democracy through non-prosecutorial means, or obtain justice for the victims of GHRV through prosecutorial means.¹⁷ The fact that state authorities of an outgoing regime are often accountable for GHRV,¹⁸ imposes a dilemma to new democratic governments whether to yield to calls for justice through prosecution of the liable perpetrators or succumb to the petitions for amnesty.¹⁹ Either way the stakes are customarily high for neglecting any of these alternative options. There is an inevitable risk of losing popularity and authenticity, as well as failing to esteem the rule of law,

¹³ *Velasquez Rodriguez Case* (Judgment) Inter-Am.Ct.H.R. (Ser. C) No. 4 (29 July 1988).

¹⁴ *ibid.* paragraph 174.

¹⁵ General Comment No. 20 on Article 7 UN. Doc. HRI/Gen/11/Rev 1 (1994).

¹⁶ Scholars describe the meaning of amnesties as forgetfulness or state of oblivion. See Norman Weisman, ‘A history and Discussion of Amnesty’ (1972) 4 Colum. Hum. Rts. L. Rev. 529. Page 529.

¹⁷ Elma G.M. Weitekamp, *et al.*, *How to Deal with Mass Victimisation and Gross Human Rights Violations. A Restorative Justice Approach* (IOS Press 2006), pages 217 -241.

¹⁸ Kathryn Sikkink & Carrie Booth Walling, ‘Impact of Human Rights in Trials in Latin America’ (2007) 44(4) *Journal of Peace Research* 427.

¹⁹ Elin Skaar, ‘Truth Commissions, Trials: Or Nothing? Policy Options in Democratic Transitions’ (1999) 20(6) *Third World Quarterly* 1109.

by neglecting the demands for justice.²⁰ Conversely, a probability of inciting a vicious military response, and hence endangering the fragile democracy, by neglecting the demands for amnesty by the outgoing regime, exists.²¹

Extrapolating from the above analysis, policy choices for democratic stabilisation are strongly contingent upon the strength of the outgoing regime during transition, since trials only occur where there has been a complete breakdown of the outgoing regime.²² By the same token, truth commissions are a trade off arrangement which guarantees against a further downward spiral into a violent instability should the outgoing regime be in a position of strength.²³ This balance of power between the old regime and the new democratic government evokes a conflict between demands and their solutions, and hence determine the mode through which consecutive governments deal with the perpetrators of historic GHRV significantly.

This point is sustained by the following variable scenarios. The feasibility of the Nuremberg trials in the post-war Germany was due to the emergence of an incontrovertible victor,²⁴ whereby the vanquishing allies had militarily subdued the Nazi regime, thus imposing retributive justice through trials.²⁵ In contrast, during the Chilean democratic transition, the military continued to command extensive power,²⁶ thus absolutely impeding the newly elected democratic government from indicting any of the liable military personnel, hence granting them blanket amnesties.²⁷ However, a unique variation existed in the South African situation, while the former regime retained control over a formidable military and police force, the balance of power did not exclusively favour them, thus amnesties were guaranteed on condition

²⁰ *ibid.*

²¹ *ibid.*

²² Terry Lynn Karl and Philippe C. Schmitter, 'Modes of Transition in Latin America, Southern and Eastern Europe' (1991) 128(2) *Internal Social Science Journal* 267.

²³ Brian Walsh, 'Resolving the Human Rights Violations of a Previous Regime' (1996) *World Affairs* 111.

²⁴ Gitta Sereny, *Albert Speer: His Battle with Truth* (Knopf New York 1995).

²⁵ *ibid.*

²⁶ When General Augusto Pinochet, the former head of the Chilean junta, agreed to restore power to an elected civilian government, he still commanded sufficient power and was able to remain in office as the head of the armed forces.

²⁷ Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449.

that perpetrators made full disclosures of the truth.²⁸ This “third way”,²⁹ which is a compromise, is offered by Truth Commissions. Essentially, it is a bargaining chip through which human rights violators are coerced into agreeing to peace and hence relinquish power.³⁰

As the discussion in the preceding paragraph demonstrates, the provision of amnesties is at times required to achieve peace, however, Scharf suggests that amnesties should be reserved as a bargaining tool only in drastic circumstances.³¹ He contends that retributive justice for violations of international humanitarian law, particularly, potentiates certain advantages worth considering. For example, trials can discourage future human rights abuses, inhibit vigilante justice, and hence consolidate respect for law in the budding democratic government.³²

The author regards the assertive influence of international law an intervening variable positioned between human rights violations on one hand, and the responsibility for States to act decisively within the confines of the law against such violations on the other. Consequently, this raises a critical question of whether disregarding criminal activities of the prior regime, through granting amnesties to the alleged perpetrators, for the purpose of promoting national unity, is consistent with international law. While this paper argues for the acknowledgement of the assertiveness of international law in obligating States to embark on prosecutorial actions against perpetrators of GHRV, it examines the extent of this obligation. Subsequently, it further interrogates if States which select truth commissions as the sole transitional justice mechanism are in violation of international law.

It will do so by interrogating whether: (1) the ICC paradoxically requires justice at the expense of peace; (2) there are benefits to prosecutions; and finally, (3) duty to prosecute is a legal absolute.

²⁸ Paul van Zyl, ‘The Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission’ (1999) 52(2) *Journal of International Affairs* 648.

²⁹ Desmond Tutu, *No Future Without Forgiveness* (Random House 2012).

³⁰ John Dugard, ‘Retrospective Justice: International Law and the South African Model’ in *Transitional Justice and the Rule of Law in New Democracies* (James McAdams eds) (Hellen Kellog Institute for International Studies 1997).

³¹ Michael P. Scharf, ‘Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?’ (1996) 31 *Tex. Int’l. L.J.* 4.

³² *ibid.*

Contrasting the ICC with Truth Commissions

During the ICC negotiations, high profile debates on to how to resolve the problem of national amnesties and truth and reconciliation commissions were made, albeit, without a forthright and an unreserved expression in the Roman Statute.³³ Opinions were acutely conflicted since the vast majority of participants had an unwavering viewpoint that “prosecutions are the sole appropriate response” while equally, there was a corresponding conviction asserting the adequacy of the alternative mechanisms.³⁴ Whilst not discounting that circumstances facing newly-formed democracies vary considerably, it is inappropriate to entirely argue against criminal proceedings for GHRV, as some scholars do.

For instance, it has been argued that while the establishment of the ICC is morally expedient, it inflicts a legal apprehension in that it could be misconstrued as “foreclosing the use of truth commissions”.³⁵ Scholars assert it would be lamentable for trials and punitive actions to be the only intended pathway for dealing with perpetrators of GHRV, instead of assisting States in finding own suitable solutions, “provided there is no blatant disregard for fundamental human rights”.³⁶ Likewise, Minow argues that courts have a limited capacity as a mechanism, for the facilitation of political transitions, because prosecutions are slow, partial and preoccupied with the ‘either and or’ simplifications of the adversarial process.³⁷ She further suggests that this emphasises the importance of an unconstrained worth of truth commissions in unearthing the “larger patterns of atrocity and the complex lines of responsibility and complexity”.³⁸

Scholarly arguments reflect proponents of the what the author terms the middle pathway. While individual accountability for GHRV through prosecution at the ICC is affirmed, provisions for the ICC to defer to truth commissions initiatives that are legitimate for transitioning into stable

³³ Darryl Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) EJIL 14(3) 481. This was raised in the context of article 17 (n 19).

³⁴ *ibid*, page 483.

³⁵ Charles Villa-Vicencio, ‘Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet’ (2002) 49 Emory Law Journal 205, page 205.

³⁶ Alex Boraine, *A Country Unmasked: South Africa’s Truth and Reconciliation Commission* (OUP Southern Africa 2000).

³⁷ Martha Minow, *Between Vengeance and Forgiveness: Facing the History after Genocide and Mass Violence* (Beacon Press 1998) page 87.

³⁸ *ibid*.

democracies are advocated. Broomhall posits that the truth commissions are a satisfactory concession between ICC prosecution and impunity, provided that the process is credible, with full disclosure on the acts of the perpetrators and respect for rights of victims to reparations.³⁹ Hayner proposes that when a difficult decision of deferral is taken, the stability of the State, its attitude towards impunity, and the feasibility of Truth Commissions or amnesties should be considered relevant.⁴⁰

Other scholars who put forth a case for prosecutions, hinge it on the competency with which trials prohibit commissions of GHRV in the future.⁴¹ Be that as it may, the author is quite sceptical that punitive actions for historic crimes can be rightfully justified as deterrents against futuristic illegal conduct. Nonetheless, it is argued that by meting out justice for a historic crime whose conduct can no longer be deterred, criminal jurisprudence attempts to guarantee against a similar illegal behaviour in the future.⁴² Similarly, in its Preamble, the ICC states its resolve of ending impunity for international crimes and their prevention through prosecutorial means,⁴³ which has evoked legal scholars to surmise that to defer a prosecution on the grounds that a national amnesty exists, would be inconsistent with this resolve.⁴⁴

Without refuting that the ICC prosecutions and national amnesties are necessary in distinct contexts, the author believes that the ICC should contemplate against prosecutions only in situations where amnesties are absolutely critical for the survival of the democratic change. As Han states, pressing ahead with prosecutions by the ICC in all cases is an attractive option, so that it chooses primarily a legal path, while delegating the volatile political situations to the Security Council.⁴⁵ Article 16 of the Rome Statute provides the Security Council with power to defer ICC prosecutions.⁴⁶ Of course, this grants national governments time and space to

³⁹ Bruce Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law' (2000) 35(2) New Eng. L. Rev. 399.

⁴⁰ Priscilla Hayner, 'International Guidelines for the Creation and Operations of Truth Commissions: A Preliminary Proposal' (1996) 59(4) Law & Contemp. Probs. 174.

⁴¹ Alejandro M. Garro and H. Dahl, 'Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward' (1987) 8 Hum. Rts. L.J. 343.

⁴² Herbert Fingarette, 'Rethinking Criminal Law Excuses' (1980) 89(5) Yale L.J. 1002.

⁴³ UNGA (n 8), Preamble.

⁴⁴ Michael P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell Int'l. L.J. 507.

⁴⁵ Sang Wook Daniel Han, 'The International Criminal Court and National Amnesty' (2006) 12 Auckland U.L. Rev. 97.

⁴⁶ UNGA (n 8), art. 16.

restore law and order while preparing for prosecutions in the earliest convenient future. Thus, even in States where a fragile democracy is a bar to domestic prosecutions, there is no valid impediment to international prosecutions, owing to the ICC being remotely located, both physically and politically.

Are there benefits to Prosecutions?

Judge Cassese offers valuable insights by listing four benefits of prosecutions.⁴⁷ Firstly, trials are superior to amnesty because they “establish individual responsibility” even in circumstances where perpetrators are so innumerable that guilt could be collectively assigned.⁴⁸ Secondly, “justice dissipates the call for revenge” since demands for retribution by victims are met when a Court ascertains guilt and assigns a sentence for a crime.⁴⁹ Thirdly, it is by a virtue of a Court dispensing justice that “victims are prepared to be reconciled” with their historic persecutors.⁵⁰ Fourthly, “a fully reliable record” of the heinous acts that victims endured is established and immortalised, whose contents the future generations will always be fully aware of.⁵¹ Furthermore, Matas once observed that “nothing emboldens a criminal so much as the knowledge he can get away with a crime”, while asserting “that was the message a failure to prosecute for the Armenian Massacre gave to the Nazis”.⁵² In addition he warned that ignoring the lessons of the Holocaust would be “at our own peril”.⁵³

On balance, and as mentioned earlier, prosecutions are not feasible in all post-conflict situations. Roht-Arriaza argues against the notion of prosecutions-at-all-cost by affirming that granting amnesties, instead of prosecutions, is not analogous to replacing accountability and redress with impunity.⁵⁴ Moreover, Dressler, while conceding that amnesties are in stark contrast to criminal prosecutions, he contends they represent the cornerstones of a criminal justice system.⁵⁵ He supports his position by listing these bedrocks as prevention, deterrence,

⁴⁷ Antonio Cassese, ‘Reflections on International Criminal Justice’ (1988) 61(1) *Modern Law Review* 1.

⁴⁸ *ibid.*, page 6.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² David Matas, ‘Prosecuting Crimes Against Humanity: The Lessons of World War 1’ (1990) *Fordham Int’l. L.J.*, page 104.

⁵³ *ibid.*

⁵⁴ Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (OUP 1995) pages 282 - 303.

⁵⁵ Joshua Dressler, *Cases and Materials on Criminal Law* (Minn: West Group 1994), pages (21 - 63).

punishment and rehabilitation.⁵⁶ At the same time, Roht-Arriaza commends amnesties as being closely associated with lustrations, revealing the identities of perpetrators, documentation of abuses, and pecuniary reparations to the victims or their families, and thus are punitive and remedial.⁵⁷

Despite the arguments in the preceding paragraph, it is worth noting that States have an ability to violate human rights in the most cruel, pervasive and systematic manner.⁵⁸ The extent of which is so vast and perennial that the same States who have a duty to protect under international human rights law, tend to be the “chief threat to its own citizens”.⁵⁹ Therefore there is both a moral and legal obligation that perpetrators of such crimes should be prosecuted.

Is the Duty to Prosecute absolute?

An explicit obligation to prosecute and punish human rights crimes in societies emerging for a repressive era is found in the Genocide Convention⁶⁰ and Convention Against Torture,⁶¹ while for post-war societies is found in the Geneva Conventions.⁶² Astonishingly, the most comprehensive human rights treaties which enshrine the right to a redress, do not explicitly express a requirement for States to prosecute or punish any of the violations specified in those conventions.⁶³ This has evoked divided scholarly views on whether the duty to prosecute perpetrators of crimes against humanity is absolute or not.

Scharf states that there is no absolute duty on States to prosecute crimes against humanity, and thus initiation of investigations and conduction of criminal trials is at the prerogative of States,

⁵⁶ *ibid.*

⁵⁷ Roht-Arriaza (n 54).

⁵⁸ Thakur and Vesselin (n 12).

⁵⁹ *ibid.*, page 46.

⁶⁰ UNGA, ‘Convention on the Prevention and Punishment of the Crime of Genocide’ (9 December 1948) 78 UNTS, p. 277, art. 1.

⁶¹ UNGA, ‘Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment’ (10 December 1984) 1465 UNTS, p. 85, art. 4.

⁶² Geneva Convention for the Amelioration of the Condition of and the Wounded and the Sick in the Armed Forces In the Field (12 August 1949) 75 UNTS 31, art. 50; Geneva Convention for the Amelioration of the Condition of and the Wounded and the Sick in the Armed Forces In the Sea (12 August 1949) 75 UNTS 85, art. 51; Geneva Convention Relative to the Treatment of the Prisoners of War (12 August 1949) 75 UNTS 135, art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 UNTS 287, art.147.

⁶³ These Conventions are already cited in (n 3).

hence they can opt for granting amnesties.⁶⁴ However, Orentlicher, asserts that authoritative interpretations crystallises that human rights treaties obligate States to investigate serious violations of physical integrity⁶⁵ and bring those responsible to justice.⁶⁶ She further affirms that prosecution and punishment are the most effective and adequate means of warranting a narrow class of rights that merit special protection.⁶⁷ Another notable aspect is an overlap between the elements of crimes against humanity and those crimes for which there is an explicit obligation to investigate and prosecute.⁶⁸ It could be argued that, due to these treaty provisions, States have an obligation to prosecute, failing which they would be in breach of their international law obligation.

Conclusion

The author opines that the epidemic of amnesties should evoke an international concern that evolves into an impetus to interrogate their legitimacy in cases of international human rights violations. This might fuel a perceptible shift from States dealing with perpetrators at their discretion, to setting limitations on domestic jurisdictions which are construed to violate international law through granting amnesties. Such a legal dimension is consistent with the Vienna Convention which stipulates that States should not implement domestic laws which violate international jurisprudence.⁶⁹ Though it could be rational to conclude that an inconsiderate and cold interpretation of international law has been rendered by the author, it is fair to say some treaties prohibit amnesties.⁷⁰ As previously stated, the Convention Against Torture, the Genocide Convention, the ACHR and the International Covenant on Civil and Political Rights advocate for the investigation, prosecution of perpetrators, and redress for victims.⁷¹

⁶⁴ Scharf (n 44).

⁶⁵ Such as torture, extrajudicial executions and forced disappearances, which are elements of crimes against humanity.

⁶⁶ Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) Yale L.J. 2537.

⁶⁷ *ibid.*

⁶⁸ UNGA (n 8), art. 7(1)(f).

⁶⁹ UN, 'Vienna Convention on the Law of Treaties' (23 May 1969) 1155 UNTS 331 (VCLT), art. 27.

⁷⁰ Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence of Amnesty' (1998) 20 Hum. Rts. Q. 843.

⁷¹ *ibid.*

Further to previous comments on the *Velasquez Rodriguez Case*, the Court found that blanket domestic amnesties, which obviate both the prosecutions and civil redress, are in violation of the obligations of States provided by human rights treaties.⁷² Nevertheless, there is evidence that this international legal obligation to prosecute has limitations in that it can potentially be annulled by the Court of law, whether domestic or international. For example, the Azanian Peoples Organisation (AZAPO) challenged granting of amnesties to GHRV perpetrators who testified before the Truth and Reconciliation Commission (TRC), at the Constitutional Court in South Africa.⁷³ Notwithstanding the basis of their claim that the amnesty scheme violated the rights of families to seek judicial redress for extra-judicial murders of their loved ones was valid⁷⁴, it was rejected by the Court.⁷⁵ The basis of this rejection was that neither the South African Constitution nor any applicable treaty precluded granting of amnesties in exchange for truth⁷⁶, which demonstrates the limitations of the legal obligation to prosecute.

It is prudent, however, to place a significant consideration on the stipulations relating to the duty of States to prosecute, as contained in authoritative documents regulating the standard with which States are expected to deal with perpetrators of GHRV. States are commanded to be resolute in abrogating any “legislation leading to impunity for those responsible for grave violations of human rights”, and thus must “prosecute such violations”.⁷⁷ Likewise, States are urged to take all necessary and possible action, in accordance to the due process of law, “to hold accountable perpetrators, including their accomplices, for violations of international human rights and humanitarian law”.⁷⁸ Even the Roman Statute of the ICC, in its preamble, recalls that each States has a duty to “exercise its criminal jurisdiction” over the perpetrators of international crimes.⁷⁹

It is equally important to note that some States which have dealt with alleged human rights criminals, through the non-prosecutorial processes such as truth commissions, have determined

⁷² *Velasquez Rodriguez Case* (n 13).

⁷³ *Azanian Peoples Organisation v President of the Republic of South Africa Case*, Case CCt 17.96, Constitutional Court of South Africa, 25 July 1996.

⁷⁴ *ibid.* paragraph 8.

⁷⁵ *ibid.* paragraph 51.

⁷⁶ *ibid.* paragraphs 33 & 35.

⁷⁷ UN, ‘Vienna Declaration and Programme of Action’, UN Doc. A/CONF.157/23 (25 June 1993), paragraph 60.

⁷⁸ CHR, ‘Resolution on Impunity’ UN Doc. E/CN.4/RES/2001/70 (25 April 2001), paragraph 20.

⁷⁹ UNGA (n 8), Preamble.

that GHRV do not fall under the categories which warrant amnesties. During Establishment of a Commission for Reception at the Truth and Reconciliation in East Timor, an explicit resolution to exclude the “serious criminal offences” was taken, thus omitting them from the Community of Reconciliation Process.⁸⁰ Such crimes were addressed through the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.⁸¹ They comprised genocide, crimes against humanity, war crimes, murder, sexual offences and torture.⁸² In this way, the truth commission was complemented by the prosecutorial hybrid Court which investigated and prosecuted the perpetrators of these serious violations.⁸³ Meaning it was deemed necessary, for the purposes of fostering national peace and reconciliation on one hand, and of securing justice for the victims on the other, to engage a dual approach in dealing with the perpetrators.

This is consistent with the provision on amnesty in the Statute of the Special Court of Sierra Leone that “an amnesty granted to any person falling within the jurisdiction...” of the Court, “shall not be a bar to prosecution”.⁸⁴ Needless to say, this approach embraces an obligation for States to comply with the principle of international law and the right of victims to a redress in the Court of Law. A conclusion that an obligation to prosecute exists is reached while being fully cognisant that circumstances in fragile democracies could be an impediment to criminal prosecutions. Professor Cherif Bassiouni states in a case where “peace is not intended to be a brief interlude between conflicts,” it must be supplemented with justice.⁸⁵ Additionally, Huntington seemed to echo similar sentiments by stating in the event that trials were embraced, they must proceed soon after transition⁸⁶, while emphasising that “in new democratic regimes, justice comes quickly or it does not come at all”.⁸⁷

⁸⁰ Regulation No.2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 (13 July 2000), paragraph 4.

⁸¹ Regulation No. 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (6 June 2000), section 1.3.

⁸² *ibid.*

⁸³ United State Peace Institute of Peace, ‘Truth Commission: Timor-Leste (East Timor) (2002) available at <https://www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor> under Prosecutions paragraph 1. Accessed on 1 June 2018.

⁸⁴ UNSC, ‘Statute of the Special Court of Sierra Leone’ (16 January 2002) art. 10, available at <http://www.rscsl.org/Documents/scsl-statute.pdf> accessed on 1 June 2018.

⁸⁵ Professor Bassiouni, Chairman of the United Nations Investigative Commission for Yugoslavia, in UNCHR, ‘Report on the Consequences of Impunity’ UN Doc. E/CN.4/1990/13.

⁸⁶ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991), page 217 - 226.

⁸⁷ *ibid.* page 213.

Granted, the Rome Statute codifies the *ne bis in idem* principle which prohibits the prosecution of a perpetrator for a crime that the ICC proscribes, for which the perpetrator has already been tried in a different Court.⁸⁸ Legal scholars refer to this principle an international law equivalent of the prohibition of double jeopardy under domestic law.⁸⁹ However, the ICC attaches two exceptional conditions to it: (1) if the trial was conducted by the domestic Court to shield “the person concerned from criminal responsibility”;⁹⁰ and, (2) if the trial is “not conducted independently and impartially”.⁹¹ Scharf states a problem might arise should the accused, who has already testified before a truth commission, argue against being tried by the ICC for the same offence on the grounds of this principle.⁹² He elaborates that whilst the principle refers to a trial by another Court, a truth commission is not a Court, and hence this principle is inapplicable to proceedings “inconsistent with an intent” of subjecting an alleged perpetrator to justice.⁹³

With all the facts and arguments above considered, it is fair to conclude that States which select truth commissions as a sole mechanism for the purpose of transition, could be interpreted as violating their duty to prosecute perpetrators of GHRV under international law. As demonstrated, while truth commissions play a significant political role in post-conflict societies, they are not a bar to prosecuting against international criminal law crimes. Truth Commissions are not prohibitive. The right to an effective redress in a Court of Law obligates States to grant justice to the victims by prosecuting the perpetrators. Whilst it has been argued that the justice system of newly democratic States is nonadaptive for conducting such trials, such States can assume responsibility by referring those cases to the ICC. As Orentlicher affirms, granting amnesties for GHRV contradicts international law.⁹⁴

⁸⁸ UNGA (n 8), art. 20.

⁸⁹ Scharf (n 44).

⁹⁰ UNGA (n 8), art. 20(a).

⁹¹ *ibid.* art. 20(b).

⁹² Scharf (n 44).

⁹³ *ibid.*, page 525.

⁹⁴ Orentlicher (n 65).

Bibliography

I. Primary Sources

United Nations Documents, Resolutions and Treaties:

CHR, 'Resolution on Impunity' UN Doc. E/CN.4/RES/2001/70 (25 April 2001).

General Comment No. 20 on Article 7 UN. Doc. HRI/Gen/11/Rev 1 (1994).

Regulation No.2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 (13 July 2000).

Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (6 June 2000).

CHR, 'Resolution on Impunity' UN Doc. E/CN.4/RES/2001/70 (25 April 2001).

ICRC, 'Geneva Convention for the Amelioration of the Condition of and the Wounded and the Sick in the Armed Forces In the Field' (12 August 1949) 75 UNTS 31.

ICRC, 'Geneva Convention for the Amelioration of the Condition of and the Wounded and the Sick in the Armed Forces In the Sea' (12 August 1949) 75 UNTS 85.

ICRC, 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War' (12 August 1949) 75 UNTS 287.

ICRC, 'Geneva Convention Relative to the Treatment of the Prisoners of War' (12 August 1949) 75 UNTS 135.

UNGA, 'Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment' (10 December 1984) 1465 UNTS, p. 85.

UNGA, 'Convention on the Prevention and Punishment of the Crime of Genocide' (9 December 1948) 78 UNTS, p. 277.

UNGA, 'International Covenant on Civil and Political Rights' (16 December 1966) UNTS vol. 999, p. 171.

UNGA, 'Rome Statute of the International Criminal Court' (signed 17 July 1988) 2187 UNTS 3.

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

UN, 'Vienna Convention on the Law of Treaties' (23 May 1969) 1155 UNTS 331 (VCLT).

UNCHR, 'Report on the Consequences of Impunity' UN Doc. E/CN.4/1990/13.

United State Peace Institute of Peace, 'Truth Commission: Timor-Leste (East Timor) (2002) available at <https://www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor> Accessed on 1 June 2018.

UNSC, 'Statute of the Special Court of Sierra Leone' (16 January 2002) available at <http://www.rscsl.org/Documents/scsl-statute.pdf> accessed on 1 June 2018.

Regional Treaties:

AU, 'African Charter on Human and Peoples' Rights' "*The Banjul Charter*" (adopted 27 June 1981) 21 ILM 58.

CoE, 'European Convention of Human Rights and Fundamental Reforms', as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5.

OAS, 'American Convention on Human Rights', "*Pact of San Jose*" (22 November 1969).

Cases:

Azanian Peoples Organisation v President of the Republic of South Africa Case, Case CCT 17.96, Constitutional Court of South Africa, 25 July 1996.

Velasquez Rodriguez Case (Judgment) Inter-Am.Ct.H.R. (Ser. C) No. 4 (29 July 1988).

II. Secondary Sources

Books:

Boraine A, *A Country Unmasked: South Africa's Truth and Reconciliation Commission* (OUP Southern Africa 2000).

Dressler J, *Cases and Materials on Criminal Law* (Minn: West Group 1994).

Hamber B, *Transforming Societies After Political Violence. Truth, Reconciliation, and Mental Health* (New York 2009).

Huntington SP, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991).

Minow M, *Between Vengeance and Forgiveness: Facing the History after Genocide and Mass Violence* (Beacon Press 1998).

Rather SR & Abrams JS, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Clarendon, 1997).

Roht-Arriaza N, *Impunity and Human Rights in International Law and Practice* (OUP 1995).

Sereny G, *Albert Speer: His Battle with Truth* (Knopf New York 1995).

Tutu D., *No Future Without Forgiveness* (Random House 2012).

Weitekamp EGM, et al., *How to Deal with Mass Victimisation and Gross Human Rights Violations. A Restorative Justice Approach* (IOS Press 2006), pages 217 -241.

Journals:

Cassese A, 'Reflections on International Criminal Justice' (1988) 61(1) *Modern Law Review* 1.

Dugard J, 'Retrospective Justice: International Law and the South African Model' in *Transitional Justice and the Rule of Law in New Democracies* (James McAdams eds) (Hellen Kellog Institute for International Studies 1997).

Garro AM & Dahl H, 'Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward' (1987) 8 *Hum. Rts. L.J.* 343.

Fingarette H, 'Rethinking Criminal Law Excuses' (1980) 89(5) *Yale L.J.* 1002.

Han SWD, 'The International Criminal Court and National Amnesty' (2006) 12 Auckland U.L. Rev. 97.

Joyner CJ, 'Redressing Impunity for Gross Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998) Journal of International Law & Policy 26(4) 591.

Karl TL & Schmitter PC, 'Modes of Transition in Latin America, Southern and Eastern Europe' (1991) 128(2) Internal Social Science Journal 267.

Matas D, 'Prosecuting Crimes Against Humanity: The Lessons of World War 1' (1990) Fordham Int'l. L.J.

Orentlicher DF, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) Yale L.J. 2537.

Ramesh T & Vesselin P, 'The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty and Impunity' (2007) The Global Community Yearbook of International Law and Jurisprudence 1.

Robinson D, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) EJIL 14(3) 481.

Roht-Arriaza N & Gibson L, 'The Developing Jurisprudence of Amnesty' (1998) 20 Hum. Rts. Q. 843.

———, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 449.

Scharf MP, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 Cornell Int'l. L.J. 507.

Skaar E, 'Truth Commissions, Trials: Or Nothing? Policy Options in Democratic Transitions' (1999) 20(6) Third World Quarterly 1109.

———, 'Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?' (1996) 31 Tex. Int'l. L.J. 4.

Sveaass N, 'Gross Human Rights Violations and Reparation Under International Law: Approaching Rehabilitation as a Form of Reparation' (2013) 4(17191) European Journal of Psychotraumatology 1.

Sikkink K & Walling CB, 'Impact of Human Rights in Trials in Latin America' (2007) 44(4) Journal of Peace Research 427.

Van Zyl P, 'The Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52(2) Journal of International Affairs 648.

Villa-Vicencio C, 'Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2002) 49 Emory Law Journal 205.

Walsh B, 'Resolving the Human Rights Violations of a Previous Regime' (1996) World Affairs 111.

Weisman N, 'A history and Discussion of Amnesty' (1972) 4 Colum. Hum. Rts. L. Rev. 529.

Fathers and immigration detention: A pilot study

Kate Alexander

Introduction

My PhD will illuminate the experience of an under researched population – fathers who have experienced immigration detention. Other research (Griffiths, 2016, Griffiths, 2015) has looked at deportable men and family life and has included within it some examination of detention. A larger literature examines fathers in prison (e.g. Arditti et al., 2005, Chui, 2016, Clarke et al., 2005, Day et al., 2005, Hairston, 1998, Hairston, 2001, Dyer, 2005, Dyer et al., 2012, Ugelvik, 2014, Secret, 2012) and their experience has some relevance to fathers in detention, but to date no research has focused specifically on their experience.

My research aims to plug this gap, with a view to answering the research question “What is the experience of fathers in immigration detention?”. Sub questions to be explored include:

- How do fathers in detention understand the concepts of ‘fatherhood’ and ‘fathering’, and how does detention affect these understandings?
- How are ‘fatherly’ relations altered by detention and how do fathers seek to renegotiate them through their detention?
- Do fathers seek to rebuild their relationships with their children after they leave detention and if so, how?
- To what extent do men believe their status as fathers is considered in decisions to detain them and to maintain their detention, and in decisions of courts regarding their immigration status.

This paper considers a small pilot study, conducted in March and April 2018, which recruited and interviewed two fathers living in the community in the UK after being detained.

Methodology

The research is sociolegal and has a constructivist ontology, which holds that there is no single objective reality but multiple realities which are created as people act (Bryman, 2016, Slevitch, 2011, Lorelli et al., 2017). My role as a researcher is therefore to seek to understand and interpret the way in which these realities are constructed. (Lorelli et al., 2017, Creswell and Miller, 2000). In taking that position, I recognise that my own positionality affects and

contributes to the understandings and meanings created through the research process. (Lorelli et al., 2017).

These ontological and epistemological positions imply the need to be reflexive throughout the research process (Mauthner and Doucet, 2003, Finlay, 2002, Orange, 2016). To that end, I kept a reflexive journal. Such journals “serve as a way for researchers to document the methodological decisions they make throughout their studies, track their analysis process, consider their own emotions and the roles they play in the process, document insights, and consider researcher bias” (Orange, 2016, p.2177).

This did not come naturally to me. I have never kept a journal either professionally or personally and I had to remind myself to do it. This difficulty was exacerbated by the fact that I am a part-time student and half my time is spent working. My work, as director of Scottish Detainee Visitors, is highly relevant to my research but the skills a practitioner uses are very different from the skills a researcher needs. Sometimes issues came up at work which made me think of my research, but I did not have the space or time to reflect on them or record them. I became better at this throughout the process but in the analysis section below, I consider my limitations in this area.

For my PhD, I will conduct face to face, telephone and online interviews with men inside and outside detention. For this pilot, I aimed to interview face to face two fathers who had been released from detention. I used my contacts with fathers I have met in detention to reach potential participants. This purposive sampling approach ensured I was able to reach participants relevant to my research questions (Bryman, 2016, p. 408).

The data collection method was semi-structured interviews using a topic guide based on the sub-questions above. The questions were open and broad ensuring that, as much as possible, the issues covered reflect the experiences, perspectives and concerns of the participants, rather than being pre-defined by me as the researcher (Bryman, 2016).

Some of the issues explored in the interviews are sensitive and I was aware they could cause participants distress (Lee and Renzetti, 1990). People who experience immigration detention may have been through traumatic life events and in the case of fathers, this is compounded by separation from their children. Asking them to recall these events has the potential to retraumatise them. I was aware of this risk and minimised it by providing clear information about the nature of the research and the topics it covers. I also made it clear that participants do not have to answer any questions they do not want to answer and can withdraw from participation at any point. Throughout the interviews, I aimed to establish a relationally safe space, which allows for the control of the participant but also for the responsibility of the researcher to actively listen, to be aware of signs of distress and to be prepared to halt the interview or take a break (Hydén, 2014)

I have not made a final decision regarding analysis for my PhD. However, for this pilot, I decided to use theoretical thematic analysis (Braun and Clarke, 2006). Thematic analysis is a useful method for exploring the perspectives of different research participants, which makes it appropriate for looking at the two interviews conducted for this pilot. (Lorelli et al., 2017). A theoretical approach to thematic analysis is driven by the researcher's analytic interests and I used the sub-questions for my research as an initial, pre-determined coding frame (Braun and Clarke, 2006).

Recruitment of participants

In March, I emailed two fathers who I had met in the course of my work, both of whom are now living in Glasgow. I attached a participant information sheet describing the research. One never responded, despite several follow up emails. The other, Jambu, responded positively almost immediately, but then dropped out of contact for several weeks despite emails attempting to set a date for our interview.

Jambu is a man I have known since 2006/7, when I visited him in Dungavel. For a period of about a year after his release, I saw him quite regularly. After losing touch for a number of years, I became aware of him again when he was re-detained in 2015 and was the focus of a

public anti-deportation campaign. A year or so after that I met him by chance and our paths have crossed several times since both professionally and socially.

In my journal, I reflected on the difficulty in setting up an interview with Jambu:

“I feel quite awkward about contacting Jambu again. I don’t know whether his lack of contact means he’s thought better of taking part or just that he’s not got round to emailing me/hasn’t seen the email. I’m concerned he might have agreed because he feels a sense of obligation to SDV, although I’ve tried to reassure him this isn’t about that. Also, he’s told me about [difficult aspects of his life]. Has this made him feel uncomfortable about being interviewed by me? It makes me a bit uncomfortable. I know quite a lot about him and he knows very little about me.”

This troubled me. I was haunted by a sentence I had underlined in a journal article: “In case of a conflict between the best interests of the research project and the research participant, the latter is a priority” (Hydén, 2014, p. 801). When I read it, I completely agreed, and still do. But faced with the prospect of having nobody to interview for my pilot study, I was aware that there can be a tension between the ethical conduct of research and a deadline. In the event, one further email elicited a response and the interview went ahead four weeks after initial contact.

Abdul was my second participant. I also met him while he was in detention and a couple of times since his release. I had not considered him as a participant as he lives in London, but once suggested by a colleague, he seemed ideal. His immigration status is secure, and he has a job, making his circumstances very different from Jambu’s. In addition, his location meant that I would have to interview him over the phone, which would provide further contrast.

There were challenges in the recruitment of both participants related to my positionality as a researcher. My prior contact with them was in the context of a service provider. This brought with it both advantages and disadvantages (Finlay, 2002). Both participants knew me and knew that I had a professional understanding of the issues around immigration detention. I had also met both of them while they were in detention and was aware of some of the personal challenges they had faced. I hope this provided them with reassurance about my

motivations for conducting the research. However, both have spoken about the positive impact SDV had had on their lives which raised some concerns regarding any sense of obligation they might feel in being involved.

The previous service provider relationship introduced a further power imbalance between me as a researcher and both participants. Relationships formed with people in detention have the potential to be ended by the forcible removal of one party from the country. SDV encourages all staff and volunteers to think about their own emotional wellbeing in this context. My approach to this has always been to maintain a professional distance. I am friendly and open to discussion, but I do not share personal information with people I encounter in detention. At the same time, providing a service means finding out about the circumstances of the service beneficiary. As I noted in my journal extract above, this means that I knew a lot about the personal lives of these participants and they knew virtually nothing about mine. The research relationship continued this imbalance to a great extent, although I took a conscious decision to give them both my personal mobile number, as a small means of demonstrating that I was entering into a relationship of trust with them.

Data collection: Telephone and face to face interviews compared

Previous research has indicated that conducting interview by phone and face to face produces similar results (Vogl, 2013, Sturges and Hanrahan, 2004) but that there are advantages and disadvantages to each mode to both the researcher and the participant (Oltmann, 2016, Opdenakker, 2006, Sturges and Hanrahan, 2004, Vogl, 2013). Conducting the interviews with Jambu and Abdul enabled me to compare the two modes and test my own experience against the literature.

The key difference I experienced between the two was the availability or otherwise of visual cues. (Opdenakker, 2006, Oltmann, 2016, Sturges and Hanrahan, 2004). Abdul and I spoke over one another more than was the case with Jambu, as we both lacked the non-verbal cues that we had finished speaking.

Of greater significance was the availability of such cues with Jambu. Anger about his experiences was a feature of his interview as this extract shows:

“Shocking experiences I have had in the country. Especially with the way families and children are treated. It's appalling. It shouldn't happen, but this is who we are. Now I know the real Britain from the Britain I knew before entering this country. And it's a shame and we should be ashamed of ourselves and our system. It's disgraceful.”

His anger is apparent in his words and was noticeable in his tone of voice, but it was far more apparent in his demeanour. When he spoke these words, he leaned forward, held my gaze intently and pressed his fists into the table. It was a very tense moment. I wondered about asking if he wanted to stop but, in the event, some supportive words of agreement from me and a pause seemed sufficient (Hydén, 2014, p. 800). We each drank our coffee for a few moments and resumed. Listening to the recording and reading my transcript, I am certain that had I not been in the room with him, the level of his anger would not have been clear to me and I would have been unlikely to respond in the same way.

