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Submissions and enquiries should be addressed to:

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## EDITORIAL

I am pleased to introduce Volume 26 of the Nottingham Law Journal. The journal, founded forty years ago in 1977 as the *Trent Law Journal*, shares critical legal thinking to help meet the challenges of understanding the contemporary legal environment. We are extremely proud of our forty-year history, its scale and reach. This edition features thought-provoking contributions across a range of legal disciplines.

Our first article by Nicola Harris arises from the second International Advocacy Teaching Conference held at Nottingham Law School on 24–25 June 2016, convened by my colleague Jeremy Robson, Principal Lecturer in Advocacy and Director of the School's Centre of Advocacy. Advocates, members of the judiciary and academics from around the world came to our fair city to share experiences of teaching and development of advocacy skills in legal education (undergraduate, postgraduate or professional).

Turning to ethics and health, Dr. Elizabeth Curran explores justice in the multi-disciplinary practices in health sphere. Next Adina Portaru, a practitioner, seeks a better understanding of the history and nature of Article 17 TFEU, particularly topical in light of Great Britain's impending exit from the European Union. Finally, we travel to Hong Kong where Eric Hong considers the concept of judicial independence, whereby the judiciary should not be subject to improper influence from other branches of government or from private interests and its contemporary relevance in that jurisdiction.

Congratulations to Nottingham Law School LLB student Rebecca Clarke who won the Student Essay Prize. We are delighted to publish student work of such a high standard.

My sincere gratitude to all the contributors, reviewers, subscribers and readers of the Nottingham Law Journal. I am grateful for the support of Dr Helen O'Nions, the previous Editor, who was at the helm of many outstanding editions. Particular thanks to my small but able team of Deputy Editors, Dr Helen Hall and Dr David Barrett. Finally, thanks to our fabulous administrative assistants, Carole Vaughan and Kerri Gilbert.

DR JANICE DENONCOURT



## ARTICLES

*The address for submission of articles is given at the beginning of this issue.*

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### ASSESSING ADVOCACY: LISTENING TO THE STUDENT EXPERIENCE

NICOLA HARRIS\*

#### ABSTRACT

This article examines the assessment principles and strategies used in teaching the skill of advocacy at the vocational stage of legal education. In England and Wales, advocacy is taught as part of the Bar Professional Training Course (BPTC) or the Legal Practice Course (LPC). To date, the assessment of advocacy has performed a number of functions; it has acted as a gatekeeper to the professions, a mark of accreditation and a signifier of competence. A critical analysis of a student survey regarding their experience is presented.

#### INTRODUCTION

It is an educational truism, oft quoted but nonetheless true, that assessment is at the core of the student experience. It can be either formative or summative in nature. It can occur at a single point in time or throughout a module. It shapes, drives and is an essential part of learning. Inevitably, it provides a major focus and motivation for students, creating their priorities and affecting what they see as being valuable within the learning experience.

“Assessment defines what students regard as important, how they spend their time and how they come to see themselves as students and then as graduates. . . . If you want to change student learning then change the methods of assessment”<sup>1</sup>

In advocacy teaching as much as in other educational spheres assessment must be key to the design of teaching and learning, but it also performs additional functions in that it plays a significant role in the shaping of the future advocate and the accreditation of practitioners.

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<sup>1</sup> George Brown with Joanna Bull & Malcolm Pendlebury, *Assessing student learning in higher education* (Routledge 1997) 7.

In England and Wales, the assessment of advocacy skills has usually been conducted during the vocational stage of the traditional tripartite structure of legal education as part of the Bar Professional Training Course (BPTC) or the Legal Practice Course (LPC). As a skill taught within the vocational stage of legal education the assessment of advocacy has performed a number of functions; it has acted as a gatekeeper to the professions, a mark of accreditation and a signifier of competence. However, the division of legal education into academic and vocational stages has historically led to a separation of “skills” from “knowledge” and a limited role for advocacy within the undergraduate curriculum. Whilst Mooting has been a staple of the undergraduate law student experience for many years, it has frequently been extra-curricular, falling outside the usual structures of assessment and instead taking the form of a competition in which assessment is comparative in nature and feedback, if any, somewhat limited.

However, it may be argued that a more detailed consideration of the integration of skills into the broader undergraduate curriculum is both timely and necessary, both in terms of pedagogical innovation in legal education and the embedding of employability skills. The landscape of undergraduate provision has changed over the last few decades and there has been a gradual shift away from the near universal lecture-tutorial model of legal teaching towards a broader and more innovative model offering a range of teaching methods, often underpinned by concepts of experiential learning, learning by doing. Dramatic changes to legal education have been seen within the clinical legal education movement, developments in problem-based learning and the use of online teaching and flipped learning models. Along with this expansion of models of teaching and learning has gone an increased visibility of skills (in the broadest sense – both general and discipline specific) in the undergraduate curriculum. Some universities have developed degrees offering greater integration between the academic and vocational stages<sup>2</sup> whilst others have sought to increase the skills taught at LLB level. In light of changes proposed by the Bar Standards Board<sup>3</sup> and the Solicitors Regulation Authority,<sup>4</sup> moves towards a more diverse and skills-focussed undergraduate curriculum are likely to gain further momentum. Given that students tend to work strategically towards their assessment, academics need to make equally strategic choices about assessment in order to promote good student learning.<sup>5</sup> Therefore, if legal academics are to incorporate skills into a broader and more integrated curriculum, a more creative approach will be needed towards effective modes of assessment in a law school. If the curriculum is to be aligned with its assessment methods, those methods need to consider the need to assess the skills being taught both reliably and validly. This will inevitably bring the assessment of skills into sharper focus.

Skills, specifically vocational skills, are of course taught across many disciplines and assessed in many different ways. An examination of assessment methods beyond the discipline of law can therefore offer ideas and warnings, cautionary tales and inspirations. It can also give us a chance to hear the student and staff experience of skills-based assessments.

<sup>2</sup> Carol Boothby & Cath Sylvester, *Getting the fish to see the water: an investigation into students' perceptions of learning writing skills in academic modules and in a final year real client legal clinic module*, (2015) *The Law Teacher*, DOI:10.1080/03069400.2015.1070650.

<sup>3</sup> Bar Standards Board, *Future Bar Training*, (Bar Standards Board, October 2016) available at [https://www.barstandardsboard.org.uk/media/1794621/future\\_bar\\_training\\_routes\\_consultation\\_\\_final.pdf](https://www.barstandardsboard.org.uk/media/1794621/future_bar_training_routes_consultation__final.pdf).

<sup>4</sup> Solicitors Regulation Authority, *A New Route to Qualification: The Solicitors' Qualifying Examination* (SRA, October 2016) available at <http://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page#download>.

<sup>5</sup> Gibbs, 'Using Assessment Strategically to Change the Way Students Learn' in S Brown and A Glasner (eds) *Assessment Matters in Higher Education: choosing and using diverse approaches* (OUP 1999).



This article uses data generated by a survey of staff and students involved in a variety of skills-based assessments across five subject areas in Cardiff University to examine how effectively assessment methods in an Advocacy module were achieving the aims of reliability and validity, to consider where problems lay and to suggest what approaches might be taken to improve the assessment of advocacy within a university setting.<sup>6</sup>

## THE PRINCIPLES OF ASSESSMENT

Assessment of advocacy, or any assessment of skills, is underpinned by a number of basic principles of assessment in just the same way as any other type of assessment. Notions of validity, reliability and fairness are vital to the design and process of assessment.