Analysis

The reliability, credibility and validity of analysis depends on being reflexive throughout and being clear and open about the decisions and assumptions made (Mauthner and Doucet, 2003, Braun and Clarke, 2006, Finlay, 2002). I realised when conducting the interviews, and especially when I was transcribing them, that while I had considered the way in which my professional position might affect my choices and my participants' reactions, I had not thought carefully about my personal positionality (Finlay, 2002, Mauthner and Doucet, 2003).

This is important. I knew both of my participants but I am very different from them and my own subjectivity affects the way I interpret their words and experiences (Mauthner and Doucet, 2003). For example, I am a feminist woman researching aspects of masculinity and am a non-parent researching aspects of parenthood. Race, ethnicity, citizenship and culture are additional aspects of my positionality as a researcher that I bring to my analysis. The issue of religion and its cultural significance was something I had not considered carefully

before my interviews, possibly because I had not reflected on the extent to which my atheism colours my world view. By contrast, it was important to both my participants in describing their experience.

I transcribed both interviews fully and this was an important part of the analysis process. A key feature was the difference in the way participants spoke. Jambu's speech was remarkable for its clarity and the extent to which he spoke in full sentences. By contrast, Abdul's speech was more conversational, with thoughts and phrases intersecting and running over one another. Transcribing Jambu was straightforward but with Abdul I was much more aware of the choices I made in how to record his words and that this was explicitly part of the process of interpretation. If I had chosen to punctuate his words differently, the meaning would have been changed (Braun and Clarke, 2006).

I read through both transcripts several times to familiarise myself with the data, making notes and annotations about interesting features (Lorelli et al., 2017, Braun and Clarke, 2006). I used my sub-questions as an initial (and very broad) coding frame to organise my data (Braun and Clarke, 2006) in order to generate the initial findings below.

Findings

Understandings of fatherhood

The literature makes distinction between different types of father: biological fathers and social fathers i.e. fathers who live with children who are not their biological children. (Hobson, 2002, Popay et al., 1998). This distinction was evident in one of the interviews. Jambu was highly invested in notions of 'social' fatherhood. This was related to his personal history as an adoptee, a fact about himself he discovered in difficult circumstances as a teenager. This experience was important in forming his notions of family, as being about more than biological connections, and led him to seek to create a family for himself and for others by adopting four children from an orphanage in Ghana in his twenties. In fleeing Ghana several years later, he was forced to make the painful decision of returning his adopted children to the orphanage:

“And when I was started having issues, when I wanted to marry and started having the issues and needed to run away from the country, I took them back to the orphanage, which was the most evil thing I've ever done in my life - taking those children back to the orphanage because it's not a good place. And I kind of brought them up telling they've got family, they've got me, and then all of a sudden, I'd got to take them back and they've got nobody. It was very difficult.”

So, by the time Jambu reached the UK he had already experienced ‘social fatherhood’. He had also experienced enforced separation from his children, and loss. This loss was compounded by the other losses he had experienced in his life as someone who had fled his country, been refused asylum in the UK and had been living for years in destitution.

In the UK, he had two children, only one of whom was his biological child, and he made no distinction between them. Being a father was about emotional connection with his children:

“I know what it feels like not to have biological connections. And so it doesn't mean anything to me, but it's the psychological and emotional connections”

But being a father was also crucial part of his identity in the context of the losses he had experienced in his life:

“... for the past 13 years since arriving in this country I've been the same. The Home Office saying because I'm from Ghana, they don't recognise individual cases and so my situation is deemed null and void. I am not going to be allowed to stay in this country and so I'm still here. Thirteen years of my life is lost. I lose my children back home in Ghana. I lost my property, my job. I have basically no life. The only life I have now is thesis children I have, and they make me feel like I'm still a human and that I belong to this planet.”

‘Fatherhood’ in the literature refers to the cultural coding of men as fathers: does fatherhood mean providing for children financially, or caring for them in more practical and emotional ways? This is often characterised as the distinction between ‘cash and care’ (Hobson, 2002, Popay et al., 1998). This distinction also emerged in the interviews. Abdul was explicit about how his understandings of fatherhood had changed from one that emphasised breadwinning to one that prioritised emotion, presence and care:

“Why was I busy with work, why I didn't give them my time? Money is not everything. Before I thought life was, man, he just provides the food and drink. I thought it was just about that. Now I think if I continue like that, when my children grow up, they will never love me.”

Jambu’s discussions of fatherhood also focused on care. He talked of being a ‘daddy and a mentor’ to his children and of protecting them from the impacts of a system that had affected his own life so adversely:

“I'm trying so hard to protect my children from the shame or the pain or the fear or the negative effects and impacts. I want to, you know, kind of serve like their shock absorber and receive that on their behalf and not let anything get to them. So that's why I'm still here, fighting.”

But he also discussed the difficulties of being a ‘provider’ and performing a breadwinning role. Unlike Abdul, who had a job and was able to provide financially and materially for his children, even providing the basics was a struggle for Jambu:

“I'll be going everywhere to feed these children, going to food banks and I've been side-lined and blacklisted from many food banks. I went all the way to Kirkintilloch to get food for my children. Went all the way to Motherwell to get food for my children because all the Glasgow food banks know me and say no, you've been coming here for too long and nobody cares about these children, how they eat, what they wear.”

Both fathers spoke not only about the present, but also about how their care and support would sustain their children in later life. For Abdul, whose immigration status was secure, these reflections were positive:

“So I'm thinking now forward. Not only now in my children's life. I'm thinking ahead when they grow up, when they get married, when they ... you know, I help them when they, you know, unlimited now. I think about their future”

For Jambu, however, thoughts about the future, were inflected with fear about how the experiences his family had endured as a result of his precarious immigration situation would affect his children's lives:

“if it is true [...] that children can remember the memories they have, the horrible memories, even as far as two and a half years, they can remember and in their 40s it will come back and haunt them, then I don't want them to have those experiences. Because then when they are 40 and they are going through all this, I will not be there, and I cannot explain to them that it's because when they were younger the Home Office treated me this way and that's why this happened to them and that's why they're going through this.”

Negotiating fatherhood through detention

‘Fathering’ is used as a parallel term in the literature to ‘mothering’ both of which make a distinction between ‘identity’ as a father or mother and a set of practices. They reflect gendered ways of doing the work of being a parent (Hobson, 2002). ‘Fathering’ is an important concept in my research as how detention affects the ways in which men relate to their children is a key question.

Jambu, who had been detained in Dungavel before the Home Office ended their practice of detaining children there and before he had become a father to his two children in the UK reflected on families he had witnessed in detention. His thoughts here focused on the way in which detention prevents fathers from being active in the care and protection of their families:

“Being a father in detention, you become impotent. I've seen fathers who look so useless, so empty, so lost and so dead in detention. They're dead. They're dead living. They're dead walking. You can see them, especially in Dungavel when you saw families. The man, and the woman and the children are looking at the father to help us escape, take us out of here. But the father is so incapable, impotent, he's made useless, he can't do anything.”

In reflecting on his later period of detention, once he had become a father in the UK, he spoke of the pain of separation and not being able to be there for his children. He also echoed some of the findings of the prisons literature and spoke of how phone calls to his children enabled him to continue some of the rituals and routines of family life (Clarke et al., 2005). He read stories to his children from detention and comforted them when they were upset.

By contrast, detention transformed Abdul's relationship with his children in a very positive way. In a further echo of some of the literature on fathering from prison (Arditti et al., 2005, Chui, 2016), he spoke of how being detained gave him time to reflect on his role as a father. He spent time in detention reading, particularly holy texts, and speaking to people from other cultures, which challenged his previous understandings of family, fatherhood and how to father. He phoned his children every day from detention and built a relationship of greater trust with them:

“that detention time it's built a lot of relationship between me and my children. It allowed them to tell me everything they do, even when they do something wrong, they come and tell me”.

However, neither father saw their children when they were detained. Jambu, in common with some of the fathers in the prisons literature, did not tell them he was in detention (Clarke et al., 2005, Chui, 2016), but told them that he was attending a conference. A key difference between prison and detention is that in most circumstances, prisoners know when they will be released. The indefinite nature of immigration detention made this subterfuge more problematic for Jambu, and he noted that, were he to be detained again, his older son would be unlikely to be convinced by such a story. Abdul's children knew that he was detained but,

like Jambu, he did not want his children to see him in a prison-like environment (Clarke et al., 2005, Dyer et al., 2012, Arditti et al., 2005).

Rebuilding fatherly relations after detention

Abdul's changed perceptions of family, fatherhood and fathering brought him into conflict with his wife and ultimately led to the relationship breaking down shortly after his release. For a year after that he needed to renegotiate contact with her in order to continue to father as he wished to. However, by the time of our interview, he had established routine contact and was enjoying what he described as a 'beautiful' relationship with his children. From his now secure immigration position he was able to reflect in this rather surprising way:

"To be honest, I thank the Home Office for what they've done to me because they've transformed my life. So otherwise I would continue what I was before and my children will grow up without love".

By contrast, the threat of further detention, and possible deportation, was ever present in Jambu's life. He was haunted by the prospect of his children growing up without him and the detrimental effects that could have on them:

"As you will know, the statistics are clear, that children with one or no parents are likely to end up being institutionalised. And to make it even more worse, a high percentage of this number of children are from ethnic minority backgrounds, especially the black communities, and my children are from that community and it scares me to think, having to think that if I'm not there for my children they will end up being in prison and being in a bad situation, and not grow up to become responsible adults."

Was fatherhood taken into account in decisions to detain?

Neither father believed that their status as fathers had any influence on decisions to detain them. Abdul, who is a citizen of a European country having arrived there as a refugee when he was a child, had moved to London to work in his twenties, where he formed his family. He was taken to detention on a deportation order after serving a prison sentence. He explained his family circumstances to immigration officials, but they were not interested:

“No, no they didn't pay any attention. They said you can take your children with you. I say but they are British. They are British citizens. How can they? They can't change their lives and start again. They don't speak the language. They can't. And their mother, she will not accept that. I told them that. They didn't pay any attention. They just want to deport you. That's what only they want.”

Jambu also expressed anger about the callousness of the Home Office:

“They don't give a damn. Even if the children I know people who are married to British citizens and have children and they deport them and they don't care. The Home Office doesn't care. You're just a number and they always treat you as such. You're a number and they need to meet their targets and add it to their tally and they will do that irrespective of the children or the family setting, the family, whatever connections you have. They don't care.”

In securing his release from detention Abdul had a different experience. His family life in the UK, though not the focus of his appeal against his deportation order, was used as supplementary evidence and his children were present in court as his appeal was heard. This experience, however, was entirely dependent on arguments made by his solicitor, who he met through a friend in detention, who had discussed his case with his own solicitor. Abdul's original solicitor had not recognised the potential to challenge the Home Office's decision and had urged him to prepare himself for deportation.

Conclusion

This pilot research project has been very constructive and has allowed me to reflect on each stage of the research process. Addressing ethical questions regarding recruitment of participants and conducting different types of interviews, as well as improving my reflexive practice are key areas that I will seek to develop as I progress in my PhD.

The initial analysis of my data has revealed that being detained has substantial influence on the way in which fathers negotiate their relationships with their children both during and after their detention and that its impacts can be felt long after detention has ended, both negatively,

and perhaps surprisingly, positively. Neither of the participants thought that the Home Office considered either their (or anyone else's) status as a father when making decisions to detain and attempt to deport or remove them.

The interviews also revealed some further themes which will warrant attention as I progress. These include: participants' lack of knowledge and understanding of immigration law and the way it is enforced, and limited access to adequate legal advice; the support and camaraderie experienced by people in detention, which is expressed in a variety of ways such as through sharing worship, sharing stories and working together to challenge aspects of the detention regime; and the brutality and violence that can be part of the experience of detention.

Bibliography

Arditti, J. A., Smock, S. A. & Parkman, T. S. 2005. "It's Been Hard to Be a Father": A Qualitative Exploration of Incarcerated Fatherhood. *Fathering*, 3, 267-288.

Braun, V. & Clarke, V. 2006. Using thematic analysis in psychology. *Qualitative Research in Psychology*, 3, 77-101.

Bryman, A. 2016. *Social research methods*, Oxford, Oxford University Press.

Chui, W. H. 2016. Voices of the incarcerated father: Struggling to live up to fatherhood. *Criminology & Criminal Justice : CCJ*, 16, 60-79.

Clarke, L., O'Brien, M., Day, R. D., Godwin, H., Connolly, J., Hemmings, J. & Van Leeson, T. 2005. Fathering behind Bars in English Prisons: Imprisoned Fathers' Identity and Contact with their Children. *Fathering*, 3, 221-241.

Creswell, J. W. & Miller, D. L. 2000. Determining Validity in Qualitative Inquiry. *Theory Into Practice*, 39, 124-130.

Day, R. D., Bahr, S. J., Acock, A. C. & Arditti, J. A. 2005. Incarcerated fathers returning home to children and families: introduction to the special issue and a primer on doing research with men in prison. *Fathering*, 3, 183+.

Dyer, W. J. 2005. Prison, Fathers, and Identity: A Theory of How Incarceration Affects Men's Paternal Identity. *Fathering*, 3, 201-219.

Dyer, W. J., Pleck, J. H. & McBride, B. A. 2012. Imprisoned Fathers and Their Family Relationships: A 40-Year Review From a Multi-Theory View. *Journal of Family Theory and Review*, 4, 20-47.

Finlay, L. 2002. "Outing" the researcher: the provenance, process, and practice of reflexivity. *Qualitative health research*, 12, 531-545.

Griffiths, M. 2015. "Here, Man Is Nothing!". *Men and Masculinities*, 18, 468-488.

Griffiths, M. 2016. Invisible fathers of immigration detention in the UK. *Open Democracy* [Online]. Available from: <https://www.opendemocracy.net/5050/melanie-griffiths/invisible-fathers-of-immigration-detention> [Accessed 4 April 2017].

- Hairston, C. F. 1998. The Forgotten Parent: Understanding the Forces That Influence Incarcerated Fathers' Relationships with Their Children. *Child Welfare*, 77, 617-639.
- Hairston, C. F. 2001. Fathers in prison: responsible fatherhood and responsible public policies. *Marriage and Family Review*, 32, 111-135.
- Hobson, B. (ed.) 2002. *Making men into fathers: men, masculinities and the social politics of fatherhood*, Cambridge: Cambridge University Press.
- Hydén, M. 2014. The teller-focused interview: Interviewing as a relational practice. *Qualitative Social Work*, 13, 795-812.
- Lee, R. M. & Renzetti, C. M. 1990. The Problems of Researching Sensitive Topics: An Overview and Introduction. *American Behavioral Scientist*, 33, 510-528.
- Lorelli, S. N., Jill, M. N., Deborah, E. W. & Nancy, J. M. 2017. Thematic Analysis: Striving to Meet the Trustworthiness Criteria. *International Journal of Qualitative Methods*, 16, 1609406917733847.
- Mauthner, N. S. & Doucet, A. 2003. Reflexive Accounts and Accounts of Reflexivity in Qualitative Data Analysis. *Sociology*, 37, 413-431.
- Oltmann, S. 2016. Qualitative Interviews: A Methodological Discussion of the Interviewer and Respondent Contexts. *Forum: Qualitative Social Research*, 17.
- Opdenakker, R. J. G. R. 2006. Advantages and disadvantages of four interview techniques in qualitative research. *Forum Qualitative Sozialforschung = Forum : Qualitative Social Research*, 7, art.11.
- Orange, A. 2016. Encouraging Reflexive Practices in Doctoral Students through Research Journals. *The Qualitative Report*, 21, 2176.
- Popay, J., Hearn, J. & Edwards, J. 1998. *Men, gender divisions, and welfare*, London, Routledge.
- Secret, M. 2012. Incarcerated fathers: Exploring the dimensions and prevalence of parenting capacity of non-violent offenders. *Fathering: A Journal of Theory, Research, and Practice about Men as Fathers*, 10, 159-177.
- Slevitch, L. 2011. Qualitative and Quantitative Methodologies Compared: Ontological and Epistemological Perspectives. *Journal of Quality Assurance in Hospitality & Tourism*, 12, 73-81.
- Sturges, J. E. & Hanrahan, K. J. 2004. Comparing Telephone and Face-to-Face Qualitative Interviewing: a Research Note. *Qualitative Research*, 4, 107-118.
- Ugelvik, T. 2014. Paternal pains of imprisonment: Incarcerated fathers, ethnic minority masculinity and resistance narratives. *Punishment & Society*, 16, 152-168.
- Vogl, S. 2013. Telephone Versus Face-to-Face Interviews: Mode Effect on Semistructured Interviews with Children. *Sociological Methodology*, 43, 133-177.

Adequacy of the Legal Safeguards for the Patients' Right of Confidentiality under the Saudi Arabian Legal System

Abba Amsami Elgujja, Nicolas Kang-Riou

Abstract

The concept of patient confidentiality is nearly as old as the practice of health professions and, has evolved and transformed over the years, from one jurisdiction to the other. Patient confidentiality can be a fundamental human right, an ethical duty or, a legal duty.

The Saudi laws have evolved around its Shari'ah-based legal culture, its history and the international human right laws (IHRLs). These elements have moulded the Saudi Arabia's unique perspective on patient confidentiality. Its confidentiality laws are found scattered in several legislations. Is the Saudi patient confidentiality law able to adequately deal with the contemporary challenges?

The study tested the relevant Saudi laws for their adequacy based on the quality of the law relative to the IHRLs. Findings suggest that they have not strictly conformed to the requirements of these tests. There are issues bordering on the lack of quality comprehensive data protection laws, on clarity and foreseeability of the existing laws, and on the accessibility of the courts. Furthermore, the lack of a system of law reporting and stare decisis potentially gave the judges a wider latitude of discretion in interpreting the laws.

Therefore, the study recommends for a comprehensive data protection law with a clear definition of "confidential information", of data controllers and their role, and of specific safeguards against potential abuses. Others include defining legitimate purposes for using the patient's data, and his role, and the extent to which he can control the use of his own data. Consistency in legal interpretations, and an improved law reporting system could positively enhance the overall outcome.

I. Introduction

"...It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection those in need of medical assistance may be deterred, ... from

*seeking such assistance thereby endangering their own health (and), ... that of the community. The domestic law must therefore afford appropriate safeguards so there may be no such communication or disclosure of personal health data as may be inconsistent with the guarantees of Article 8 of the Convention.*¹

This thesis proposes to review and assess the adequacy of the legal safeguards to patient confidentiality under the Saudi Arabian legal system. To achieve this goal, the study examined the nature and extent of legal protections available to patient confidentiality under the Saudi Arabian legal system, and how the evolving technologies have impacted on the applicability of the existing laws purporting to protect patient confidentiality.

Protection of the patient's health data is an important issue in diverse contexts such as healthcare, including care given through eHealth or in a cross-border healthcare context, and research. However, an unauthorised disclosure of personal health information could negatively impact on an individual patient's personal and professional life.² Achieving a balance between giving access to information and respecting patients' confidentiality is a crucial issue for any healthcare setting.³ Nonetheless, the dynamics of technological advancements and the evolution and proliferation of social networks have resulted in creating difficulties in maintaining the duty of confidentiality as the information gathered tends to become more prone to unlawful disclosure to third parties in such insecure settings.⁴

As the capabilities of information technology grow, legal frameworks and professional guidance need to be created or refined to safeguard the rights of patients.⁵ Therefore, it has become imperative to have regulation to consider the changes triggered by these new

¹ *Z v Finland* (1997) 25 EHRR 371; [1997] ECHR 10

² The new EU Regulation on the protection of personal data: what does it mean for patients? <http://www.eu-patient.eu/globalassets/policy/data-protection/data-protection-guide-for-patients-organisations.pdf>

³ Alahmad, G., Hifnawy, T., Abbasi, B. and Dierickx, K., 2016. Attitudes toward medical and genetic confidentiality in the Saudi research biobank: An exploratory survey. *International journal of medical informatics*, 87, pp.84-90.

⁴ Kassim, P.N.J. and Ramli, N., 2016. The Inviolability of Medical Confidentiality in Malaysia: An Analysis of the Rules and Exceptions. *IIUM Law Journal*, 24(2), p.335.

⁵ Strobl, J., Cave, E. and Walley, T., 2000. Data protection legislation: interpretation and barriers to research. *BMJ: British Medical Journal*, 321(7265), p.890.

technologies.⁶ Sadly, despite the abundant literature that exists on patient confidentiality world-wide, there are only a few studies in the Saudi Arabian jurisdiction⁷ which, by themselves, have also raised concerns regarding potential breach of patient confidentiality.

Although the record of court cases involving issues of patient confidentiality is lacking (thanks to the lack of law reporting system), the rampant use of internet and social media could also raise the risk of breaching patient confidentiality. From the foregoing, therefore, it is apparent that it is also a problem in Saudi, and a reason to study the problem.

There is not a comprehensive law under the Saudi Arabian legal system that specifically provides for data protection excepting some provisions scattered here and there under some legislations.⁸ Also, currently, there is a lack of national laws to protect electronic patient records (EPR), which may be due to both the lack of awareness and that of expertise to explore and establish such laws.⁹ The currently adopted EPR policies appear to be generic, inconsistent and potentially insecure. Furthermore, none of the Saudi laws require organisations to maintain adequate security or the confidentiality of personal information that they acquired or stored online.¹⁰ This lacuna in the law calls for stringent rules in the Saudi laws to apply to processing sensitive data, especially concerning health issues.

Some of the pitfalls of the existing Saudi data protections laws include lack of statutory definition of the term “personal data” or “disclosure”, and requirement for a formal notification or for a registration before the processing of data in Saudi Arabia. The lack of a national data regulator means that personal data security breaches are not reported to any entity under any

⁶ <http://www.eu-patient.eu/globalassets/policy/data-protection/data-protection-guide-for-patients-organisations.pdf>

⁷ Ghiath Alahmad and others, 'Attitudes toward Medical and Genetic Confidentiality in The Saudi Research Biobank: An Exploratory Survey' (2016) 87 International Journal of Medical Informatics.

⁸ Laith A. Alsulaiman and Waleed A. Al Rodhan, 'Information Privacy Status in Saudi Arabia' (2014) 7 Computer and Information Science.

⁹ Aldajani Mouhamad, 'Electronic Patient Record Security Policy in Saudi Arabia National Health Service' (PhD, De Montfort University, Leicester 2012).

¹⁰ Ibraheem M. Alharbi and Suzanne Zyngier, 'A Holistic View on The Opportunities and Risks Faced By Saudi Arabia Government In Their Adoption Of The New Law Regulating Electronic Privacy And Data Protection', *WIAR 2012; National Workshop on Information Assurance Research* (IEEE EXPLORE 2012) <<http://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=6210571>> accessed 1 April 2017.

law in Saudi Arabia. Such lack of specific provisions gives the Saudi Arabian courts a great latitude of discretion in dealing with confidentiality violations under the Sharia law.¹¹

Furthermore, this study is not without its own challenges. The lack to enough empirical studies in English on patient confidentiality is a factor that may limit the scope of our study. Other challenges faced include the lack of structured law reporting and the non-implementation of the principles of *stare decisis* under the Saudi legal system. This has led to a scarcity of reported cases on breach of patient confidentiality under the Saudi legal system. Even the recently introduced system of judges reporting their own cases on the ministry of justice website is very defective, as the ingredient of the case is either obscured or the parties' identities are anonymised.

Needless to add that, the researcher is on a distance learning but full-time Ph.D. program that is frequently punctuated by a highly demanding full-time job and family needs. Notwithstanding the above challenges, the study's methodological approach is chosen to answer the problem question, to wit, how adequate are the legal safeguards provided for patient confidentiality under the Saudi Arabian legal system?

It is, therefore, expected that, the outcome of this study could enrich the body of knowledge by creating a new perspective on the concept of patient confidentiality under the Saudi legal system. It could, also, contribute to developing legislations that address the identified gap on patient confidentiality, and serve as a trigger for more studies on this jurisdiction.¹²

II. Methodological approach

The study primarily focuses on the protection of patient confidentiality from arbitrary abuse and interference by both the state authorities and individuals. Initially, the study examines the

¹¹ Opined by Muhammad Arif, Saeed and Muhammad and Anum Saleem, 'Cyber Security and Data Privacy Law in Saudi Arabia' (*Financier Worldwide*, 2015) <<https://www.financierworldwide.com/cyber-security-and-data-privacy-law-in-saudi-arabia/#.WN8vFfmGO00>> accessed 1 April 2017.

¹² Lisa Coolinghood

Saudi Arabian constitutional¹³ and other statutory protections to patient confidentiality right, and then, focuses more specifically, on patient confidentiality under the relevant laws.¹⁴

The study reviewed these legislations in the light of the Saudi Arabia's historical antecedents, legal culture, the influence of the international and regional declarations (e.g., UDHR), conventions (e.g., ECHR) and regional charters (e.g., the Arab Charter) on human rights.¹⁵ Here, the study took cognisance of the unique nature of the Saudi Arabian conservative culture and its strict rules on the issue of privacy and confidentiality. Therefore, the study attempts a thematic evaluation of several pieces of legislation within the same field related to confidentiality.¹⁶ However, the study did not digress into the consideration of political / economic benefits¹⁷ or such other facilities derivable from the laws¹⁸, checks and balances available,¹⁹ and other projected goals²⁰

i. Conformity to universal human rights.

Since patient confidentiality springs out from the universal human right to privacy, one of the study's criteria is to assess for its conformity to the universal human rights laws, e.g., its consistency with the universal declaration of human rights (UDHR), or even the regional conventions or charters (e.g., the Arab Charter) on human rights.²¹ The UDHR is considered as a living document that has been accepted as a contract between a government and its people throughout the world.²² It is an admirable attempt at a statement of common principles setting a minimum standard for human rights protection, but it is not justiciable.²³

¹³ The Saudi Arabian Basic law of Governance represents the constitution of Saudi Arabia.

¹⁴ The Saudi Law of Healthcare Professions, Laws of Healthcare Research etc.

¹⁵ W. Bussmann, 'Evaluation of Legislation: Skating on Thin Ice' (2010) 16 Evaluation.p290

¹⁶ W. Bussmann, 'Evaluation of Legislation: Skating on Thin Ice' (2010) 16 Evaluation.

¹⁷ R. M. Tomkins, 'Evaluating National Health Insurance Legislation' (1974) 6 Compensation & Benefits Review.

¹⁸ Benny Wong, 'Evaluating Hong Kong's Air Pollution Legislation and Policies' (*Hub.hku.hk*, 2017) <<http://hub.hku.hk/handle/10722/207623>> accessed 3 June 2017.

¹⁹ Michelle Van Kampen, 'The Adequacy of Legislation Regulating The Environmental Effects Of Mining' (2012) 16 NZJ Env'tl. L.

²⁰ Sara L. McDonald, Rebecca L. Lewison and Andrew J. Read, 'Evaluating the Efficacy of Environmental Legislation: A Case Study from The US Marine Mammal Take Reduction Planning Process' (2016) 5 Global Ecology and Conservation.

²¹ Henkin, L., 1989. The universality of the concept of human rights. *The Annals of the American Academy of Political and Social Science*, 506(1), pp.10-16.

²² Universal Declaration of Human Rights <http://www.humanrights.com/what-are-human-rights/universal-declaration-of-human-rights/> Accessed April 1, 2018

²³

ii. The “Triple Test”

Conversely, our choice of the ECHR as a benchmark for assessing the adequacy of the legal safeguards to patient confidentiality in Saudi Arabia is partly because, the ECHR is grounded both on a universal and a regional inspiration.²⁴ It has also played a leading role at the UN level in affirming and enforcing the UDHR and other related international conventions to which Saudi Arabia is a signatory. Europe has also inspired the UN’s Human Rights Committee as well as other treaty bodies for which Saudi is a party. The ECHR is, unlike the UDHR, also enforceable by the European Court of Human Rights. On the other hand, the Arab Charter on human rights is still struggling have that done.

Consequently, the study considered the evaluation criteria of “legality test”, “legitimate aim” and “necessity (or proportionality) test”²⁵ (hereinafter referred to as the ‘triple test’) as advanced in the various decisions of the ECtHR.²⁶ The “Legality” test states that an interference will contravene Article 8 unless it is “in accordance with the law.”²⁷ Hereunder, part of the ‘legality test’ includes eliciting for availability of sanctions, accessibility, precision/foreseeability and safeguards from arbitrariness.

In addition to passing the legality test, the “legitimate aim” test requires that the purpose of the infringement, even though legal, must be to pursue one or more of the legitimate aims referred to in paragraph 2 of that Article.²⁸ Additionally, an infringement would, also, not be justified unless it is “necessary in a democratic society” in order to achieve the aim.²⁹ The “democratic test” is adopted from the test developed by the ECtHR based mostly on the decisions in the

²⁴ Viljanen, J., 2008. The role of the European court of human rights as a developer of international human rights law. *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, (62), pp.249-265.

²⁵ Greer, S.C., 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Vol. 88). Council of Europe. P. 8

²⁶ European Court of Human Rights, right to respect for private and family life, Guide on Article 8 of the Convention, First Edition, 2017

²⁷ **HR. Radu v. the Republic of Moldova**, Eur. Court of judgment of 15 April 2014, application no. 50073/07.

²⁸ **HR. Radu v. the Republic of Moldova**, Eur. Court of judgment of 15 April 2014, application no. 50073/07.

²⁹ **HR. Radu v. the Republic of Moldova**, Eur. Court of judgment of 15 April 2014, application no. 50073/07.

cases of *Handyside*,³⁰ *Silver*,³¹ and *Lingens*³² cases which consists of three principal elements, to wit, the nature of the necessity,³³ proportionality³⁴ and margin of appreciation.³⁵

iii. Role of the Patient in managing his own confidential information:

As part of the patient autonomy, the study evaluates the law for the privilege given to the patient can, for instance, to consent to an otherwise unlawful disclosure,³⁶ or when the patient's consent may be dispensed. The law will also be assessed for the impact of the patient's own disclosure (or contribution thereto) of his/her personal data on his claim for a breach, and for the patient's right (and limits, if any) to access,³⁷ portability,³⁸ object to data processing, e.g., for research,³⁹ and rectification of inaccuracies,⁴⁰ or erasure,⁴¹ if no longer legal or if its purpose is outdated.

III. Saudi Arabia and the universality of human rights

The concept of human rights is viewed in different ways by different schools of thought. The common definition is that human rights are the rights possessed by all humans by virtue of their humanity,⁴² or because one is human."⁴³ How are far have the Saudi laws conformed to the United Nations Declaration of Human Rights (UDHR) and other international treaties and conventions?⁴⁴ We selected the UDHR because, although "not binding with the same force as domestic legislation,"⁴⁵ the UDHR, which Saudi Arabia has affirmed, is considered as "a

³⁰ Judgment, op. cit., paragraphs 48-50.

³¹ Judgment, op. cit., paragraphs 97-98.

³² Judgment, op. cit., paragraphs 37-41.

³³ Sunday Times judgment, op. cit., paragraph 59; Glasenapp, report of 11 May 1984, paragraph 90.

³⁴ Axel Springer AG v. Germany, Eur. Court of HR, judgment of 7 February 2012, application no. 39954/08; L.L. v. France, Eur. Court of HR, judgment of 10 October 2006, application no. 7508/02. See also, Observer and Guardian judgment, op. cit., paragraph 72; Tolstoy Miloslavsky judgment, op. cit.

³⁵ Greer, S.C., 1997. The exceptions to Articles 8 to 11 of the European Convention on Human Rights (Vol. 88). Council of Europe. P. 16

³⁶ *L.L. v. France*, Eur. Court of HR, judgment of 10 October 2006, application no. 7508/02

³⁷ (Rec 63, Art. 15) EU Direction

³⁸ Art. 20

³⁹ Art. 21, EU Direction

⁴⁰ Art. 15, EU Direction

⁴¹ Art. 16, EU Direction

⁴² Tasioulas, J., 2002. Human rights, universality and the values of personhood: retracing Griffin's steps. European Journal of Philosophy, 10(1), p.86.

⁴³ Donnelly, J., 2013. Universal human rights in theory and practice. Cornell University Press.

⁴⁴ Herring, Medical Law and Ethics, p228

⁴⁵ M. Khadduri, The Islamic Concept of Justice 236-37 (1984), p236

common standard of achievement for all peoples and of all nations”,⁴⁶ or “an inclusive set of rights that transcend most cultural and ideological divisions.”⁴⁷ The high incidence of consensus (80 percent) with which the resolutions of the Commission on Human Rights were adopted further stresses the universality of the Declaration itself.⁴⁸

This declaration has been further reaffirmed and reinforced in several other international covenants to which Saudi Arabia is a signatory, e.g., the International Covenant on Civil and Political Rights (ICCPR),⁴⁹ the UN Convention on Migrant Workers⁵⁰ and the UN Convention on Protection of the Child.⁵¹ Regionally, the Arab Charter on Human Rights⁵² and the European Commission’s Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) made privacy right enforceable within the their member countries.

i. Saudi Arabia and the UDHR

Before the final affirmation of the UDHR through the Arab Charter, Saudi Arabia and a few third world nations had resisted it for several decades after its declaration in 1948. These nations had sought to redefine the term "human rights" because, in their view, the UDHR, as it were, was part of what they referred to as “the ideological patrimony of Western civilisation.”⁵³ Saudi Arabia initially abstained from reaffirming the ‘universality of human rights’⁵⁴ at the world conference⁵⁵ because, it felt that the Declaration “went too far in some regards and not far enough in others”.⁵⁶ Some of its objections to the affirmation, include issues covered by Article 18, which borders on freedom of thought, conscience and religion etc.

⁴⁶ See the preamble to UDHR, 1948

⁴⁷ Eckert, A., 2001. Universality by Consensus: The Evolution of Universality in the Drafting of the UDHR. *Human Rights and Human Welfare*, 1(2), p.22.

⁴⁸ RAMCHARAN B.G., How Universal Are Human Rights? Debate IPG 4/98 p 423

⁴⁹ International Covenant on Civil and Political Rights, 1976 <<http://www.hrweb.org/legal/cpr.html>>

⁵⁰ A/RES/45/158 25 February 1991, Article 14.

⁵¹ UNGA Doc A/RES/44/25 (12 December 1989) with Annex, Article 16.

⁵² of 1992 as amended in 2004

⁵³ Cerna, p740

⁵⁴ The Vienna Declaration and Programme of Action, adopted by The World Conference on Human Rights 24 June 1993, U.N. Doc. A/Conf. 157/24 (Part 1), at 20-46 (13 Oct. 1993).

⁵⁵ Christina M. Cerna, 'Universality of human rights and cultural diversity: Implementation of human rights in different Sociocultural contexts' (1994) 16(4) Human Rights Quarterly p742

⁵⁶ Donna E. Arzt, 'The Application of International Human Rights Law in Islamic States' (1990) 12 Human Rights Quarterly.

Saudi Arabia and its allies wanted the definition of human right to include their own peculiarities, while the West maintained that such rights cannot be measured differently in some countries.⁵⁷ The Muslim world doubted the compatibility of the UDHR with the whole world⁵⁸ which they considered, simply, as a manifestation of liberal, Western, Christian ideas.⁵⁹ And so, they sought for alternatives.

ii. Islamic human rights declarations

The Muslim critics of the UDHR have further argued that its secular philosophy does not take cognisance of the fundamental diversity of the people around the world, particularly, that of the Muslims.⁶⁰ Therefore, the Muslim countries, including Saudi Arabia, had felt that the UDHR is contrary to Islam and, therefore, is of no validity in the Islamic countries, because, it represents a secular understanding of the Judeo-Christian tradition, and did not represent the Islamic values recognised by Muslims. Muslims recognise no authority or power but that of Almighty God and that there is no any legal tradition apart from Islamic law.⁶¹ Therefore, they believe that the Human Rights are given only by God and not by any king or legislative assembly. They assert that when “we want to find out what is right and what is wrong we do not go the United Nations; we go to the Holy Koran”.⁶²

Under the Islamic law, no ruler, government, assembly or authority has the authority to curtail or violate, in any way, the human rights conferred by God, nor can they be surrendered.⁶³ Unlike the UDHR, which is not legally binding and can be withdrawn or modified, the rights ordained by God cannot be withdrawn nor can it be amended, they asserted.⁶⁴ And therefore, they clamoured for alternatives to the UDHR.

⁵⁷ Cerna p741; Alan Riding, A Rights Meeting; But Don't Mention the Wronged, N.Y. TIMES, 14 June 1993, at A3

⁵⁸ Sædén, L., 2010. Alternative Islamic Human Rights.p13

⁵⁹ See section of “Adoption of Arab Charter on Human Rights at page....

⁶⁰ Olayemi, A.A.M., Alabi, H., Majeed, A. and Hidayah Buang, A., 2015. Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI In Context Of UDHR. P29

⁶¹ At the presentation of UIDHR to UNESCO in 1981. Also see Olayemi at p31

⁶² Sædén, L., 2010. Alternative Islamic Human Rights.p17

⁶³ Universal Islamic Declaration of Human Rights 1981, foreword

⁶⁴ Olayemi, A.A.M., Alabi, H., Majeed, A. and Hidayah Buang, A., 2015. Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI In Context Of UDHR. P28

ii.i The Universal Islamic Declaration on Human Rights (UIDHR)

The UIDHR was introduced in 1981 at the UNESCO headquarters in Paris as an Islamic version of Universal Human Rights to serve as an alternative to the UDHR. Unlike the UDHR, it was a religious declaration for mankind, a guidance and instruction.⁶⁵ A reference to “the Law” in the Declaration text refers to the *Shari’ah*,⁶⁶ and are sourced from verses of the Qur’an or specific parts of the Hadith. The West would view this as limiting the application of human rights as obtainable under the UDHR. The UIDHR further reiterates, in its foreword, that:

*“... no ruler, government, assembly or authority can curtail or violate in any way the human rights conferred by God, nor can they be surrendered”*⁶⁷

Under the UIDHR, “(e)very person is entitled to the protection of his privacy.”⁶⁸ This right is only subject:

*“... to such limitations as are enjoined by the Law for the purpose of securing the due recognition of, and respect for, the rights and the freedom of others and of meeting the just requirements of morality, public order and the general welfare of the Community (Ummah).”*⁶⁹

ii.ii The Cairo Declaration on Human Rights in Islam (CDHRI) 1990

On the other hand, the CDHRI 1990, which, unlike the UIDHR, was a governmental approach, was adopted in Cairo by the 19th Islamic Conference of Foreign Ministers of the Organization of the Islamic Conference (OIC).⁷⁰ The CDHRI, which was considered as the only acceptable and practicable International Islamic Instrument on human rights,⁷¹ establishes the *shari’ah* law as “the only source of reference” for the protection of human rights in Islamic countries.⁷² Despite the initial aversion to it,⁷³ the CDHRI was presented to the UN in 1992 and, was

⁶⁵ Al Qur'an, Al-Imran 3:138; The Declaration was more of religious nature

⁶⁶ Universal Islamic Declaration of Human Rights 1981, foreword

⁶⁷ Ibid

⁶⁸ Article XXII, UIDHR, 1981

⁶⁹ Explanatory Notes No. 3, UIDHR, 1981

⁷⁰ The OIC is the second largest inter-governmental organization, surpassed only by the United Nations. With 57 members from four different continents, the organization acts globally to promote Islamic solidarity. The organization does maintain permanent observer status with the UN. OIC acknowledges the Cairo Declaration of Human Rights in Islam, not the Universal Declaration of Human Rights.