The principle of validity<sup>7</sup> asks us to consider whether the assessment allows us to measure that which we wish to measure. This inevitably links to issues of alignment: are we measuring or assessing that we teach? Congruence or alignment between Learning Outcomes, teaching and assessment will lead to greater validity of that assessment.<sup>8</sup> In terms of advocacy this principle gives rise to the question of whether we are assessing the skill of advocacy itself, assessing a subject area through the medium of advocacy or a combination of the two.

The second key principle is that of reliability. This principle refers to “the attempt to make sure that any assessment describes the phenomenon being assessed and is not a product of the measurement instrument being used”.<sup>9</sup> In the assessment of advocacy skills this principle introduces the question of whether the assessment is marked to the same standard regardless of who is marking it and encompasses issues of both consistency (of marking by each assessor and between assessors) and replicability of assessment experience.<sup>10</sup>

These two principles are perhaps the twin cornerstones of assessment design,<sup>11</sup> but others are also significant factors to bring into consideration. The principle of fairness might be seen as aspect of validity: is each student getting a fair chance to demonstrate their competence? Issues of accessibility and inclusion are related to assessment fairness and in the assessment of advocacy variability of assessment experience also becomes relevant, in particular variability of “witnesses” played by actors, but also variability of judicial intervention if that forms part of the assessment. The principle of transparency is also important: is it clear to the students what is required? Without transparency, whether it be in the form of clearly constructed rubrics, clear advance information or greater assessment literacy, there is a risk of confusion on the part of the student or the assessor.

Authenticity, a relevance and relationship to the lived experience of practice, might be seen as a weakness in some forms of assessment which can seem to the student to be somewhat false and artificial in design, but is perhaps a principle to which advocacy lends itself more than many other assessment methods, being modelled on real-world practice. This emphasises to the student the way in which the skill being assessed relates to the world beyond the academy.

<sup>6</sup> Thanks are due to my colleagues from the four other subject areas who took part in the study and who kindly allowed me to use our joint data for this paper: David Buchs, Ian Dennis, Ellen Parker and Rowan Yemm.

<sup>7</sup> Sally Brown & Peter Knight, *Assessing Learners in Higher Education* (Routledge Falmer 1994) 17.

<sup>8</sup> Biggs, J and Tang, C. *Teaching for Quality Learning at University* ( McGraw-Hill and Open University Press 2011)

<sup>9</sup> Sally Brown & Peter Knight, *Assessing Learners in Higher Education* (Routledge Falmer 1994) 14.

<sup>10</sup> Assessment parity can be addressed in part by, for example, the use of detailed scripts for those playing witnesses, but still requires careful moderation to detect inconsistencies.

<sup>11</sup> As recognised by the expectation set out in chapter B6 of the QAA's *UK Quality Code for Higher Education* - available at <http://www.qaa.ac.uk/assuring-standards-and-quality/the-quality-code/quality-code-part-b>.

Moving beyond general principles, skills assessments, the measuring of the student's ability to put their learning into practice in real-world contexts, occur across a wide variety of subjects, be they creative, scientific, medical or vocational.

Several pedagogic studies have investigated the nature and practice of professional or practical assessments (for example, in Geology,<sup>12</sup> Health Sciences,<sup>13</sup> Medicine,<sup>14</sup> or Archaeology<sup>15</sup>) but the number of contributions varies significantly among different disciplines, being relatively abundant in Medicine and Pharmacy where skills-based assessment is well-established and well-embedded, but significantly less common elsewhere, and most studies are limited to their own discipline. Few comparative studies exist which cross over disciplinary boundaries, although some works have sought to bring a variety of approaches to the assessment of skills together.<sup>16</sup>

Turning to Law, discipline-specific literature on skills assessment is perhaps more limited than in other areas where skills-based assessments have been more widely incorporated into undergraduate degrees. This may reflect the fact that oral assessment has traditionally played a very limited role in British legal education prior to the vocational stage. In addition, Chloe Wallace has noted that “there remains a body of opinion within the legal academy and the profession that written examinations are the “gold standard” in terms of academic rigour and providing motivation to study”<sup>17</sup> and any diversification of assessment methods in undergraduate law teaching seems relatively limited in most institutions and often confined to clinical legal education modules. It is perhaps unfortunate that the use of a more diverse diet of assessment methods is so limited. Those writing on the subject of assessment within law have noted both the importance of oral communication skills to lawyers and the benefits of oral skills-based assessment methods for promoting “deep learning”<sup>18</sup>. In considering the assessment of both written and oral skills on the LPC, Mike Maughan has suggested a move to a capability-based approach<sup>19</sup> but a closer analysis of how we assess oral skills is generally lacking.

## METHODOLOGY

The survey upon which this paper draws was the result of collaboration across five disciplines within Cardiff University. The aim of the survey was to capture the student and staff experience of skills assessments across a variety of subject areas and assessment forms. Students and staff involved came from Law (Advocacy on the Bar Professional Training Course), Medicine and Pharmacy (both of which used Objective Structured Clinical Examinations – OSCEs – to assess clinical skills in undergraduate students on a rotation of short “stations” using actors to play patients), Earth Science and Archaeology (in which Field or Dig skills were being assessed).

<sup>12</sup> AP Boyle, P Ryan, A Stokes, ‘External drivers for changing fieldwork practices and provision in the UK and Ireland’ (2009) Geological Society of America Special Papers 461, 313–321. Society of America Special Papers 461, 341–356.

<sup>13</sup> S Kilminster, T Roberts, *Standard Setting for OSCEs: Trial of Borderline Approach* (2004) Adv Health Sci Educ Theory Pract 9, 201–209.

<sup>14</sup> C R Whitehead, A Kuper., B Hodges., R Ellaway, ‘Conceptual and practical challenges in the assessment of physician competencies’ (2014) 37 Medical Teacher, 245–251.

<sup>15</sup> P Everill, R Nicholls, *Archaeological Fieldwork Training: Provision and Assessment in Higher Education* (2011) University of Winchester and Higher Education Academy Subject Centre for History, Classics and Archaeology.

<sup>16</sup> See, for example, Ruth Pickford and Sally Brown, *Assessing Skills and Practice* (Routledge 2006).

<sup>17</sup> C J Wallace, ‘Using oral assessment in law: opportunities and challenges’ (2010) 44:3 The Law Teacher, 365–377, 366.

<sup>18</sup> Karen Hinett and Alison Bone, ‘Diversifying Assessment and Developing Judgement in Legal Education’ in R Burridge, K Hinett, A Paliwala and T Varnava, *Effective Teaching and Learning in Law* (Kogan Page 2002) 52–80, 74.

<sup>19</sup> Mike Maughan, ‘A Capability Approach to Assessing Skills on the LPC’ in Julian Webb and Caroline Maughan (eds) *Teaching Lawyers’ Skills* (Butterworths 1996) 337–402.

Prior to the design of the survey a standardised template of questions was completed by each of the colleagues involved in the project to provide information about how professional skills were assessed within their disciplines. The questions related to several aspects of skills assessments, including their context within the course, who conducted the assessments, how the assessments were designed and prepared, marking criteria and the use of technology in the assessments. This approach allowed for a direct comparison between the five disciplines considered in the study.

Collection of data for the study was in the form of a questionnaire for staff and students. These surveys consisted of a short series of multiple choice and long answer questions, and was offered to participants in either an online or paper format. This approach was used to maximise response rate from participants who may predominantly work off-site without computer or email access (e.g. Fieldwork). SurveyMonkey® and Typeform® were the chosen survey platforms, both being well-established and having clear and easy-to-use mobile device interfaces. A link to the online survey was sent out via email with a covering statement providing a brief introduction and background to the study.

The questionnaires were divided into three sections covering participants' demographics (staff and student), their experiences of undertaking professional skills assessments and freetext answers to questions about their general views on these assessments.

Participants were asked to rate on a 5-point Likert scale of 'strongly agree' to 'strongly disagree' their level of agreement with a series of statements describing professional skills assessments. Additionally, three long-answer questions aimed to explore barriers and facilitators associated with these assessments and enable participants to express their views and add any additional comments. Thus both quantitative and qualitative data was obtained.

A purposive sampling strategy was adopted, targeting staff members and other external assessors who were known to be both currently or previously involved in the assessment of professional skills within one of the five disciplines. Staff participants were asked about their experiences and views on these assessments, and so it was necessary that they had direct experience in assessing professional skills. The questionnaire was sent to all participants meeting the inclusion criteria, which, in relation to the students, meant all those currently enrolled on the courses which were being studied. The timing of the survey meant that they had all been assessed recently.

All participants were sent a reminder email after one week to encourage participation in the study. As questionnaires were anonymous, it was not possible to specifically target non-responders.

Data from the completed questionnaires was downloaded into an Excel spreadsheet for the purpose of analysis. Partially complete questionnaires were included in the analysis. Frequencies and chi-squared analysis was carried out using SPSS® version 20 to analyse demographics and level of agreement with the listed statements. Basic thematic analysis of written answers in free-text sections was conducted to identify key themes.

In total 179 student responses were received, 23 of which were from law students (representing a 33% return rate from the Law cohort). 53 responses were received from staff. Although only 7 of these were from Law staff involved in Advocacy assessment, this did represent a 100% return rate. Sample size in relation to Law was therefore relatively small.

## FINDINGS – GENERAL THEMES

Overall, the responses from students fell into three general themes.

The first was that of expectations and preparation for the assessment. Some students raised concerns over insufficiencies in initial relevant training, especially where teaching methods and mode of assessment were not well aligned. Another factor which appeared to be closely linked to inadequate training and preparation was that of stress, although this was much more of an issue in some disciplines than others. It did not feature very heavily with the Law students, but whether this was a result of close alignment between teaching and assessment or merely a reflection of the students who had already chosen to study for a qualification heavily focussed upon advocacy and public performance is impossible to tell.

The second major theme in responses was that of consistency and competency. This ranged from concerns about variations in Assessor notions of professional competency to issues with assessing a balance of skills and with the consistency and fairness of assessments. Many students raised concerns about perceived inconsistency in marking, fearing that staff have different notions of competency and preferences, whilst staff voiced the opinion that inflexibility of marking schemes did not allow for ‘grey’ areas or discretion. This weighs against the fact that students wanted absolute certainty and fairness, giving rise to a tension between fairness and authenticity of practice-replicating experience.

The third general area of concern related to the logistics of assessment. This covered issues relating to realism and context, the set-up and management of assessments and a student preference for assessment over a period of time. There was a marked student preference for continual over “snapshot” assessment but law, medicine and pharmacy were to a certain extent driven by professional need to perform on the day given the serious implications to the individual client or patient of underperformance or a lack of competency in relation to their own case.

These findings and themes reflect the generality of replies across the disciplines, but for the purpose of considering how we teach and assess advocacy it is necessary to look at the replies of the advocacy students and examine where their concerns mirrored or ran against the general trends.

## FINDINGS – LAW

By way of context, all the advocacy students were post-graduate, whilst students in all other disciplines were undergraduate, although many medicine and pharmacy students were in the fourth or fifth years of their studies so ages and degrees of maturity and assessment experience were not dissimilar. All advocacy students had chosen to study a course which would lead to qualification as a barrister. This might lead to a degree of self-selection, with a more confident profile of personalities across the cohort.<sup>20</sup>

The teaching model used on the course was particularly closely aligned to assessment. All teaching was conducted in small groups of six and involved the making of submissions or the examination and cross-examination of witnesses in a manner which closely modelled the assessment procedures. Further, the advocacy students had regularly seen and used the assessment criteria, which were set out on the form used for written tutor

<sup>20</sup> Although it is worth noting that about half the overall cohort were studying to qualify for overseas jurisdictions where the work they anticipated undertaking was not necessarily contentious in nature.

feedback and for peer feedback in each class and for self-reflection after each session. Whilst the students were filmed in their assessments, they were already accustomed to being filmed since every classroom session was video-recorded with the same cameras and recording equipment used in the assessment.

Therefore, it would seem that students were in general likely to be more confident and feel better prepared for assessment given the preparation and alignment within the course and looking at the data it did seem that in general the law students seemed a little more content with their assessment experience than the other (non-law) students. When asked whether they felt they had been provided with adequate guidance for the assessment 100% agreed with 45% choosing “strongly agree” as opposed to respective figures of 79% and 19% overall. When asked if they understood the marking scheme 83% agreed/strongly agreed as compared to 64% overall.

When asked if they wanted their assessment recorded 87% agreed, with 65% agreeing strongly as opposed to respective figures of 74% and 29% overall. Here it is suggested that the significantly higher figure for strong agreement shows that being used to cameras in the classroom meant that the advocacy students had little fear of being filmed.

Another question asked whether students felt that the same assessor should be used for all candidates. The overall agreement rate for this question was 66%, whilst 39% of the law students agreed. Whilst the figure for law students was lower, this could in part be explained by the fact that their assessments, being 20–25 minutes long, would clearly pose great logistical difficulties if all students were before a single assessor. Indeed, it might be suggested that the fact that over a third of advocacy students agreed reflected concerns about consistency of marking and of assessor notions of competence.

Staff were asked the same question and answers were more variable. It was a proposition with which staff generally disagreed, with all law staff disagreeing, but archaeologists tended to agree, perhaps reflect differing practicalities between the disciplines and across different forms of assessment.

Overall therefore, the law students could be seen to be giving replies which positioned them as feeling significantly better prepared and more confident about their assessment, but there proved to be one question where law students gave very similar answers to the whole cohort: whether they were worried that assessors may have different ideas of competence. Overall, 79% agreed with the statement that they had this concern, with 82% of law students agreeing, although the percentages choosing “strongly agree” were lower for the law students.<sup>21</sup>

Again, staff were asked a similar question and overall 48% agreed that they worried that their idea of competence might differ from their peers and a further 22% replied that they were unsure whether they worried about this. The sample size in law was very small, but a similar pattern emerged: four agreed, two disagreed, one was unsure.

Thus it can be seen that amongst both students and staff this was an area for concern consistently across the disciplines and across differing assessment types. This was the one area where the more aligned teaching methods and greater familiarity with assessment criteria within advocacy did not seem to take effect in reducing concern and dissatisfaction. This seems to suggest that whilst clear alignment of teaching with assessment and transparent provision of assessment criteria can improve assessment literacy and student experience in relation to the principles of validity, questions of reliability remain problematic. Consistency within marking and variability in notions of competence were clearly the hardest for us to address and seemed to represent the knottiest part of the problem of improving assessment of advocacy.

<sup>21</sup> 27% as compared to 40% overall.

Turning to the qualitative results for Law students (and here again there must be a caveat regarding the relatively small numbers of responses) the themes which emerged were noticeably more consistent than was seen within the other disciplines, both as to what helped and what they were concerned about.