⁷¹ Olayemi ibid p30

⁷² Olayemi, p32

⁷³ The CDHRI was presented for approval at the OIC Summit Meeting of Heads of State and Government, held in Dakar, Senegal on 9 December 1991. However, this was averted following a press release from their Geneva-

accepted into the Human Rights Commission's Compilation of International Instruments in 1997.⁷⁴ This singular act was arguably viewed as an official veneration of the document by the UN.⁷⁵ Since then the CDHRI has formed a part of the international instrument on human rights.

The CDHRI provides for privacy as follows:⁷⁶

(b) Everyone shall have the right to privacy in the conduct of his private affairs (....) It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

All rights under the CDHRI are, similarly, subject to the *Shari'ah*,⁷⁷ and that *Shari'ah* is the only source of reference for the explanation or clarification of any of the articles of this Declaration.⁷⁸ That, just like the UDHR, would be considered a strong limiting factor to the application of the UDHR to the Muslim countries.

Given to the strong Muslim belief that only God makes laws, to their inclination towards the God's laws as compared to the human made laws, and the limitation to powers of the legislative bodies to alter or curtail the "God-given" human rights, it is not surprising that they have constantly clamoured for a different set of human rights distinct from those proposed by the "human UDHR".

Despite their affirmation of the UDHR, the regional Arab Charter on Human Rights, to which Saudi Arabia is a signatory, is still based on the *Shari'ah*. To that extent, therefore, it seems safe to submit that the Arab Charter and Saudi Arabian laws on the right to patient confidentiality, originating from *Shari'ah*, would not be consistent with the UDHR.

based International Commission of Jurists (ICJ); See David G. Littman, Human Rights and Human Wrongs: Shariah can't be an exception to international human-rights norm, at 2.

⁷⁴ Vol. II (1997), pp. 478-84

⁷⁵ Resolution No. 49/19-P on the Cairo Declaration on Human Rights in Islam, U.N. Doc. A/45/421 (1990).

⁷⁶ Article 18, CDHRI, 1990

⁷⁷ Article 24, CDHRI, 1990

⁷⁸ Article 25, CDHRI, 1990

IV. The Arab Charter on Human Right to Confidentiality⁷⁹

The Arab charter on human rights is a supposed regional replica of the UDHR, but in an Islamic way, and has been already been criticised for its inconsistencies with the international laws on human rights.⁸⁰ This is despite its declaration that its aim is to “place human rights at the centre of the key national concerns of the Arab States” and to “entrench the principle that all human rights are universal...”⁸¹ Saudi Arabia is a signatory to the ‘Arab Charter on Human Rights’⁸² that affirms the UDHR and other conventions on human rights⁸³ which is seen as a move towards universalism rather than relativism.⁸⁴

The Arab Charter provides:

“Privacy shall be inviolable and any infringement thereof shall constitute an offence. This privacy includes (...) the confidentiality of correspondence and other private means of communication.”⁸⁵

However, this is subject to Article 4(a):

“No restrictions shall be placed on the rights and freedoms recognised in the present Charter except where such is provided by law and deemed necessary to protect the national security and economy, public order, health or morals or the rights and

⁷⁹ The Arab Charter on human Rights (1994), later updated in 2004. The main weakness with the 1994 version was the lack of any human rights enforcement mechanism, particularly in comparison to the mechanisms within the European and American Conventions on Human Rights, and the African Charter on Human and Peoples’ Rights. See also: Al-Midani, M.A., Cabanettes, M. and Akram, S.M., 2006. Arab Charter on Human Rights 2004. *Boston University International Law Journal*, 24(2), p.148.

⁸⁰ For instance, Article 6 still imposes death sentence to ‘most serious crimes’; Article 8(a) does not prohibit ‘physical or psychological torture’ and ‘cruel, inhuman, degrading or humiliating treatment’, as a punishment; Article 24 grants the right to peaceful assembly and association to ‘citizens’ only, etc. See also Rishmawi M, ‘The revised Arab charter on human rights: A step forward?’ (2005) 5(2) Human Rights Law Review p371. See also the statement by the UN High Commissioner for Human Rights, Louise Arbour, that the Charter is incompatible with international standards for women’s, children’s and non-citizens’ rights. <http://iheu.org/arab-charter-human-rights-incompatible-international-standards-louise-arbour/>

⁸¹ Article 1, Arab Charter on Human Rights, 2004

⁸² Rishmawi M, ‘The revised Arab charter on human rights: A step forward?’ (2005) 5(2) Human Rights Law Review 361

⁸³ In its preamble, the Arab Charter on Human Rights reaffirms the Charter of the United Nations and the Universal Declaration of Human Rights, as well as the provisions of the United Nations International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the Cairo Declaration on Human Rights in Islam.

⁸⁴ Rishmawi M, ‘The revised Arab charter on human rights: A step forward?’ (2005) 5(2) Human Rights Law Review p368

⁸⁵ Article 17, Arab Charter on Human Rights, 1994. See the amended Arab Charter on Human Rights, 2004 at Article 21. (1) “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. (2) “Everyone has a right to the protection of the law against such interference or attacks.” <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf> Accessed on 9th September, 2016

Article 4(a) of the Charter is quite similar to the ECHR Article 8(2)⁸⁷ from which (the latter), three main ingredients can easily be identified: legality, legitimate aims and democratic necessity. All, but the democratic requirement, are also required under Article 4(a) of the Charter. Even the revised version of the Charter of 2004 has not materially changed this provision.⁸⁸ The only difference was, instead of the phrase “necessary in a democratic society” of the ECHR, the revised Charter used “necessary in a society that respects freedom and human rights”. This move could be seen as a compromise between the “democratic necessity” of the Convention and the complete lack of qualifiers in the 1990 version of the Arab Charter.⁸⁹

Despite some of the reservations that the Arab Charter do not meet international norms and standards,⁹⁰ the adoption and entry into force of the Arab Charter was a major step forward for the region although a number of concerns still persist on its implementation and compliance by member states.⁹¹ Unlike its equivalents in elsewhere, the Arab Charter has no court to interpret and enforce it⁹² or to harmonise the differences between international human rights law and Islamic law.⁹³ Even the updated version of 2004 does not provide for an effective

⁸⁶ The ‘modernized’ version of 2004 did not amend the substance of the Article 4 of the 1994 Charter. See Rishmawi M, ‘The revised Arab charter on human rights: A step forward?’ (2005) 5(2) Human Rights Law Review p371

⁸⁷ ECHR (Article 8(2): “*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*”

⁸⁸ Article 24 (7) of the Arab Charter (2004) provides: “*No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a society that respects freedom and human rights, in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.*” (emphasis supplied).

⁸⁹ But it is still debatable as to whether some of the member states of the Arab League, including Saudi Arabia, meet the requirements of a “society that respects freedom and human rights” given to the numerous criticisms cited previously.

⁹⁰ These are mostly in the areas of the application of the death penalty for children, the treatment of women and non-citizens etc. Also see Louise Arbour, UN High Commissioner for Human Rights, *Arab rights charter deviates from international standards*. UN News Center

<http://www.un.org/apps/news/story.asp?NewsID=25447#.WIPHY6iWbb0> Accessed January 5th, 2018

⁹¹ Ann Elizabeth Mayer, *Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct*, 15 Mich. J. Int’l L. 343 (1994)

⁹² Marisa McCrone and Waleed Alhariri, *Challenges Abound in Proposed Arab Court of Human Rights*. The Global Observatory. International Peace Institute. March 27, 2015

⁹³ The proposed Court could help to harmonise the domestic and international laws through, e.g., the adoption of the ‘margin of appreciation’ doctrine, or retaining room for manoeuvre in the interpretation and application of both bodies of law. See also: Joe Stork, *New Arab Human Rights Court is Doomed from the Start*. International Business Times, November 26, 2014

enforcement mechanism, and the expert Committee, without the powers of a court, still remains the only system of monitoring state compliance.⁹⁴

The debate is still raging as to whether the revised Charter has become consistent with international human rights standards.⁹⁵ And, despite its affirmation of the UDHR, the Arab Charter on human rights is, still founded on, and heavily influenced by the *Shari'ah* law. Are the Saudi human rights laws consistent with the UDHR and the ECHR?

V. The Saudi Laws on Privacy and Confidentiality

Although Saudi Arabia endorsed the UDHR through the Arab Charter, the substance of its law did not accurately reflect the spirit of the UDHR.⁹⁶ Moreover, unlike the UK's complete adoption of the ECHR through the Human Rights Act of 1998, the Saudi law did not adopt the Arab Charter⁹⁷ into its domestic law in a like manner. It is also important to reiterate that there is not a comprehensive data protection law in effect in the Kingdom of Saudi Arabia like those in the UK jurisdiction. Confidentiality protection can only be found scattered in several laws, and their scope is limited.⁹⁸

The Basic Law provides that the State shall protect human rights “*in accordance with the Islamic Shari'ah*,”⁹⁹ and the *Shari'ah* shall prevail over all laws of the state.¹⁰⁰ Saudi legal system relies on *Shari'ah* principles when interpreting and implementing of secular

⁹⁴ Al-Midani, M.A., Cabanettes, M. and Akram, S.M., 2006. Arab Charter on Human Rights 2004. Boston University International Law Journal, 24(2), p.147.

⁹⁵ Rishmawi, M., 2005. The revised Arab Charter on Human Rights: a step forward? Human Rights Law Review, 5(2), pp.361-376.

⁹⁶ Ann Elizabeth Mayer, Universal versus Islamic Human Rights: A Clash of Cultures or Clash with a Construct, 15 Mich. J. Int'l L. 350 (1994)

⁹⁷ Article 4(a) of the Arab charter of 1990 provides similarly: “*No restrictions shall be placed on the rights and freedoms recognised in the present Charter except where such is **provided by law and deemed necessary** to protect the **national security and economy, public order, health or morals or the rights and freedoms of others***” (emphasise supplied)

⁹⁸ Alharbi, I.M. and Zyngier, S., 2012, April. A Holistic View on The Opportunities and Risks Faced by Saudi Arabia Government in Their Adoption of The New Law Regulating Electronic Privacy and. In WIAR'2012; National Workshop on Information Assurance Research; Proceedings of (pp. 1-7). VDE.

⁹⁹ Article 26, Basic Law.

¹⁰⁰ Article 7 of the Basic Law of Governance

international human rights laws.¹⁰¹ Note that neither the UN Declaration nor any other covenant or convention relies on any religious law.

The Basic Law also broadly provides for privacy and confidentiality:¹⁰²

*“Correspondence by telegraph and mail, telephone conversations, and other means of communication shall be protected. They may not be seized, delayed, viewed, or listened to except in cases set forth in the Law.”*¹⁰³

Similarly, the Saudi Telecommunications Act reinforced that the confidentiality and security of telecommunications information is sacrosanct.¹⁰⁴ It is an offence to intentionally disclosure (other than during duty) of any telephone call or data carried on the public telecommunications networks in violation of the provisions of this Act.¹⁰⁵ On the other hand, the Electronic Transaction Law¹⁰⁶ has provided for the confidentiality of personal data shared during electronic transactions. It prohibits the use or sharing of consumers’ personal data with third parties without their consent. Similar protection of confidentiality could be found under the Anti Cybercrime Law¹⁰⁷ under which it is an offence to engage in spying and defamation by the use of camera operated devices.¹⁰⁸

Note that none of these laws explicitly stipulate the exceptions where a breach of confidentiality could be deemed justified as being “according to the law” and “necessity” to fulfil a “legitimate aim”. The phrase “except for cases stipulated by (set forth in the) law” seems

¹⁰¹ Faleh Salem Alkahtan *The Protection of Human Rights in Saudi Counter-terrorism Laws* Arab Journal of Forensic Sciences & Forensic Medicine 2016; Volume 1 Issue (4), 443-445; See also Article 1 of the Basic Law of Governance.

¹⁰² Ahmad Al-Daraiseh and others, 'Social networks' benefits, privacy, and identity theft: KSA case study' (2014) 5(12) International Journal of Advanced Computer Science and Applications p129

¹⁰³ Article 40, Basic law of Governance

¹⁰⁴ Article 3, Telecoms Act, 2001 http://www.mcit.gov.sa/Ar/MediaCenter/Download/Telecoms_Act_En.pdf
Accessed 13th September 2016

¹⁰⁵ Article 37, Telecoms Act, 2001

¹⁰⁶ Issued under the Council of Ministers Decision No. 80 dated 7/3/1428 H, and it was approved by Royal Decree No. M/18 dated of 8/3/1428H. The Law was published in the Issue No. (4144) of the Official Gazette (Um Al Qura) on 13/04/1428H.

¹⁰⁷ Royal Decree No. M/17 8 Rabi 1 1428 / 26 March 2007

¹⁰⁸ Article 3, Anti-Cybercrime Law, 2007





to suggest that any such exception would only be justified if it is provided by, according to, or under a (any other) law validly established.

One of such exceptions could be found under the Terrorisms and Financial Crimes Law¹⁰⁹ under which the Minister of Interior may authorise the monitoring, seizure and recording of all forms of communication in relation to a committed or plotted crime, *if deemed useful*.¹¹⁰ The Law did not specify under what circumstance it would be *deemed useful*. Moreover, where, an accused person cooperates with investigator and helps in apprehending the accomplices of said crime or similar crime, the Minister of Interior may stay his prosecution,¹¹¹ or order his release if the Minister has reasonable ground to do so.¹¹²

Does this law pass the legality test which implies that there must be a “measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by” the law?¹¹³ Although these exceptions “set forth” in a law, and therefore, “according to the law”, the legality test further requires sub-tests for sanctions against the infraction, safeguard against arbitrariness, precision/foreseeability, and accessibility to the citizens.

The principal laws have made both positive and negative duties to protect personal data from unlawful disclosure to third parties.¹¹⁴ and can attract a fine of millions of riyals. ¹¹⁵ Therefore, the answer is yes, that the principal law has adequately sanctioned an infraction of the right to privacy and confidentiality. However, as to whether the law has provided adequate safeguard to prevent an arbitrary abuse of the exceptions, this could be deduced from the nature of power vested in the Minister authorising him to breach the privacy and confidentiality rights of persons being investigated for terrorism related crimes.¹¹⁶ Although it might sound justified to

¹⁰⁹ Royal Decree No. M / 16 Dated 24 / 02 / 1435 H

¹¹⁰ Article 17

¹¹¹ Article 23

¹¹² Article 24

¹¹³ Malone case para 67

¹¹⁴ Article 37 of the Telecommunications Law; For instance, it is a crime to, unlawfully eavesdrop, record or disclose information conveyed on public telecommunication network.

¹¹⁵ Article 39 of the Telecommunications Law

¹¹⁶ Article 17

achieve a legitimate aim under the circumstance, but is this proportionate to the aim? Does it allow for arbitrariness?

Ordinarily, under the ECHR, national authorities are allowed a broad margin of appreciation in interpreting domestic law and in determining whether legislative procedures have been followed.¹¹⁷ However, the only precondition placed in this provision is “if deemed useful”. In the case of *Malone v United Kingdom*¹¹⁸, the ECtHR has frowned at granting an unfettered discretionary power to the executive. It recommends that the scope of such discretion should be clear to avert possible abuse.¹¹⁹ Also, in the case of *Herczegfalvy* the court had held that “if a law confers a discretion upon a public authority, it must indicate the scope of that discretion.”¹²⁰ Therefore, the phrase “if deemed useful” seems too vague and can give the authority an unfettered and limitless discretion that could be open to arbitrary abuse. Therefore, just like in *Huvig and Kruslin* where it was held that the system under which official telephone tapping took place in France did not provide adequate protection against possible abuses, so does this provision unable to provide adequate safeguard against arbitrary abuse as required.¹²¹

Is the law accessible to the citizen?¹²² In *Leander v. Sweden*,¹²³ the Court, while deciding if a secret collection of information by the Swedish police was “in accordance with the law”, held that the accessibility requirement was fulfilled by the fact that the system operated under a published law. The provisions of the Law of Terrorism Crimes and Financing came into effect after it was duly published in the official gazette,¹²⁴ and therefore, it is hereby submitted that the provision has fulfilled the requirement of accessibility.

¹¹⁷ Kruslin judgment, op. cit., paragraph 29; Barthold judgment of 25 March 1985, A 90, paragraph 48; Hadjianastassiou judgment of 16 December 1992, A 252-A, paragraph 42; Chorherr judgment of 25 August 1993, A 266-B, paragraph 27; Kokkinakis judgment of 25 May 1993, A 260-A, paragraph 40.

¹¹⁸ (1992) 14 EHRR 657

¹¹⁹ *Malone* case at paragraph 68.: “...it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

¹²⁰ Paragraph 89

¹²¹ *Khruslin* case at paragraph 35

¹²² *Sunday Times* case, at paragraph 49

¹²³ (1987) 9 EHRR 433

¹²⁴ Article 41, Law of Terrorism Crimes and Financing

Is the law sufficiently precise and its consequences, reasonably foreseeable? Although the law had to be “sufficiently clear” to give the public an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to the interference with this right,¹²⁵ it was not necessary that the public should know the precise criteria by which information was stored and released.¹²⁶ However, since the provisions of the Terrorism and Financial Crimes Law “does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”, “the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.”¹²⁷ The interference complained of lacked foreseeability and was, consequently, not “in accordance with the law”.¹²⁸

The democratic test requires us to determine, not only that the state acted reasonably, carefully and in good faith, but also that the restriction was proportionate and justified by relevant and sufficient reasons.¹²⁹ The test consists of three principal elements: the nature of democratic necessity, the burden of proof/proportionality, and the margin of appreciation/European supervision.

Even though Saudi Arabia is neither democratic nor aspiring to be one, we would apply the test for the nature of the necessity.¹³⁰ The interference must be necessitated by a “pressing social need” relating to one or more of the legitimate aims¹³¹ The study submits that preventing terrorism is indeed, a “pressing social need”. It is, therefore, argued that the provision fulfils the requirement of “democratic necessity.”

Is the infringement proportionating to the aim pursued? ¹³² A secret surveillance can constitute an interference with the right to privacy and confidentiality¹³³ but can be justified if they are

¹²⁵ *Leander v. Sweden* (1987) 9 EHRR 433 at paragraph 51

¹²⁶ Greer, at 12

¹²⁷ Paragraph 79

¹²⁸ Paragraph 87

¹²⁹ *Vogt v. Germany* (1996) 21 EHRR 205. Judgment of 26 September 1995, A 323, paragraph 52. See also e.g. Appl. No. 18714/91, Brind; Appl. No. 18759/91, McLaughlin.

¹³⁰ *Lingens* judgment, op. cit., paragraph 43. *Ezelin v France* [1991] ECHR 29. Judgment of 26 April 1991, A 202, paragraph 51.

¹³¹ See for example, *Observer and Guardian V the United Kingdom*: [1991] ECHR 1385. Judgment, op. cit., paragraph 71.

¹³² See for example, *Observer and Guardian* judgment, op. cit., paragraph 72; *Tolstoy Miloslavsky* judgment, op. cit.

¹³³ *Klaus v Germany* Application no. 415/07 para 41

“strictly and proportionately necessary for safeguarding the democratic institutions”.¹³⁴ And a legitimate aim, that is common to both the Charter and the Convention, is the maintenance of security and prevention of crimes which may include combat of terrorism.

The last element of the necessity test is the margin of appreciation. It refers to the latitude of discretion states are permitted in their observance of rights and, in particular, to the application of the various exceptions to the Convention. Is the aim and necessity of this infringement allowed for the public interest compatible with the Convention? It could be elicited by using either the “reasonableness test” in which the state has the burden of proof of the reasonableness of its decision, or the “unreasonable test”, where the burden shifts to the applicant to prove that the decisions were unreasonable, the benefit of any doubt being given to the state.¹³⁵ The study argues that, given the seriousness of the impact of terrorism on the society, the impact of the provisions is reasonable and proportionate to the legitimate aims.

Consequently, although the exceptions would have passed the necessity and proportionality tests, however, the law is not precise/clear enough to be foreseeable, and its preconditions are too wide and vague that could result in abuse. Therefore, the legality test is not passed.

VI. Patient Confidentiality under the Saudi Laws

The Law of Healthcare Professions¹³⁶ exclusively provides for the duty on health care professionals¹³⁷ to, among many others,¹³⁸ maintain the *patient’s* confidentiality.¹³⁹

¹³⁴ *Klaus*, para 44; See also, *A, B, C and D v. the Federal Republic of Germany* DR 18 (1980) p. 176; Appl. No. 18601/91

¹³⁵ Greer p15

¹³⁶ Royal Decree No. M/59 dated 4 / 11 / 1426 H and Council of Ministers Resolution No. 276 dated 3 / 11 / 1426 H (December 6, 2005)

¹³⁷ Article 1, Law of Healthcare Professions defines the healthcare professional as: “*Any person licensed to practice a healthcare profession, including the following categories: physicians, dentists, pharmacists, health care technicians (in radiology, nursing, anaesthesia, laboratories, pharmacy, optics, epidemiology, artificial limbs, physiotherapy, dental care and prosthodontics, tomography, nuclear medicine, laser equipment and surgery), psychologists and social workers, dieticians and public health specialists, midwifery, paramedics, speech therapists and audiologists, occupational rehabilitation and therapy, medicre physics and other health professions to be agreed upon by the Minister of Health and the Minister of Civil Service and the Saudi Commission for Health Specialties.*”

¹³⁸ The Law also requires healthcare professionals to serve the interest of the patient and the society at large, respecting the patient’s dignity and customs under Article 5, Law of Healthcare Professions

¹³⁹ Several other healthcare related laws have reinforced the requirement of the duty of patient confidentiality as well.

*“A healthcare professional shall maintain the confidentiality of information obtained in the course of his practice and may not disclose it except (as provided by the law) ...”*¹⁴⁰

A violation of this law could attract criminal liability, which attracts a fine,¹⁴¹ a warning, or revocation of the license for the practice and/or a further ban from re-registration for a period of two years from the date of revocation.¹⁴²

Note that, the protection to patient confidentiality under this law is not absolute. Where a statute requires or allows a disclosure of an otherwise confidential information under some defined circumstances, such disclosure would not be in breach of confidentiality. Article 21 of the Law made exceptions to that duty, which include disclosures to the appropriate authorities for reporting a case of crime-related death,¹⁴³ or for notification communicable or epidemic diseases to public health authorities,¹⁴⁴ Where findings suggest a crime-related injury¹⁴⁵ notification is in the public interest.¹⁴⁶ Violators shall be subject to imprisonment, fine or both.¹⁴⁷

Other exceptions include disclosure during a court session, or valid consent in writing authorising disclosure, or a disclosure to a family member,¹⁴⁸ or a disclosure pursuant to court order.¹⁴⁹ These provisions are similar to the statutory authorisations under the English laws that allow for the reporting of infectious diseases,¹⁵⁰ or stating of the underlying cause of death in a death certificate¹⁵¹ or notification of birth and deaths,¹⁵² and, reporting of suspected child abuse.¹⁵³ There are, also, circumstances where disclosure is permitted in the patient’s own

¹⁴⁰ Article 21

¹⁴¹ Art 30

¹⁴² Article 31 of the Law of practicing healthcare professions

¹⁴³ Article 20

¹⁴⁴ Art 11

¹⁴⁵ Article 11, Law of Practising Healthcare Professions,

<https://www.boe.gov.sa/printsystem.aspx?lang=en&systemid=164&versionid=178>

¹⁴⁶ '0703-The Legal and Ethical Basis of Medical Practice' (Omarkasule-04.tripod.com, 2017) <http://omarkasule-04.tripod.com/id1318.html> accessed 11 March 2017

¹⁴⁷ Art 28

¹⁴⁸ Article 18

¹⁴⁹ Article 21

¹⁵⁰ Infectious Diseases (Notification) Act, 1889, 52 & 53 Vic., c. 72

¹⁵¹ For instance, see S. 1 of Coroners and Justice Act, 2009

¹⁵² E.g., under the Births and Deaths Registration Act, 1926. [16 & 17 GEO. 5. On. 48.]

¹⁵³ E.g., under section 130 of the Social Services and Well-being (Wales) Act 2014.

interest.¹⁵⁴ Lastly, a healthcare professional may be compelled to divulge confidential information¹⁵⁵ in court during proceedings.¹⁵⁶

Let us now subject the laws to our testing grids to see if they pass the “triple” test to provide the much-needed safeguards against abuse or arbitrary disclosure to other third parties.

i. Legality Test

This legal protection would clearly seem to be “according to the law” since it is founded on a law properly established.¹⁵⁷ However, answering the four questions on legality could give us a definitive answer as to its legality. Firstly, is the relevant legal provision accessible to the citizen? Yes, it properly published in the official gazette and only became effective after sixty days from date of publication¹⁵⁸ as required by *Leander v. Sweden*.¹⁵⁹ Article 38 of the Basic Law assures that “... *there shall be no punishment except for deeds subsequent to the effectiveness of a statutory provision.*” Secondly, does the law sanction the infraction? The Law clearly prohibits unlawful disclosure¹⁶⁰ and thereby making it an offence.¹⁶¹

Thirdly, is the law precise and clear such that its effects and course could be foreseen? Unfortunately, the term “personal data” is not defined in any laws or regulations¹⁶² except in the new policy on the novel health information exchange portal of Saudi Ministry of Health which does not carry a legal weight.¹⁶³ Under the laws, there is no provision for data

¹⁵⁴ e.g., Section 60 of the Health and Social Care Act 2001 empowers the Secretary of State to authorise the processing of patient data in the interests of patient care and public health.

¹⁵⁵ One very important omission from this law and its *implementing regulations*, is that, it failed to define the term “confidential information”. This lack of clear definition of this term could give rise to ambiguity in the interpretation of the law.

¹⁵⁶ Good Medical Practice, p76

¹⁵⁷ It was established by a Royal Decree: Royal Decree No. M/59 dated 4 / 11 / 1426 H and Council of Ministers Resolution No. 276 dated 3 / 11 / 1426 H (December 6, 2005)

¹⁵⁸ Article 33 of the Law.

¹⁵⁹ (1987) 9 EHRR 433

¹⁶⁰ Article 21 of the Law

¹⁶¹ Article 28 of the Law

¹⁶² Turki Alsheikh, Data protection in Saudi Arabia: overview, DLA Piper Saudi Arabia, Thompson Reuters Practical Law. Accessed Ed 8/04/2018

[https://content.next.westlaw.com/Document/I02064fc01cb611e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I02064fc01cb611e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1)

¹⁶³ Policy No.1 Saudi Health Information Exchange Definitions, Saudi Health Information Exchange Policies <https://www.moh.gov.sa/en/Ministry/eParticipation/Policies/Pages/Policy.aspx?PID=1> Accessed on February 22nd, 2018 Define it as as:

controllers, guardian or such similar instruments to deal with and control the use of the patient's sensitive data.

On the other hand, the law provided for reasonable exceptions to those grounds on account of, e.g., public policy or public interest as may be necessary to avert danger or to warn others of potential harm.¹⁶⁴ The exceptions are; a disclosure to the family if the patient consents in writing, or disclosure public authorities for the purposes reporting or prevention of crimes or communicable diseases, or in defence of professional accusations.¹⁶⁵

Does the law provide adequate safeguards against arbitrary interference with the respective substantive rights? The Court had frowned at granting a “legal discretion to the executive with (...) an unfettered power. ...”¹⁶⁶ What the Regulation stated is that “the competent authority in the Ministry of Health shall identify the infectious diseases to be reported, and the procedure thereto.”¹⁶⁷ In this case, the scope of this discretion given to the competent authority at the Ministry Health could not be held to be precise enough to avoid potential abuse.

The Regulation itself does not provide for adequate safeguards against the potential risk of secondary disclosure of the sensitive data and, if there are any exceptions to this rule, as required.¹⁶⁸ There are no clear and detailed statutory regulations clarifying the safeguards applicable, and setting out the rules governing, *inter alia*, on data collection, storage, use and destruction.¹⁶⁹ But, again, the new policy has offered some of these stipulations.¹⁷⁰

“Information about an identifiable person which relates to the physical or mental health of the individual, or to provision of health services to the individual, and which may include: a) information about the registration of the individual for the provision of health services; b) information about payments or eligibility for health care with respect to the individual; c) a number, symbol or particular assigned to an individual to uniquely identify the individual for health purposes; d) any information about the individual collected in the course of the provision of health services to the individual; e) information derived from the testing or examination of a body part or bodily substance; f) identification of a person (e.g., a health professional) as provider of healthcare to the individual.”

¹⁶⁴ **Tarasoff v. Regents of the University of California** 551 P.2d 334 (Cal. 1976).

¹⁶⁵ Article 21, Law of Practicing Healthcare Professions.

¹⁶⁶ Case of Malone, para 67

¹⁶⁷ Article (11-1), Implementing Regulation for the Law of Practicing Healthcare Professions, 1439

¹⁶⁸ **Iordachi and others v. Moldova, Eur.** Court of HR, judgment of 14 September 2009

¹⁶⁹ **M.M. v. the United Kingdom, Eur.** Court of HR, judgment of 13 November 2012, application no. 24029/07.

¹⁷⁰ The Purpose of Use Policy categorises circumstances under which a use of the data *shall* be permitted, *may* be permitted and when *not* permitted without a valid court order to that effect. Policy No. 2 Saudi Health Information Exchange Purpose of Use Policy, <https://www.moh.gov.sa/en/Ministry/eParticipation/Policies/Pages/Policy.aspx?PID=2> Accessed February 22nd, 2018

Unfortunately, the policy has its limitations; as it only applies the Ministry of health facilities and affiliates. And, has no explicit legal weight.

From the foregoing, therefore, the study argues that the Saudi Arabia laws have not sufficiently passed the “legality test” under article 8(2) of the Convention.

ii. The “Legitimate Aim” Test

An infringement thereunder would not be justified under Article 8(2) of the Convention unless it pursues one or more of the legitimate aims referred to in the Article¹⁷¹ i.e., if there is a causal relationship between the interference and its legitimate objectives.¹⁷² All of the exceptions under Article 21 tally with the “legitimate aims” listed under Article 8(2) of the ECHR and Article 4(a) of the Arab Charter.¹⁷³ Therefore, it is submitted that, this test is passed.

iii. “Necessity Test”

The nature of the necessity should be tested for three principal elements; i.e., it is related to a “pressing social need,” “proportionate” to the aim, and the justification is “relevant and sufficient.”¹⁷⁴ Yes, the disclosure to competent authorities to avert harm, diseases and prevent crimes are related to pressing social needs.¹⁷⁵

But, is the infringement proportionate to the legitimate aim pursued? Such interference could not be compatible with the Convention unless it was justified by an overriding requirement in the public interest.¹⁷⁶ It would seem to be in the public interest that the Saudi Arabian laws have allowed for these exceptions.

¹⁷¹ *HR. Radu v. the Republic of Moldova*, Eur. Court of judgment of 15 April 2014, application no. 50073/07.

¹⁷² Gerards J. How to improve the necessity test of the European Court of Human Rights. *International journal of constitutional law*. 2013 Apr 1;11(2):466; Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *The European System for the Protection of Human Rights* 125, 131 and 145 (R. St. J. Macdonald et al. eds., 1993)

¹⁷³ The exceptions under 8(2) of the ECHR and 4(a) of the Arab Charter are: national security, public safety or economic well-being, prevention of disorder or crime, protection of health or morals, and protection of others' rights and freedoms.

¹⁷⁴ *Sunday Times (I) v. UK* 30 Eur. Ct. H.R. (ser. A), §62.

¹⁷⁵ *Ibid*

¹⁷⁶ *Z v Finland* (1997) 25 EHRR 371; [1997] ECHR 10

Conclusion

The examination of the Saudi Arabian legal safeguards to patient confidentiality has produced a mixed result of compliance, partial compliance and non-compliance to the various elements of the chosen grids.

The study has clearly shown that the Saudi Arabian human rights do not conform to the international human rights law as it follows the shariah law which is distinct from and run parallel to the UDHR and other conventions.

Neither the Arab Charter, the Basic Law nor other Saudi legislations have successfully passed the legality test because they have not provided for a clear, precise and foreseeable safeguard from abuse of exceptions to infringement of Article 8 rights. There is an unfettered discretionary power to state authorities to could result in arbitrariness and abuse.

These results are in addition to the paucity of literature, laws, and law reports on patient confidentiality in the Saudi jurisdictions which could potentially lead to wider discretion to the courts and executive authorities leading to inconsistent interpretation and implementation of the laws.

The study is still yet to consider the remaining two grids, the role/power given to the patient to control the use of his data, and achievement of the objectives of the laws.

The Aspirational Shortcomings of the Irish Legislative Proposals in Assisted Human Reproduction

Claire O'Connell

Introduction

The law in relation to assisted human reproduction (AHR) in Ireland was long awaited and finally realised in 2015 with the *Children and Family Relationships Act 2015* (the CFRA). Parts 2 and 3 dealt with donor assisted human reproduction (DAHR) and parentage; however, three years later, these parts have yet to commence. In October 2017, the Department of Health published the General Scheme of the *Assisted Human Reproduction Bill* (the AHRB) which deals with surrogacy and is currently in pre-legislative scrutiny stage. Being mindful of the Scottish, and England and Wales Law Commission's inclusion of surrogacy on their next programmes of law reform, this paper seeks to provide an analysis of the current legislative proposals of Ireland with reference to the two neighbouring jurisdictions in reference to awards of parentage against the underlying concept of the child's right to identity. This shall include an exploration of the strict definitions within the legislation which includes a commercial ban, not only on surrogacy, but also on donation.

It is evident that regulating individuals and their wishes to reproduce is a difficult, if not impossible, task and requires a balance between the enforcement of certain aspirational provisions and the reality being faced by such individuals. The legislative framework must not be too onerous so as to export the issue and push people towards reproductive tourism,¹ but strict enough to provide safeguards to those involved. The historical Irish approach has been to leave surrogacy unregulated and allow natural principles of parentage to pervade the reality of AHR and surrogacy agreements. There is now a shift towards acknowledging these agreements and providing a state enforced system that positively protects the new family form through effective birth registration and the assignment of guardianship rights based on social, rather

¹ It should be noted that in Ireland, in terms of recognition of guardianship that has arisen in another state, a person shall have their guardianship recognised where he or she has acquired rights and responsibilities that are equivalent to guardianship, pursuant to a judgment that is entitled to recognition under Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 or the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, signed at the Hague on the 19th day of October, 1996, (the Convention) pursuant to a measure under the Convention or by operation of the law of a state other than Ireland as provided for in Chapter III of the Convention.

than biological reality. With regard to the intended parents and their right to respect of private and family life, registration can be a means of recognition, as in Ireland,² or it can inhere rights in the individuals registered, such as in the UK.³ In order to respect the child's right to identity, information regarding birth parents should either be recorded on the birth certificate or in a register for donors and surrogates that may be accessed once the child reaches maturity. Such registers of information are dealt with well in both jurisdictions under the 1990 Act, the CFRA and the AHRB.⁴ These systems are straight forward and provide for a recording of relevant information, provision for informed consent to such recordings and a system through which the information shall be released once the child reaches maturity. They are not the concern of this paper which seeks instead, to focus on the highly restrictive nature of the proposed regulation of AHR in Ireland in terms of applicability and the assumption that one size fits all. The nature of overly-onerous systems is such that it encourages reproductive tourism or non-compliance through deception. Assuming birth registration as the most effective means of realising a child's right to identity, as opposed to relying on the will of the social parents, it is argued that both of these outcomes affect the child's right to identity through inaccurate registration or a lack of enforcement of a duty to register the details of the biological parents.

² As the Law Reform Commission recognised, there is a significant level of confusion surrounding the registration of a birth and therefore, there exists a reluctance to comprehensively register the biological contributors for fear that parental responsibility will automatically accrue or the register's rights will diminish. Law Reform Commission, Consultation Paper, Legal Aspects of Family Relationships (LRC CP 55 - 2009) at paragraph 2.12. Although registration does not currently create any rights of guardianship, those who provide day-to-day care to the child and seek to perform administrative tasks and are not so registered, face significant difficulty. In its final report, the Law Reform Commission recommended that legislation should be enacted to provide for automatic joint parental responsibility of both the mother and father of any child, and that such should be linked to compulsory joint registration of the birth of the child. However, this report did not consider children of assisted human reproduction. Law Reform Commission, Report, Legal Aspects of Family Relationships (LRC Law Reform Commission, Consultation Paper, Legal Aspects of Family Relationships (LRC 101- 2010) at paragraphs 2.07-2.08.

³ England and Wales: section 111 of the Adoption and Children Act 2002 amended section 4 of the Children Act 1989 to provide that where a non-marital father jointly registers the birth of the child with the mother, he will obtain parental responsibility. Scotland: section 23 of the Family Law (Scotland) Act 2006 introduced parental responsibility on joint registration of the birth. Northern Ireland: section 1 of the Family Law Act (Northern Ireland) 2001 amended section 5 of the Children (Northern Ireland) Order 1995 to ensure that a non-marital father could obtain parental responsibility for his child following the joint registration of the birth.

⁴ Section 31ZA(1-2) of the 1990 Act, as inserted by section 24 of the 2008 Act provides that a child aged 16 is entitled to non-identifying information such as the sex of the person and the year of birth of that person. Once the child reaches 18, they may request and receive identifying information. Section 35 of the *Children and Family Relationships Act 2015* provides that a donor-conceived child who reaches 18 years of age may request the name, date of birth and contact details of the relevant donor. Head 54 of the AHRB provides that a child born as a result of a surrogacy agreement who has attained the age of 18 years may request from the Regulatory Authority the name, date of birth and contact details of his or her surrogate or intending parent that are recorded in the National Surrogacy Register.