In response to the question of what had helped them with their assessments, student replies included:

“Practice and reviewing my performance via a recording”

“Practice in small groups and feedback from tutors during those small groups”

“Marking schemes”

“Practice. Feedback from tutors”

“Practice and constructive feedback”

When asked about problems they had encountered in relation to assessments they replied:

“Different assessors may have different expectations”

“The preparation may sometimes be confusing when it involves different teachers with different opinions”

“Feeling unsure what different assessors will expect during assessments”

In a similar way to that seen in relation to the quantitative data, the qualitative replies seemed to bear out the conclusion that although the effective use of feedback and close alignment between teaching methods and assessment helped students, reliability and consistency remained the most significant issues. Students voiced concern that different assessors might have differing expectations or conceptions of competence and those concerns were exacerbated if they perceived that there had been differences between tutors in the feedback given during teaching sessions.

It is of note that one clear message which came from staff replies to the question asking them to “describe anything you find helpful when assessing professional skills” was the extent to which they valued the opportunity, where it existed, to speak with colleagues and develop a professional consensus to promote fairness and reduce inconsistency. This was something full-time staff seemed to do, whether organised or otherwise, but in assessments reliant upon external professionals as assessors who did not know each other or have an opportunity to speak together this consensus-building was not possible.

## CONCLUSIONS

In both the qualitative and the quantitative replies a pattern emerged of the advocacy (law) students having a narrower range of concerns and worries than those displayed by the students in other disciplines. In general, their replies displayed a higher degree of satisfaction with their experience of and preparation for assessment than did those of students in other disciplines and it would seem that this in part reflected a close alignment between teaching and assessment methods. Their assessment experiences led them to express the greatest discontent when considering issues relating to reliability and consistency. In looking to improve the assessment processes it was clear that we needed to focus our efforts on understanding why this was a problem and what we could do about it.

It is of course important that we do not ignore the all too obvious elephant in the room: put simply, we might sit in court together and disagree about the persuasiveness of an advocate's argument. In assessing advocacy as a skill, we are inevitably comparing the student's performance with a notion of competence, with a notion of excellence, and determining where the student meets that standard and where he or she falls short of it. But advocacy cannot be measured in the way that the height of our elephant can be measured. Indeed the question "What makes an effective piece of advocacy" is perhaps at first glance closer in its nature to "what makes a beautiful painting" than "how tall is this elephant" in that it requires a degree of subjectivity, bringing in notions of persuasiveness, of integrity and emotional appeal, of *ethos* and *pathos* as well as *logos*. It is this subjectivity that students worry about, perhaps overlooking the fact that marking criteria for written work often uses phrases like "a conscientious attempt", "lucid" or "sophisticated" which similarly import a degree of subjective discretion into the marking process.

We cannot mitigate the problem of a lack of reliability in marking by pretending that there is no problem. Rather we need to examine whether there are ways of reducing disagreement about what makes "good" advocacy and of ameliorating any inconsistency which might flow from differing conceptions of competence.

The starting point within the learning experience seems to be consistency in teaching and feedback, the provision of a strong and consistent message as to what constitutes competence. Where this was absent, where feedback had been, or had been perceived to be, inconsistent, students' concerns about a similar inconsistency in assessment were heightened. For those whose courses are dependent upon the input of practitioners or part-time staff, shared video examples of different levels of performance will be of value as will the sharing of feedback given during the teaching process.

Clear, well-drafted, and carefully considered level descriptors are vital to both students and assessors when assessments are graded beyond a mere pass/fail, but they almost inevitably involve subjective concepts like persuasiveness. Transparent and explicit assessment criteria are equally important. Whilst there might be a move towards general marking criteria across all modules or courses across a Department, School or wider academic subset within the University, these will frequently be unfit for purpose when it comes to skills assessments and will need careful adaptation. For those training students for the Bar of England and Wales, assessment is underpinned by the Dutton criteria,<sup>22</sup> but it should be noted that the students responding to this survey had used criteria based on the Dutton criteria in every teaching session, so the mere provision and use of the criteria does not seem to fully address the problem of inconsistency, perceived or real.

Moderation must be a vital part of the process and necessitates the video-recording of assessments if that moderation is to be meaningful. All assessors will need to be sampled for moderation and the number of performances moderated will need to be large enough to detect significant marking anomalies. Robust internal and external moderation processes need to be in place and need to be explained to students.

Another possible route might be the use of pre-assessment calibration of assessors. This is already used in some clinical setting (e.g. dentistry<sup>23</sup>) where video performances are used to calibrate all assessors, especially those based outside the university setting. The assessors are asked to grade the performances and the module leader can inform

<sup>22</sup> *Report On Assessment Of Advocacy by the Advocacy Working Party under Timothy Dutton QC* (February 2004) Annex 3 available at <https://www.advocacytrainingcouncil.org/advocacy-training/what-are-the-dutton-criteria>.

<sup>23</sup> <http://www.rdc-tmdinternational.org/TMDAssessmentDiagnosis/DCTMD/ExaminerTraining.aspx> provides an example of this.

them if their marking is significantly out of line with the norm. These videos could also be used with students to give them a sense of how a performance is marked and increase assessment literacy, in a manner akin to the common practice of giving students sample essays to mark at various grade levels.<sup>24</sup>

Perhaps the final conclusions should be the need to communicate effectively with students and manage expectations. Students may want an automaton-like, rigid consistency of mark, but as pointed out by Brayne et al.,<sup>25</sup> the assessment of oral skills of a lawyer cannot be reduced to a mere algorithm, but must leave space for judgement, wisdom and intuition.

<sup>24</sup> The creation of videos of this kind is one element of a project in which the author is currently involved investigating the use of video resources in assessment funded by the Centre for Education Innovation at Cardiff University and led by Professor Sheila Oliver and Dr Ilona Johnson.

<sup>25</sup> Hugh Brayne , Caroline Maughan & Mike Maughan, 'Assessing oral skills—time for reflection, time for risk' (2002) 36: 2 *The Law Teacher*, 140–167, 147.



# MULTI-DISCIPLINARY PRACTICE HEALTH JUSTICE PARTNERSHIPS – WORKING ETHICALLY TO ENSURE REACH TO THOSE MOST IN NEED

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## *ABSTRACT*

This article examines the emergence of Health Justice Partnerships (HJP) in Australia, ethical dilemmas and resolutions of dilemmas that have emerged during the research and from practice. A Health Justice Partnerships (HJP) sees a partnership between a legal assistance (or legal aid) service and health services (including allied health services). Non-legal professionals such as allied health and health professionals work alongside a lawyer on site in a health care setting such as a hospital or a community health centre with a focus on reaching clients who would otherwise not gain assistance with legal problems. The article explores how HJP have found ways to, not just work ethically, but build a mutual capacity and an awareness of ethical boundaries as well as ‘work arounds’ that ensure ethical practice with the central focus on client outcomes.

## INTRODUCTION

This Article will examine the emergence of Health Justice Partnerships (HJP) and the legal ethical issues that are pertinent to HJP. A HJP is where a lawyer works as a part of a health or allied health team so as to reach clients who might otherwise not gain help with problems capable of a legal solution. The rationale and justification for such an innovation is defined and discussed in more detail below. HJP are emerging in Australia and abroad as research reveals the ‘traditional approaches to lawyering’ namely, expecting clients and their professional supporters to identify issues as legal and make appointment with lawyers, are problematic leaving those most in need of help excluded from legal help due to a range of barriers, some of which are systemic.