Restrictive Definitions

The Children and Family Relationships Act 2015

There are many positive aspects of the legislation. In terms of the child's right to identity, it provides for a mechanism through which all the identifying donor information that the child is entitled to, shall be gathered before conception by an independent body. For the first time, it provides a means of providing same sex unions with parentage from conception as long as they intend to become such a parent and consent to all relevant procedures.⁵ Both same-sex partners will have their names registered on the birth certificate⁶ and will have 18 years free from any perceived interference that a third party donor may bring given that, under the CFRA, the donor of a gamete is not the parent of a child born as a result of the DAHR procedure. Unlike the UK system, there is no prohibition on single mothers becoming the parent of the child; however, this Act does not assist single fathers as that would only be provided for in the surrogacy proposals in the AHRB. It must be said therefore, that there are significant incentives to follow the legislative proposals; however, there are those that will undoubtedly fall outside of the regulations either through a lack of financial resources, ignorance or simple mistake and this paper focuses on those individuals.

In terms of restrictiveness, the main issue under the CFRA is that all DAHR treatment must take place in a DAHR facility. This automatically excludes all informal methods of conception that do not involve sexual intercourse, such as self-insemination. This approach is one that is purely aspirational and seeks to strike the balance between protecting those involved from exploitation through a system of counselling and informed consent as well as fully screened genetic material against the right to beget a child.⁷ The donor must be 18 years of age,⁸ have been informed by the DAHR facility's operator that if they donate, the donor can request information from the register on the number of persons that have been born from their gametes

⁵ Section 5 of the *Children and Family Relationships Act 2015*.

⁶ Section 27A of the 2004 Act, as inserted by the *Children and Family Relationships Act 2015*, section 97, not yet commenced.

⁷ See: *Murray v Ireland* [1985] IR 532; *Dickson v The United Kingdom* [2007] ECHR 1050. These cases are not specifically related to the right to have a child and have him or her registered in the manner in which you desire or being bestowed with the necessary rights and responsibilities in respect of that child but rather, facilitation of conception in some form or other. It is submitted that the right to be registered or be bestowed with such rights and responsibilities is more to do with the child's welfare and best interests rather than any one person.

However, these interests often overlap and it is argued that it will often be in both the caregiver's and child's best interests to have a legal tie to each other.

⁸ Section 6(1)(a) of the *Children and Family Relationships Act 2015*.

along with the sex and year of birth of each of the children born (unless the child objects under section 36(3)⁹).¹⁰ In addition, a donor is defined as a person who has consented for his or her gametes to be used in a DAHR procedure.¹¹ They must also be informed that the personal information¹² provided shall be recorded in a register¹³ and made available to the child, if the child requests such information upon attaining 18 years of age.¹⁴ Having regard to the child's right to identity, the operator will inform the donor that it is desirable that the donor updates the information provided as required.¹⁵ The operator must also inform the donor that, in the event of a child being born using his or her gamete, he or she shall not be the parent of that child.¹⁶ The donor must also be informed of their right to revoke consent to having their gamete used in a DAHR procedure under section 8 of the CFRA.¹⁷ They must then make a declaration¹⁸ that they consent to the gamete being used in a DAHR procedure¹⁹ and that they understand the information as provided to them by the operator.²⁰ This written and dated declaration must be made before the donation and signed in the presence of a person authorised by the operator of the donation facility where the gamete is provided.²¹

The intended mother under the CFRA must be at least 21 years of age, consent to the procedure and have been informed by the DAHR facility's operator that once a DAHR procedure is performed, her personal information²² shall be provided to the Minister, that she, and not the

⁹ This section provides that [w]here the Minister receives a request under subsection (2), and a statement under subsection (1) by the donor-conceived child is recorded on the Register, the Minister shall send the donor-conceived child a notice informing him or her that— (a) a request under subsection (2) has been made by the relevant donor, and (b) unless he or she informs the Minister, within 12 weeks from the date on which the notice is sent, that he or she objects to the release to the relevant donor of the information contained in the statement under subsection (1), the Minister shall release that information to the relevant donor

¹⁰ Sections 7(a)(i), 34(2) of the *Children and Family Relationships Act 2015*.

¹¹ This must be done either in conformity with sections 6 or 26(1)(b)(ii) of the *Children and Family Relationships Act 2015*. Section 6 lays out the Irish provisions and section 26(1)(b)(ii) provides for valid consent in another jurisdiction when the consent procedure is “substantially the same” as that provided for in section 6.

¹² Section 24(3) provides that the information provided shall be his or her name, date and place of birth, nationality, the date the gamete was donated and contact details.

¹³ Section 7(b)(ii) of the *Children and Family Relationships Act 2015*.

¹⁴ Sections 7(b)(iii), 35 of the *Children and Family Relationships Act 2015*.

¹⁵ Section 7(b)(v) of the *Children and Family Relationships Act 2015*.

¹⁶ Section 7(b)(i) of the *Children and Family Relationships Act 2015*.

¹⁷ Section 7(c) of the *Children and Family Relationships Act 2015*.

¹⁸ Section 6(1)(c), (3)(a) of the *Children and Family Relationships Act 2015*.

¹⁹ Section 6(3)(b) of the *Children and Family Relationships Act 2015*.

²⁰ Section 6(3) of the *Children and Family Relationships Act 2015*.

²¹ Section 6(2) of the *Children and Family Relationships Act 2015*.

²² Section 25(3) of the *Children and Family Relationships Act 2015* provides that this information will include her name, her date of birth and her address and contact details.

donor,²³ shall be the parent of any child born as a result of the DAHR procedure,²⁴ that certain information in respect of her and any other intended parent shall be recorded in the register²⁵ and that the child may access such information.²⁶ She must also be informed of her right to revoke her consent before the procedure takes place.²⁷ She must make a declaration confirming receipt of this information and her agreement to same, along with her consent and, where applicable, the consent of her spouse, civil partner or cohabitant to being the parent of the child.²⁸ The same requirements extend to such a partner in terms of information, consent and declaration under section 11 of the CFRA.

The Assisted Human Reproduction Bill 2017

A donor under the AHRB for the purposes of parentage assessment is somewhat less restrictive depending on how the definitions will be applied. A donor under the AHRB is defined as a person who provided a gamete or embryo for use in providing AHR treatment or research and who does not intend to be a legal parent of the child in accordance with Part 3 of the AHRB.²⁹ AHR is defined as “all treatment or procedures that involve the handling of gametes and embryos for the purposes of establishing a pregnancy”.³⁰ This wording echoes the definition provided by the Commission on Assisted Human Reproduction in 2005.³¹ “All treatment” may suggest medical intervention but is not definitive and could potentially encompass all forms of non-natural conception. This may provide for a level of uncertainty and inconsistency with the CFRA if this was intended to allow for informal conception for surrogacy but not for DAHR treatments. Unfortunately, the general scheme provides no explanatory note for its interpretation, but the Commission’s 2005 report refers to “handling” in terms of two types of intervention: assisted insemination and in vitro insemination which suggests medical facilitation.³²

²³ Section 13(b)(ii) of the *Children and Family Relationships Act 2015*.

²⁴ Section 13(b)(i) of the *Children and Family Relationships Act 2015*.

²⁵ Section 13(b)(iii) of the *Children and Family Relationships Act 2015*.

²⁶ Section 13(b)(iv) of the *Children and Family Relationships Act 2015*.

²⁷ Section 13(d) of the *Children and Family Relationships Act 2015*.

²⁸ Section 9(3)(d) of the *Children and Family Relationships Act 2015*.

²⁹ Head 2(1) of the *Assisted Human Reproduction Bill 2017*.

³⁰ Head 2(1) of the *Assisted Human Reproduction Bill 2017*.

³¹ Report of the Commission on Assisted Human Reproduction (2005) at V.

³² *Ibid* at X.

Part 3 of the AHRB provides that a donor must consent and be at least 18³³ and no more than 35 if she is an egg donor³⁴ and no more than 40 if he is a sperm donor.³⁵ The consent must be in writing, given voluntarily and the person providing consent must have had capacity to do so.³⁶ The donor will also be notified in writing that the law pertaining to the use of donated gametes in other jurisdictions may not be the same as it is in the State.³⁷ Surrogacy under the AHRB is only permitted if it is domestic,³⁸ gestational³⁹ and non-commercial surrogacy⁴⁰ that has been pre-approved by the Regulatory Authority.⁴¹ There is pre-requisite counselling, legal explanations of the implications of each action,⁴² information regarding risks, and consent procedures that must be followed.⁴³ The surrogate must be habitually resident in Ireland,⁴⁴ have previously given birth to a child⁴⁵ and be aged between 25 and 47.⁴⁶ She must be physically and physiologically assessed by a registered medical practitioner.⁴⁷ In relation to the intended mother, she must be unable to gestate a pregnancy and unable to conceive for medical reasons.⁴⁸ There is no explanatory note explaining whether medical reasons extend to biological impossibilities such as in the case of same sex unions or only in response to infertility issues. Also, while a surrogate, or either or both of the intending parents may make a parental order which allows for a transfer of parental responsibility,⁴⁹ it must be accompanied by proof

³³ Head 12 (1)(b) of the *Assisted Human Reproduction Bill 2017*.

³⁴ Head 12(1)(c) of the *Assisted Human Reproduction Bill 2017*.

³⁵ Head 12(1)(d) of the *Assisted Human Reproduction Bill 2017*.

³⁶ Head 12(5)(a) of the *Assisted Human Reproduction Bill 2017*.

³⁷ Head 12(9) of the *Assisted Human Reproduction Bill 2017*.

³⁸ Head 36(1)(a) of the *Assisted Human Reproduction Bill 2017*.

³⁹ Head 36(1)(b) of the *Assisted Human Reproduction Bill 2017*. Tobin notes the evidence provided from Dr Mary Wingfield of the Institute of Obstetricians and Gynaecologists who emphasised that “there are increased risks in pregnancy if a woman conceives using donated eggs. Her body will not reject the eggs but there are immunological changes that can happen. She also noted that donated eggs are extremely difficult to obtain in Ireland”, B. Tobin, “Forging a Surrogacy Framework for Ireland: the Constitutionality of the Post-Birth Parental Order and Pre-Birth Judicial Approval Models of Regulation” (2017) 29(2) CFLQ 133 at 136. Tobin notes that there has been no attempt to articulate what the public policy reasons are for prohibiting gestational surrogacy. Given the invasive procedure required, as opposed to in uterine insemination whereby the sperm is placed directly into the uterus by way of a narrow catheter. or self-insemination, this decision is in conflict with one of the two general principles of the AHRB, that of having due regard to the health and wellbeing of the women who receive such treatments and taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of such technologies and associated research.

⁴⁰ Heads 36(1)(c), 40 of the *Assisted Human Reproduction Bill 2017*.

⁴¹ Head 37(1) of the *Assisted Human Reproduction Bill 2017*.

⁴² Head 43 of the *Assisted Human Reproduction Bill 2017*.

⁴³ Head 45 of the *Assisted Human Reproduction Bill 2017*.

⁴⁴ Head 38(1)(a) of the *Assisted Human Reproduction Bill 2017*.

⁴⁵ Head 38(1)(b) of the *Assisted Human Reproduction Bill 2017*.

⁴⁶ Head 38(1)(c), (d) of the *Assisted Human Reproduction Bill 2017*.

⁴⁷ Head 38(1)(e) of the *Assisted Human Reproduction Bill 2017*.

⁴⁸ Head 39(3)(d) of the *Assisted Human Reproduction Bill 2017*.

⁴⁹ Parental responsibility is known as guardianship in Ireland. Section 10 of the 1964 Act provides that a guardian appointed under the Act shall be entitled to the custody of the child and to take proceedings against any persons who wrongfully takes away or detains the child, or for the recovery, for the benefit of the child, of

that the child born was not created using an egg from the surrogate and was created using a gamete from at least one intending parent of the child.⁵⁰ The Bill provides that at the time of the application, the home of the child named in the application shall be with an intending parent named on the application. This provision endorses the idea that legal ties do not reflect social reality and that day to day care can be provided by individuals who have no rights in relation to the child. The application can only be made between 6 weeks and 6 months after the child's birth,⁵¹ but this may be extended if the court determines there are exceptional circumstances or if it is in the child's best interests to do so.⁵² A parental order application can only be made if it includes all children born as a result of the surrogacy agreement.⁵³

The restrictive nature could cause two potential issues, assuming the proposed legislation is approved. In the absence of total compliance with these provisions, the surrogacy agreement and subsequent application for a parental order could be in jeopardy.⁵⁴ However, as they emanate from proposed legislation only, there is no judicial exploration in Ireland of the various circumstances that could arise and whether a *de minimis* approach shall be taken to lapses in procedure that could be post-facto corrected or, if not corrected, would not materially have affected the consent or intent of the key stakeholders. If a stricter approach is taken and, due to a mistake or omission, the relevant stakeholders fall outside the terminology and thus, protections, of the legislation provided to donors, surrogates and intended parents, the legal

damages for any injury to or trespass against the person of the child. It also provides that the guardian shall be entitled to the possession and control of all property, real and personal of the child and shall manage all such property and receive the rents and profits on behalf and for the benefit of the child until the child attains the age of twenty-one years [...]. Interestingly, when a person, other than a parent of the child is appointed a guardian under section 6C (the section dealing with non-biological persons who have been exercising care of the child for more than 2 years, or 12 months if the child has no other guardian), they are explicitly provided with the right to decide the child's place of residence; to make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing; to decide with whom the child is to live; to consent to medical, dental and other health related treatment for the child for which a guardian's consent is required; to place the child for adoption or consent to such adoption (section 6C(11)). He or she shall also have the rights and responsibilities of a guardian under such enactments as are named in section 6C(12).

⁵⁰ Head 47(4) of the *Assisted Human Reproduction Bill 2017*.

⁵¹ Head 47(6) of the *Assisted Human Reproduction Bill 2017*. This was increased from the earlier proposed 30 days under head 13 of the *General Scheme of the Children and Family Relationships Bill 2014*. This was proposed to allow the gestational mother to recover from the "rigours of pregnancy and childbirth before participating in proceedings".

⁵² Head 47(7) of the *Assisted Human Reproduction Bill 2017*.

⁵³ Head 47(8) of the *Assisted Human Reproduction Bill 2017*.

⁵⁴ Alghrani and Griffiths note that "parental orders which transfer parentage from the surrogate to the intended parents go to the most fundamental aspects of status and to the very identity of the child, who s/he is and who his/her parents are. It is central to a child's being, whether as an individual or as a member of his [or her] family", A. Alghrani & D. Griffiths, "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" (2017) 29(2) CFLQ 165 at 172.

parentage would undoubtedly default to that governing natural conception. In Ireland, that would mean that the gestational mother is the legal mother⁵⁵ and that the biological father will only attain automatic guardianship of the child if he has lived with the mother for twelve months, three months of which will involve cohabitation with the child.⁵⁶ Therefore, intended parents attaining guardianship of the child outside of the surrogacy provisions will rely on planned adoption proceedings which would have to identify the originally intended parents as the adopters.⁵⁷ This scenario is of course reliant on the consent of the surrogate and any other guardian of the child, for example, her husband.⁵⁸ A surrogate could potentially consent to a guardianship application made by the biological father under sections 2(2) and 2(4) of the *Guardianship of Infants Act 1964* (the 1964 Act) but that would not provide co-parentage rights to his partner, nor would it divest the surrogate of her legal guardianship. Alternatively, a person other than a parent may be appointed as a guardian if he or she has provided for the child's day-to-day care for a continuous period of more than 12 months but only if the child has no parent⁵⁹ or guardian who is willing to exercise the rights and responsibilities of

⁵⁵ This is by virtue of Article 40.3 of the Constitution as confirmed in *G v An Bord Uchtala* [1980] IR 32 and *MR & DR v An tArd Chlaraitheoir* [2014] IESC 60.

⁵⁶ This was only introduced in 2016 by section 43(c) of the *Children and Family Relationships Act 2015* which inserted section 2(4A) into the 1964 Act. A father may also become a guardian through the provisions in section 6A or section 6D of the 1964 Act but these are reliant on the consent of the mother or the approval of the court in the absence of the mother's consent.

⁵⁷ In *B v C (Surrogacy: Adoption)* [2015] EWFC 17 (Fam), Theis J stated that a parental order "creates a legal parentage and removes the legal parentage of the birth family under the provisions of the [2008 Act]. Unlike adoption there is already a biological link with the applicants before the parental order application is made. Its purpose is to create legal parentage around an already concluded lineage connection. From the point of view of the child the orders are different. An adopted child is seen to have had a family created for it, whereas in a surrogacy arrangement the child's conception and birth has been commissioned by the parents, the child has a biological connection and the same identity as one of the parents...In surrogacy situations the court by making a parental order settles the identity issue and does not leave other fictions to be resolved" at page 70.

⁵⁸ Section 26(1) of the *Adoption Act 2010*.

⁵⁹ Section 2 of the 1964 Act: A "parent" under the Act is described as a father or mother as defined in the Act. "Mother" means a female adopter, "father" includes a male adopter but subject to section 11(4), does not include the father of a child who has not married that child's mother unless — (a) an order under section 6A is in force in respect of that child, (b) the circumstances set out in subsection (3) of this section apply, (c) the circumstances set out in subsection (4) of this section apply, (d) the circumstances set out in subsection (4A) of this section apply, or (e) the father is a guardian of the child by virtue of section 6D. Section 11(4) provides that even if a parent is unmarried, a parent shall include he or she who is not a guardian of the child and such a person will be permitted to make an application under section 11 for the custody of the child and a right of access shall extend to such a parent. Section 6A provides the court with the power to appoint a guardian following an application by a parent of the child without affecting the prior appointment of the any other guardian. Section 2(3) provides for guardianship for a father who entered into a marriage that was nullified in the previous ten months to the birth of the child and where the father reasonably believed he was in a valid marriage. Section 2(4) provides that a father may include the man who is not married to the mother but yet declare they are the father and mother, that they agree to the appointment of the father as guardian and that they have made a statutory declaration to that effect. Section 2(4) provides for the father to include an unmarried father who has cohabited for 12 consecutive months with the mother to include 3 months living with the child. Section 6D provides for a person to be made a guardian of the child where he or she has accrued similar rights in another state.

guardianship in respect of the child.⁶⁰ Again, this would have to be made with any guardian's consent, which would include the consent of the surrogate,⁶¹ unless such consent is "unreasonably withheld".⁶² This is extremely unsatisfactory, especially if one parent is biologically related to the child. These options do not promote legal certainty for the child or provide full legal rights and responsibilities to the caregivers of the child from birth. The intended parent could apply for a parental order, six weeks after the birth, but it is uncertain how the courts will approach this if the more substantial legislative provisions have not been abided by, for example, the surrogate had exceeded the age limit permitted for a surrogacy agreement, or if proper counselling and information relating to legal implications had not been provided by all parties.

The UK Approach

Surrogacy and AHR in the UK is regulated through the *Surrogacy Act 1985* (the 1985 Act),⁶³ the *Human Embryology and Fertilisation Act 1990* (the 1990 Act) and the *Human Embryology and Fertilisation Act 2008* (the 2008 Act). The law in the UK, which is currently the subject of a review by both Law Commissions,⁶⁴ has been described as having been developed "in a haphazard fashion" with "piecemeal changes" that have been confusing for all involved.⁶⁵ The most important aspect of the 1985 Act which remains the biggest issue in both jurisdictions is the fact that no surrogacy agreement can be enforced against the person who carries the child.⁶⁶ Therefore, the 1985 Act provides that the State will not interfere with such an agreement that is made between private individuals by decriminalising surrogacy

⁶⁰ Section 6C(2)(b) of the *Guardianship of Infants Act 1964*.

⁶¹ Section 6C(6)(a) of the *Guardianship of Infants Act 1964*.

⁶² Section 6C(7) of the *Guardianship of Infants Act 1964*.

⁶³ The 1985 Act did not give specific requirements on the nature of the agreements or the stakeholders but rather, provided that any commercialisation of such a process, aside from non-profit organisations, was an offence.

⁶⁴ The surrogacy project shall be placed in the Scottish Law Commission's tenth programme of law reform and on the England and Wales Law Commission's thirteenth programme of law reform. The need for the project is based on a need for clarity and modernity as it is suggested that the law has "fallen behind changing social attitudes", Law Commission, Thirteenth Programme of Law Reform (Law Com No 377) at paragraph 2.42. Issues have also arisen from the facilitation of parental orders where statutory conditions have not been implemented. Also, there has recently been a declaration of incompatibility of the ECHR in respect of the provision insisting that parental orders may be only applied for by two people. See: *Re Z* [2016] 2 FLR 327.

⁶⁵ A. Alghrani & D. Griffiths, "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" (2017) 29(2) CFLQ 165.

⁶⁶ Section 1A of the 1985 Act, as inserted by section 36(1) of the *Human Embryology and Fertilisation Act 1990*.

insofar as it is satisfied that the agreement was not commercial in nature.⁶⁷ There has been an undeniable reluctance on the legislature in both jurisdictions to distinguish natural conception from surrogacy. In both jurisdictions, the legal mother is the gestational mother and unless she is willing to provide her consent to a parental order, she will remain the legal mother of the child, with sole parental responsibility (unless she is married), even, as was seen in *Re AB (Surrogacy: Consent)*,⁶⁸ if she does not wish to look after the child herself. In the UK, if the surrogate is unmarried, the biological father may be the legal father but may not have any parental responsibility in respect of the child, unless he is named on the birth certificate.

Parental orders were introduced by the 1990 Act⁶⁹ and stated that the applicants had to be married; aged over 18; domiciled in the UK, Channel Islands or Isle of Man and at least one of them had to have a genetic link to the child. The legal parents must have consented to the legal order and similar to the Irish proposals, the child must have been living with the intended parents at the time of the application. The order must have been made within six months of the child's birth and the surrogate must only have been paid reasonable expenses. The 2008 Act repealed this provision and introduced a new, but similar, list which extended the category of intended parents to same sex unions and two persons living as partners in an enduring family relationship not within the prohibited degrees of relationship to each other.⁷⁰

The question under the Irish provisions is what happens when a certain page of a consent form is not signed, if the operator does not inform the donor that the child will attain identifying information at the age of 18 or the surrogate does not receive counselling? These are undoubtedly infringements of varying degrees and it is hoped that the minor infractions can be resolved through a consideration of the child's best interests, as has been the case in the UK courts. As Alghrani and Griffiths have noted, both the Warnock Report and the 1985

⁶⁷ Section 2 of the 1985 Act provides that no person shall on a commercial basis initiate, take part in, offer or agree to negotiate or compile any information with a view to its use in making, or negotiating the making of, a surrogacy agreement. However, this does not apply to surrogates or intended parents, only private bodies seeking to make a profit. It shall not be an offence for a non-profit making body to initiate, facilitate or offer or agree to take part in such an agreement so long as any compensation does not exceed what is considered reasonable for carrying out such work. It shall also be an offence to advertise any indication that any person is willing to enter into a surrogacy agreement or negotiate or facilitate the making of a surrogacy agreement. Again, this does not apply to non-profit bodies.

⁶⁸ [2016] EWHC 2643 (Fam).

⁶⁹ Section 30 of the 1990 Act.

⁷⁰ Under section 54 of the 2008 Act, the intended parents must be married, in a civil partnership or living in an enduring family relationship; must apply for the order within 6 months of the child's birth; the child must be living with the intended parents and either or both of the applicants must be domiciled in the United Kingdom, the Channel Islands or the Isle of Man; must be over 18; the gestational mother and any other parent must have consented to the order and no money or other benefit can be provided or received by either of the applicants in consideration for the making of the order, any agreement, the handing over of the child, the making of arrangement with a view to making the order.

Act were notably silent as to the welfare of the child.⁷¹ This trend continued until the *Human Fertilisation and Embryology (Parental Orders) Regulations 2010*⁷² applied section 1 of the *Adoption and Children Act 2002* to parental orders so that the child's welfare, throughout their life, must be the paramount consideration and that the courts must follow a welfare checklist.⁷³ This has been used by the UK courts to effectively override any minimal statutory infraction and even to authorise somewhat excessive payments to the surrogate. In contrast, the AHRB merely states that "due regard" shall be given to the health and the wellbeing of children born as a result of AHR treatments.

In terms of parental orders, the UK courts have been clear in their concern and therefore, quick to provide a remedy. In *Re C and D (children) (Parental Order)*⁷⁴, Theis J expressed his concern about children who were not subject to parental orders made in respect of their day-to-day caregivers. She stated that "there is a real risk that those who care for children born as a result of these arrangements may be inadvertently sleep walking into an uncertain legal future for their much-wanted child. That uncertainty is very likely to be detrimental to that child's long-term welfare".⁷⁵ In *Re X (A Child) (Surrogacy: Time Limit)*⁷⁶ the parental order was granted two years and two months after the child was born, on the basis of the child's welfare. The intended parents explained that the delay was due to their ignorance of the requirement. Similarly, in *Re C and D (Children) (Parental Order)*,⁷⁷ the parental order was made two years and one month after the child was born, for the same reason and in light of Article 8 of the ECHR. Last year, the President of the Family Division, Sir James Munby, was faced with 34 parental order applications, where all of the requirements of section 54 were met by the intended parents, but the consent form had not been filled out correctly.⁷⁸ As each party

⁷¹ A. Alghrani & D. Griffiths, "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" (2017) 29(2) CFLQ 165 at 168.

⁷² S.I. No. 985 of 2010.

⁷³ Section 1 of the Act states that the court must be mindful that any delay in coming to a decision is likely to prejudice the child's welfare. In considering the child's welfare, the court must take account of the child's ascertainable wishes and feelings, their particular needs, the likely effect on the child of having ceased to be a member of the original family, their age, sex, background and any other characteristics the court deems necessary, any harm which the child has suffered or is at risk of suffering and the relationship the child has with relatives.

⁷⁴ [2015] EWHC 2080 (Fam).

⁷⁵ *Ibid* at paragraph 13.

⁷⁶ [2014] EWHC 3135 (Fam).

⁷⁷ [2015] EWHC 2080 (Fam).

⁷⁸ Munby J stated that "although I am acutely conscious of the stress, worry and anxiety burdening all the parents in these cases, and of the powerful human emotions that are inevitably engaged, each of these cases is, in terms of applicable legal analysis, straight forward and simple", *Re AD, AE, AF, AG, AH* [2017] EWHC 1026 (Fam).

believed they had signed the forms as legally required, each parental order was awarded. In terms of domicile, it was decided in *AB (Domicile)*⁷⁹ that an applicant who hadn't lived in the UK since 2013 due to a forced sale of family home satisfied the domicile condition under section 54. However, a parental order was refused in *Y v Z*,⁸⁰ where Y was living and working in New York with his new partner D and the child, X, and Z was living and working in London, having not seen X since October 2015. Y could not make an application by himself so once the order was refused the child had no one taking parental responsibility for him. This case shows the court will only go so far in bending the rules to suit the facts of the case and that the welfare of the child depends on provisions that contain an element of judicial discretion.

The case of *Re AB (Surrogacy: Consent)*⁸¹ involved intended parents who had fallen out of favour with their surrogate who refused to consent to the parental order but also did not wish to be the parent of the twins, who lived with, and were cared for, by the intended parents. This, as Theis J described, left the children in "legal limbo" but as the consent could not be vacated, the court had no option but to adjourn the case generally and hope that the respective parties could find a mutual resolution. The UK approach has clearly been navigating the legislative provisions as best it can, mindful of the child involved. The European Court of Human Rights has been significantly less forgiving and this should be borne in mind with respect to the deference shown to the rule of law in other jurisdictions.⁸² Unlike the UK legislative system; however,⁸³ the AHRB does provide an option for the court to dispense with the surrogate's

⁷⁹ [2016] EWFC 63.

⁸⁰ [2017] EWFC 60.

⁸¹ [2016] EWHC 2643 (Fam).

⁸² In *Paradiso and Campanelli v Italy* (Application no. 25358/12), the applicants were a married couple who availed of a surrogacy agreement in Russia following 8 failed IVF attempts. They also were approved to be adoptive parents but having waited four years to receive a child and reaching the age limit at which they were permitted to adopt, they resorted to surrogacy, which was illegal in Italy. Through a mix-up at the clinic, the intended father turned out not to be biologically linked to the child. The surrogate was paid €50,000 and gave consent but as the intended mother signed her and her husband as the parents on the Russian birth certificate, the Italian authorities initiated legal proceedings for fraud, declared the child stateless, stripped the child of his identity and removed him from the applicants. Despite the intended parents being assessed and found to be loving caregivers and the long term perceived damage that such separation could be done to the child, the Italian authorities left the child in care for a year and a half and subsequently adopted. The Grand Chamber would not consider arguments in relation to the child as it held the applicants had no standing in relation to him. While the Court held that while it could not ignore the emotional hardship suffered by those whose desire to become a parent has not or cannot be fulfilled, given the public interests at stake; it could not show preference to the applicant's interest in their personal development by continuing their relationships with the child. Legalising the relationship would have condoned an unlawful act that breached Italian legislation and therefore, the Court held that there had been no violation of Article 8.

⁸³ While it is not provided for in legislation, in *Re L (Surrogacy)* [2012] EWHC 2631 (Fam), Baker J held, in dispensing with the surrogate's consent, that "[i]t is only when all reasonable steps have been taken to locate her [the surrogate mother] without success that a court is likely to dispense with the need for valid consent."

consent, or that of her husband's, where they are deceased, lack capacity, cannot be located or *for any other reason the court considers to be relevant*.⁸⁴ It is yet to be borne out by the courts on what it will consider relevant as these proposals have yet to even be debated by the Oireachtas. However, completely dispensing with a legal mother's consent, especially a married mother, may be at constitutional loggerheads with the child's best interests under Article 42A as the extinguishment of such rights can usually only occur through consent or a failure on the part of the parent in respect of the child. This may be hard to prove where a surrogate has changed her mind and is an otherwise loving and caring individual. This is the same reasoning for why a pre-conception framework, providing for a transfer of parental responsibility before the birth, may also not work in Ireland.⁸⁵

Commercialisation

Twenty-one years following the Warnock Committee⁸⁶ published its report; and fifteen years after the *Human Fertilisation and Embryology Act 1990*, the Commission on Assisted Human Reproduction (CAHR) published Ireland's first recommendations on AHR and surrogacy. Just like its neighbouring counterpart, the CAHR recommended that donors should not be allowed to lay down conditions for the use of their gametes and should not be paid for such donation, aside from reasonable expenses.⁸⁷ Both review groups believed that the commercialisation of AHR techniques would lead to the exploitation of the individuals involved. This was particularly true in the UK, where, in the aftermath of the Baby Cotton case⁸⁸ and *A v C*,⁸⁹ the *Surrogacy Act 1985* (the 1985 Act) was introduced. The 1985 Act provides that the surrogate

⁸⁴ Emphasis added. Head 48(2) of the *Assisted Human Reproduction Bill 2017*.

⁸⁵ See: B. Tobin, "Forging a Surrogacy Framework for Ireland: the Constitutionality of the Post-Birth Parental Order and Pre-Birth Judicial Approval Models of Regulation" (2017) 29(2) CFLQ 133.

⁸⁶ M. Warnock, Committee of Inquiry into Human Fertilisation and Embryology 1984, Cmnd 9314 (1984).

⁸⁷ Report of the Commission on Assisted Human Reproduction 2005 at XIII. It found that children born through donated gametes should be entitled to know the identity of their genetic parents upon maturity; however, parental responsibility should be conferred on the intended parents rather than the donor or surrogate. It found that, in donor programmes, intent should be the basis of an assignment of parentage. It also believed that surrogacy should be permitted; that surrogates should receive reimbursement of expenses directly related to their participation and that the child should be entitled to access the identity of the surrogate, again, upon maturity.

⁸⁸ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846, in this case, Ms Kim Cotton who was a mother of two, was paid £6500 for acting as a surrogate. The child's intended parents were eventually granted wardship by the courts but the case was met by media and public outcry given the perceived ethical, moral and social desirability elements of the case.

⁸⁹ [1985] FLR 445, the case was only reported in 1985. This case involved a couple who offered to pay a prostitute £3500 to carry their child. She refused but found another woman who wished to act as the surrogate. Ms C was artificially inseminated with Mr A's sperm and was to be paid £3000 but once the child was born, she refused to give the child to Mr A and his wife. Mr A was initially granted access but this was withdrawn on appeal.

mother is a woman who carries a child on foot of a pre-conception agreement with a view to handing the child over and parental responsibility being met by “another person or other persons”.⁹⁰ The 1985 Act did not give specific requirements on the nature of the agreements or the stakeholders but rather, provided that any commercialisation of such a process, aside from non-profit organisations, was an offence.⁹¹ In contrast, it was never an offence in Ireland to commercialise surrogacy as the practice was, by and large, ignored.

Under the CFRA, the consent of the donor shall not be valid where it is given in exchange for financial compensation in excess of the “reasonable expenses associated with the provision of the gamete concerned or the giving of consent under that section”.⁹² In this section, which covers DAHR procedures only, reasonable expenses include travel costs, medical expenses and any legal or counselling costs.⁹³ This section does not provide for payment in return for the donation but rather, only the associated costs. Similarly, it is prohibited under the AHRB for a person to receive or offer to receive, provide or offer to provide, any payment or any other reward to another person for the donation of a gamete or embryo for use in providing AHR treatment to one or more other people or research.⁹⁴ Under the AHRB, a donor may be provided with reimbursement or payment of reasonable expenses which are, similar to the CFRA, defined as a person’s travel expenses, medical expenses, counselling expenses and any legal expenses arising in relation to the donation process.⁹⁵

Ireland does not have its own sperm bank; therefore, all of its sperm is imported from foreign sperm banks located in Denmark, Ukraine and the Czech Republic. These clinics are commercial in nature and therefore compensate their donors, which if the proposed legislation is to be followed, would exclude all unknown sperm donors. This prohibition is in conflict with section 26(1)(b)(ii) of the CFRA which provides for the use of donors from outside the State

⁹⁰ Section 1(2) of the *Surrogacy Act 1985*. Interestingly, unlike the 1990 and 2008 Acts which dealt with assisted human reproduction, this extended surrogacy to single individuals.

⁹¹ Section 2 of the 1985 Act provides that no person shall on a commercial basis initiate, take part in, offer or agree to negotiate or compile any information with a view to its use in making, or negotiating the making of, a surrogacy agreement. However, this does not apply to surrogates or intended parents, only private bodies seeking to make a profit. It shall not be an offence for a non-profit making body to initiate, facilitate or offer or agree to take part in such an agreement so long as any compensation does not exceed what is considered reasonable for carrying out such work. It shall also be an offence to advertise any indication that any person is willing to enter into a surrogacy agreement or negotiate or facilitate the making of a surrogacy agreement. Again, this does not apply to non-profit bodies.

⁹² Section 19 of the *Children and Family Relationships Act 2015*.

⁹³ Section 19(3) of the *Children and Family Relationships Act 2015*.

⁹⁴ Head 19(1), (2) of the General Scheme of the AHRB.

⁹⁵ Head 19(3), (4) of the General Scheme of the AHRB.

where the consent procedure is “substantially the same” as that provided for in section 6 of the Act. Not only would these clinics have to provide for a similar procedure as has been laid out in the CFRA in terms of information, counselling and registration, but they would also have to stop compensating their donors. This is undoubtedly a significant issue and a potential interference in the intended parent’s right to respect for private and family life in favour of an arbitrary pseudo-ethical objection.⁹⁶ It requires the intended parents to use the sperm of altruistic foreign donors or known donors. It is unclear how this would work in terms of commercial banks who would sell the donation to Irish clinics. It seems nonsensical that a clinic, rather than a donor, could profit from this system. In addition, any hope of this provision being a draftsman’s oversight or short-sighted misstep was dashed during pre-legislative scrutiny of the Bill before the Joint Committee on Health.⁹⁷ Under the UK system, only reasonable expenses are provided for; however, the court has yet to refuse a parental order based on excessive payment. In *Re L (A Minor)*,⁹⁸ Hedley J stated that “it will only be in the clearest case of abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making”.⁹⁹ The court in this case authorised \$27,000. In *X and Y (Children)*,¹⁰⁰ a similar approach was taken and £27,405.22 was authorised

⁹⁶ The concurring judgment in *Paradiso and Campanelli v Italy*, made extreme statements on surrogacy itself and the child who it considered “a victim of human trafficking” who was “commissioned and purchased by the applicants”. It also stated that: “Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the Convention...Not everyone is capable of using their intellect, as this requires considerable intellectual efforts and life-long learning, which is a very difficult task. It is much easier to earn money using the body, especially if one takes into account that strong demand exists for bodies for the purpose of surrogacy, and this demand has been quite stable for centuries...Those who prefer to use their brains will continue to develop new technologies and science. In the situation of a radically increasing global population, it could be considered reasonable from an economic perspective, to exploit the body”. This passage is extremely insulting to surrogates who make great sacrifices on an altruistic basis. It creates the image of women who lack intelligence and therefore, only resorted to surrogacy because they had no other options. It equates intellect with success which is extremely misguided. This judgment also perpetuates the cycle it wishes to prevent.

⁹⁷ Joint Committee on Health Debate, 17 January 2018, *General Scheme of the Assisted Human Reproduction Bill 2017: Discussion*. See comments made by the Chairman, Ms Geraldine Luddy and Dr Tony Holohan. In the following debate: Joint Committee on Health Debate, 28 February 2018, *General Scheme of the Assisted Human Reproduction Bill 2017: Discussion (Resumed)*, Dr John Waterstone commented that the absolute ban on anonymous gamete donation and the ban on payment of any sort of financial compensation to donors, along with the provision to inform the child of identifying information regarding their donors against their parent’s wishes is an “unacceptable degree of coercion and is unconstitutional”. He continues, “donor egg and sperm treatment are good things. They allow couples who would otherwise never have been able to enjoy the fulfilment of family life to have children and, as they are good things, we need to facilitate the process. We feel that in order to do so, some degree of slight financial compensation is allowable and justifiable for the donors concerned”. He also commented that he believed Parts 2 and 3 of the *Children and Family Relationships Act 2015* to be regrettable and a result of a lack of appropriate oversight in the Department of Justice and Equality.

⁹⁸ [2010] EWHC 3146 (Fam).

⁹⁹ *Ibid* at paragraphs 9 and 10.

¹⁰⁰ [2011] EWHC 3147.

by the court. In *J v G*,¹⁰¹ the surrogate was paid \$53,000. In *Re C (Parental Order)*,¹⁰² the surrogate was paid £8,812 and in *Re X and Y (Foreign Surrogacy)*,¹⁰³ the surrogate was paid \$25,000. In each case, the parental order was made. The child's welfare is being taken extremely seriously by the courts which is undeniably a satisfying approach; however, as Horsey notes, "recent judgments indicate increasing judicial dissatisfaction with some provisions of the law, especially in relation to the criteria under which parental order applications may be granted and how these match the realities of modern day surrogacy".¹⁰⁴

Medical intervention is undoubtedly required for any embryo creation which would also involve egg retrieval; therefore, any AHR treatment involving embryo implantation or egg donation will force its participants to follow the legislation, so long as the procedure is performed in a licensed facility. This includes any surrogacy that seeks to be compliant given the total ban on non-gestational surrogacy under the AHRB.¹⁰⁵ There are; however, undoubtedly those who will not require such medical intervention who may either be ignorant of the law or who simply may not have the financial resources to follow it. There may also be those who do not wish to follow the legislative path due to issues of autonomy and fear of interference from a known donor, such was the case in *JMcD v PL & BM*.¹⁰⁶ This potentially includes opposite sex couples where the male partner is infertile, lesbian couples and single women. Similar to those who cannot fulfil the restrictive requirements mentioned above, these individuals may resort to less conventional and less formal means of conceiving which fall outside legal regulation and default to natural rules of legal parentage.

In terms of the child's right to identity, the introduction of known donors is important as it means that the individual(s) who wish to avoid third party interference and buy sperm online, for example, will not be subject to the same registration requirements (such as consent under

¹⁰¹ [2013] EWHC 1432 (Fam).

¹⁰² [2013] EWHC 2413 (Fam).

¹⁰³ [2008] EWHC 3030 (Fam).

¹⁰⁴ K Horsey, "Fraying at the Edges – UK Surrogacy Law in 2015" (2016) 24(4) *Medical Law Review* 225.

¹⁰⁵ Head 36(1)(b) of the *Assisted Human Reproduction Bill 2017*.

¹⁰⁶ [2010] 2 IR 199. In this case, a known donor and friend of a lesbian couple made a written agreement that the donor would act as a favourite uncle and not in a parental role. Following the birth of the child, he wished to become more and more involved. The gestational mother then became unwell and wished to travel with her partner and their child to Australia. McD sought an injunction from the High Court to block this travel along with guardianship, custody and access to the child. This was refused by the High court on the basis of the *de facto* family relationship that existed between L and M. The Supreme Court reversed this decision granted him the right of access despite the child being extremely young and their contact very brief, on the basis of the importance of the society of the father.

section 5 of the CFRA).¹⁰⁷ Opposite sex couples who fall outside the legislative provisions by using informal methods of conception could deceptively register the social father on the birth certificate as the biological father. This would only be discovered upon a challenge to paternity and a DNA test which is unlikely to be forthcoming from an online donor. For same sex couples, it will be immediately evident that the same sex partner is not biologically related to the child; therefore, deceptive practices will be unsuccessful. The only way in which the same sex partners could jointly be registered, following a DAHR procedure, is by following the legislative provisions under Part 2 of the CFRA or, by applying for a parental order following a surrogacy agreement under the AHRB. Consent under section 5 can only be provided, and it is envisioned, valid, if it is given previous to the conception itself. If the same sex couple fall outside of the legislative requirements, they are not incentivised to register the birth father's information as it does not correspond to the bestowing of the title "parent" with its accompanying rights and responsibilities.

The question is, whether a person, who has provided their donation to an online service, rather than the mother of the child, owes a duty to a particular child in another jurisdiction. Especially given the fact, that the mother will have most likely have chosen the service for two reasons, lack of financial resources or anonymity. If the first, that mother may wish to provide the father's information but if the second, that would imaginably be unlikely. It is also doubtful whether such identifying information would be disclosed to such a mother upon her online

¹⁰⁷ Section 5(1) of the *Children and Family Relationships Act 2015* provides that the parents of a donor-conceived child shall be the mother and the spouse, civil partner or cohabitant, as the case may be, of the mother. The CFRA differs from the AHRB and the *Adoption Act 2010* (the 2010 Act) in that, the persons who consent under section 5 of the CFRA to be the parents of that child shall be registered on the child's birth certificate as the child's parents. This is in contrast with the AHRB which provides a surrogacy certificate and the 2010 Act which provides an adoption order in addition to the original birth certificate which shall reflect biological reality. It is therefore unclear whether registration of a father would operate in the same manner with the same level of enforcement where a couple followed the legal procedure under the CFRA. It should be stated however, that the term "parent" is not defined in the CFRA or the AHRB; however, the definition of parent under the *Guardianship of Infants Act 1964* (the 1964 Act) is amended to include a parent of a child under section 5 of the CFRA. Section 6B of the 1964 Act provides for rights of parents to guardianship for individuals who are parents for the purposes of section 5 of the CFRA. It provides that a person who is a parent of the child under section 5 of the CFRA and married to, or in a civil partnership with, the child's mother shall be a guardian of the child. If the parents have been cohabiting for 12 months, three of which will include living with the child, from the date on which the section is commenced, the second parent shall be a guardian. This section provides the same protection to an intended parent under section 5 of the CFRA to a biological father under the rules of natural conception. The same second parent may also become a guardian to the child if he or she jointly makes a statutory declaration with the child's birth mother stating that they are parents under section 5 and that they agree to the appointment of the person as a guardian of the child. This provision, along with the registration of section 5 parents on the birth certificate has the effect of completely disregarding the gamete donor until the child has attained 18 years of age. Such a strong indifference to the donor and endorsement of the social reality is therefore confusing when read against the ban on commercialised donation.

purchase. If, due to financial resources only, the child's mother used a known donor, she would potentially be able to use the provisions under the *Civil Registration Act 2004*, as amended by the *Civil Registration Act 2014*, to compel the registration of his information. However, while the father may be penalised for the offence of non-attendance at the registrar's office, the compellability of his registration is still unclear.¹⁰⁸

Conclusion

By forcing people to travel abroad to countries that may commercialise surrogacy or allow it to continue unregulated, states allow for legal uncertainty for children and they allow countries to capitalise on this and turn it into a business. If states regulate AHR practices in a balanced and realistic manner and provide for reasonable commercialised practices, its citizens would not have resort to reproductive tourism¹⁰⁹ which is almost prohibitively expensive. By criminalising the practice and taking away the only chance people may have of conceiving a child, states ignore the realities of life and the development of science. What is undoubtedly required is an international framework on surrogacy that would provide some sense of uniformity and decrease the need to seek alternative and less regulated AHR and surrogacy systems. However, the nature of international conventions often provides low, or opt-out,

¹⁰⁸ There is currently no obligation on the child's father to give information under the Civil Registration Act 2004 (the 2004 Act) regarding the birth of a child if he wasn't married the child's mother at the time of birth or in the previous ten months (Section 22(1) of the Civil Registration Act 2004). There is also no obligation on the child's mother to give information relating to the child's father. However, following the commencement of the Civil Registration Act 2014 (the 2014 Act), this provision shall be deleted and new provisions shall be inserted which provide that a father is responsible for registering the details of the child's birth, even if he is not married at the time of the child's birth or in the previous ten months. Where the mother of the child attends to register the child without the person she identifies as the child's father, the registrar shall register the required particulars without the surname of the child and those relating to the father of the child. The registrar shall then make all reasonable efforts to give written notice to the person, suspected to be the child's father, to attend within 28 days the office of the registrar or any other convenient place in order to inform the registrar if he agrees that he is the child's father (Section 22(1B) of the Civil Registration Act 2004, as inserted by section 7(1) of the 2014 Act, not yet commenced). If this person provides a statutory declaration to the registrar, along with his required particulars, to include the child's surname, then the registrar shall enter such information into the register and the person shall then sign the register (Section 22(1C) of the Civil Registration Act 2004, as inserted by section 7(1) of the 2014 Act, not yet commenced). Section 94 of the Children and Family Relationships Act 2015 inserts section 22(1K) which provides that if the registrar is satisfied that, having made all reasonable efforts, the father cannot be found, he or she will complete the registration of the child with the required particulars other than those relating to the father. If the person refuses to attend the office of the registrar or the mutually agreed upon place, he shall be guilty of an offence. The penalty for such an offence is a fine not exceeding €2,000 or imprisonment for a term not exceeding 6 months or both. It is unclear whether such a father would be compelled to register his information in addition to this penalty.

¹⁰⁹ Alghrani and Griffiths note that given the widespread media acceptance, celebrity involvements, low cost flights and easy access to the internet, increasing numbers are "evading the restrictive regulation of surrogacy in the UK, and resorting to informal or overseas commercial surrogacy arrangements", A. Alghrani & D. Griffiths, "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" (2017) 29(2) CFLQ 165 at 170.

enforcement mechanisms in order to attract signatories and have shown a historical deference to individual member states where issues of ethics or morality arise. What is more likely to have an effect in Ireland is if those legislating through fear and tradition were decisive instead of evasive.

They need to navigate a workable system, based in evidence-based research, that is malleable to emerging family forms rather than evade reality and leave children of AHR in a legislative lacuna. This means addressing bioethical concerns through legal safeguards rather than overly stringent pre-requisites for those wishing to avail of AHR. The largest potential for this lies in defining exploitation and creating the offence of exploitation, as opposed to commercialisation. There must be a legal acknowledgment of AHR treatment outside of AHR facilities, expanded protections for those who fall outside of the definitions, but nonetheless pose no threat to the child, and finally, provision is required for incentivised registration that corresponds to awards of parentage and guardianship rights.

Child Rights Protection, Federalism and Culture: Irreconcilable Goals?

Lekan Ogunde

A prevalent dilemma in human rights discourse is the development of universal standards of rights protection in an international community comprising of states with diverse customs and cultural practices. In federal states comprising of a central government with different constituent governments having a certain degree of autonomy, the prospects of developing universal standards may be further undermined by such existent autonomy. There is in addition a notable suggestion, especially in non-Western countries that the concept of rights (in its contemporary form) is antithetical to well-established customary practices that are regarded as fundamental to the preservation of societal order.

This paper seeks to examine this dilemma with particular emphasis on states practicing the federal system of government. In doing so, one would examine culture from various perspectives before proceeding to consider the influence of culture (if any) on the child rights protection framework under international, regional and national law. In this paper, the relationship between the child rights concept and other relevant constitutional tenets such as democracy and federalism will be extensively considered. It will be argued that the creation of an atmosphere conducive for the realization of the rights of the child is dependent on the harmonization of these concepts. A further argument of this paper will be that securing an effective balance between the preservation of culture and protection of the rights of the child requires a multi-dimensional approach to rights protection.

What is Federalism?

Federalism is the form of government where the component units of a political organization participate in sharing powers and functions in a cooperative manner in spite of existent divisions created by ethnic pluralism and cultural diversity.¹ It is also described as a ‘compromise solution in a multinational state between self-determination provided by a

¹ Tamuno, Tekena, ‘Nigerian Federalism in Historical Perspective’ in Amuwo, Agbaje, Suberu and Herault (eds), *Federalism and Political Restructuring in Nigeria* (Spectrum Books, 1998), 13

national government and that of component states.² It emphasizes decentralization of powers and constitutional guarantees of the powers of each component unit of a federal system.³ In a federal system, the participating political communities agree to pursue some objectives together and other objectives on their own.⁴ More specifically, they agree to establish a central government and to empower it to make and administer laws in some areas; and they agree to retain the power to make and administer laws themselves in other areas.⁵ The concept of federalism as a system of government is practiced in countries such as Canada, Nigeria and most notably, the United States of America. The position in Nigeria for example is explicitly stated as follows:

...Nigeria operates a federal system of government. This ensures the autonomy of each government. None of the government is subordinate to the other...under this system, each tier of government has its legislative competence or functions⁶

What is Culture?

The concept of culture is a highly ambiguous one. Various definitions of culture have been postulated in the past and others may arise in the future.⁷ There is a view of culture as ‘the set of shared characteristics of a particular community or nation’.⁸ It may also refer to ‘everything enabling man to be successful and active in his universality and more freely to turn to good account all forms of expression in the interest of human contacts’.⁹ Alternatively, it is ‘a sum of human activities, the totality of values, knowledge and practices’.¹⁰ Culture is considered to be ‘closely connected with the diverse ways in which social groups construct their lives ideologically, economically, socially, legally and politically’.¹¹ The various approaches to culture according to Szabo reveal culture as a constituent of ‘social man’.¹²

² Elaigwu, J.I., ‘The Politics of Federalism in Nigeria’ (Adonis and Abbey, 2007), 6

³ Nwabueze, B.O., *Federalism in Nigeria under the Presidential Constitution* (Sweet and Maxwell, 1983), 377

⁴ Ibid

⁵ Ibid

⁶ Attorney-General of Lagos State vs. Attorney-General of the Federation (2003) 6 S.C

⁷ C.E.S.C.R. General Comment No 21: *Right of everyone to take part in Cultural Life* (2009) E/C.12/GC/21, Paragraph 10

⁸ Hotlmaat and Naber, *Women’s Human Rights and Culture: From deadlock to dialogue* (2011, Intersentia publishing), 52

⁹ Szabo, Imre, *Cultural Rights* (Aw Sijthoff-Leiden, 1974)

¹⁰ Symonides, J., ‘Cultural Rights, a neglected category of human rights’ (1998) *International Science Journal* Vol 50, Iss. 158, 559-572, 559

¹¹ Hotlmaat and Naber, *Women’s Human Rights and Culture: From deadlock to dialogue* (2011, Intersentia publishing), 53

¹² Szabo, *supra* n.9

In previous times, the notion of culture was considered self-reproducing and unchanging.¹³ However, contemporary notions of culture suggest an element of dynamism and evolution to which end culture is viewed in a political context as principles established by the consensus of the individuals of a society¹⁴ rather than a pre-existent, static ideology. Thus, culture is ‘far more effectively characterized as an ongoing adaptation to a changing environment rather than as a static supraorganic entity’.¹⁵ The United Nations Committee on Economic, Social and Cultural Rights describes culture as encompassing ‘ways of life....religion or belief systems, rites and ceremonies....customs and traditions through which individuals, groups of individuals and communities express their humanity and meaning they give to their existence’.¹⁶ According to the United Nations Educational, Scientific and Cultural Organization (UNESCO), culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group which encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.¹⁷ The foregoing definitions establish culture as a comprehensive and multi-faceted concept which unsurprisingly makes the task of providing a precise definition of culture difficult. While there may be conceptual differences as to the precise definition of culture, culture is clearly a great influence on societal behaviour.

Child Rights Law and Culture

The Convention on the Rights of the Child (CRC) ‘takes due account of the importance of the traditions and cultural values of each people for the protection’.¹⁸ In addition Article 1 of the CRC defines a child as every human being below the age of eighteen years ‘unless under the law applicable to the child, majority is attained earlier’. Under Article 30, children belonging to ethnic minorities have the right to enjoy their culture, practise their religion and use their own language. Article 31 recognizes the right of the child to participate freely in cultural life and the arts with states required to respect and promote this right.

¹³ Wright, S, ‘The politicization of culture’ (1998) *Anthropology Today* Vol 14 No 1, pp 7-15,8

¹⁴ *Ibid*,10

¹⁵ Zechenter, E.M, ‘In the Name of Culture: Cultural Relativism and the Abuse of the Individual (1997) *Journal of Anthropological Research* Vol. 53 No 3,319-347,332-333

¹⁶ See CESCR General Comment no 21 *supra* n.717

¹⁷ UNESCO Universal Declaration on Cultural Diversity (2001) available at http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed 17th May,2018)

¹⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 30 April 2018], Preamble

The cultural rights of the child are also restated in Article 12 of the African Charter on the Rights and Welfare of the Child. Unlike the CRC, the African Charter also considers the effect of harmful cultural practices with Article 21 in particular imposing an obligation on states to take appropriate measures to eliminate ‘customs and practices’ prejudicial to the health of the child as well as discriminatory customs and practices. To this end, the practice of child marriage and betrothal is specifically prohibited under the charter.¹⁹ Under the Nigerian Child Rights Act, every child has the right to participate in the cultural and artistic life of the Nigerian, African and world communities.²⁰

Federalism and Child Rights: The Nigerian Example

In Nigeria, legislative powers are divided between the federal and state law-making powers. The next question turns on the position of human rights and in particular child rights in the context of law making. This to a large extent determines the nature and status of the Child Rights Act (CRA) as a yardstick for child rights protection in Nigeria. Under the Nigerian constitution, there is no explicit reference to child rights protection or indeed human rights as a law-making topic for legislative houses. This does not however imply a complete lack of reference to any matter that has an effect on child rights protection. For instance, Item 61 of the Second schedule to the constitution considers as a matter under the exclusive legislative list the ‘formation, annulment and dissolution of marriages’. However, this does not include marriages under Islamic and customary law. This implies for instance that the provisions of the Child Rights Act prohibiting child marriage²¹ would be applicable to the exclusion of all other legislation except in instances where such a marriage is contracted under Islamic or Customary law. Item 60 also outlines the promotion and the observance of the fundamental objectives of the constitution as a matter within the exclusive legislative jurisdiction of the federal government. It however in a most curious manner limits such exclusive powers to the ‘establishment and regulation of authorities’ for the promotion of such objectives. It may have been expected that such jurisdiction would be vested in a more general context to the promotion of fundamental objectives without any of such limitations. This arrangement by implication regards the establishment of the National Child Rights implementation committee as being a matter for the National Assembly without the protection of substantive child rights falling

¹⁹ Article 21 (2)

²⁰ Section 12 (2)

²¹ Section 21

under the same legislative purview. Notwithstanding, the exclusive list also considers ‘any matter incidental or supplementary’ to any item on the list as being under the jurisdiction of the National Assembly.²² One may therefore argue that the question of protecting children from exploitation or neglect is incidental to the establishment of a committee responsible for the protection of rights. A conclusion that the National Assembly can establish a committee to protect children without being able to determine the nature of protection afforded to children is at the very least absurd and renders ineffective the exclusive powers granted under Item 60. The concurrent legislative list makes little explicit reference to issues discussed under the Child Rights Act except in empowering the state House of Assembly to make laws with respect to university or post-primary education ‘including the establishment of institutions for the pursuit of such education’.²³ It is extremely strange that the ‘establishment of institutions’ is regarded as being supplementary to the general power to make laws with respect to education whereas the reverse is the case under the exclusive list.

The above discussion of the nature of legislative powers under the constitution to an extent highlights the intricacies created by a federal system of government with division of powers between each legislative house. However a major matter of contention is with respect to the exact position of child rights as a legislative subject. As noted earlier, it is not a matter listed under any of the legislative lists. This therefore implies as is the case with all residual matters, child rights as a legislative subject is not under the exclusive control of any of the houses with each state retaining discretion as to enactment of laws guaranteeing and protecting the rights of the child. Thus, in cases where there is a federal legislative enactment explicitly dealing with child rights or the protection of children, it is not applicable in the states of the federation unless expressly incorporated into domestic legislation by an enactment of the state house of assembly. However, Section 12 (2) of the Constitution explicitly vests in the National Assembly powers to ‘make laws for the Federation or any part thereof with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty’. According to Egede, the CRA can be deemed legislation applicable to any part of the federation given the status of the CRA as being an implementation of an international treaty.²⁴ A key question in this regard is the appropriateness of such a description in view of the nature of the Act itself. According to UNICEF, the CRA ‘aimed at principally enacting into law in Nigeria the principles enshrined

²² Item 68

²³ Items 27-29

²⁴ i.e. the Convention on the Rights of the Child

in the Convention on the Rights of the Child (CRC) and the AU charter on the Rights and Welfare of the Child'.²⁵ In the first state report submitted by Nigeria to the Committee on the Rights of the Child, the government considered the Act (then a draft bill) as 'taking into consideration the provisions of the Convention' with the rights being contained in the Act being 'well articulated in the draft bill'.²⁶ The third report submitted in 2008 regarded the substantive Act as 'domesticating the provisions of the CRC'.²⁷ This corroborates the view of Egede with regard to the status of the Act. This in his view implies that the Act would be applicable even in the territory of a dissenting state in so far as it has been validly enacted.²⁸ This is however not the case in Nigeria as the CRA is deemed inapplicable in states that have failed to domesticate the Act. A reason for this outcome, it is submitted is linked to the nature of the federalist system of government. It must be noted that the CRA itself was only implemented in 2003, ten years after it was proposed as a draft bill. It was opposed at the time for various considerations, including religious and cultural considerations, considerations key to the development of a federalist concept.²⁹

The discussion above to a large extent highlights a complicated system of ratification of the CRC in the Nigerian federation, which is regarded by Woehrling the most important disadvantage of federalism. On the one hand, there is the protection of the legislative autonomy of states and prevention of 'legislative encroachment' by the federal legislative body. On the other hand, there is the need for a cross-carpeted guarantee of individual rights and freedoms not only in line with existing international standards, but also in tenor with constitutional guarantees of rights and freedoms to 'every person'.

What Hope for Universal Child Rights Protection in a Federalist System?

As stated above, federalism as a concept decentralizes power and in the process enables citizens to participate more effectively in political life and confers greater influence on a smaller section of people.³⁰ Applying this to the Nigerian federation, this enables states to enjoy discretion in terms of enforcing the CRA and as a result, a dissenting state is not obliged to apply the

²⁵ UNICEF Factsheet: Nigeria available at http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf

²⁶ State Report to the Committee on the Rights of the Child (1995) CRC/C/8/Add 26

²⁷ Third and Fourth State Report to Committee on Rights of the Child (2009) CRC/C/NGA/3-4

²⁸ Egede, E, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' *Journal of African Law* (2007) Vol. 51 No.2 (2007), 249-284, 258-259

²⁹ http://www.cleen.org/nigeria_ngo_report_OMCT.pdf 6.

³⁰ Woehrling, *Federalism and Human Rights* in Breitenmoser, Ehrenzeller and Sassoli (eds) *Human Rights, Democracy and the Rule of Law* (2007), 897

provisions of the Act. Furthermore, it also prevents the federal legislature from exercising authoritarian control over state legislature which, had it been exercisable, could lead to abuse of power. However, there is also the tendency for such power to be abused at a sectorial level,³¹ an outcome, which may have negative effects for the protection of fundamental rights and freedom, in this case, child rights. There is noticeable in the enactment of legislation a lack of involvement of the people and the populace. With respect to the constitution for instance, Tamuno observes as follows:

Despite the preambles being replete with pretentious phrases such as ‘we the people’, the elite rather than the masses of the poor and marginalized in society were the ones who played key roles in the making of these documents. Although committees and commissions have always been established, the governments have always handpicked the committee members, and the mandates of the commissions were usually defined in such a way that consultation, mobilisation, education, dialogue and debate on a nation-wide process were never on the agenda³²

With particular reference to the origin of federalism, Ikpe also observes the emergence of the Nigerian federation as being a product of a ‘colonial fiat’ as opposed to the universal agreement of the Nigerian population which fact is corroborated by the existence of various conflicts since independence, most notably the Nigerian civil war.³³ The question of legitimacy of government, especially in the context of a constitutional democracy remains a highly contentious issue at the highest realm of government in Nigeria. Even at lower levels of government, it may be argued that the position is the same to a large extent. There is little evidence on the part of state governments that have failed to incorporate the CRA that such a decision has been taken following consultation with the populace in some form. This may not be unconnected with Williams’ assertion of democratic governments having an ‘almost irresistible temptation to forget the true source of their authority and to encroach upon individual rights and liberties in an unwarranted manner.’³⁴ In the case of child rights, it may be argued that such an outlook is responsible for a failure to consider children as members of society whose interests are in need to protection.

³¹ Ibid.

³² Tamuno *supra* n.1, 18

³³ Ikpe, U.B, ‘Public Culture and National Integration in multicultural states: Comparative observations from the United States and Nigeria’ available at <http://www.tandfonline.com/doi/pdf/10.1177/1477570004041687>

³⁴ Williams F.R.A. *Fundamental rights and the prospect for Democracy in Nigeria* (1960). 1077 (available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6217&context=penn_law_review&sei-redir=1&referer=https%3A%2F%2Fscholar.google.co.uk%2Fscholar%3Fstart%3D940%26q%3Dhuman%2Brights%2Band%2Bthe%2Bconstitution%2Bin%2Bnigeria%26hl%3Den%26as_sdt%3D0%2C5%26as_vis%3D1)

For the purpose of this discussion, one major method of reconciling federalism and child rights is rooted in the recognition of the nature of rights and child rights as a specific subject. A major aspect of the concept of rights is its universal application. Various human rights instruments affirm the universal nature of rights and while this concept has been challenged by various scholars, such challenges have been more concerned with the universality of a particular conception of rights as opposed to the universality of the underlying tenets grounding the conception of rights. This is particularly more pronounced with respect to the CRC, which has been described for instance as being ‘more intrusive into areas of traditional state control’ than previous human rights instruments ratified by the United States.³⁵ With respect to Nigeria, it is possible to suggest that the notion of children being in need of protection through fundamental rights should be regarded as being applicable to all children in Nigeria. Under the constitution, the fundamental rights provisions are regarded as being applicable to ‘every person’, which according to Egede, should also be interpreted as including children.³⁶ Thus, the recognition of children as right holders, while not necessarily explicit should be universally accepted, at least as a result of the supremacy of the constitution. However, it must be noted that there is no other legislation specific to groups of people in Nigeria in the manner of the Child Rights Act. For such a legislation to be universally accepted, there is a need to reconcile differing ethnic and religious notions regarding the child, which are constitutionally guaranteed.³⁷ A possible means of achieving this goal is, as suggested by the Committee on the Rights of the Child, the inclusion of child rights as a legislative subject under the concurrent legislative list, by which method the CRA may be applied in states that have not domesticated the Act.³⁸ A further implication of such a step is the supremacy of the CRA over existing legislation with the CRA prevailing over state legislation in cases of inconsistency. One must in doing so carefully consider the effect of such an outcome on the perception of states regarding their legislative powers. The notion of children as beings in need of protection must be universally recognized. This must nevertheless be approached with caution. For as noted by Woehrling, the universality and intangibility of rights require a uniform application by courts and federalism in its nature

³⁵ Kilbourne, Susan, The Convention on the Rights of the Child: Federalism Issues for the United States (1998) *Georgia Journal on Fighting Poverty* Vol 5. No.2, 327-334,330

³⁶ Egede supra n.28

³⁷ Section 315 of the Nigerian constitution contains saving clauses for Islamic and customary law. Item 61 of the Second Schedule to the Nigerian constitution also provides that marriages contracted under Islamic and customary law are excluded from family law powers vested exclusively in the federal legislature.

³⁸ UN Committee on the Rights of the Child (CRC), *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding observations - Nigeria*, 21 June 2010, CRC/C/NGA/CO/3-4, available at: <http://www.refworld.org/docid/4efb2c612.html> [accessed 17 May 2018], para 8

serves as a constraint as it creates different legal regimes.³⁹ One may therefore in this context align with a view of rights as being a ‘balance of interests’ in which case federalism enhances its cause given the underlying ‘balancing of divisions’ notion grounding the concept in itself. The particular view adopted of child rights in itself is key to the success of its protection under the Nigerian system.

The problem of compelling states to adopt the domesticated provisions of a treaty is not peculiar to the Nigerian federation and in Canada, the federal government concludes a ‘federal-provincial treaty agreement’ where provinces agree to fulfil their responsibility at the implementation stage in return for involvement in the ratification process.⁴⁰ To an extent, this may have been adopted with respect to the CRA with opposition from representatives of various states being responsible for the delay in its implementation. However, there is no evidence of such express state undertaking with states only being urged to implement the CRA on other grounds different from a matter of obligation. In any case, such a step may be too late in the context of the CRA. Another possible consideration is a constitutional amendment to ensure that the CRA, being the domestic implementation of a treaty, has direct effect. Section 4(5) of the constitution considers an act domesticating a treaty has prevailing over any other inconsistent law. Thus, any law contrary to the CRA may be deemed inconsistent and void under the constitution. This however does not imply that the CRA has effect in a state for instance where the issue is a lack of legal protection for the child as opposed to inconsistent legislation.

There is also the possibility of reviewing the legislative lists under the constitution in order to ensure that the protection of children is regarded as a specific subject involving interaction between state and federal legislative houses. It is noteworthy that the current legislative lists in the Nigerian constitution to a large extent reflect the position under the 1979 constitution, which was enacted in a political era where human rights had not been fully developed as a legal subject, even in the international community. This is not the case today and as a result there is a greater need for legislative responsibility to be defined explicitly in this area. For as rightly noted by Tran, human rights constitute too vast and diffuse a legislative subject to be assigned

³⁹ Woehrling J., *Federalism and Human Rights* in Breitenmoser, Ehrenzeller and Sassoli (eds) *Human Rights, Democracy and the Rule of Law* (Dike Verlag, 2007), 905

⁴⁰ *Ibid.* 905

exclusively to either one of the governmental levels.⁴¹ The Committee on the Rights of the Child has recommended that it be included in the concurrent legislative list to ensure the applicability of the CRA in all states of the federation without controversy.⁴² This is plausible for several reasons, chief of which is the fact that it ensures children are protected as right-holders where no such protection existed without necessarily undermining the power of states to implement legislation specifically suited to meet the needs of children in each state further to the CRA. This is not to imply that such an approach is without its challenges. States dissenting to the adoption of the CRA may not necessarily be satisfied with having legislative powers in that respect, especially in view of the fact that the CRA remains supreme in the event of conflict between the CRA and other legislation. This may lead to certain compromises and adjustments being tolerated which, while beneficial to the preservation of federalism, may be inimical to the interests of the child.

Engagement of Child Rights with Culture under the Federal System

The question that may arise in this instance therefore is whether there is a way by which a ‘rights culture’ can be established which is consistent with the concept of cultural pluralism. One would argue in this instance that such a possibility exists. In making such an argument, it has been observed that an ‘excessive rhetoric of rights’ could be ‘counterproductive and harmful to interpersonal relationships’. According to Osiatynski,

An excessive rhetoric of rights can be counterproductive and harmful to interpersonal relationships. Nevertheless, in cases of abuse, violence or drastic neglect, children should be protected even within their own family. But such protection should be assured by family law and penal law alone, without the need to invoke the concept of rights⁴³

This should not be taken to imply that the concept of rights cannot be directly invoked in certain circumstances. For as he rightly observes,

⁴¹ Tran, Luan-Vu N, *Human Rights and Federalism: A Comparative Study on Freedom, Democracy and Cultural Diversity* (Martinus Nijhoff Publishers, 2000), 205

⁴² *Concluding observations: Nigeria* supra n.38

⁴³ Osiatynski, Wiktor, *Human Rights and Their Limits* (CUP, 2009), 203.

However, when the law does not offer such protection-or when the law exists but is neglected-the assertion of rights can protect victims and compel state authorities to issue and enforce proper laws⁴⁴

A contextual approach to societal practices does not preclude legislative prohibitions. An increased awareness of the negative effects of certain harmful practices created by increased sociological engagement with these practices has not necessarily resulted in its eradication.⁴⁵ Thus in certain instances, legal prohibitions may be necessary for legitimizing growing societal intolerance with respect to certain behaviour evidenced as inimical to the development of its members. However, it remains the case that such legal prohibitions would be most effective where an ‘enabling environment’ has been created through effective education and establishment of social conventions which serve in themselves as an opposition to those practices sought to be prohibited under the Act.

A notorious criticism of children’s rights documents is the fact that such documents are based on Western perspectives and fail to reflect other cultures.⁴⁶ In an ethnically diverse country such as Nigeria, a universalist perspective of rights in the manner espoused by the CRA or CRC may give rise to such criticisms especially where cultural values clash with rights protection standards. Building an effective rights framework must therefore entail some form of interaction between rights and culture as opposed to an outright imposition of rights on culture. Having said this, culture may be used as an instrument to protect selfish political interests. It is hardly inconceivable that the main proponents of the ‘cultural defence’ to the influence of human rights are the political elite who are by no means directly involved in the ‘cultural practices’ serving as the basis for their justification.⁴⁷ In Nigeria for instance, there is a tangible disconnect between the political elite and the individuals whose interests they claim to protect particularly as is related to children. It is therefore difficult to argue that the ‘culture’ defence which serves as a hindrance in the universal applicability of the CRA is specifically

⁴⁴ Ibid.

⁴⁵ Ibekwe, PC, Onoh, RC, Onyebuchi, AK, Ezeonu, PO and Ibekwe, RO, ‘Female genital mutilation in Southeast Nigeria: A survey on the current knowledge and practice’ (2012) *Journal of Public Health and Epidemiology* Vol. 4(5), pp. 117-122.

⁴⁶ Harris- Short, S, ‘International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child’ (2003) *Human Rights Quarterly* Vol 25, Iss 1, 130-181

⁴⁷ Kaime, Thoko, ‘The Convention on the Rights of the Child and the cultural legitimacy of children’s rights in Africa: Some reflections (2005) 2 *African Human Rights Law Journal* 221-238

directed towards protection of children. This is especially given the fact that as shown by empirical research, children are relatively unaware of their status as rights holders.⁴⁸ In a sense, one could therefore argue that the cultural defence in the Nigerian context is more symbolic of a paternalistic and elitist view of the best interests of children.

Concluding Thoughts

In conclusion, one notes the relationship between human rights and federalism as a highly complex one, both in a political and socio-cultural context. Federalism in itself harnesses the concept of diversity in population in various context and in a sense attempts to 'satisfy all comers' in the hope that such an approach fosters national integration and development. Human rights on the other hand considers as fundamental to its existence a 'transcendental notion' of rights based on a set of shared characteristics considered fundamental to the notion of a common humanity. As is the case with federalism, there is recognition of the concept of diversity among groups, which is nevertheless subject to the need to protect individual rights and freedoms. In the context of child rights in Nigeria, it is important to understand that child rights protection as symbolized by the CRA is not necessarily at odds with the notion of federalism. In order to ensure such an outcome, the philosophies grounding both concepts must be effectively harmonized. For instance, child rights in its universalistic sense regards the submission of competing cultural beliefs and value systems to the protection of the welfare of the child. Similarly, federalism aims at reconciling different cultures and submitting it to the protection of the overall interest of the federation albeit through a different approach of granting limited autonomy to groups comprising the federation. Notwithstanding the distinction in method, a useful starting point in reconciling child rights and federalism as far as the Nigerian state is concerned is by recognising the similarity in their objective, which is the protection of an overall interest that transcends existing divisions in groups of people. This view is corroborated by Kilbourne who concludes thus on federalism and the CRC in the United States:

The United States system of federalism should not be a barrier to ratification and implementation of the Convention. It may be true that it would be bad policy or bad politics for the federal government to "interfere" in traditional state functions such as family law, education, and juvenile justice. As a matter of constitutional doctrine,

⁴⁸ See Ejeih, M.U.C and Akinola, O.B, 'Children's Rights and Participation in Schools : Exploring the Awareness Level and Views of Nigerian Primary School Children (2009) *Elementary Education Online* 8 (1), 176-182

however, ratification of the Convention, and enactment of federal legislation pursuant to the Convention, would not necessarily offend or imperil federalism values.⁴⁹

Another useful mechanism, especially as an interim measure is the enforcement of the provisions of the CRA on the basis of its fundamental nature not only to the interest of the child, but also to the Nigerian state. For instance, Section 17 of the Constitution regards as a fundamental objective of government policy ‘the protection of the child from exploitation and neglect’.⁵⁰ The inclusion of this as a fundamental objective to an extent highlights its importance, especially in the context of other child rights issues such as the right of a child to leisure and play. The exclusive legislative list regards matters incidental to fundamental objectives a matter for exclusive federal legislation. Thus, it may be argued that to the extent as the CRA applies to protect the child from exploitation and neglect, dissenting states are bound by its provisions. Although such states could argue in the context of legislative autonomy that existing laws already protect such interests, the CRA may retain legislative supremacy in such areas. This is not incompatible with federalism for federalism does not entail equality in division of powers, neither does it by definition aim at transferring powers from a central authority to a coalition of regional or provincial authorities as appears to currently be the case with respect to child rights protection in Nigeria. Such a position is untenable, given its inconsistency with constitutional provisions on division of legislative powers. It is therefore encouraged that for the purpose of protecting the rights of the child, the CRA should be universally applicable at the very least to the extent provided by the provisions of the constitution. This would by implication answer, though not completely, a charge against federalism of crystallizing differences and making it impossible for people to rise above their loyalties to a higher order.⁵¹

Conclusion

This paper has examined the relationship between federalism, child rights and culture with particular emphasis on the Nigerian legal system. While the relationship is a highly complex one, it has been argued that these notions can be effectively harmonized in a federal legal system. It has been particularly suggested that federalism should work to serve the interests of

⁴⁹ Kilbourne *supra* n.34 ,334

⁵⁰ Section 17(3)

⁵¹ Nwabueze Ben, A constitutional history of Nigeria (C.Hurst & CO, 1983), 147

rights protection for which purpose certain elements of it may require revision. It is also the view of the author that interaction and engagement with culture is highly essential for developing an effective child rights framework.

References

Amuwo, Agbaje, Suberu and Herault (eds), *Federalism and Political Restructuring in Nigeria* (Spectrum Books, 1998)

Nwabueze Ben, *A constitutional history of Nigeria* (C.Hurst & CO, 1983)

Osiatynski, Wiktor, *Human Rights and Their Limits* (CUP, 2009)

Nwabueze, B.O, *Federalism in Nigeria under the Presidential Constitution* (Sweet and Maxwell, 1983)

Hotlmaat and Naber, *Women's Human Rights and Culture: From deadlock to dialogue* (2011, Intersentia publishing)

Breitenmoser, Ehrenzeller and Sassoli (eds) *Human Rights, Democracy and the Rule of Law* (Dike Verlag, 2007)

Attorney-General of Lagos State vs. Attorney-General of the Federation (2003) 6 S.C

Tran, Luan-Vu N, *Human Rights and Federalism: A Comparative Study on Freedom, Democracy and Cultural Diversity* (Martinus Nijhoff Publishers, 2000), 205

Kaime, Thoko, 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections (2005) 2 *African Human Rights Law Journal* 221-238

Ejeih, M.U.C and Akinola, O.B, 'Children's Rights and Participation in Schools : Exploring the Awareness Level and Views of Nigerian Primary School Children (2009) *Elementary Education Online* 8 (1), 176-182

PC Ibekwe, RC Onoh, AK Onyebuchi, PO Ezeonu and RO Ibekwe, Female genital mutilation in Southeast Nigeria: A survey on the current knowledge and practice (2012) *Journal of Public Health and Epidemiology* Vol. 4(5), pp. 117-122.