Multi-disciplinary practices (MDP) are where different professionals work together as a team for a client and include Health Justice Partnerships which is the focus of this article. This article’s key focus is to explore some of the ethical dilemmas and resolutions of these dilemmas that have emerged from the author’s research and other studies she has encountered during her own research.

Different jurisdictions have different legal services legislation, ethical rules of conduct and case law governing legal professional conduct. This article bases its discussion on the jurisdiction with which the author is most familiar, namely Victoria, in Australia. Many of the ethical frameworks and requirements have commonalities across different jurisdictions and so the issues will resonate across jurisdictional boundaries in the United Kingdom, United States, Canada and New Zealand and perhaps elsewhere, in countries where they have similar conduct rules governing their legal professionals. In the United States, Canada and Australia HJPs are an emerging as part of the landscape

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to increase access to justice. In the United Kingdom, a recent report has also described some HJPs in the United Kingdom and recommended them as a way forward.<sup>1</sup>

The focus of this article will be on how ethical ‘work-arounds’ for lawyers can occur when working in MDPs such as HJP. An ‘ethical work around’ is defined by the author as, where lawyers and non-legal professionals find ways to support and assist clients without breaching their professional responsibilities whilst, at the same time finding ways to ensure clients gain the support that they need. This is especially critical in circumstances of limited access to legal services for client who experience vulnerability, disadvantage or social exclusion. This will be discussed later in this article. ‘Work arounds’ are developed through the professionals in an MDP such being mindful of professional responsibilities and ethical protections in law, rules and codes of conduct that exist to protect clients, ensure ethical practice and, in the case of lawyers, additionally, to meet the broader requirements of practice, beyond the immediate client, in upholding the rule of law and the integrity and confidence in the legal system that is required of them as officers of the court.

This article also canvasses some of the shortcomings in current frameworks for legal ethics that are predicated on law firms in competition with each other in ‘for-profit’ settings. These frameworks are often narrowly predicated on traditional lawyer models rather than a context of lawyers working collaboratively, and ‘not for profit’ to reach clients who otherwise would not gain legal help due to a range of not insubstantial, barriers.

## CONTEXT AND EVIDENCE BASE FOR THE RESEARCH

The author has been evaluating a number of HJPs with the research embedded from service start-up. This research not only measures service effectiveness but examines and measures positive outcomes and impacts on the social determinants of clients’ health as a result of the HJP intervention. Some of the author’s HJP research projects, where she is either conducting in the evaluation or has an advisory role include:

- Bendigo HJP a partnership between a community legal centre, ARC Justice Ltd (ARC Justice) and the Bendigo Community Health Service in a rural and regional area of Victoria, Australia. Its focus on parents whose children have disabilities. (The author conducted the longitudinal ANU evaluation over three years with a Final Report delivered to the agency in October 2016. Final Report forthcoming).
- Victorian Legal Services Board and Commissioner (LSB) a state-wide statutory body with a grants program. The author is engaged in an advisory capacity only, to facilitate workshops to develop common measures across eight LSB funded HJP projects (sixteen partners) and support their separate evaluation processes.<sup>2</sup>

<sup>1</sup> The Law Commission *The role of Advice Services in Health Outcomes: Evidence Review and Mapping Study*, (Consillium Research and Consultancy, 2015) <[http://asauk.org.uk/wp-content/uploads/2015/06/ASA-report\\_Web.pdf](http://asauk.org.uk/wp-content/uploads/2015/06/ASA-report_Web.pdf)> accessed 2 October 2016. See also Department for Business, Energy & Industrial Strategy. *Learning from Experience. An Independent Review of the Research. Excellence Framework* (Lord Nicholas Stern, President of the British Academy and IG Patel Professor of Economics and Government, London School of Economics, July 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/541338/ind-16-9-ref-stern-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541338/ind-16-9-ref-stern-review.pdf)> accessed 6 October 2016. The Stern Review recommends introducing a new institutional level assessment to foster greater cohesiveness between academics and reward collaboration on interdisciplinary activities.

<sup>2</sup> Liz Curran, Sue Ball and Cindy Wong and the Victorian Legal Services Board and Commissioner Health Justice Partnership Development Report [2016]. <[http://www.lsb.vic.gov.au/documents/Report-Health\\_Justice\\_Partnership\\_Development-2016.PDF](http://www.lsb.vic.gov.au/documents/Report-Health_Justice_Partnership_Development-2016.PDF)> accessed 25 August 2016.

- The Aboriginal Medical Legal Service (AMLS) based at Royal Prince Alfred Hospital (RPA) a partnership with Redfern Legal Centre. This is the first hospital based Medical Legal Partnership in Sydney. The author has an advisory role (pro bono) with the hospital evaluation team as limited funding from October 2015 – current). The project is in an urban setting.
- Hume Riverina Community Legal Service (auspiced by Upper Murray Family Care) – ‘The Invisible Hurdles – Better outcomes for young people experiencing family violence in North East Victoria’ which is funded by the LSB. It is situated in three rural settings and is a blend of an MDP and a HJP with three partner agencies including, Albury Wodonga Aboriginal Health Service (AWAS), Flexible Learning Centre (FLC) and North East Support and Action for Youth Inc. (NESAY). The author and Pamela Taylor Barnett of the ANU, are conducting the longitudinal evaluation over two years which concludes in October, 2018.
- Advising on evaluations and start-ups in Ontario Canada for the Halton Community Legal Services, April 2016- 2019. This is an advisory consultancy.
- Advising on start-up and evaluation the Community & Advocacy Legal Centre Belleville. Advisory (pro bono) since July, 2015.
- Consumer Action Law Centre, Victoria, Australia. This is an MDP with financial counsellors. (Advisory, pro bono since June 2012 – current).<sup>3</sup>
- Portsmouth University Multi -Disciplinary Student Clinic Evaluation (Start-up and evaluation conducted by Portsmouth University. The author is an advisor (pro bono) on the student clinic evaluation (August 2016- current).
- Mortgage Wellbeing Service HJP – a project partnership between Community West (BMCLC) and Djerriwarrh Health Services (DjHS). In an urban setting. (pro bono consultancy withdrew end 2015).

Elements have emerged in this research around effective processes and ways of working for lawyers so that they can work ethically in integrated models such as MDP in general and HJP specifically. The author seeks to share the research on how HJP have grappled with such dilemmas and overcome these.

This article firstly explores, not just the way in which the HJP’s have enabled ethical practice, but also the additional adaptations the author incorporated into the actual conduct of research to ensure that the research itself was ethical in its approach that went beyond the normal university and health service Board ethics requirements. Namely, the process of ensuring that participants in the research were integrally involved in its design and how the elements demonstrative of an effective HJP were also adopted and integrated into how the research itself was conducted. This consideration of the ethics of the conduct of the actual legal research is outlined for the benefit other legal service researchers who might wish to broach similar research.

The article will then flag some of the ethical rules which can be triggered in HJPs. It will examine how ethical ‘work arounds’ have been found by professionals working together collaboratively with a focus on ‘client care’ specifically complying with ethical conduct rules under the Australian Solicitors Conduct Rules (ASCR).<sup>4</sup>

<sup>3</sup> Liz Curran and T Willcox & G Williams Consumer Action Law Centre, ‘Evaluating Consumer Action’s Worker Advice Service’ [2016]. <<http://consumeraction.org.au/evaluating-consumer-actions-worker-advice-service/>> accessed 4 September, 2016 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2835377](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835377)> accessed 21 November 2016.