Harris- Short, S, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) *Human Rights Quarterly* Vol 25, Iss 1, 130-181

Symonides, J, 'Cultural Rights, a neglected category of human rights' (1998) *International Science Journal* Vol 50, Iss. 158, 559-572, 559

Kilbourne, Susan, The Convention on the Rights of the Child: Federalism Issues for the United States (1998) *Geographical Journal on Fighting Poverty* Vol 5. No.2, 327-334, 330

Wright, S, 'The politicization of culture' (1998) *Anthropology Today* Vol 14 No 1, pp 7-15

Ikpe, U.B, 'Public Culture and National Integration in multicultural states: Comparative observations from the United States and Nigeria' available at

<http://www.tandfonline.com/doi/pdf/10.1177/1477570004041687>

Williams F.R.A. Fundamental rights and the prospect for Democracy in Nigeria (1960). 1077 (available at

[http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6217&context=penn_law_](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6217&context=penn_law_review&sei-)

[redir=1&referer=https%3A%2F%2Fscholar.google.co.uk%2Fscholar%3Fstart%3D940%26q%3Dhuman%2Brights%2Band%2Bthe%2Bconstitution%2Bin%2Bnigeria%26hl%3Den%26as_sdt%3D0%2C5%26as_vis%3D1\)](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6217&context=penn_law_review&sei-)

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at:

<http://www.refworld.org/docid/3ae6b38f0.html> [accessed 30 April 2018]

UNICEF Factsheet: Nigeria available at

http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf

ESCR General Comment No 21: Right of everyone to take part in Cultural Life (2009) E/C.12/GC/21

UNESCO Universal Declaration on Cultural Diversity (2001) available at

<http://portal.unesco.org/en/ev.php->

[URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last accessed 17th May, 2018)

UN Committee on the Rights of the Child (CRC), *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding observations - Nigeria*, 21 June 2010, CRC/C/NGA/CO/3-4, available at:
<http://www.refworld.org/docid/4efb2c612.html> [accessed 17 May 2018]

Frame, Legal Consciousness and Participation: A Case Study of Immigration Bail Hearings

Susannah Paul

This article considers applicant participation in tribunal hearings with reference to notions of legal consciousness and frame, in particular, the light in which a legal representative conceives the hearings. The work examines the role of legal representatives' in constructing the hearing environment and the nature of proceedings. This article uses a case study of the Immigration Bail Hearings involving semi-structured interviews with legal representatives. The study of immigration bail hearings found that a legal representative's understanding of the nature of the process appears to inform and mediate their approach to their client's involvement. It appeared that there was a link between the legal representative's perception of the system being adversarial in nature and the practice of viewing the active oral contributions in terms of liability and risk. Conversely, the legal representatives who viewed the system as being less adversarial and more informal and inquisitorial in nature spoke positively of the benefits of the involvement of the bail applicant. The article calls for legal representatives to be aware of their own legal consciousness and frames and to reflect on the manner in which these may structure the hearing environment.

1. Background and aims

This work stemmed from a research project in which the impact and implications of the use of video link technology in Immigration Bail Hearings was studied. The use of video link technology was introduced in the UK in 2006 and the reasoning behind the introduction was to save money on transportation costs and reduce the inefficiency issues associated with detainees not being brought to the court on time.¹ In the UK there has been a general move towards the use of 'online dispute resolution' and the Ministry of Justice has stated that operating more 'virtual hearings' is a policy intention.² The use of video link technology has

¹ BID and RC, (2008) *Immigration Bail Hearings by video link: a monitoring exercise by Bail for Immigration Detainees and the Refugee Council*. accessed via: https://www.refugeecouncil.org.uk/assets/0001/7078/RC_and_BID_report_on_Bail_hearings_and_video_links_Mar_08:: date accessed: 25/07/17

² Ministry of Justice and HM Courts and Tribunals. (2016) *Transforming our justice system - summary of reforms and consultation*. September 2016, Cm 9321, accessed via: <https://consult.justice.gov.uk/digital->

featured in court decisions; in 2016 Judge McCloskey warned that ‘the mechanism of evidence by video link’ was ‘unsatisfactory’ in certain contexts.³ Notably, immigration bail hearings have been distinguished from other types of case. In the case of Mohibullah, Judge McCloskey raised concerns relating to the ability to make a detailed scrutiny of demeanour and the ability of the legal counsel to take further instructions amongst other concerns relating to the lack of judicial control and supervision.⁴ Yet Judge McCloskey described what he described as ‘the conventional video link bail hearing, at which the subject is virtually present but making little or no active contribution’ as an instance to be contrasted.⁵ Numerous systematic studies of Immigration Bail Hearings has been conducted over the past ten years and the use of video link technology has been routinely cited as a problematic feature of the hearings.⁶

The research from which this paper emanates was designed to investigate the use of video link technology in immigration bail hearings. The data was generated through five one-to-one semi-structured interviews with legal representatives who represent clients in Immigration Bail hearings in Scotland. It should be noted that this study was not set up to investigate legal consciousness or frame; the concept and it’s analytic power have been applied to the data themes. It therefore does lack some of the methodological validity of work which has been set up in order to explore the phenomena of legal consciousness and frame directly.

There also remain drawbacks concerning the data itself. The sample size of 5 participants was small this was due to the relatively short time period available for completing the research; it was completed in partial fulfilment of a Master’s Degree. While it is important not to

[communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf](https://www.refugeecouncil.org.uk/assets/0001/7078/RC_and_BID_report_on_Bail_hearings_and_video_links_Mar_08.pdf): date accessed: 3/06/17

³ R (on the application of Mohibullah) v Secretary of State for the Home Department [2016] UKUT 561 (IAC) at 90

⁴ Ibid

⁵ Ibid

⁶ BID and RC, (2008) *Immigration Bail Hearings by video link: a monitoring exercise by Bail for Immigration Detainees and the Refugee Council*. accessed via:

https://www.refugeecouncil.org.uk/assets/0001/7078/RC_and_BID_report_on_Bail_hearings_and_video_links_Mar_08.pdf: date accessed: 25/07/17, Cardiff University Law School Pro Bono Scheme Bail Observation Project 2015-16: Final report, accessed via: <https://bailobs.files.wordpress.com/2016/09/cardiff-bail-observation-report.pdf>: date accessed 3/08/17, Immigration Bail Hearings: A Travesty of Justice? Observations from the Public Gallery (2011), accessed via: <https://closecampsfild.wordpress.com/bail-observation-project/>: date accessed 14/05/17, The Bail Observation Project, Still a Travesty: Justice in Immigration Bail Hearings (2013), accessed via: <https://closecampsfild.wordpress.com/bail-observation-project/>: date accessed 14/05/17

overstate the aims of the research, it is hoped that the findings will provide a snapshot of the immigration bail hearing process and be used as a starting point for developing and guiding further enquiry.

2. The Immigration Bail Hearing

The Immigration Act 2016 has added confusing terminology to immigration bail. By removing the concept of ‘temporary admission’ the act considers anyone that does not have leave to remain in the UK to be on immigration bail.⁷ Immigration bail also still refers to what people apply for to be released from immigration detention and it is this form of immigration bail that this paper refers to. People held in Immigration detention may apply for bail if they have been in the UK for at least 8 days. The Immigration Act 2016 introduced the use of automatic bail hearings to be arranged for those who have been in detention for four months, or if four months have passed since their last immigration bail hearing.⁸

The judge in an immigration bail hearing effectively has to balance the applicant’s right to liberty with the risk that they may abscond.⁹ The judge is directed by the guidance note that they should grant bail ‘where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control.’¹⁰

2.1. Fair hearing rights

Article 6 of the European Convention on Human rights and Article 6 of the Human Rights Act protect the right to a fair hearing. It is striking to note however, that civil rights have been distinguished from public and administrative matters and the articles have been judged to not apply to immigration matters.¹¹ It was held by the court in 2012 in the case of DD that although ‘detention pending deportation affected an individual’s civil rights it does not determine them’.¹²

⁷ Immigration Act 2016, s.61.

⁸ Ibid, paragraph 11, Schedule 10.

⁹ Clements. (2012) President of The First-Tier Tribunal Immigration and Asylum Chamber. *Bail Guidance for Judges Presiding over Immigration and Asylum Hearings*. Presidential Guidance Note No 1 of 2012 at para 4.

¹⁰ Ibid

¹¹ Clayton, G. (2014). *Textbook on Immigration and Asylum Law*. Oxford University Press, 6th edition, p.242, Maaouia v France (2001) 33 EHRR 42

¹² R (on the application of BB) v SIAC and SSHD [2012] EWCA Civ 1499

2.2. Participation and the Adjudicative set up

It was hoped that the introduction of tribunals would create an accessible adjudicatory setting that was less formal than courts.¹³ The rules of procedure suggest that ‘avoiding unnecessary formality and seeking flexibility in the proceedings’ is part of treating a case ‘fairly and justly’.¹⁴ The procedural rules of the tribunal explain that ‘fairly and justly’ include ‘ensuring so far as is practicable that the parties are able to participate fully in proceedings.’¹⁵

The setup of tribunal hearings draw from both adversarial and inquisitorial adjudicatory models. The terms can be used to describe the extent and nature of the judge’s involvement in proceedings.

In an adversarial hearing, the idea is that each side to a dispute presents their position and argument and argues against the case of their opponent. The judge plays the role of an ‘impartial referee’ ‘holding the ring’ between the parties and considering only the evidence and arguments put forwarded by each party when making their decision.¹⁶ The adversarial hearing has a formal nature and there are norms relating to the conduct of the hearing; parties present their cases one at a time and the involvement of parties is usually strictly prescribed according to their role and function in the proceedings. In an inquisitorial hearing, the judge takes on a more proactive role in identifying issues, gathering evidence and governs the participation of the parties. There is a sliding scale of involvement in proceedings and this ranges from the judge asking questions to garner evidence for their decision making to the judge issuing directions for matters to be investigated. Alongside the involvement of the judge there is a general emphasis on employing cooperation and participation in reaching the decision. Immigration tribunal hearings tend to be adversarial in nature although it is not easy to generalise and hearings can fluctuate in the adjudicative model for many reasons including

¹³ Genn, H. (1993). *Tribunals and Informal Justice*. The Modern Law Review, vol. 56, issue 3, Blackwell Publishing Ltd

¹⁴ Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 No. 2604 (L.31) s.2(2)(b).

¹⁵ Ibid, s.1(2)(1)

¹⁶ Thomas, R., (2012). *From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals in The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspective*. (ed.) L. Jacobs and S. Baglay, 51-70. Ashgate, 2013, p.51.

the nature of the issues being considered, the abilities of parties to contribute and other factors.¹⁷

3. Theoretical perspectives

3.1. Frame

The concept of Frame was first suggested by Goffman in 1974 and has been employed and expanded since. Hawkins describes a frame as 'a structure of knowledge, experience, values and meanings that decision-makers employ in deciding'.¹⁸ Hawkins notes that frames 'control and organize the decision making raw materials' and frames both 'constitute reality and reflect and sustain a social reality'.¹⁹ Hawkins has expanded his analysis to encompass the environment in which frames arise, exist and operate.²⁰ He uses the descriptors 'surround' and 'field' to help understand the connections between the decision making environment and the processes the decision maker engages with when coming to their conclusions.²¹ The surround forms part of the broad setting in which the decision making takes place; it should be understood to encompass the environment for individual decision making and also the activities of the legal bureaucracies under which the decisions are being made.²² The surround can change by political, economic changes or salient public events and other circumstances, and should be thought of as the environment in which the organisational and decision making is occurring.²³ The conceptual boundary between the surround and the field is relevant here. The decision field operates within the social surround, it denotes the organisationally defined and constructed setting in which the decisions are made.²⁴ In the context of Immigration Bail Hearings, the field would encompass the laws themselves, alongside the policies and expectations of the organisation. It is the organisation which controls and defines the field, whereas it is the external conditions and wider social surroundings which influence the surround.²⁵ Hawkin's 'frame, surround and field' approach

¹⁷ Ibid, p.69.

¹⁸ Hawkins, Keith (2003) 'Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency', Oxford University Press, p. 52.

¹⁹ Ibid, p. 57.

²⁰ Ibid

²¹ Ibid, p. 48.

²² Hawkins, Keith (2003) 'Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency', Oxford University Press, p. 48.

²³ Ibid, p. 49.

²⁴ Ibid, p. 50.

²⁵ Hawkins, Keith (2003) 'Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency', Oxford University Press, p. 49.

is particularly useful due to the political setting of immigration decision making and has been employed by Jessica Hambly in her examination of legal representatives in asylum appeals hearings.²⁶

3.2. Legal Consciousness

Legal consciousness has formed a central theory in socio-legal studies over the last thirty years.²⁷ It has been said to have emerged out of the concern that law and society researchers were looking through the lens of law too much and not penetrating enough into the society aspect of their enquiry.²⁸ It is, therefore, heavily influenced by sociological thought.

Halliday and Morgan describe legal consciousness as studying the ‘background assumptions about legality which structure and inform everyday thoughts and actions’ which they consider are ‘taken-for-granted’ and ‘not-immediately-noticeable’²⁹ Susan Silbey, a prominent legal consciousness theorist has described legal consciousness as forming part of the reciprocal processes whereby the meaning that individuals give to their world becomes patterned, stabilised and objectified, and suggests that once the meanings become institutionalised they become ‘part of the material and discursive systems that limit and constrain future meaning-making’.³⁰

Foucault’s understanding of power has influenced legal consciousness studies.³¹ He suggested that ‘power is employed and exercised thorough net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power... individuals are vehicles of power, not its points of application.’³²

²⁶ Hambly, Jessica (2017) ‘Advocates in Asylum Appeals’, University of Bristol

²⁷ Richards, Sally. (2015) ‘Unearthing bureaucratic legal consciousness: government officials’ legal identification and moral ideals’, *International Journal of Law in Context*, II, 3, Cambridge University Press, p. 302.

²⁸ Cowan, Dave. (2004) ‘Legal Consciousness: Some Observations’, *Modern Law Review*, Blackwell Publishing, p. 930.

²⁹ Halliday, Simon, and Morgan, Bronwen (2013) ‘I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination’, *Current Legal Problems*, Vol. 66, accessed via: <https://academic.oup.com/clp/article-abstract/66/1/1/311191>, date accessed 01/05/18 p.2.

³⁰ Silbey, Susan. (2005) ‘After Legal Consciousness’, *Annual Reviews Law and Social Sciences*. P.333

³¹ Cowan, Dave. (2004) ‘Legal Consciousness: Some Observations’, *Modern Law Review*, Blackwell Publishing

³² Foucault, Michel, (1976) ‘Two Lectures’ reproduced by Gordon, Colin, ‘Michel Foucault: Power/Knowledge, London (1980) cited by Cowan, Dave. (2004) ‘Legal Consciousness: Some Observations’, *Modern Law Review*, Blackwell Publishing, p. 929.





Legal consciousness has predominantly been used to consider the ways in which law is understood and experienced by ‘ordinary citizens’ outwith the formal sites and structures of law.³³ Silbey suggested in her work ‘After Legal Consciousness’ that the most promise appears to exist in work which looks at institutional practices.³⁴ I suggest that legal consciousness has been employed effectively and with analytical promise in examining the ‘internal’ processes of law. Sally Richards used legal consciousness to examine the government officials approach in the Refugee Review Tribunal of Australia and considered decision makers ideals in terms of their legal identification.³⁵

Legal consciousness would appear to form one aspect of ‘frame’ since it can be understood to involve the individuals’ background assumptions about law, and therefore forms the structure of knowledge and meaning that individuals use to interact with the world. This work will draw from and align these theories in order to examine legal representatives’ background assumptions about the structure of immigration bail hearings and how these may reflect and produce the frame through which they understand, approach and interact with bail hearings and the manner in which this may affect participation of applicants in the hearings and in turn the fundamental dynamics of the hearings.

4. A Case Study from the Bail Hearing: Legal Representatives

As was mentioned above, the study aimed to examine the manner in which the use of video link technology impacted on the participation of the applicant in the bail hearing. It emerged from the data that the legal representatives had varying opinions on the benefits of calling the applicant to answer questions and speak during the hearing and it is these differing opinions that this study is aiming to unpack. The legal representative’s view of applicant participation

³³ Halliday, Simon, and Morgan, Bronwen (2013) ‘I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination, Current Legal Problems, Vol. 66, accessed via: <https://academic.oup.com/clp/article-abstract/66/1/1/311191>, date accessed 01/05/18 p.4.

³⁴ Silbey, Susan. (2005) ‘After Legal Consciousness, Annual Reviews Law and Social Sciences. P.360

³⁵ Richards, Sally. (2015) ‘Unearthing bureaucratic legal consciousness: government officials’ legal identification and moral ideals’, International Journal of Law in Context, II, 3, Cambridge University Press, p. 301.

was gauged through questions asking whether or not they routinely called the bail applicant they were representing to answer questions during the hearing. Follow-up questions then covered the legal representatives reasoning for their approaches. The five legal representatives responses will be considered below, in order to maintain their anonymity, they will be referred to as legal representative 1-5. The numbers refer to the order in which the interviews were conducted. Due to the relatively small nature of the profession in Scotland it has been judged that this is more appropriate than using pseudonyms which denote the participants ethnic background since this may risk making the participants identifiable. The gender of the participants is not considered to risk identification so gendered pronouns have been used.

Three of the legal representatives characterised the participation of the bail applicants as beneficial and the other two legal representatives spoke of the participation of the bail applicant cautiously and in terms of liability and risk. This finding initially suggests that lawyers may, in effect, act as the gatekeepers to their clients participation and hold the power to determine their involvement or exclusion from the hearing. The reasoning behind the lawyers' evaluation of participation appears to be linked to the applicants framing of participation with their understanding of the field; the adjudicative model of the hearing.

4.1. Participation as liability

The two participants, Legal Rep 4 and 5, that reflected on the applicant's active oral participation in terms of liability both described the nature of proceedings in formal language.

'You are making submissions on instructions from a client... so there should only be a need technically for them to be questioned if that is not accepted... So, in my view, unless they are definitely going to be cross examined, by the judge or Home Office, I shouldn't be opening them up to it. I would be doing the Home Office's job for them which I don't think is good for the client.' Legal Representative 4

'I think the judge expects you to have your clients' instructions and therefore your clients there to participate in the hearing; his right is to sit in the hearing and be there, present. The Home Office's job is to question. You can end up in a situation where you are doing the Home Office's job for them by picking and pushing and revealing too much.' Legal Representative 5

The language of ‘submissions’ ‘cross-examination’ and ‘clients instructions’ create the image of a hearing which is formal in nature and structured. Both Legal Rep 4 and 5 raised concerns regarding calling their clients to speak as amounting to ‘doing the Home Office’s job for them’ and opening the client up to attack or scrutiny by the Home Office. These reflections add to the framing of the hearing as operating in a structured manner, with actors having prescribed roles, and the roles taking the traditional adversarial form of presenting your argument and discrediting that of the other side.

The legal reps understanding of the adjudicatory nature of proceedings, as adversarial, could be described as their legal consciousness since it encompasses their assumptions and understandings about the law. This legal consciousness relates to aspects which could be considered as the field of the institutional setting structures the frame through which they approach the bail hearings.

Additionally, Legal Rep 4 and 5 referred to the applicant’s active contribution as risky, explaining that there was a risk that the applicant would say something that would undermine their bail claim. Both made reference to the legal maxim that a lawyer should never ask a question if they do not know what the answer is going to be. Legal Rep 4 explained ‘quite often when people do have the chance to speak in bail hearings they say things that end up being very problematic’, similarly, Legal Rep 5 said ‘if you pick and push, quite often information is revealed that doesn’t support your client’s case’. Both referred to the risk in terms of losing control of the direction of the hearing by involving the applicant’s oral contributions. To be fair, the reasoning behind the legal reps worries may be based more on procedural factors relating to the immigration system rather than a form of cynicism regarding their client’s cases. In explaining her perspective, Legal Rep 4 situated bail hearings as one aspect of the client’s broader immigration case. Bail applicants will often have immigration and asylum appeals outstanding. Legal Rep 4 explained that:

‘Legally speaking, people want to have two positions; they want to have the position that assists their asylum or human rights claim, that “I cannot go back there because of all the issues associated with going back”, either “my life’s at risk” or “it will tear this family life I have apart” or “I’ll die as a result of this medical condition I have”. But, you need to go into the bail hearing and say “I will go back if you want me to”. So these are two separate and

incompatible decisions and it is very difficult for people to maintain orally, if they are pushed on it by anyone with any skill in cross-examination it's likely to kind of fall apart.'

This consideration highlights very concerning incongruences in the legal system and that, while outwith the scope of this work, appear to be a topic worthy of anxious consideration.

4.2. Participation as Beneficial

There were two main themes that emerged in the accounts of the legal representatives that viewed participation as beneficial; reference to the judge and the concept of creating a conversation or dialogue.

Reference to the judge

The participants that viewed the active oral participation of the bail applicant as beneficial all started by making reference to the judge. It is worthy of note that the judge had not been the focus of the question or the prior discussion in any of the interviews; this would appear to be a theme, rather than a case of the interviewees anchoring their thoughts and answers according to the preceding conversation. When answering questions relating to whether or not they call their clients to speak or give evidence during the hearing, Legal Reps 1 and 3 both referred to the participation of the applicant as being a chance to convince the judge of their client's case for bail. Legal Rep 2 also spoke positively about the active involvement of applicants although, while he focused on the position of the judge, he rationalised his approach slightly differently. His language was also neutral as he considered the requirements of good decision making, referring to the task of the judge being to 'determine if the person is going to follow the conditions of bail'. Legal Rep 2 also used neutral wording when he referred to the fact that the applicant's participation helps the judge decide whether or not they believe the applicant is a credible witness'. The reflections of legal reps 1, 2 and 3 framed their approach as being directed by what the judge would want to know, and what might convince the judge of their clients application. This centring of the judge's perspective is interesting considering that a prominent aspect of inquisitorial style hearings is the active direction and involvement of the judge. This is an interesting contrast to the legal reps who

considered the involvement of the applicants predominantly in terms of liability and appeared to frame the hearing as adversarial in nature.

The other main theme which emerged in the accounts of the legal reps who viewed participation as beneficial was the idea of wanting to create a dialogue the hearing. Legal Rep 2 made reference to the processes of ‘asking questions and responding’, Legal Rep 1 referred to the idea of having a ‘natural conversation’ as being beneficial. Legal Rep 3 spoke of the chance for the judge to ‘hear it from the horse’s mouth’ by involving the applicant directly. All three appear to be valuing a natural form of communication in the hearing, both in making reference to the concept of the dialogue itself and the language they choose to describe it. The language that Legal Reps 1, 2 and 3 used was notably non-legalistic, it was conversational and employed everyday language. Legal Rep 1 referred to the nature of the bail hearing as being a ‘promise’ that the applicant makes to follow certain conditions. These concepts of natural conversation and dialogue also contribute to the idea of their frame being drawn from an inquisitorial style understanding of the hearing, since in its traditions it values cooperation and solution finding and has accessible and enabling connotations with respect to the applicant’s involvement.

5. Discussion and Conclusion

It appears that the legal representatives understanding of the field, in this case the adjudicative nature and setting of the immigration bail hearing, influences the manner in which they frame the participation of the bail applicants. In this case the legal representatives frame appeared to influence whether or not they called the applicant to actively participate in the hearing. This is noteworthy for a number of reasons, firstly, it leads us to consider what the purpose of the bail hearing really is, as previously discussed above, the legal task is to balance the applicant’s right to liberty with the risk that they may abscond. Since the applicant’s right to liberty is a universal right, it is the consideration of the risk of absconsion which forms the purpose of the hearing.

It initially may appear that the legal representatives act as the gatekeepers to the applicant and their participation. This work has shown that the legal representatives hold differing views on the topic of active participation in the bail hearing. Furthermore, it has shown that if we look

deeper into the reasoning behind the lawyers' points of view, it appears that the lawyers understanding and consciousness regarding the adjudicatory nature of proceedings frames and informs their views on the topic. These considerations initially identify the power lawyers possess in their choice to include or limit the participation of the bail applicant, then locates this power as operating in response to, and in the confines of, the lawyers perception of the hearing and adjudicatory structure. Other works have considered the power that lawyers possess; Hawkins noted the possibility for the lawyers to possess 'real power' when he explained that 'those supplying information may create a frame for the subsequent exercise of discretion by describing or presenting the case in a particular fashion, thereby setting cases off in a particular direction and producing clear and specific expectations as to what the 'right decision' should be.'³⁶ This work suggests that our understanding of frame can help us identify power as existing with the legal representatives' control. Legal representatives are key actors in immigration bail hearings and they play a key role in the mutual construction of the hearing alongside the judge, Home Office representative and other actors. This work highlights the link between the legal representatives' understanding of the nature of the hearing and their reflection on the participation of the bail applicant. It is suggested that awareness of this is of great importance so that legal representatives can reflect upon the manner in which their frame can impact upon their clients' hearings and may be able to reconsider how they may best utilise their power to structure the hearing.

³⁶ Hawkins, Keith (2003) 'Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency', Oxford University Press, p. 34.

Bibliography

Law, Guidance and Policy Documents

Immigration Act 2016.

Clements. (2012) President of The First-Tier Tribunal Immigration and Asylum Chamber. *Bail Guidance for Judges Presiding over Immigration and Asylum Hearings*. Presidential Guidance Note No 1 of 2012 at para 4.

Ministry of Justice and HM Courts and Tribunals. (2016) *Transforming our justice system - summary of reforms and consultation*. September 2016, Cm 9321, accessed via: https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf: date accessed: 3/06/17.

Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 No. 2604 (L.31).

Cases

Maaouia v France (2001) 33 EHRR 42.

R (on the application of BB) v SIAC and SSHD [2012] EWCA Civ 1499.

R (on the application of Mohibullah) v Secretary of State for the Home Department [2016] UKUT 561 (IAC) at 90.

Books and Articles

BID and RC, (2008) *Immigration Bail Hearings by video link: a monitoring exercise by Bail for Immigration Detainees and the Refugee Council*. accessed via: https://www.refugeecouncil.org.uk/assets/0001/7078/RC_and_BID_report_on_Bail_hearings_and_video_links_Mar_08: date accessed: 25/07/17.

Cardiff University Law School Pro Bono Scheme Bail Observation Project 2015-16: Final report, accessed via: <https://bailobs.files.wordpress.com/2016/09/cardiff-bail-observation-report.pdf>: date accessed 3/08/17, *Immigration Bail Hearings: A Travesty of Justice? Observations from the Public Gallery* (2011), accessed via: <https://closecampfield.wordpress.com/bail-observation-project/>: date accessed 14/05/17.

Clayton, G. (2014). *Textbook on Immigration and Asylum Law*. Oxford University Press, 6th edition,

- Cowan, Dave. (2004) 'Legal Consciousness: Some Observations', Modern Law Review, Blackwell Publishing.
- Foucault, Michel, (1976) 'Two Lectures' reproduced by Gordon, Colin, 'Michel Foucault: Power/Knowledge, London (1980) cited by Cowan, Dave. (2004) 'Legal Consciousness: Some Observations', Modern Law Review, Blackwell Publishing, p. 929.
- Genn, H. (1993). Tribunals and Informal Justice. The Modern Law Review, vol. 56, issue 3, Blackwell Publishing Ltd.
- Halliday, Simon, and Morgan, Bronwen (2013) 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination, Current Legal Problems, Vol. 66, accessed via: <https://academic.oup.com/clp/article-abstract/66/1/1/311191>, date accessed 01/05/18.
- Hambly, Jessica (2017) 'Advocates in Asylum Appeals', University of Bristol.
- Hawkins, Keith (2003) 'Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency', Oxford University Press.
- Richards, Sally. (2015) 'Unearthing bureaucratic legal consciousness: government officials' legal identification and moral ideals', International Journal of Law in Context, II, 3, Cambridge University Press.
- Silbey, Susan. (2005) 'After Legal Consciousness, Annual Reviews Law and Social Sciences. The Bail Observation Project, Still a Travesty: Justice in Immigration Bail Hearings (2013), accessed via: <https://closecampsfeld.wordpress.com/bail-observation-project/>: date accessed 14/05/17.
- Thomas, R., (2012). *From 'Adversarial v Inquisitorial' to 'Active, Enabling, and Investigative': Developments in UK Administrative Tribunals in The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspective*'. (ed.) L. Jacobs and S. Baglay, 51-70. Ashgate, 2013.

Political Positivism, Judicial Moral Reasoning and Judicial Power(s)

Ana Cannilla¹

I. Introduction

Critics of judicial review of legislation tend to frame their scepticism within arguments that sound very familiar to those of legal positivism. In a similar way as critics of judicial review, positivists have been traditionally hostile to judicial moral reasoning (JMR).² In constitutional law, JMR is said to be illegitimate by default for only representatives of the people are entitled to represent citizen's moral views on how the constitutional order should be. The reason, normative positivists claim, is that judges' role is to apply the law and that law's sources consist of social facts such as statutes, customs or precedents and not of moral principles.³ While I agree that the role of judges is to apply the law and not to create it, I argue that the illegitimacy of judicial review is related to specific judicial powers (such as the power to strike down legislation), and not to the fact of judicial moral reasoning. While the latter is unavoidable and even desirable, the former is a prior question of institutional design that is dependent on the role we want for judges.

II. Legal Positivism

That law is a human construction, that is the main contribution of legal positivism to the philosophy of law, which had previously approached law rather as a non-artificial phenomenon well into the 19th century. A good formulation of legal positivism's distinctive claim is Gardner's:

“(LP) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits”.⁴

Some positivists, the so-called exclusive legal positivists, contend that the valid sources of law are social facts, this means acts performed by people. Despite accepting that moral rules may

¹ PhD Candidate in Law, University of Reading.

² See Jeremy Waldron, *Law and Disagreement* (OUP 1999). 33.

³ See Joseph Raz, *Between Authority and Interpretation* (OUP 2009) 345.

⁴ John Gardner, ‘Legal Positivism: 5½ Myths’ (2001) 46 *The American Journal of Jurisprudence* 199, 199.

be incorporated into social facts, exclusive positivists claim that moral rules do not validly count as autonomous or independent sources of the law. Others, the so-called inclusive legal positivists, contend that moral rules can be a valid source of law, particularly in those areas of law where social facts appear exceedingly indeterminate.

Regardless of the differences, one methodological core idea is deducible from the above. All of the positivist theories of law endorse to some extent the “separability thesis”.⁵ The separability thesis states that there is no necessary conceptual connection between law and morality. This means that law and morality are different normative realms which, as I said, may overlap in some degree for some positivists or may not overlap at all for others. Despite differences on this degree, it is clear that positivism claims that the legal validity of acts and rules do not depend on its moral merits. Two relevant consequences follow from this agreement. Firstly, legal validity, the intrasystem validity of any given legal order, is defined by this separation. An act is legally valid whenever it is derived from a social, empirically testable, source and thus, identifying law shall rarely need moral-legal judgement. i.e. an act of Parliament or a court’s ruling, “law in books” or legal conventions or principles as conceded by soft positivism. Secondly, and more importantly, law that *is* -whether in books or in principles- need not coincide with law that *ought* to be. A legally valid and thus enforceable act might be immoral; as it is easy to advert to many unfortunate examples.

But despite the heterogenous literature, positivism still seems to fall short when describing law in real societies. The description or definition of law is not an naïve task. There is a reason, I believe, that philosophers have been unable to come up with a shared concept of law. The concept of law, differently of the concept of politics, economics or history has straightforward consequences in real life. The determination of the concept of law is primarily linked to the determination of legal validity and the whole point of the determination of legal validity is no other than guiding political obligations - even if we distinguish legal validity from legal, political or moral obligation with the finest rigour. In a way, by begging the normative question, positivists might have risked to produce an uncomplete description of law. As in Kipling’s poem *The Elephant’s Child*, positivism has explained what law is; who it involves; where, when

⁵ See HLA Hart, *The Concept of Law* (2nd edn, OUP 1994).

or how it can be found but seems to miss an account of why or what law is *for* in today's democratic legal systems.

In this sense, legal positivism seems to encounter some difficulties in explaining why subjects of law peacefully partake in legal orders. How is it possible that immoral or unpopular legal rules are obeyed in democratic societies? Without resort to violence, why does a system of social ordination work functionally if the law that *ought* need not coincide with the law that *is*? In contemporary democracies, people abide to law mainly to be granted justice, and not to confirm that rules are correctly adjudicated with minor, or with none, moral evaluation. This seems to be particularly true of constitutional democracies, that distinctively claim authority to deploy a set of shared moral and political superior values. Arguably, we should not be too pessimistic about this matter. It would be a very difficult task to keep a legal system working without appealing to whatever moral merit it may possess. Law(s) can be immoral but, most probably, a legal system, as a functional and efficient device that assumes the voluntary subjection of those whose lives aims to order, will necessarily be perceived as mostly moral by those people. Under basic democratic conditions, it would hardly work differently. We know, or we like to think that democracy assumes voluntariness. Thus, in a democratic system, law assumes -and jurists can expect- general *voluntary* obedience to its rules; and not mere habitual or factual obedience that may be achieved through plain force like positivist tend to see it.⁶

In this vein, Dworkin has famously noted that contemporary positivism cannot supply a successful explanation of what law is, let alone what law ought to be.⁷ I agree that a thesis by which law is expected to work (whether decently or not) without requirements of morality is too demanding for modern societies. It would be difficult to make a legal system work on formal source-based law and not on merit-based law, unless, of course, there is some kind of moral merit in a source-based law. As Waldron has put it, without some kind of normative stance the separability thesis and other related features of positivism “look a little odd standing on their own” for today's liberal democratic communities.⁸ In regard to the interest of the

⁶ See Hans Kelsen, *Pure Theory of Law*, (M. Knight tr, University of California Press 1967).

⁷ See Ronald Dworkin, *Law's Empire* (HUP 1986); Ronald Dworkin, 'Thirty Years On' (2002) 115 1655.

⁸ Jeremy Waldron, 'Can There Be A Democratic Jurisprudence?' (2009) 58 Emory Law Journal 675, 712.

present thesis, if we are to explain how law works and how law ought to work today, we should give special attention to what makes people obey the law in a democratic context. Obedience and allegiance in a non-violent context comes at a price, a price that probably has more to do with questions of political morality than with questions on aseptic attempts to describe and use law.

So why do most subjects of law voluntarily submit to a legal system on the first place? Or using Raz's terminology, how can rules act as reasons for action that pre-empts us from following the reasons that would have genuinely guided our behaviour instead? The answers range widely. From a pragmatist view one can think that the main factor for complying with the established rules is to avoid any kind of sanction - whether privation of freedom, a minor fine or plain social repudiation. Also Raz justifies obedience to law in an instrumental way, namely, whenever the subject would likely better comply with her obligations by following the authority's directive. Quite differently, Dworkin argues that members of a political association have a moral duty to honour the responsibilities attached to that membership. Similarly, Rawls develops an idea of fair play by which if one accepts the benefits of cohabitation in a political community, then one has to follow certain civic duties with the rest of the members of that community. An interesting intermediate justification of authority is that of deliberative democracy theorist Habermas, for whom law appeals both to social facts and to an ideally consent based legitimacy.

Indeed, all of these are accounts that differently explain obedience to the law. Now, the assumption of voluntariness that all share is not a general descriptive hypothesis. It is a political idea at the very foundation of modern political authority that is raised in opposition to tyranny or arbitrary government. In my opinion, descriptive positivism cannot satisfactory explain the political meaning of voluntariness in democratic societies. That need not count as an unsurpassable handicap, positivists never meant to give a democratic account of the relation between legal validity and political obligations anyway. However, I think it is relevant to frame the debate of legal validity within democracies, particularly in discussions over the institutional design of democratic regimes. In a democratic scenario, the nature of authority is not only formal, as positivists have tend to see it. In my opinion, a strictly formal description of authority cannot fully explain how legal and political authorities work today in those societies that we

are familiar with. Differently, the nature of authority must rely on other elements that are distinctive of those legal systems we are interested in, namely democratic ones, those in which there is a point in discussing the legitimacy of judicial review. If we are to understand law within a particular political context, a democratic context, we must understand the desiderata or logic of democracy. In this vein, some authors speak of normative positivism, in an attempt to explain the gaps left by descriptive positivist jurisprudence.

III. Normative Positivism

In Jeremy Waldron's opinion, normative positivism is interested in a legal methodology that "is connected with the values that are engaged when citizens deploy it [the law]" since "[T]hey use it also to grasp the desirability of being governed in certain ways rather than other ways".⁹ In particular, normative positivism is a moral claim stating that it is a desirable ideal for the law to be as much as the positivists describe it. It is "the thesis that the law *ought* to be such that legal decisions can be made without the exercise of moral judgement".¹⁰ In this sense, any moral judgment that takes place in legal-decision making should be "condemned and minimized".¹¹ Similarly, Campbell defines ethical positivism as a

"theory that expresses a preference for a certain type of legal system, where [...] there is a set of fairly specific general rules that can be identified and applied without recourse to contentious moral or other speculative matters, a system that it is possible for citizens to understand and follow (no doubt with legal advice in complex areas) and judges to apply without recourse to controversial first-order moral judgments".¹²

This does not mean that normative positivists defend a kind of jurisprudence that sacralises law and imposes on citizens an unlimited moral duty to obey it, in some sort of radical ideological positivism. Normative positivist are fully aware of Hart's "sobering truth":

⁹ Jeremy Waldron, 'Normative (or Ethical) Positivism' in Jules Coleman (ed), *Hart's Postscript* (OUP 2001) 427.

¹⁰ Waldron, 'Can There Be A Democratic Jurisprudence?' (n 15) 167.

¹¹ Waldron, *Law and Disagreement* (n 1) 167.

¹² Tom Campbell *Prescriptive Legal Positivism: Law, Rights and Democracy* (UCL 2004) 114.

“[T]he step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not”.¹³

Consequently, normative positivists should not lead us to think that law is good in itself.¹⁴ Law’s value is always instrumental. Its practical faults can indeed outweigh any initial merit.¹⁵ Despite this awareness normative positivists state that, under certain democratic conditions, there are good reasons to keep legal decision-making clear as much as possible from moral judgment. Some of these reasons have to do with the “desirability of certainty, security of expectation, and knowledge of what legally empowered officials were likely to require” that arise from the aspiration to avoid arbitrariness in government.¹⁶ Positivism focuses in values such as legal formalism, legal certainty and legal order in favour of a strict view of the separation of powers, a preference on the view of law as a rule-governed activity and thus a preference towards procedural democracy, distinguished by the kind of decision-making processes that can be well regulated and controlled such as legislative procedures and formalist interpretative methods.

An interesting version of normative positivism is Waldron’s proposal of a democratic jurisprudence. In his opinion, descriptive positivism cannot deal satisfactorily with the fact of disagreement in pluralistic societies. There is something missing in descriptive positivism to explain why people comply to law even despite feeling a particular statute might work against one’s interest. Waldron thinks that what is missing is the distinctive desiderata of democratic law, which in his opinion is its public interest:

“[M]odern positivists pay insufficient attention to the *public* character of law-to the fact that law presents itself not just as a set of commands by the powerful and not just as a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the

¹³ Hart (n 5) 202.

¹⁴ Waldron, ‘Normative (or Ethical) Positivism’ (n 17) 428.

¹⁵ *ibid* 430.

¹⁶ Waldron, *Law and Disagreement* (n 1) 167-168.

public, norms that ordinary people can in some sense appropriate as their own, *qua* members of the public.”¹⁷

Democratic law and democratic authority claim to act and stand in the name of the community and that idea, Waldron argues, makes people respect law’s commands despite not agreeing with them. For law to work, it needs to “*purport* to promote the public good”.¹⁸ But as I will elaborate later on, Waldron seems to forget that law includes adjudication, and thus also adjudication needs to purport to promote the public good in order to be a socially sustainable practice, at least in democratic regimes. Furthermore, I claim that a method of adjudication that purports and ideally achieves the public good, is superior to one that does not.

It is well known that Waldron is interested in democracy as “procedures disciplined at all times by the principle of political equality” and thus by a jurisprudence that informs the spirit of law in such way.¹⁹ In this vein, he takes what I shall call a ‘procedural turn’ on Raz’s NJT. Raz’s normal justification thesis, Waldron argues, falls short in those cases where people disagree about whether sources of law actually satisfy the NJT.²⁰ The NJT can only work for subjects of law that assume that obedience to a rule is *substantially* better for them than opting for disobedience. This means, for example, that one will obey a rule stating “every person in the queue will get one book from this bookstore” because one wishes to acquire that one book and would do so without being ruled to do it anyway. But this does not say too much about the circumstances that are of most interest to law, those when one wants two books instead of one. So what about the people that do not assume that following the rule will benefit them, Waldron rightly questions. This situation seems particularly relevant in cases where there is deep disagreement over a rule, as it tends to happen in constitutional matters. In this case, Waldron thinks that people who peacefully obey an authority’s command notwithstanding the fact they think that the command might be harmful to their interests still do so because they assume that it is *procedurally* the best option for them as members of a democratic community. It is legitimate. Someone queuing at the bookstore line from the previous example will respect the one-person one-book rule because that is what the majority of the bookstore’s board decided

¹⁷ Jeremy Waldron, ‘Can There Be A Democratic Jurisprudence?’, 700-704.

¹⁸ *ibid* 702.

¹⁹ Waldron, ‘Can There Be A Democratic Jurisprudence?’ 680.

²⁰ Waldron, *Law and Disagreement* (n 1) 101.

is in the interest of the bookstore, even if one has good grounds to feel deserves two books instead and even if one actually deserves two. This procedural turn avoids, at least to an important extent, the “surrender of judgment” obstacle of Raz’s NJT.²¹ The reason, I think, is that the surrender of judgement in this case is limited by one’s moral or political preferences about the democratic system. This means that a procedural NJT pre-empts one’s judgment on the substantial content of the rule, but not on its procedural legitimacy, which is, in my own opinion at any rate, pretty much all we can aim at under ‘the circumstances of politics’.²² Following from the bookstore example, people that have good reasons to disagree on the one-person one-book rule will still judge it fair procedurally, institutionally. Judgments of the public good thus, are not surrendered completely.

But despite this normative or political stance that aims at providing positivism with a legitimacy framework, anti-positivists have not found relief to their fears of a positivist understanding of law. In the next section, I will analyse some of these critics in constitutional law.

IV. The Perils of Constitutional Positivism

David Dyzenhaus has probably advanced the most severe critiques against positivism.²³ He has accused positivist of being “destructive of healthy legal practice”²⁴ to the extent that he has held positivism accountable of “collaboration in an authoritarian political project”.²⁵ The reason is that, in Dyzenhaus opinion, “positivism says that judges should apply only those values and norms that have been explicitly incorporated into the law by statute” independently

²¹Raz (n 3) 142.

²² The term ‘the circumstances of politics’ was coined by Waldron as an analogy of Rawls’ ‘circumstances of justice’ in the following terms: “The circumstances of justice are those aspects of the human condition, such as moderate scarcity and the limited altruism of individuals, which make justice as a virtue and a practice both possible and necessary. We may say, along similar lines, that the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are the *circumstances of politics*.”

²³ He has been more tough with some versions of positivism than with others. He seems to set aside ‘conceptual positivists’ like Bentham, Hart and Raz as well as ‘leftwing neo-benthamites’ like Griffith and ‘constitutional positivists’ like Waldron and Goldsworthy. See David Dyzenhaus, “The Incoherence of Constitutional Positivism” in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2008) 138-160.

²⁴ Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (OUP 1999) ix.

²⁵ David Dyzenhaus, ‘Why Positivism Is Authoritarian’ (1992) 37 *The American Journal of Jurisprudence* 112.

of its moral merits.²⁶ In particular regard to judicial review, he has stated that “positivism cannot supply a foundation for judicial review since it is politically committed to minimising the role of judges in legal order”.²⁷ Dyzenhaus agrees with Dworkin’s view that the debate on judicial review and constitutional interpretation turns on the political point of legal order, which is, I agree, achieving justice. “Is the point of law to be an effective instrument of the powerful”, he asks, “or is it to ensure that political power is exercised in accordance with principles of legality?”²⁸ But Dyzenhaus pushes Dworkin’s contest against positivism one step further arguing that “the cost for contemporary positivists of resisting this attempt is an unwitting collaboration in an authoritarian political project of which they should want no part”.²⁹

In particular, Dyzenhaus describes constitutional positivism as a family of positions in legal and political theory that “include critics of judicial activism and academics who advocate an enhanced role for legislatures in constitutional interpretation and a diminished role for judges [who] tend to see originalism [...] as a way of disciplining judges in order to confine their activism and diminish their role in legal order”.³⁰ The argument, it may be said, is that given the value of certainty and security for positivists, the fact of constitutional indeterminacy pushes the quest of legitimacy towards originalism or textualism.³¹

In my opinion, however, there is not at all a necessary link between positivism and originalism nor textualism in adjudication. Originalism and positivism do not come in a package deal. Positivism, whether descriptive or normative, is a theory of law. Originalism and textualism are, differently, theories of adjudication. Indeed, formalism in adjudication can be based on a positivist account of law.³² But so can an openly anti-formalist theory as realism.³³ There is no intrinsic incoherency in these options. One can endorse a positivist raw description of law –that

²⁶ Dyzenhaus, ‘The Juristic Force of Injustice’ in David Dyzenhaus and Mayo Moran (eds) *Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case* (University of Toronto Press, 2005) 261.

²⁷ David Dyzenhaus, ‘Form and Substance in the Rule of Law’ in Christopher Forsyth (ed), *Judicial Review & The Constitution* (Hart Publishing 2000) 159.

²⁸ David Dyzenhaus, ‘The Incoherence of Constitutional Positivism’ in Grant Huscroft (ed), *Expounding the Constitution Essays in Constitutional Theory* (CUP 2008) 158.

²⁹ Dyzenhaus (n 38) 112.

³⁰ Dyzenhaus (n 41) 138.

³¹ See eg “Legal positivism and originalism go together and cannot be pried out” in Larry Alexander, ‘Legal Positivism and Originalist Interpretation’, San Diego Legal Studies Research Paper Series 11/2015.

³² *ibid* 5.

³³ See Brian Leiter, “Legal Realism and Legal Positivism Reconsidered” in his *Naturalizing Jurisprudence* (OUP 2007).

law is mainly what officials *do* – and still claim that officials can *do* contrasting different things when applying the law, including to detach as much as possible from any statutory interpretations that lead to unfair results³⁴, to include legal principles in grey areas of law³⁵ or to resort to morality in hard cases.³⁶

Moreover, originalism faces two serious limits. The first one has to do with the possibilities of originalism. The second one with the political stance of originalism. First, when a text mainly states vague principles –as in the case of constitutions-, a theory of adjudication that resorts to plain-text interpretation or to one single legislative intention is a fallacy and self-defeating. When indeterminacy is so high, descriptive positivism loses its point. If there is high disagreement at the level of the source thesis, then we can be prepared to expect that positive law does not include the answer to particular case. Whether we consider morality and politics extra or intra legal arguments, the solution of hard cases will need resort to these domains. In this sense, originalist courts are no less activist or political than their no-originalist counterparts. It just does not seem plausible, or at least no more plausible than the interpretivist Dworkinian one right answer thesis, to consider that constitutional judges can find the one “authorially-intended meaning” of an aggregation of former MPs.

Secondly, and more importantly, originalism does not truly question the distribution of political power that gives normative foundation to positivism. Positivism focuses in values like legal formalism, legal certainty or separation of powers precisely because positivists are worried that people that have not been elected as legislators might end-up modifying *sui generis* the rules that govern public life. Positivism is concerned with the perils of a juristocracy or a government of the judges. Originalism, as a theory that upholds the ideal that judges safeguard an allegedly true meaning of the constitution, seems closer to an anti-positivist or Dworkinian view of law and adjudication than to what positivists have in mind. Originalism thus, does not successfully offer a solution to the problem of judicial supremacy.

³⁴ This was eg the Critical Legal Scholars proposal.

³⁵ Such as ‘inclusive positivists’.

³⁶ Raz (n 3) .

As I have said, originalism and positivism do not go hand with hand as naturally as some hold. That said, it is true that normative positivists are uncomfortable with judicial moral reasoning in general and thus might search for interpretative methods guided by statutes more than principles. From the standpoint I am defending here, however, I am not uncomfortable with judicial activism itself, I am uncomfortable with judicial review all together. Just as a positivist is someone that distinguishes law from morality, but that does not mean that a positivist cannot favour progressive [or morally good] laws, a normative positivist is someone that aims at an institutional design that facilitates a differentiated roles in dealing with legal and moral disagreements, but that does not mean that a normative positivist cannot favour progressive judges and progressive interpretations of the law. So, if i.e. a legal system happens to contain a practice of strong judicial review, I will prefer, as someone who “takes rights seriously”, a court that is close to some progressive living-tree statutory adjudication theory, even if I am aware of its limited effects in transforming the social reality and if, as an institutional designer, I prefer that the last say on the protection of rights lays in parliament.

In conclusion, it is not surprising that Dyzenhaus and others fear that positivism can lead to authoritarianism if they takes for positivism that judges should obey anything enacted by parliament and that political positivists do not want a “culture of human rights”³⁷ and prefer originalist or textualist interpretations instead. But I am doubtful this is exactly what positivists, particularly democratic positivists, promote. Besides that accusation, however, anti-positivists are very reasonable in their anxiety on the idea and consequences that positivists take judicial moral reasoning is wicked by default. Positivists are right that indeterminacy, and its consequent unavoidable amount of JMR, raises some questions of legitimacy, but neither indeterminacy nor JMR mean illegitimacy of adjudication by default. Dyzenhaus is concerned that if judges do not follow principles or if they do not enjoy enough freedom to avoid immoral statutes, then judgments may result in unjustified injustices. I agree with this risk and I share Dyzenhaus’ sympathy with alternative non-formalist adjudication. This is different, however, from committing to strong judicial review.

³⁷ Dyzenhaus (n 41) 151.

V. Jurisdiction as Firewall

So far, I have argued that a theory of law in democratic societies needs to take into account the desiderata of democracy. I have then argued that the desiderata of democracy, even if understood as a procedural or majoritarian democracy, is not close to a system of mere judges as mouthpieces. My aim now is to defend that a democratic jurisprudence that counts on judges to reason morally is compatible with a positive theory of law and with a radical critic against judicial review. As I said before, normative positivism is a theory of law, while interpretativism is a theory of adjudication. Judicial review, we may add, is a theory of institutional design.

Before we have seen how positivism prefers an ideal legal system where rules can be identified, followed and applied without resort to moral judgment. In Waldron's opinion normative positivism "is the thesis that the law *ought* to be such that legal decisions can be made without the exercise of moral judgement".³⁸ That would indeed make things easy, and probably many anti-positivists would share this wish had anyone believed in its plausibility. But that ideal not only sets the expectations a too tall order, it sets law in a different defining universe. Actually, Waldron is well aware that "legal decision-making itself takes on a moral or political character", in his own terms.³⁹ He just seems to find this a terribly unsatisfactory element of law to be minimized as much as possible. But I am doubtful this is the most felicitous way to envisage an unavoidable critical aspect of the law. Moreover, there are good reasons for legal decision-making to enjoy that character, ranging from the right to be judged by one's equal (and this probably includes someone not deprived from the ability to reason morally) or the benefits from applying flexible and proportionate tests in adjudication. A different question is, in my opinion, what tasks we should endeavour unelected moral reasoners to deal with. My concern, thus, is not so much with judicial moral reasoning but with specific judicial power(s).

As Dworkin famously argued, moral judgment in adjudication is not only unavoidable but also highly desirable. I am persuaded, together with many others, that the unavoidability argument is largely sound. My concerns linger, however, with the desirability component. In my opinion, the desirability of moral judgment depends on the role that an authority plays.⁴⁰ In this sense,

³⁸ Waldron, *Law and Disagreement* (n1) 167.

³⁹ *ibid* 166.

⁴⁰ Here I am using "authority" in reference to judges, institutions or public administrations and not to *law* itself. My concern has to do with the legitimacy of judicial moral reasoning and of judicial review as instruments by which someone imposes a decision against someone else, in the name of the community and with coercive force. I share Coleman's observation that an "ordinary notion of authority [...] is a relationship primarily between or

why is it desirable that a mother exercises moral judgment when commanding her daughter to do her homework? Why is it desirable that judges exercise moral judgment in legally deciding a case? The answer lies in the prior justification of social practices (such as parenting or judging) and jurisdictions (one's child's homework or one's right to get damages), for there are good reasons for authorities to have some tasks or roles but not others (one has no jurisdiction over one's child secret diary and judges have no jurisdiction over one's political preferences). We do not want machines rising children in place of mothers nor computers adjudicating cases in place of judges. So I am convinced of the extremely valuable fact for democratic societies that authorities, and not only subjects, still happen to enjoy moral agency and to exercise moral judgement. Indeed, the role of ordinary courts is to solve a particular case with the instruments they have and, faced with gaps and indeterminacies, to be creative according to a range of statutory interpretation methods. It seems a bit unrealistic to say, like i.e. Coleman does, that law includes only positive law and that when a certain case is not solvable within the available positive laws, then judges should decline to take on the responsibility of adjudicating and instead defer to political decision-makers.⁴¹ This position indeed aims to offer a highly respectful and deferent treatment to citizen's self-government hopes, but I think it would probably be a quite upsetting and counterproductive practice.

VI. Conclusion: The Role of Authorities

Throughout this paper I have claimed that the idea of accepting and valuing some levels of judicial discretion does not equal accepting and valuing judicial supremacy. The fact that courts need to exercise judicial discretion in the resolution of a legal case does not mean that courts need to exercise a strong control of legislative acts. In this vein, I argue that in those realms where an authority has jurisdiction, moral judgment is not only unavoidable but also desirable. Contrarily, when there are no good reasons to endow an authority with a role that unavoidably involves moral judgment, then moral judgment from that authority in that role is undesirable.

Before we decide on the benefits and perils of judicial moral reasoning, we should decide on the role that we wish to assign to courts and to legislatures in constitutional decision-making. The assignment is not innocent for "roles have normative attributes", as Herskovitz has

among persons" while Raz's involves "a relationship between reasons and persons", Jules Coleman, 'Beyond Exclusive Legal Positivism' (unpublished manuscript, Yale University) 18 cited in Scott Herskovitz, 'The Role of Authority' 11 *Philosophers' Imprint* 1, 11.

⁴¹ Jules L Coleman, 'Negative and Positive Positivism' (1982) 11 *The Journal of Legal Studies* 139.

observed in discussing Raz's service conception of authority.⁴² This means that before attributing power to an authority, and before justifying the way in which authority exercises power, we should first decide on the justification of that power as a social practice in the democratic polity.⁴³ Surely, critics of judicial review should not take for granted the illegitimacy of courts as moral reasoners. But similarly, defenders of judicial review should not take for granted the merits of judges as moral guardians of the constitution.

The point of the matter is, in my view, what role we want for each institution. The matter of judicial review is a matter of jurisdiction. But this, of course, is another conversation. While I will not elaborate on the democratic credentials of parliament or on the value of voting here, it is important for my argument to remind that there are good reasons of political morality for relying in public representatives for the task of legislating.⁴⁴ In a democratic polity, we hope for a separation of public powers not only for the benefits of division of labour but also, or mainly, for the benefits of a division of power that is representative of our political preferences. To what extent our political preferences have to do with the case that moral questions should be ultimately solved through legislatures and not through judicial decision-making processes is a topic for another day.

⁴² Herschovitz (n 55) 12.

⁴³ Usually judicial review but also other powers eg the Spanish Constitutional Court reform in 2015 that enabled the Spanish Constitutional Court to judge and execute proceedings against MPs directly without prior proceedings in criminal or civil court see Amendment Act [2015] of the Constitutional Court Act [1979] for the execution of the resolutions of the Constitutional Court as a warrant for the Rule of Law (Ley Orgánica 15/2015 de reforma de la Ley Orgánica 2/1979 del Tribunal Constitucional, para la ejecución de las resoluciones del Tribunal Constitucional como garantía del Estado de Derecho).

⁴⁴ For a contesting view see Dimitrios Kyritsis, *Where Our Protection Lies* (OUP 2017) 82-97.

Ethical value pluralism: Some implications for the UK's legal sovereignty

Leanne Cochrane⁴⁵

Introduction

The intention of this short paper is to put forward some early formative (and speculative) ideas as to how a commitment to ethical value pluralism might influence understandings of sovereignty in UK law. It starts therefore with an overview of the nature of value as presented by Isaiah Berlin, the scholar attributed with authoring the concept in its initial and most detailed form.⁴⁶ It progresses to justify the read-in this paper takes to legal sovereignty by committing to at least a partially normative understanding of the nature of law. The third section of the paper attempts to get to the heart of the matter by suggesting that ethical value pluralism should commit to a view of legal sovereignty that promotes conflicting legal opinions and lack of consensus; a heterarchical, including vertical diffusion of legal authority; and procedures of participation that cultivate an attitude of humility regarding one's own committed opinions and respect for the relevance and opinion of the other. The final section seeks to tease out the rather abstract conclusions of the preceding section within the context of more specific sovereignty debates within UK public law. To summarise, these support 'shared sovereignty' understandings of legislative and judicial authority, the promotion of devolved entities as well as other bodies in the legal consideration of values, and greater recognition of international authorities regarding values that can be considered universal.

I. The nature of value and Isaiah Berlin's (ethical) value pluralism

Before embarking on a brief overview of the primary tenets of Berlinian value pluralism, it is helpful to identify where it sits within ethical thought. Ethical value pluralism, which is perhaps more commonly known as one of either 'ethical pluralism', 'moral pluralism' or 'value pluralism', is not primarily a normative ethical concept in the sense that it does not

⁴⁵ Ph.D. Candidate at Queen's University Belfast. Email: lcochrane03@qub.ac.uk

⁴⁶ See generally, the Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Henry Hardy ed, Pimlico 2003); Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969). See also the earlier formative ideas of Max Weber, *The Methodology of the Social Sciences* (Free Press 1949).

seek as its primary goal to infuse ethics with ‘ought’ criteria. The theory is predominantly focused on the meta-ethics branch of ethical theory which concerns the nature of moral judgment such as the meaning and significance of calling something right or wrong.⁴⁷

The paper relies upon the theory as set out by Isaiah Berlin and as presented primarily in the context of his political philosophy.⁴⁸ According to Berlin, political philosophy is “but ethics applied to society”.⁴⁹ Ethical thought he describes as the watermark study of human relations from which “systems of value” for living are based.⁵⁰ The values in ethical value pluralism therefore refer to answers to questions about valuable forms of life. The values Berlin speaks about concern ‘absolute’ ends to which one may direct their valuable form of life. The concept may therefore be taken to concern what might be called ‘ultimate values’; values, that is, that do not need to be explained with reference to other values. They hold within their own meaning an explanation to justify the judgment that it is of itself good.⁵¹ The preferred term in this paper is that of ‘values’; but values, ethics and morals should be understood in this context to refer to highly similar concepts despite their subtle distinctions in philosophical thought.⁵² As such, the phrase ‘ethical value pluralism’ which appears throughout this paper might appear like a duplication of terms. This fuller description is used however, to distinguish the concept from another meaning of value pluralism often found in political theory which focuses on whether government should limit an individual’s choice, given that at the level of choice, there are multiple values. A person might therefore hold a ‘monist’ view of values in ethics, such as Ronald Dworkin does, by believing that all values

⁴⁷ Ted Honderich (ed), ‘Meta-Ethics’, *The Oxford Companion to Philosophy* (2nd edn, Oxford University Press 2005) (italics mine); Ted Honderich (ed), ‘Moral Pluralism’, *The Oxford Companion to Philosophy* (2nd edn, Oxford University Press 2005).

⁴⁸ For the main references see, Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas*; Berlin, *Four Essays on Liberty*. Also note the earlier formative ideas of Max Weber, Weber.

⁴⁹ Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 2.

⁵⁰ *ibid* 1–2.

⁵¹ Dennis Davis, Alan Richter and Cheryl Saunders, ‘Introduction’ in Dennis; Davis, Alan; Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values* (Hart Publishing 2015) 11 (using a Razian definition).

⁵² Dworkin for example identifies ethical standards as the criteria which dictate “how we ought to live ourselves” and moral standards as criteria which concern “how we ought to treat others”. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 191. In *Justice for Hedgehogs*, Dworkin aims to find some ethical standard that will guide his interpretation of moral, and in turn, political behaviour. On the breadth of values, see Ted Honderich (ed), ‘Value’, *The Oxford Companion to Philosophy* (2nd edn, Oxford University Press 2005).

can be derived from one so-called meta-value. For Dworkin, this role is played by ‘dignity’.

⁵³ But the monist might equally believe that political structures should recognise diverse values at the level of choice. ⁵⁴

Berlin’s pursuit in his theory is not, as described, to focus on identifying right and wrong values, but rather to reject a view of values based on ‘monism’, which Berlin describes as the belief “that all questions [regarding the right way to live] have one true answer”; an answer thought to be found by applying scientific technique to human affairs.⁵⁵ Berlin famously distinguishes himself from the predominant thinking of the Enlightenment period in this regard, and attributes his idea to a reading of Machiavelli and others. What impressed upon Berlin about Machiavelli’s works was his juxtaposition of, on the one hand, the ruthless pursuit of power by “gifted and resourceful men” necessary to achieve the preferred Romanic state, against persons espousing Christian virtues of suffering, humility and unworldliness, and in particular the perspective of Machiavelli that the two styles of living (or values) were incompatible.⁵⁶ Berlin states,

[t]he idea that this planted in my mind was the realisation which came as something of a shock, that not all the supreme values pursued by mankind now and in the past were necessarily compatible with one another. It undermined my earlier assumption, based on the *philosophia perennis*, that there could be no conflict between true ends, true answers to the central problems of life.⁵⁷

Berlin came to believe rather, that “there are many different ends that [human beings] may seek and still be fully rational, fully [human], capable of understanding each other and sympathising and deriving light from each other...”.⁵⁸ Ethical value pluralism as presented by Berlin is considered by many scholars to comprise four main ideas. A common quartet of identifiers proceeds as follows: Berlinian value pluralism is (1) an account of human values;

⁵³ Dworkin ch 9.

⁵⁴ See generally, Elinor Mason, ‘Value Pluralism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring, 2018)
<<https://plato.stanford.edu/archives/spr2018/entries/value-pluralism/>>.

⁵⁵ Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 5–6, 13–15.

⁵⁶ *ibid* 8. See also, Niccolo Machiavelli (1469-1527), *The Prince* (Oxford University Press 2008).

⁵⁷ Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 8.

⁵⁸ *ibid* 11.

(2) those values are ‘plural’ and irreducibly so; (3) the values have the potential to conflict, which leads to the belief that there is no one perfect life; and (4) the values are ‘incommensurable’ which means that no single rule can serve to rank the conflicting values in all cases.⁵⁹ The significance of Berlin’s idea of value pluralism is not just the *fact* that people hold many different beliefs. It is the aspect of value pluralism which denotes that there may not be one right answer to assist us in choosing between competing values, whether that be between the pursuit of two values, or between two opposing interpretations of one value.⁶⁰ For Berlin, this competition between values and the need to choose between competing conceptions is a tragedy:

If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never be wholly eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.⁶¹

The plural nature of values and Berlin’s objection to any one-size-fits-all solution should not however be taken to mean that Berlinian value pluralism is a commitment to relativism. Relativism, Berlin says, simply states that: “We have different tastes. There is no more to be said.”⁶² He sees pluralism on the other hand, as inclusive of the existence of a core of values held in common among societies.⁶³ There is a “great deal of broad agreement”, we are told, across different cultures and epochs as to what constitutes right and wrong.⁶⁴ We can identify these universal values by their explicit expression or implicitly through human behaviour, across societies and across time.⁶⁵ Speaking generally, on making decisions among these sometimes incompatible values, Berlin states:

⁵⁹ George Crowder, ‘Value Pluralism, Diversity and Liberalism’ (2015) 18 *Ethical Theory and Moral Practice* 549, 550–551.

⁶⁰ Raz refers to this second type as ‘interpretive pluralism’. Joseph Raz, ‘The Future of State Sovereignty’, *Legal Studies Research Paper Series: Paper No. 2017-42* (Kings College London 2017) 22.

⁶¹ Berlin, *Four Essays on Liberty* 161.

⁶² Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 11.

⁶³ *ibid* 18.

⁶⁴ *ibid*.

⁶⁵ Isaiah Berlin and Ramin Jahanbegloo, *Conversations With Isaiah Berlin* (Prentice Hall & IBD 1991) 37; Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 18.

But, in the end, it is not a matter of purely subjective judgment: it is dictated by the forms of life of the society to which one belongs, a society among other societies, with values held in common, whether or not they are in conflict, by the majority of mankind throughout recorded history. There are, if not universal values, at any rate a minimum without which societies could scarcely survive.⁶⁶

As such, Berlin perceives that values *can be* universal, in contrast to his perception of relativism as a purely subjective notion. Unfortunately, there is no comprehensive account given by Berlin of what these universal values are. He mentions liberty,⁶⁷ equality, happiness, security, public order, courage and justice as examples; whereas mindless killing, slavery, Nazi gas chambers and a duty to denounce one's parents are also identified as acts universally heinous.⁶⁸

While Berlin clearly considers that some values can be universal and objective by pointing to these positive and negative values, he is generally taken from the above passage to identify his universal values purely on the basis of the fact of agreement.⁶⁹ This has been found questionable as a justification for universal values,⁷⁰ even in the context of legitimate pluralism. Such that other value pluralists have developed more satisfactory justifications for some universality. Nussbaum for example turns to the notion of the human being and 'human capabilities' to find her set of universal values. Since humans must be treated as worthy of regard, Nussbaum believes that they must be "put in a position to live really humanly".⁷¹ Hence she develops a ten-point list focused on setting a threshold that gives

⁶⁶ *ibid* 18.

⁶⁷ Berlin's emphasis on liberty is significant. He regards the satisfaction of both his negative and positive conceptions of liberty as "ultimate value[s]...among the deepest interests of mankind". Berlin, *Four Essays on Liberty* 166.

⁶⁸ Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 18; Berlin, *Four Essays on Liberty* 170. See also, Crowder, 'Value Pluralism, Diversity and Liberalism' 550.

⁶⁹ Berlin's identification of the existence of objective, universal values as those which the majority of mankind have valued in common has been criticised as weak and susceptible to value monism due to the vulnerability of the values to being ordered by the 'act of valuing'. See, George Crowder, *Liberalism and Value Pluralism* (Continuum 2002) 74, fn 1.

⁷⁰ In the context of human rights, see Onora O'Neill, *Justice Across Boundaries: Whose Obligations?* (Cambridge University Press 2016) ch 7.

⁷¹ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000) 72, 74.

each person that opportunity, or as she calls it the ‘capability’, for uniquely human functioning (as opposed to focusing on the actual function itself).⁷² However, it is possible that by maintaining a focus on Berlin, we can also identify certain criteria concerning a necessary state of the human being that can be considered universal values in addition to those he identifies.

First, Berlin’s value pluralism can also be said to presuppose the equally valuable nature of each human being, otherwise the relevance of his whole premise on the significance of ethical value pluralism would collapse. Second, Berlin’s concern is with how this theory applies to substantive moral and political notions. As such, he places value on human beings operating in society. Related to this point, is Berlin’s emphasis on the character trait of “humility” and preparedness to compromise when facing concrete situations. Berlin expects a value plural society to operate in an “uneasy equilibrium, which is constantly threatened and in need of constant repair” via “trade-offs”.⁷³ These attributes of the human being, in terms of their moral worth, their situation in societal/community contexts, and what I will call respect for the opinion of others, can be considered universal values in an ethical value pluralist context.

Despite the difficulty therefore that Berlinian value pluralism poses for rational choice between legitimately competing values, or two different conceptions of the one value, it has remained an enduring idea in ethical thought because it speaks to the broad human experience and does not wed human understanding of value to a particular metaphysical foundation. Berlin warns of the dangers of value monism when he states that “to force people into neat uniforms demanded by dogmatically believed-in schemes is almost always the road to inhumanity”.⁷⁴ If plurality, conflict and on occasion even incommensurability, is the true experience of answers to questions about what is entailed for one to have a valuable life, then what interests this author is what that can tell us about human life in society and the concepts we employ to organise – the concept in the present case being that of legal sovereignty.

⁷² *ibid* 74.

⁷³ Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 17–19.

⁷⁴ *ibid* 18–19.

II. A normative approach to the nature of law and legal sovereignty

The first step to answering this question is to divert necessarily to laying out my own (limited) commitment regarding the concept of law. The approach I take to the law is a normative one in the sense that the law ought to say something about morality. I do not seek to lay out any kind of theory on what the law is beyond this simple but relatively common approach. Many well-known value pluralists are in fact legal positivists – Joseph Raz being an obvious example.⁷⁵ If one is committed to a view of ethical value pluralism – such that there are many different and sometimes incompatible ends which human beings may seek – it is easy to see how legal positivism, an approach which does not mingle law and morality, would be the preferred option. This is because of the difficulties that inhere from reading morality into the law when moralities can be incompatible.

For the approach that follows however, which attempts to understand how a reality of ethical value pluralism informs the legal sovereignty concept, a normative understanding that morality is at least sometimes relevant for deciding the truth of propositions about the law is necessary. Since the concept of law is understood in this way, the approach to legal sovereignty (which on my reading concerns the ultimate authority for legal rules), is naturally also informed by the nature of morality through the ethical value pluralism concept. Furthermore, in the sense that it derives legal sovereignty from a place external to the law, this approach has more in common with those conceptions of sovereignty which identify it as a jural recognition of something external. Typically, that external force is normative political power, such as in Austin's command theory, or even Loughlin's 'third order of the political' where sovereignty is described as a representation of the "autonomy of the political and the foundational concept for modern public law".⁷⁶ There is much that I agree with in Loughlin's comprehensive presentation of sovereignty in *The Idea of Public Law*.⁷⁷ My

⁷⁵ For his legal positivism see, Joseph Raz, *The Concept of a Legal System* (2nd edn, Clarendon Press 1980); on his value pluralism, see Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986).

⁷⁶ Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 72–73. See, also Martin Loughlin, 'Constitutional Law: The Third Order of the Political' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003). For a discussion on the predominantly political conception of sovereignty and the predominantly legal conception of sovereignty, including Austin, see Neil McCormick, 'Beyond the Sovereign State' (1993) 56 *The Modern Law Review* 1, 12–13.

⁷⁷ For example, sovereignty as being a partly socially constructed or relational concept; it is not solely a matter of positive law; rights are not antagonistic to sovereignty. See, Loughlin, *The Idea of Public Law* ch 5.

approach however, is more narrowly focused on the question of what the nature of value means for legal sovereignty, and in this sense the external force on which this paper focuses is not political power, nor the state, but the authority of moral norms. This is in spite of the difficulties posed by the abstract nature of the absolute values for their normative force within the ethical value pluralism.

The alternate approach to legal sovereignty, which I reject, is to view it simply as a construct of the law itself. As will be seen in the discussion on UK public law below, ‘parliamentary sovereignty’ is often viewed this way, to the effect that the courts have on occasion considered it within their remit to alter.

III. The relationship between value pluralism and legal sovereignty

What then for a Berlinian value pluralist approach to legal sovereignty given the normative approach to the concept of law outlined above? In fact, there has long been ‘pluralist theories of the state’ within political science literature dating back to the turn of the twentieth century, which have sought to reject the traditional notion of the state as sovereign in an indivisible and absolutist way.⁷⁸ Somewhat more recently, in a 1993 piece written in response to the development of European supra-national institutions, Neil MacCormick points out the parallels between the traditional conception of ‘state’ sovereignty, which is the view that the state is sovereign in an absolute sense and monist or foundational thinking: “the grounding of political certainties in the unquestionable word of the sovereign in the state”.⁷⁹ MacCormick speculated in his paper that movements against metaphysical foundationalism (for which, one may read as an example, ethical value pluralism) might also tend towards releasing legal discourse from what he considered to be “the conceptual fetters of juridical foundationalism, [an] inherited belief that sovereignty alone underpins law and liberty.”⁸⁰ This is not of course the approach I am taking to the concept of law but it does speak to what has been a persistent

⁷⁸ See, e.g. Harold Laski, *Studies in the Problem of Sovereignty* (Yale University Press 1917); Leon Duguit, *Manuel de Droit Constitutionnel* (2nd edn, Fontemoing & Cie 1911); Leon Duguit, *Les Transformations Du Droit Public* (Max Leclerc & H Bourrelrier 1913); and for a general discussion, see Francis W Coker, ‘The Technique of the Pluralistic State’ (1921) 15 *American Political Science Review* 186.

⁷⁹ The traditional conception of state sovereignty is tracked by MacCormick through from Hobbes’ state as Leviathan theory, through to Rousseau’s ‘will of the people’, Kant’s faith in the ‘constitutional state’, and finally to Diceyan ‘parliamentary sovereignty’. MacCormick 15. See, Coker 186.

⁸⁰ MacCormick 16.

unease with the sovereignty concept in both its political and legal conceptions. While modern conversations continue this unease⁸¹ and certain movements such as ‘constitutionalism’ vie to replace the sovereignty concept, it is not proposed that ethical value pluralism advocates the obliteration of the term from our legal discourse. Legal sovereignty as I have understood it, as directive of the ultimate authority/authorities for legal rules, is in my view a concept that retains utility as a communicative tool about authoritative legal institutions. This broader meaning is understood. Its deeply embedded nature within both international and UK law also indicates that it may be easier to understand authoritative legal institutions by infusing the concept with new meaning as opposed to rejecting it completely.

That slight digression into the retained utility of the legal sovereignty concept should not distract from the main point. That is, that like pluralist theories of the state, my approach to law underpinned by a commitment to ethical value pluralism rejects any suggestion that the state, or perhaps more importantly today, any other body, is *morally entitled* to social pre-eminence or authority in any absolute sense.⁸² Instead, a commitment to the belief that values are plural, often conflict, and are sometimes incommensurable, instinctively preferences a variety of conflicting opinions as a more accurate expression of human experience.⁸³ Consensus should not be expected as a normal outcome to such deliberations. A variety of diversely constituted legal authorities are more likely to further this objective than one dominant law-making entity. Legal sovereignty should be shared.

The outcome of an ethical value pluralist approach to legal sovereignty is therefore receptive of legal pluralism, the main idea put forward by MacCormick in his aforementioned article.⁸⁴ Legal pluralism, as it has become understood, reflects a “situation[] in which two or more legal systems coexist in the same societal field, sometimes in a contradictory way, in which each may have equally plausible claims to authority”.⁸⁵ It is also receptive of constitutional pluralism, when understood as a variety of autonomous constitution based legal orders

⁸¹ For the point, see Loughlin, *The Idea of Public Law* 72. For a recent view that sovereignty is without utility, see Don Herzog, ‘Sovereignty R.I.P.’, *The MacDermott Lecture 2018* (Queen’s University Belfast, School of Law 2018).

⁸² Coker 190 (discussing Laski’s views). See, Laski ch 1.

⁸³ See e.g. Bourke’s concept of ‘giving incommensurability its due’ and reading of deliberative democracy in James Ethan Bourke, ‘The Politics of Incommensurability: A Value Pluralist Approach to Liberalism and Democracy’ (Duke University 2011).

⁸⁴ MacCormick 17.

⁸⁵ Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) 385.

operating in the one social space.⁸⁶ The outcome of conflicting opinions that result from legal or constitutional pluralism are not challenges to ethical value pluralism but rather a welcome result, and should be dealt with in a way that establishes Berlin's aforementioned expectation of an "uneasy equilibrium, which is constantly threatened and in need of constant repair".