<sup>4</sup> In Australia, each state had its own conduct rules. The Australian Solicitor’s Conduct Rules (Victoria, New South Wales, South Australia and Queensland) under the Uniform Law came into operation in New South Wales and Victoria on 1 July 2015. The Uniform Law replaced the Legal Profession Act 2004 in each of those jurisdictions, and regulations and rules made under those Acts.

This article also identifies the research findings which identify the types of lawyer and lawyering that are evidently helpful in ensuring multi-disciplinary teams can work together more holistically and systemically to achieve better outcomes for clients and community. The article mainly uses the authors research on a Bendigo HJP from January 2014 – September 2016 as a case study as it has reach in both quantitative and qualitative data.

### WHAT IS A HEALTH JUSTICE PARTNERSHIP?

A Health Justice Partnerships (HJP) sees a partnership between a legal assistance services (LAS) and health services (including allied health services for example, counselling, social work, physiotherapy, occupational therapy, dentistry). In some instances, law firms are starting to provide services in health settings pro bono (i.e. for free) as well, although these examples are less common. In the main, this article's focus is on HJP where a LAS is involved. A LAS refers to the full range of services provided by Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Services. In Australia, these are publically funded legal services which employ salaried staff to provide services to the most disadvantaged or vulnerable members of the community. A HJP is where professionals such as health/allied health professionals work alongside a lawyer on site in a health care setting such as a hospital or a community health centre. Their focus is on reaching clients who would otherwise not gain assistance with legal problems. It sees lawyers going to the services where the clients are most likely to turn for help in this case, hospitals or community health services. This responds to empirical research in the Australia-Wide Law Survey<sup>5</sup> which revealed that only 13–16% of clients who are disadvantaged (and most likely to have more than one legal issue) are likely to find legal help or gain access to legal advice. This same empirical research has also revealed that such community members are more likely to turn to a trusted medical or allied health professional. Often these professionals have not been able to identify a problem as having a legal solution or what to do to assist the client or patient in gaining legal help. Research also shows that unresolved legal problems lead to poor health outcomes.<sup>6</sup> The focus in HJP is on problem solving for client/patients (with often complex and multiple problems) and solving these in a holistic way through integrating legal and non-legal services to enable client access and seamless assistance.

### THE CONDUCT OF THE EMPIRICAL RESEARCH: ETHICS

Beyond seeking and obtaining university and Health Service Board ethics approval for the projects, the process for the conduct of the actual research being ethical has been important. The research in Bendigo involved vulnerable groups targeting parents

<sup>5</sup> Christine Coumarelos, Deborah MacCourt, Julie People, Hugh McDonald, Zhigang, Reiny Iriana and Stephanie Ramsey, *Access to Justice and Legal Needs: Legal Australia Wide Survey Legal Need in Australia*, (Sydney, Law and Justice Foundation of New South Wales, 2012). <[http://www.lawfoundation.net.au/ljf/site/templates/LAW\\_AUS/\\$file/LAW\\_Survey\\_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf)> accessed 30 May 2016.

<sup>6</sup> Elizabeth Tobin-Tyler, 'Aligning Public Health, Health Care, Law and Policy: Medical-Legal Partnership as a Multilevel Response to the Social Determinants of Health', 8 *Journal of Health & Biomedical Law*, (2012) 211–247; Tishna Beeson, Brittany Dawn McCallister and Martha Regenstein, *Making the Case for Medical Legal Partnerships: A Review of Evidence*, (The National Center for Medical Legal Partnership, School of Public Health and Health Services, The George Washington University, 2013) 2- 13 and Nigel Balmer, Pascoe Pleasence, Alexy Buck, Heather Walker 'Worried sick: the experience of debt problems and their relationship with health, illness and disability,' (2005) 5(1) *Social Policy and Society* 39–51.

in a low socio-economic area with children with disabilities. The aim was to support families with a range of legal needs from debt, to the care and protection issues with children, consumer issues, housing, issues of discrimination and family violence. The ethics committee was concerned about risk and harm. To manage this the University Ethics Committee suggested the ethics approval be sought at key stages, rather than a blanket approval occurring at the project outset. This was useful especially given the project adopted a participatory action research approach within a model of continuous learning reflection and improvement. Participatory action research has been described as a reflective process of progressive problem solving led by individuals working as part of a 'community of practice' to improve the way they address issues and solve problems (Dick 1999/2011).<sup>7</sup> Using a participatory, action research approach means literature informing the project but collaboration in design by participants including service users and professionals. The Bendigo research used a 360-degree inclusion of community, clients'/patients' professionals and staff delivering the service, management and identified stakeholders in both design and as research participants. Using multiple tools to gather data also enables themes emerging to be tested and verified across the tools.

Given the phased university ethics approval was firstly required for the Community Focus Group (CFG), this CFG sought to engage community in their views on the design of the project and elements that ought to be included in that design. It asked their views on what a positive impact on the social determinants of health (SDH) looked like in their experience. Further ethics approval was then required after the CFG for the piloting of the tools in the first snapshot (over two weeks) to trial the methodology before further research would be approved conducted in two further snapshot week long periods. This phased ethics approval process was time consuming and did hold the project up, but it was worthwhile. It meant regular reflection on the manner and conduct of the research.

## SEEKING COMMUNITY VIEWS

The author's project brief was not to only measure service effectiveness but also to measure positive outcomes and the largely uncharted area of the HJPs impact on clients' social determinants of health. Early on in the Bendigo research and with the help of Dr Philips (a public health advisor on the project) it was determined as important that measures of outcomes, impact and the SDH, reflect the actual lived experiences of the community in disadvantage that the service was designed to help. Therefore, it was critical as a first step that their voice be heard as to what a SDH and a good service outcome or impact looked like for them. The CFG becoming a key informer of the design and measures of the research and evaluation alongside the international literature.

Including affected community members in the research was ethical ensuring the measures were less remote and more concrete. This broke away from traditional legal service evaluations of legal service delivery where lawyers assess lawyers through 'peer review'.<sup>8</sup> This research sought the views not only of prospective service users but of professionals from health/allied health services whose clients might use the HJP as to

<sup>7</sup> Bob Dick, 'Action Research and Action Learning for Community and Organisational Change' <<http://www.aral.com.au/>> accessed 14 October 2016.

<sup>8</sup> Alan Paterson and Avrom Sherr 'Peer Review and Quality Assurance- the emergence of peer review in the legal profession', Paper presented at the *International Legal Aid Conference*, Antwerp (2007) and Avrom Sherr, Richard Moorhead and Alan Paterson, (1994) *Lawyers: The Quality Agenda – Assessing and developing competence and quality in legal aid- transactional criteria*, Vol. 2, (London, H.M. Stationery Office).

what was an effective service that would reach their clients/patients. In 2011, the author's service evaluation of Legal Aid ACT, sought to avoid 'peer review' and 'process evaluation' as it was too narrow. The materials examined tended to focus on transactions and numbers of transactions e.g. number of cases opened and closed, rather than on the quality or impact of those transactions on clients and excluded consumer protection aspects.