A second conception of constitutional pluralism however, welcomes conflicting opinions but avoids conflicting final outcomes. It is a view of 'constitutional pluralism' that operates one higher order constitution within which extensive pluralism is allowed.⁸⁷ A recent research paper by Joseph Raz in the context of a world government views the recognition of value pluralism as essential to the legitimacy of super-national institutions to ensure their responsiveness "to local needs, interests, to diversity in tastes and preferences, to local traditions, ways of life and ways of doing things."⁸⁸ For Raz, such a system would require two mechanisms, strong application of a subsidiarity principle and receptivity towards 'simultaneous interpretive pluralism'. This latter requirement means, for example, that universal standards such as human rights norms need to embrace a plurality of correct interpretations of their meaning, even for the one standard.⁸⁹

It is my view that a commitment to ethical value pluralism is better reflected by the first conception of constitutional pluralism which permits conflicting final opinions for a number of reasons. First, I am sceptical about the ability of any monist order to support significant conflict from within. Community orders of this nature will have a homogenising force. Indeed, supra-national structures that currently exist have shown a susceptibility to being dominated by economic liberal thinking.⁹⁰ There may exist a harmonising force between

⁸⁶ See, e.g. the different ways of conceptualising 'constitutional pluralism' in Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 *Indiana Journal of Global Legal Studies* 621, 632. For an early outline of the idea, see Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.

⁸⁷ Sweet 362. For general discussion on opinions that in the EU the first conception is on its way out, see e.g. Michael A Wilkinson, 'Constitutional Pluralism: Chronicle of a Death Foretold?' (2017) 23 *European Law Journal* 213.

⁸⁸ Raz, 'The Future of State Sovereignty' 21. Raz identifies this as different from the margin of appreciation because instead of being based on toleration and conflict between different values.

⁸⁹ *ibid* 21–22.

⁹⁰ Colm O'Cinneide, 'Social Constitutionalism beyond the Nation State: Chimera or a Realistic Ambition?' (2017) 19 November 2017.

independent legal systems, such as can be seen between the EU and ECHR rights systems, but this will naturally occur to a lesser degree. Furthermore, the larger the geographic group covered by the monist system, the less able the system to cultivate an attitude of respect for the opinion of others. There is much that has already been said for example on the difficulty of fostering solidarity among trans-national organisations.⁹¹

I would further suggest that the diffusion of legal authority should not only be diffuse but more specifically, heterarchically diffuse and inclusive of a vertical diffusion of legal power. This is a conclusion not only based on the nature of values within the ethical value pluralism concept such that the dominance of any one homogenous group as an interpretator of ultimate values should be guarded against; it also derives from the substance (surprisingly) of universal values. As discussed above Berlin's account of universal values is not comprehensive but it is enough to observe that he identifies them as "values held in common...by the majority of mankind throughout recorded history...[values] without which societies could scarcely survive".⁹² Although the intention is not to give a full account as to the content of what these universal values are or should be, something can be said of the values identified by Berlin himself, by using the example of positive liberty and equality. Positive liberty as described by Berlin concerns a person's desire to govern him or herself. A desire to be a subject and not an object.⁹³ While there exists societies that do not chose to preference autonomy of this kind as an important value,⁹⁴ the ability to take actions based on conscious choice (even if that is the rejection of autonomous choice) is so pervasive, though by no means exclusive, to how human beings are recognised as 'human', that it is to my mind, a universal value of the kind Berlin spoke. The point for our vertical diffusion of decision-making power is that the existence of universal values simultaneously promotes legal decision-making at universal levels and at lower, much more local, levels. The international law can rightly be concerned about ensuring the equal moral worth of the human person while more local forms of governance assist in allowing the individual to direct his or her own course of action informed by unique personal experience and suffering.

⁹¹

⁹² Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* 18.

⁹³ Berlin, *Four Essays on Liberty* 131.

⁹⁴ A point made by William A Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge University Press 2002) 21.

Yet undoubtedly the thoughts I have espoused on the acceptability of conflicting final opinions pose real problems in terms of resolution for the individual in concrete cases. But perhaps this is where Berlinian humility and compromise come into play and the development of third options. The important emphasis for ethical value pluralists is on the need to *embrace* the pluralism as a point of principle and not just as a fact of observed life.⁹⁵ The judgment of the judges should, not least, reflect this approach. Like Raz points out, the margin of appreciation so familiar in European reasoning does not quite achieve this attitude. It is based on an attitude of toleration as opposed to an embracing of a variety of correct but incompatible answers.⁹⁶ Raz also finds the public interest exceptions of the qualified rights unsatisfactory because they do not cover a plurality of correct opinions concerning the interpretation of a singular right.⁹⁷ For my part, I observe a further attitude of viewing the public interest qualifications concerning the qualified rights in a negative light, instead of perceiving such laws as an opportunity to recognise the full plurality of ultimate values, including sociability-based values that are inexplicably absent from the UK rights framework – the framework commonly understood to be the legal representation of ultimate values.

One discourse which is of interest from an ethical value pluralist perspective is the ‘culture of justification’ approach which focuses on the justification on exercises of power as opposed to reliance on authority alone in the context of shared sovereignty and constitutionalism. This idea was developed in the context of South Africa by Mureinik⁹⁸ and has been taken forward by more recent scholars such as Dyzenhaus and Hunt.⁹⁹ Mureinik’s main idea is summed up as follows:

⁹⁵ Raz, ‘The Future of State Sovereignty’ 22.

⁹⁶ Raz sees this toleration approach as allowing provision for mistaken judgments given the different traditions of the national courts. See, *ibid.*

⁹⁷ *ibid.*

⁹⁸ Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal of Human Rights* 31.

⁹⁹ David Dyzenhaus, ‘What Is a “Democratic Culture of Justification”?’ in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015); Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015). See also, Sandra Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote’ in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015); Murray Hunt, ‘Reshaping Constitutionalism’ in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition and Human Rights* (Oxford University Press 2007).

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.¹⁰⁰

The culture of justification is attractive because it requires a greater elaboration by government of the reasoning behind certain approaches to ultimate values. Such views are then available to the electorate and the legislative body as well as the judiciary to engage with. It promotes dialogue and deliberation and supports the attitude of respect for others as well as compromise. Yet its more limited focus on government justification of rights standards means that the culture of justification concept could benefit from further development.¹⁰¹

Given the intrinsically irresolvable nature of certain conflicting interpretations however, one wonders if it is possible that other mechanisms for resolving conflict in concrete cases between final legal opinions can be concluded in new ways? Using legal interpretations of value as parameters for example, is it possible that a third body could make compromise assessments, based this time on clear scientific, even mathematical, technique? Or should a third body use the judgments as formal legal parameters, and then reach a compromise for the parties based on wider read of value, to include informal laws, such as religious law and other ‘living’ law?¹⁰² Or maybe, the conflict will be significant and pervasive enough that a referendum detailing the more narrow legal interpretation is appropriate?

IV. Reading value pluralism into the UK legal sovereignty debates

So far, the discussion has been rather abstract and speculative. To improve a little on the first, some effort will be made to read ethical value pluralism into UK legal sovereignty

¹⁰⁰ Mureinik 32.

¹⁰¹ See more recent developments into deliberation by Fredman; Alison Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017).

¹⁰² A term used by MacCormick to refer to laws which emanate from family, university and firm contexts. MacCormick 14.

debates. These debates traditionally occur at two levels. The first concerns internal institutional sovereignty, such as whether it should rest with parliament vis a vis the courts, or a combination of both. Second, is the debate concerning the UK's relationship with international institutions and the degree to which state sovereignty has been ceded. In terms of ultimate values, the relationship with the European Convention on Human Rights is most relevant. However, the legal pluralism/constitutional pluralism discourse above which came to the fore after the *Factortame* jurisprudence and the joining of the EU is also relevant given the EU's expanding remit in the field of fundamental rights, and of course Brexit.

Starting with the first discourse, it is the most recent position of the courts to uphold the view that Parliament retains legal supremacy; indeed, this paradigm was said to be 'conclusively established' in the *Miller* jurisprudence of 2017.¹⁰³ That said, parliamentary sovereignty has endured an ongoing challenge as the site of legal authority from the courts via the 'rule of law' concept. Since I have already set out an approach which supports the sharing of sovereignty, or a diffuse distribution of legal authority, this dichotomous debate which speaks to an exclusive authority is a clear point of departure.

The elevation of the rule of law and the judiciary as the ultimate (in a final sense) site of authority on certain rights matters has been pursued through the idea of 'common law constitutionalism'. This idea has been developed through a rule of statutory interpretation known as the principle of legality and is captured by the following extra-judicial writing of Lord Hope:

[t]he absence of a general power to strike down legislation which it has enacted does not mean that the courts could never fashion a remedy for use in an exceptional case where the survival of the rule of law itself was threatened because their role as the ultimate guardians of it was being removed from them.¹⁰⁴

¹⁰³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 41-43.

¹⁰⁴ Lord Hope of Craighead, 'Is the Rule of Law Now the Sovereign Principle?' in Richard Rawlings, Peter Leyland and Alison L Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 97.

What is significant is not so much that the development of the rule of law promotes an exclusive judicial sovereignty for certain ultimate values and therefore a divided sovereignty concept, but that it points to the common law as the primary site of normativity at least in regard to certain ultimate values.¹⁰⁵ As discussed, an ethical value pluralism based approach to legal sovereignty requires a sovereignty routed in value (or morality based) norms. At first blush, it might appear to have more in common with the rule of law/common law constitutionalism approach which justifies judicial supremacy in certain contexts in light of moral norms, such as fundamental rights. However, on a closer view, the parliamentary sovereignty doctrine also supports a sovereignty which reflects the value of positive liberty. Where an ethical value pluralist justification of legal sovereignty departs therefore from rule of law/common law constitutionalism debates is that it does not endorse the courts as the exclusive final authority for these normative identifications. Better ways must be found to truly share sovereignty.

One development of UK public law with potential to better diffuse normative judgments is the devolution of power to the constituent nations. Despite restrictions in the devolution statutes in terms of how devolved legislatures can alter the Human Rights Act 1998,¹⁰⁶ devolution has allowed for a greater diversity in terms of human rights promotion within the UK. For example, in the Scottish context, there is a welcome broader recognition of ultimate values through the Scottish Government's consideration of socio-economic rights as legally enforceable.¹⁰⁷ There has also been enlivened debate between the devolved parts of the UK as to how certain values should be interpreted, with Northern Ireland often taken to hold more socially conservative views. The point is not so much the particular interpretations that are held, it is rather to emphasise the need for a legal sovereignty structure that not only accommodates but embraces different good faith interpretations of ultimate values. This is to be limited only by values that are essential to human functioning and deemed universal.

¹⁰⁵ For the phrase see, Thomas Poole, 'Questioning Common Law Constitutionalism' (2005) 25 *Legal Studies* 142, 142. Well known proponents include TRS Allan, Sir John Laws, Dawn Oliver, Paul Craig and Jeffrey Jowell.

¹⁰⁶ The devolved legislatures cannot amend the Human Rights Act 1998¹⁰⁶ nor can either the devolved executives or legislatures act in a manner that is incompatible with EU law or the Convention rights. See, Scotland Act 1998, sch. 4; Northern Ireland Act 1998, § 7(1); Government of Wales Act 2006, sch. 5; and, *See* Scotland Act 1998, §§ 29, 57(2), 126; Northern Ireland Act 1998, §§ 6, 24, 81, 83, 98; Government of Wales Act 2006, §§ 81, 94, 108, 158.

¹⁰⁷ See the Advisory Group to the First Minister. Govt of Scotland, *Ambition on Human Rights* (Jan 17, 2018), <https://news.gov.scot/news/ambition-on-human-rights>.

The second sovereignty discourse concerning ultimate values centres on the UK's implementation of European rights. An approach of ethical value pluralism embraces this kind of constitutional pluralism and so too the inclusion of both European frameworks into UK law. But it also embraces a broad range of interpretations of ultimate value. The first point to note is that the European rights frameworks which apply in UK law are relatively narrow in the sense that they incorporate predominantly civil and political rights. (The aspects of the EU Charter of Fundamental Rights promoting solidarity are not enforceable in UK courts). This is not reflective of the range of ultimate values that are to be found across societies and deemed essential to the existence of humankind, nor do they in their current form give sufficient recognition to the socially embedded nature of human beings. The European Union however is showing moves to develop a more comprehensive solidarity framework, and as such, Brexit is likely to mean a loss of these informed interpretations of value from UK law. However, focusing on European frameworks alone, as enforced by the domestic judiciary, does a disservice to ethical value pluralism. Instead, what the theory of ethical value pluralism requires is more diffuse interpretations of ultimate values and greater good faith engagement between those legitimate interpretations. There is a role to be played by international human rights treaties, especially the UDHR, which is reflective of a broader range of ultimate values than is currently protected in UK law. There is also a role to be played by the devolved entities, and further there is a need to genuinely consider third bodies capable of producing compromise solutions between legitimate conflicting values.

Conclusion

Perhaps the tentative conclusion of these speculations is that the UK needs recognise a broader range of values and to allow this broader range a greater degree of interpretive plurality. Both these shifts would discourage the UK's trend towards monism and encourage the government to enter into relationships which allow for a greater sharing of sovereignty with international legal authorities as well as devolved legal authorities, and even local informal authorities.

The Power-generative Potential of Scotland's Public Sphere

Iain Hunter

Scottish Sovereignty: A Potted History

Sovereignty is one of many bitterly-contested battle-lines in Scotland's contemporary politics. The devolved system of government, which the Scottish National Party has captured to dramatic effect in the past decade, owes its existence to the work of the constitutional steering committee of the Campaign for a Scottish Assembly. In its 1988 'Claim of Right' the committee asserted the "sovereign right of the Scottish people to determine the form of government best suited to their needs"¹⁰⁸. Despite reluctance to join in at the time, the SNP has in the intervening years made much of the sentiment expressed by those who did take part. An SNP-dominated Scottish Parliament endorsed the 'Claim of Right' in 2012, and SNP MP Patrick Grady led a Commons debate on the topic in 2016.

The claim itself was issued after a period of intense dissatisfaction with the policies of Conservative UK governments which had no electoral mandate north of Hadrian's Wall, perhaps best exemplified by the use of Scotland as a test bed for the hated 'poll tax'¹⁰⁹. The committee's membership, broadly representative of Scottish civic society, attempted to place its claim squarely within a distinct Scottish tradition of 'acting against misgovernment' by naming it after the Claim of Right of 1689, which specified the terms on which the William of Orange accepted the Scottish crown and the accordant limits on the powers of his office. This call-back to the Glorious Revolution was an attempt to legitimise the actions of the Campaign for a Scottish Assembly by making clear that those actions were simply the latest of many ways in which the Scots had asserted their right to be governed only with their consent, with other, older examples including the mediaeval Declaration of Arbroath and the Renaissance writings of James VI & I's tutor George Buchanan. Whatever one may think of the historical veracity of claims to a particularly Scottish tradition of 'legal limited government'¹¹⁰, the widely positive reception of the 1988 Claim led directly to the establishment of the extra-parliamentary

¹⁰⁸ *Scotland's Claim, Scotland's Right* (Edinburgh, 1988)

¹⁰⁹ See EG Goldoni, M & McCorkindale, C, 'Why We (Still) Need a Revolution' (2013) *German Law Journal* 2197-2228

¹¹⁰ Bowie, K, 'A Legal Limited Monarchy': Scottish Constitutionalism in the Union of Crowns, 1603–1707' *Journal of Scottish Historical Studies* (2015) 35.2 131-154

Scottish Constitutional Convention – which designed the system of devolved government laid down in the Scotland Act 1998 and implemented in stages up to the close of the 20th century as part of the newly-elected Labour government’s sweeping package of constitutional reforms. Devolution was premised on the popular sovereignty of the Scots.

This is of course anathema to orthodox British constitutional doctrine, and the popular sovereignty discourse in Scotland tends to be viewed with suspicion in Anglocentric jurisprudence. Dicey, the Victorian godfather of the dominant school of British constitutional scholarship, insisted not only that no other body could stand in the way of the untrammelled power of the ‘sovereign’ Queen-in-Parliament, but also that the distinction between legal and political sovereignty must be maintained. The implications of his view colour the legal landscape to this day. An *en banc* UK Supreme Court decided in the *Miller*¹¹¹ litigation that not only did the proverbial buck stop with the Westminster Parliament, but also that a political convention that had grown up around devolution could not be enforced by the courts despite its conversion into the highest form of black-letter law. The Scotland Act 2016 put the well-worn ‘Sewel convention’ on a statutory footing, but the justices would not entertain any argument that it now amounted to an obstacle for the Queen-in-Parliament. Whatever the motivation for the initial distinction, the insistence upon it in British jurisprudence has come to colour even the most imaginative scholarly treatments of Scotland’s idiosyncratic legal order.

The late Sir Neil MacCormick and his successor as Edinburgh’s Regius Professor of Public Law and the Law of Nature and Nations, Neil Walker, have addressed Scotland’s specific constitutional circumstances in their respective variations on the theme of constitutional pluralism. MacCormick called Scotland’s weird accommodation in the governing structures of the British polity “the Scottish Anomaly”, and his father was the petitioner who tried to challenge Scotland’s wholesale subsumption into the unmodified pre-1707 English constitution in the Court of Session in the 1950s. MacCormick Sr.’s case was grounded in what his son called the ‘Defoe view’ of the Treaty of Union in honour of the English agent of the time who was its proponent; namely, that the Treaty forms a kind of *Grundgesetz* restricting the scope of the power of the new British state it created. The argument never really gained traction in the courts, but it did prompt an intriguing bit of obiter dicta from Lord President

¹¹¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

Cooper in the 1950s, who said: “I have difficulty in seeing why it should be supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament,” and that he had “not found in the Union legislation any provision that the Parliament of Great Britain should be able to alter the Treaty at will.”¹¹²

The litigious strategy of MacCormick Sr. was overtaken in the late 20th century by the less formal approach of the Campaign for a Scottish Assembly. The Scottish level of government the CSA eventually secured was, for MacCormick Jr., another layer of legal order to add to the two the UK already had; one in London, the other on the continent. He considered that the interweaving of these distinct but complementary legal orders was leading to a situation in which the very concepts of sovereignty and state became increasingly irrelevant. His position, characterised as ‘post-sovereign’¹¹³, was influential in the SNP, and he thought the heterarchical jurisgenerative sites in operation in early 21st century Scotland should and would mutually respect the boundaries of the jurisdictions belonging to each. He defined sovereignty simply as a power subject to no higher power, and although he seemed frustrated with the long shadow Dicey had cast on the British academy he accepted the distinction between legal and political sovereignty. He was quite comfortable with the consignment of both to quaint Westphalian history. Depending on his simplistic construction, he thought political sovereignty had no place in a state governed by law, and he thought legal sovereignty – as the highest power of command – would have to be abandoned as soon as more than one legal order was in play.

The polycentric governing infrastructure was powered by novel democratic arrangements at sub and supra-state levels. MacCormick contended this emerging scheme would require, and was providing, new concepts with which to conceptualise and justify the exercise of power¹¹⁴. He believed that any conflict between the diffuse centres of power could be resolved by an appeal to the overarching system of international law contained in the treaties and legislation which delineated the respective competences of each level. MacCormick called this “pluralism

¹¹² *MacCormick v Lord Advocate* 1953 S.C. 356

¹¹³ MacCormick, N, ‘Beyond the Sovereign State’ (1993) 56 (1) *Modern Law Review* 1-18

¹¹⁴ Such as subsidiarity: “The idea of subsidiarity points us to better visions of democracy than sovereignty ever did. There is a possible future reality preferable to the past of nostalgic mythology.” MacCormick, N, *Questioning Sovereignty: Law, State and Practical Reason* (OUP, Oxford, 1999) p126

under international law”¹¹⁵ and it is not difficult to see how it appealed to his thoughtful and cosmopolitan Scottish nationalism. As a small nation used to navigating a mixture of legal systems within the United Kingdom he appeared to consider that his country had a lot to gain from an enthusiastic embrace of the opportunities the EU offered. MacCormick’s approach was fleshed out and refined by Walker, who could not bring himself to jettison the concept of sovereignty. He preferred “late sovereignty”¹¹⁶, acknowledging that an alternative concept had yet to dislodge sovereignty. The change Walker felt the term “late sovereignty” described was an “emerging sense of ‘autonomy without territorial exclusivity’”¹¹⁷. He rows back from the purely normativist vision, accepting that the positivist bias in modern constitutionalism threatens “constitutional fetishism”. He seeks to promote an imaginative and diverse constitutionalism which promotes “variable reiteration” in opposition to “conservative reproduction”, and his work can be seen as a search for new ways of legitimating authority in a time when much that was once within the control of national governments appeared to be elusive, such as international capital. Walker even suggested that the emerging principles of the new constitutional pluralism he had identified could act as a *lingua franca* between polities, mutually beneficial (and recognised as such) to each of the participating jurisgenerative sites.

Both scholars agreed, therefore, that sovereignty was on its way out – they simply disagreed about when it would finally cease to be of relevance. For MacCormick that day had already come, whilst for Walker it was still some way off. They also concurred in unequivocally promoting the positive effects of the co-existence of multiple legal orders in one territorial domain. Scotland provided a handy example of such a space, subject to law from three distinct levels. The problem is that instead of the harmonious pluralism they expected in Scotland, something approaching constitutional antagonism appears to obtain. The permanent prominence of constitutional issues at the forefront of Scottish politics suggests that pluralism may not be the tonic the Edinburgh school thought it was, as does the unfolding end of the UK’s membership of the EU and its potential implications for the nature of Scotland’s relationship with the wider UK. The judgement in *Miller*¹¹⁸ also disproved an idea common to Walker and MacCormick; that power had been, or was being, irretrievably lost upwards and

¹¹⁵ *Ibid* p117

¹¹⁶ Walker, N, ‘Scottish Nationalism For and Against the Union State’ in Walker, N (Ed), *MacCormick’s Scotland* p171

¹¹⁷ Walker, N, ‘Sovereignty Frames and Sovereignty Claims’ in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p26

¹¹⁸ See n4 above

downwards to supra and sub-state centres of authority. The justices were clear that not only did the Westminster Parliament remain free to dictate the form and manner of its departure from the EU, but also that it did not require the consent of the devolved Scottish Parliament to proceed.

Loughlin's Sovereignty

How to sort through the irreconcilable positions taken up by opposite ends of the political spectrum on sovereignty in Scotland? How should we conceive of the Scottish public realm in juristic terms now that it seems circumstances have conspired to throw doubt on the optimistic account of the Edinburgh school? The central contention of this paper is that the work of Martin Loughlin, Professor of Public Law at the London School of Economics, is uniquely capable of throwing light on what is happening in post-devolution Scotland, and it requires rejection of every approach described so far. In order to appreciate what Loughlin has to say, we must first specify what he means when he uses commonly encountered terms such as public law, state, and sovereignty.

For Loughlin, public law is not and can never be simply a subset of positive law. Usually in British jurisprudence public law means the laws which deal with the relationship between the government and the citizen, as opposed to the rules governing interactions between citizens, known as private law. This is a useful distinction for Loughlin insofar as it reflects the distinction between private and public power, but it speaks to a reductive and narrow definition of public law. Loughlin's definition of public law is far wider, and arguably prior, to positive law: it moves beyond the scope of "rules posited by the constituted authority" to embrace "those precepts of political right that establish and maintain public authority"¹¹⁹, the rules which constitute the autonomous political arena which is a prerequisite for the existence of a system of positive law. This higher order system of law, called *recht* rather than *gesetz* in German jurisprudence, is described by Loughlin thus: "Public law concerns all the rules, principles, practices and maxims that establish, sustain and regulate the activity of governing the state"¹²⁰. Sovereignty is one of these. As such, for Loughlin the insistence on the Westminster

¹¹⁹ Loughlin, M, 'Reflections on the Idea of Public Law' in Christodoulidis, E & Tierney, S (Eds) *Public Law and Politics* p48. Loughlin uses the term 'precepts of political right' as a translation of what Rousseau called *les principes du droit politique*.

¹²⁰ Loughlin, M, *Political Jurisprudence* (OUP, Oxford, 2017) p16

Parliament's sovereignty as the only juristically sensible meaning of the word is reductive. Although the highest power of command is one facet or 'mark'¹²¹ of sovereignty, and certainly necessary for a coherent system of governing order, the concept cannot be reduced to that. This is, however, a common tendency in British public lawyers, and it often exists alongside its Diceyan counterpart: an adherence to the distinction between legal and political sovereignty. Loughlin's focus on a broader concept of public law is based upon a continental tradition encompassing the work of Hobbes, Bodin, Rousseau, Hegel, and Schmitt.

Another definition is necessary before addressing Loughlin's sovereignty – his definition of the state. Loughlin here adopts another continental method – the approach of the German tradition of *Staatslehre*, following sociologist Georg Jellinek. In this theory the state is comprised of three discrete elements, but is not reducible to any of them: *Staatsvolk* (people), *Staatsgebiet* (territory) and *Staatsgewalt* (government). This state is a social construct with its roots in the early-modern shift away from ideas of divine kingship and in the accordant idealisation and corporatisation of the office of the ruler. The state which is comprised of these three elements is “an abstract entity above and distinct from both government and governed”.¹²² It is necessary to mediate the conflict between the private and public lives of its citizens; to draw the “competing modalities of life” Loughlin calls community and society together. Community is the province of the clan or family, inward-looking and collective; society is premised on the rights of the individual and her freedom to act as she pleases in her own interest. Whilst he accepts that the state is on one level an abstract concept, or “scheme of intelligibility” through which we make sense of the collective, public, political world, he holds that the ideas which constitute the state must “animate, guide and give meaning to the workings of the component material entities”. Another reductive tendency of orthodox British scholarship is to equate state with government, and Loughlin seeks to rescue his definition from “the weight of argument that reduced the state to *Staatsgewalt*” in order to make clear that the state is not only “a set of institutions with a monopoly on coercive power”.¹²³

¹²¹ Loughlin notes that this sort of confusion is exactly what one of the earliest theorists of modern sovereignty, Jean Bodin, warned against in the 1600s. Loughlin, M, 'Why Sovereignty?' in Rawlings R, Leyland P & Young A (Eds) *Sovereignty and the Law* p39

¹²² Loughlin, M, *Foundations of Public Law* (OUP, Oxford, 2010) p191-194

¹²³ *Ibid* p205-206

Before considering the implications of the Loughlin's model of sovereignty it is important to note that Loughlin's relational sovereignty is a way of escaping the stand-off between what he calls "normativism" and "decisionism", two ways of thinking about legal orders best exemplified by Hans Kelsen and Carl Schmitt respectively¹²⁴. For Kelsen and the normative school, legal order is itself autonomous, and it is therefore meaningless to speak of a constituent power. As the individual legal order is a system which makes perfect hermeneutic sense, deriving its character from immanent precepts, any acknowledgement of external influences is avoided. A concept of 'legality' with an internally derived morality and authority is introduced as the justification for constitutional regimes and the people as a political unity are no longer necessary as an active constitutional ingredient. At the other end of the spectrum, Schmitt and the decisionists' theory posits the people *qua* people as a fact which predates the legal order they institute. For Schmitt, Kelsen's approach ignored the fact a system of norms must first be instituted by an act which expresses "the will of the constitution-making power"¹²⁵. For Loughlin, although Schmitt's work is helpful in that it emphasises that the constitution of a governing order is "is not merely an exercise in norm construction; it requires the formation of a political unity"¹²⁶, it founders on the converse of the problem for normativism. It simply swaps the part of the scheme that must be assumed at the outset. This is problematic: without a legal order to be represented in, how can 'the people' act at all?

Loughlin calls his solution to the impasse between normativism and decisionism relationalism, and it owes more to the latter than the former. His third way recognises a number of the insights in Schmitt: that it is necessary to relate the normative to the existential; that the political is "a domain of indeterminacy and therefore one that cannot be organised in accordance with some grand theory"; that the gulf between norm and fact "must be filled by the activity of governing"; and that governing itself "is a sphere of domination in which decisions must be taken".¹²⁷ His criticism of Schmitt is that he fails to appreciate that "once representation is invoked for the purpose of generating political power 'the people' must itself be regarded as a representation. Political power is generated only when 'the people' is differentiated from the existential reality of a mass of particular people (the multitude)."¹²⁸ It is this moment of differentiation which is

¹²⁴ Loughlin, M, 'On Constituent Power' in Dowdle, MW and Wilkinson, M (Eds) *Constitutionalism Beyond Liberalism* (CUP, Cambridge, 2017)

¹²⁵ Loughlin, M, *Foundations of Public Law* p211

¹²⁶ *Ibid* p214

¹²⁷ *Ibid* p165

¹²⁸ *Ibid* p166

crucial and Loughlin argues that it is overlooked in Kelsen and in Schmitt. Drawing on the work of Hans Lindahl, which contends that the initial exercise of the constituent power *simultaneously* constitutes the *Staatsvolk* that exercises it¹²⁹, Loughlin observes: “Constituent power expresses the fact that unity is created from disunity, inclusion from exclusion. Constitutional ordering is dynamic, never static. So instead of treating the constituent power of the people as an existential unity preceding the formation of the constitution, this power expresses a dialectical relation between ‘the nation’ posited for the purpose of self-constitution and the constitutional form through which it can speak authoritatively.”¹³⁰ Only once this initial act has taken place can sovereignty do its work.

Loughlin’s sovereignty is therefore an expression of the dialectical relationship between the people (*Staatsvolk*) and its government (*Staatsgewalt*). Neither element takes precedence. Rather, both come into existence at the foundational moment when the people represent themselves symbolically in the legal order. To the extent that positive law plays a role in sovereignty, an exclusive focus on positive law can only ever reveal half of the dynamic the concept expresses. Crucially, Loughlin’s relational and reflexive theory of sovereignty is inextricably legal *and* political.

In order to unpack this statement, the distinction made by Spinoza between two different forms of power called *potentia* and *potestas* is of crucial importance. *Potentia* is the concrete power available to a government, its ability to make a tangible difference in the material world. In modern regimes this power manifests itself as the capacity to command by law, a form of domination. *Potestas*, on the other hand, speaks to rightful authority, and its nature is political. It is generated by nothing more than the drawing together of men in pursuit of a common end. It is this power that is harnessed by governing order and thereby turned into *potentia*. This is what Loughlin means by the power-distributive legal and power-generative political aspects of sovereignty, and this operation is what sustains a governing order. The symbolic foundational pact which institutes a form of government and bestows its offices with a rightful authority simultaneously constitutes the people as ‘the nation’. Rather than master and slave, the government and the individual are stakeholders in a mutual enterprise, where each acts for the common good of their overarching object. Although an unlimited authority to rule is conferred,

¹²⁹ *Ibid* p233; see also Lindahl, H, *Fault Lines of Globalisation: Legal Order and the Politics of A-legality* (Oxford, OUP, 2014)

¹³⁰ *Ibid* p227

arbitrary or oppressive exercise of that power will undermine its strength. The command of the sovereign only carries weight insofar as it is respected as power justly exercised¹³¹: this is the function of *potestas*. The interplay between *potentia* and *potestas* means that restraint of the latter in fact increases the sum total of *potentia* in circulation. It is this dynamic which leads Loughlin to state: “The elaborate frameworks of modern constitutional contracts do not impose a set of constraints on the exercise of public power; they establish the institutional frameworks through which power can be generated.”¹³²

If *potentia* engages the legal aspect of sovereignty, then the consent and of restraint at work in *potestas* open up our view of the political aspect, the facet of sovereignty which allows Loughlin to state unambiguously: “Governmental authority rests on the allegiance of the people. Once support is withdrawn, the authority of the governors dissipates.”¹³³ The more just the distribution and the use of public power is perceived to be in a particular state, the more that state will be strengthened by the allegiance of its *Staatsvolk*. The more the *Staatsvolk* approves of and cleaves to its *Staatsgewalt* the stronger the political authority of the state; its supply of *potestas* grows in concert with the allegiance of its citizens. The more the citizenry perceives its government to rule rightfully, the more readily it will offer its allegiance to that government. An increased level of *potestas* in turn manifests itself in an increased store of *potentia*¹³⁴, the concrete physical power at its disposal. Increases in *potentia* – in governing capacity – are rendered possible only by consent to increased state interference in their lives of the governed, interference which must be justified.

Sovereignty therefore simultaneously represents the legal manifestation of the political and the political underpinning of law. As a juristic concept it can be likened to a machine which maintains the equilibrium of a state. The metaphorical input is *potestas*, which is conferred by the consent of the governed. All the *potestas* that is initially required is generated by the joining of a multitude into a political unity which institutes a system of government. In order to maintain a state, however, the *potestas* must be turned into a metaphorical output in the form of *potentia*, law which is expressed through institutions. In this symbiotic relation the political

¹³¹ “There may be an absolute right to rule, but if the sovereign weakens his power by oppressive or inappropriate action, the regime may collapse.” *Ibid* p106

¹³² *Ibid* p231

¹³³ Loughlin, M, *The Idea of Public Law* (OUP, Oxford, 2003) p82

¹³⁴ “Allegiance – the generator of power – is enhanced not so much when competence is limited but when the conditions for open, accountable and responsive government are in place.” Loughlin, M, *Foundations of Public Law* p231

and legal aspects of sovereignty depend on each other, and the strength of one is directly proportional to the strength of the other.

Loughlin's Sovereignty in Scotland

Loughlin's complex model of sovereignty enhances "our ability to evaluate claims made within the previously, and proudly, a-theoretical tradition of UK public law."¹³⁵ An immediate consequence of his approach is that it allows us to move past what a third professor at Edinburgh, Stephen Tierney, has called "otiose"¹³⁶ debates about the true location of sovereignty in the contemporary Scottish constitution. When it is understood that sovereignty in fact relates to a wider notion of public law we can see that when we try to force it into the narrower frame offered by the positive scheme of codified public law we are attempting to apprehend and apply sovereignty by making one of its mere "marks"¹³⁷ represent the whole; we reduce the complex concept to its particular manifestation in a narrow context. Invocation of sovereignty on the wrong analytical level has meant that sovereignty gets conflated with the sovereign. It ignores the political aspect of sovereignty which not only generates but also polices the distribution and exercise of public power. The side of the argument which prefers to emphasise the sovereignty of the Queen-in-Parliament conflates the highest power of command – pure power-distributive *potentia* – with the wider concept. It ignores the political, power-generative and equally essential strand of sovereignty entirely.

Meanwhile, the side which prefers to emphasise the historic sovereignty of the Scottish people, variously choosing to cite events of 1320, 1575 or 1689 as its apotheosis, falls into the same trap as Schmitt. Any assertion that the Scottish people have a constitutional right as a political unity – as the Scottish nation in the juristic sense – can only make sense once those people have been symbolically represented in a constituted governing order. The Scottish people can only exercise their sovereignty once they have harnessed their *potestas* through institutional forms and turned it into authoritative law, expressing the power produced as *potentia*.

¹³⁵ Gordon, M, 'A Basis for Positivist and Political Public Law: Reconciling Loughlin's Public Law with (Normative) Legal Positivism' [2016] *Jurisprudence* 7 (3) , 449-477, 451

¹³⁶ Tierney, S, 'Sovereignty and the Idea of Public Law' in Christodoulidis, E and Tierney, S (Eds) *Public Law and Politics* (Aldershot, Ashgate, 2005) p15

¹³⁷ In this instance, the "mark" of sovereignty per Bodin is the highest power of lawful command, or the sovereign power. Loughlin, M, 'The Erosion of Sovereignty' p63

Unsurprisingly, given their hostile approach to sovereignty and their tendency to imbue the legal order itself with some kind of inherent moral authority, Loughlin takes great exception to the pluralist treatments of MacCormick and Walker. Loughlin considers MacCormick's work to be "an echo of Kelsen's idea that there is only one legal order in the world"¹³⁸ which deals only with the pure legal forms of governing order and ignores the underlying material constitution which shapes the political world in which those legal forms become possible at all. MacCormick always treats law as *gesetz*, never as *recht*. He thinks that the division of *potentia* amongst various levels of government amounts to a division of sovereignty, failing to appreciate that sovereignty is not purely concerned with institutional competence. MacCormick's analysis is limited to one half of the relation expressed by sovereignty and as such is incapable of even approaching the question of its role in Scotland. Walker goes further in recognising that the question of political authority is engaged when discussing sovereignty, but he never specifies its relation with legal form in sufficient detail, nor suggests an alternative paradigm which would allow us to finally move beyond his late sovereignty. Each of the Edinburgh professors is also castigated by Loughlin for failing to appreciate that constitutional pluralism is impossible because sovereignty is a principle of unity and closure; the autonomy of the political world it creates is fatally undermined by competing claims to authority.

The central contention of this paper is however positive, not negative: it is submitted that Loughlin's theory offers a clear way to a new and more coherent understanding of the operation of sovereignty in contemporary Scotland. The institution of the devolved Scottish Parliament and its associated institutions of governance symbolically represented the Scottish people in a legal order which had the power to manifest the general will as law. This is the moment before which any invocation of sovereignty in Scotland is premature. Devolution made it possible to conceive of a distinctly Scottish state, an autonomous political world comprised of *Staatsvolk*, *Staatsgebiet* and *Staatsgewalt*. Significantly, the *potestas* which powers the legal order derives purely from Scottish political association. An approach which ascribes Holyrood's power to Westminster's legislative grant fails to appreciate the underlying complexities revealed by a thorough application of Loughlin's reflexive relational model. Perhaps the existence of the distinct institutions of state in Scotland throughout the union made it easier to reawaken its

¹³⁸ Loughlin, M, 'Constitutional Pluralism: An Oxymoron' (2014) *Global Constitutionalism* 9

constitutional imagination, and maybe the fact that those institutions – such as the courts, the Church, and the systems of education and local government – were already in place made it easier for the new Parliament to resume control of what was a partially-formed, half-forgotten but vital public sphere when the Scotland Act was passed. Moreover, the undeniably restricted power of the legislature and government in Edinburgh may actually serve to ensure the more rapid growth of the power of the devolved public sphere. If it is true that the more restrained and justified the exercise of public power, the greater the rate at which it can grow, then Scotland's governing institutions seem to be in a counter-intuitively strong position. No doubt at least in part because it was forced by the constraints placed on it by Westminster, rather than with an eye on prudential maxims, the devolved government has had to deploy its *potentia* with more restraint than its counterpart in London.

It is hoped that it is obvious that this analysis is not intended as an advocacy of a breakaway Scottish state. Rather, it seeks to highlight that if and when an independent Scottish state emerges, the formalisation of that event in positive law can only ever explain at best half of what went on. To discern the principles which underlie those laws and retain the crucial focus on the juristic precepts which form and condition the power they express requires an approach which moves beyond both the formalistic positivism observed in courts and textbooks and the hopeful yet hopelessly confused pluralist method championed by the Edinburgh school. More radically still, it suggests that if there are two competing political worlds in Scotland, the only thing which will guarantee one succeeds over the other is that it more assiduously solicits the allegiance of the citizenry.