Building on the approach the author took in 2011–2012 in the Legal Aid ACT evaluation, for the research in Bendigo, in 2013, the author found that by taking a broader inclusive process which asked views from community, potential clients, health/allied health, managers and relevant stakeholder agencies as well as lawyers enabling a 360-degree perspective on the service was much richer and specific. It also means the measures were not solely determined by the academic researcher. An examination of the literature in 2014 revealed the discussion of measures of SDH research centred on how it might be done with broad and imprecise measures of SDH e.g. 'better housing', 'improved income support'. The measures were often formulaic or by 'tick a box' methods. They told the author little about the quality of the service and the substance of the impact of the intervention on lives. By contrast, in the CFG specific measures were proffered. For example, 'if utilities are maintained then we can heat the house, have cooked meals and children can see their homework meaning kids do not get sick or fall behind in school'; 'being stressed means I get anxious and make poorer decisions'; 'if the legal problems can be sorted and the client is less frightened then I can get them to focus more on sorting out their health issues'. The first step of asking community what an outcome and SDH looked like for them was fruitful and inclusive.

In the author's Bendigo research and in her current research in the Upper Murray in the 'Invisible Hurdles Project', rather than assume what an outcome or positive impact on the SDH are, the first step is to ask the community or the young person the service is trying to reach, what it looks like for them. The author does not live day to day in public housing on an income below the poverty line<sup>9</sup> nor is she a young person at risk of family violence at whom the 'Invisible Hurdles' project is targeted. So it seemed presumptuous and unethical not to ask the community or vulnerable group that the HJP is targeting what a SDH or positive outcome looks like for them. An example from the Focus Group in Bendigo of what impacts on the SDH to illustrate is:

*what happens if (we) are disconnected from gas, electricity if (we) can't pay their bills? (It's) no hot meals, kids get sick, can't do homework as no light get behind in schools, (kids) get colds as no heater, get disconnected often. No money to pay. No I didn't know about hardship cases- never have this sort of information and wouldn't know where to go to look for it. (sic) (Community Focus Group, Bendigo, February 2015)*

An electricity disconnection, which is something a lawyer in Victoria can avert given hardship provisions and disconnection protocols, might on the surface not seem significant but, the flow on effects for health and schooling, as illustrated, are important for the community.

### *Views of Allied Professionals*

The Bendigo research has also involved those who actually provide the services legal and health/allied health professionals, managers and reception staff in the project design.

<sup>9</sup> The 2011 Australian Census found the Kangaroo Flat area where the HJP is offered to have the significantly highest proportion of low incomes in the City of Greater Bendigo See Australian Bureau of Statistics, 'Atlas ID' <<http://atlas.id.com.au/bendigo#MapNo=10039&SexKey=4&datatype=1&thetype=1&topicAlias=low-income-households&year=2011>> (Accessed 25 August 2016).

They also advised on what an outcome or social determinant of health looks like based on their direct service experience and client involvement. Combining these discussions and that of the CFG as well as the literature, the project indicators were shaped. These indicators consist of four proxies which if present are indicative of a positive impact on client social determinants of health and a positive standard of service. These proxies are:

- (i) Engagement – client/patient/professional and staff
- (ii) Capacity – client/patient/professional and staff
- (iii) Collaboration – client/patient/professional and staff
- (iv) Empowerment – client/patient/professional staff –including giving voice for client/patient/professional and other staff. They also identified improved advocacy for client/patient/professional towards systemic change that worked to prevent causes of problems as an element of empowerment to be considered.

The author also consulted with prospective participants (before the field research) about the process for the research that would be least burdensome to service delivery (given limited resources and heavy case-loads of those participants). Having settled on these elements the conduct of research replicated the proxies being designed to engage, build capacity, be collaborative and be empowering. In this way, the research itself was ethical as it reflected the things it sought to measure in the manner in which the research was conducted.

Briefly, the research has collected quantitative data. In order to understand this data, it has also a significant qualitative data component through Surveys, Questionnaires, Focus Groups, Case studies over time, Guided Professional Journals, In-depth Interviews and aggregated data depending on the projects. The detail of the methodology will not be canvassed in this article as it not relevant to its key ethics focus outlined in the introduction. The collection of significant qualitative data as well as the more traditional quantitative data does take time but has been an ethical inclusive approach. It goes beyond statistics to uncover and unpack what works and does not work and how an HJP can be done to effect. On so many levels this ethical inclusive approach to the research enabled the facilitation of a culture of learning and respect as it is connected and people have been able to have a voice.

## LEGAL ETHICS

Some of the ethical rules and duties most pertinent to an HJP examining first principles involve:

- (i) The Proper Administration of Justice
- (ii) Client Confidential Information
- (iii) Client Privileged Legal Information
- (iv) Conflicts of Interest
- (v) Informed Consent

This article does not have time to discuss all duties and so will focus on those that have emerged as themes in the author's HJP research.

### *Proper Administration of Justice*

The court has inherent jurisdiction to restrain its officers from acting where appropriate.

The test to apply is whether “a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a lawyer should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice”.<sup>10</sup>

In Australia, as in other jurisdictions, lawyers as officers of the court also have duties to uphold the Rule of Law and protect the confidence in and integrity of the legal system. For instance, the ASCR<sup>11</sup> states:

*3.1 A solicitor’s duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*

*4.1 A solicitor must also:*

*4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;*

*4.1.4 avoid any compromise to their integrity and professional independence;*

In other jurisdictions, such as the American Bar Association Rules<sup>12</sup> and the Federation of Law Societies of Canada Model Code of Professional Conduct, there is also explicit mention of the obligations of lawyers to enable access to justice through pro bono<sup>13</sup> and other work. This is not a requirement in the ASCR. In Australia, as in Canada, there is a ‘mixed model’ of legal assistance services with a combination of private and public salaried lawyers.

The main rationale for many HJPs is to reach clients who would otherwise not gain access to legal help. In view of their limited access to lawyers, ethical rule adherence needs to be realistic. Due to a limited understanding of what problems are capable of a legal solution; inability to pay; or a lack of access to lawyers, especially in rural, remote and regional setting (a significant issue in Australia with vast distances and often limited access to lawyers) access to justice needs to be balanced in consideration of the ethical rules. The author suggests that the proper administration of justice and the rule of law also involves people being able to access legal help and advice. Rigid adherence to ethical conduct rules where there is no risk of harm or negligible risk but which as a consequence of excluding access to such legal help or advice. In this author’s view, this compromises the proper administration and the rule of law. Such rigid adherence without thinking the issue through may accordingly be a breach of the duty to properly administer justice. This has implications in the conflict of interest rules which are discussed below.

### *Client Confidential Information*

A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client’s engagement to any person<sup>14</sup> who is not: a solicitor who is a partner, principal, director, or employee of the solicitor’s law practice; or a barrister or an employee of, or person otherwise engaged by, the solicitor’s law practice or by an associated entity for the purposes of delivering or administering legal

<sup>10</sup> *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76]; see also *Grimwade v Meagher* [1995] 1 VR 446 at 452, see *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501.

<sup>11</sup> Australian Solicitors Conduct Rules 2015 <<http://www.legislation.nsw.gov.au/regulations/2015-244.pdf>> accessed 14 October 2016.

<sup>12</sup> American Bar Association ABA, Model Rules of Professional Conduct <[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)> accessed 6 June 2016.

<sup>13</sup> ABA Rule 6.1: Canadian Bar Association, Codes of Professional Conduct, Rule 4, <[http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-\(1\)/Codes-of-Professional-Conduct](http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct)> accessed 6 June 2016.

<sup>14</sup> Rule 9.1 of the ASCR (n11).



services in relation to the client. Rule 9.2 allows a solicitor to disclose information which is confidential to a client if the client expressly or impliedly authorises disclosure; the solicitor is permitted or is compelled by law to disclose; the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations<sup>15</sup> (and most likely applicable in an HJP); the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence; the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or the information is disclosed to the insurer of practice/solicitor. The client must expressly or impliedly authorize such disclosure.<sup>16</sup> The discussion seems to envisage relationships between lawyers, law firms and their insurers. Lawyers working with health/allied health professionals in 'not for profit' settings aiming to holistically support clients are not envisaged.

It is not just the confidential information itself that is protected but it can extend to client knowledge. Gillard J<sup>17</sup> notes that 'lawyers' relationships with clients means they "learn a great deal about a client, their strengths, weaknesses, honesty or lack their reactions, attitudes and tactics. These are factors he calls 'getting to know you' factors. These can be seen as confidential and where there is a risk of it being used by one client even inadvertently against another a solicitor is unwise to act."

Matters in family law of a confidential and personally sensitive nature such 'getting to know you factors' can be even more prevalent in HJPs that support families such as the ones in Bendigo and the 'Invisible Hurdles Project' and so extra care is needed.

Where a solicitor or law practice is in possession of confidential information of a client which might reasonably be concluded as material to another client's current matter and detrimental to the first client there is a conflict, the lawyer must not act for the other client.<sup>18</sup> There is an exception under where each client has given informed consent or where an effective information barrier has been established.<sup>19</sup> The latter is very hard to establish as case law is proscriptive.

In gaining client informed consent to share confidential information, the information in question must be identified with precision and not merely in global terms".<sup>20</sup> This is a very high and difficult to satisfy.<sup>21</sup> HJP' lawyers therefore need to be mindful of this in how they work and draft client consents for the sharing of information as well as not inadvertently compromising Client Legal Privilege. This is discussed later in this article in more detail.

### *Client Privileged Legal Communications*

Legal advice is protected if it was provided for the dominant purpose of legal advice.<sup>22</sup> Legal client privilege entitles a client to not have to disclose some of their confidential

<sup>15</sup> Rule 9.2.3 of the ASCR (n11).

<sup>16</sup> Rule 9.2.1 ASCR (n11).

<sup>17</sup> *Yunghanns & Ors v ELFIC Ors Ltd* (Unreported), Vic SC, 3 July 1998, at 10–11.

<sup>18</sup> Rule 11.3, of the ASCR (n11).

<sup>19</sup> Rule 11.4.1 ASCR (n11).

<sup>20</sup> *Carindale Country Club Estate P/L c Astill* [1993] FCA, at 314.

<sup>21</sup> Law Council of Australia, 'Australian Solicitors' Conduct Rules 2011 and Commentary' (2013) 15 <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-zdocs/SolicitorsConductRulesHandbook\\_Ver3.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-zdocs/SolicitorsConductRulesHandbook_Ver3.pdf)> accessed 7 June 2016.

<sup>22</sup> The provisions of the Australian Evidence Act (Commonwealth) 1995. Client legal privilege are sections 118 and 119. On 1 January 2009 amendments to s118(c) of the *Evidence Act* commenced (the words "the client or lawyer" were replaced with "the client, lawyer or another person."); *Evidence Act 2008* (Vic) Section 131A, which deal with the subject of *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia*, [1999] 201 CLR 49. The 'privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'.

communications to another party including the courts, tribunals, regulatory bodies and enforcement agencies. It is not just limited to legal advice but advice on steps the client ought to take. It is an absolute right and, once it has been established, can only be overridden in very limited circumstances such as fraud. However, privilege will be lost if the communication loses its confidentiality. Legal advice privilege is relevant to HJPs. This protects confidential communications, and evidence of those communications, between a lawyer and a client provided that the communications are for the purpose of seeking and receiving legal advice in a relevant legal context. It does not protect communications with third parties. Communications within the client team may not be privileged if they are not for the purpose of seeking and receiving legal advice.

In HJP's examined including the Bendigo HJP lawyers were clear with third parties that the purpose of the communication is for legal advice this minimised risks to the client's protection. People working in a MDP for the client's best interests, would not want to compromise the client's legal rights and for this reason is critical that lawyers be careful and clear about information being shared and for what purpose. Keeping a record of the fact the discussion is for the purpose of legal advice is critical and clarity that the client does not intend this to act as a waiver of their legal rights through asking for MDP support. Such measures reduce the risk of privilege being lost by the client.

There is also litigation privilege. This protects confidential communications, and evidence of those communications, between a lawyer and his client and/or a third party, or between a client and a third party. It will apply to communications that have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual legal proceedings, or legal proceedings that are reasonably imminent. Where lawyers are advising as members of a multi-disciplinary team, it will frequently be necessary for the legal advice to be copied to other members of the team. This should not amount to a waiver of privilege so long as the disclosure is made on confidential terms.<sup>23</sup>

It is therefore critical that non-legal professionals understand that the sharing of client information is different when done in a legal advice or litigation context and that their awareness of the significance of this is different to other confidential settings in different spheres such as social work or patient doctor confidentiality is made clear. At every level each person involved, the client, the non-legal professional need to be fully informed of the contexts, use and rights for protection of the information and if required what is to be shared and in what circumstances and with whom. It may well be that the support worker is not present for aspects of the legal advice, as the case example below will highlight.

The client legal privilege is critical to ability of clients to gain access to full legal advice and enables frank legal advice that is tailored accurately to their situation. It is fundamental to the operations of the legal system given the compellability of evidence in courts and tribunals through subpoena and so on that is not protected in a similar way in other settings. It goes to the core of the role of lawyers also as 'officers of the court'. In Australia under the ASCR lawyers must serve the interests of justice.<sup>24</sup> As such their function goes beyond the assistance to the individual client to ensuring the legal system can protect rights and that there is integrity of the legal system (see duty above). Cole highlights this tension and the need for careful thinking between professionals as to

<sup>23</sup> See 'Legal News and Guidance' from Prinset Masons (2012) 'Legal Professional Privilege: Some practical considerations' < <http://www.out-law.com/topics/dispute-resolution-and-litigation/privilege/legal-professional-privilege-some-practical-considerations/>> accessed 2 October 2016.

<sup>24</sup> General Principles of Professional Conduct (B) (iii), ASCR (n21 and n23).

how they can work together but still keep client protections and ethics in tact in MDPs in social work and legal settings<sup>25</sup>

### *Conflicts of interest*

Conflicts problems are not confined to lawyer/client relationships. Other professions in their roles have to be wary of conflicts of interest. But lawyers have more conflict problems because of the nature of their work and often the adversarial setting in which they work.

“If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients’ interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.”<sup>26</sup>

This presents unique challenges in HJPs where they are working in community settings with non-legal professionals, not for profit and services have an often ongoing engagement with families in areas such as family law, care and protection, debt, housing, discrimination, drug and alcohol and mental health issues and family violence.

There are a range of matters that can constitute a conflict of interest relevant to HJP:

- Current client conflict
- Successive client conflict
- Indirect Conflict of interest

In current client conflicts, lawyers owe duties of loyalty and confidentiality to each client. If the interests of those client’s conflict, lawyers will have an indirect conflict of interests, because of the need to ‘serve two masters’.

A successive client conflict occurs if the lawyer is representing, or planning to act for a current client in a transaction which involves a former client. Care is needed so that lawyer does not put themselves in a position where they are required to give a current client the benefit of information disclosed to them in confidence by a former (or current) client. This is an ‘indirect’ conflict of interest.<sup>27</sup> This prohibition is there to protect the client. If the duty of confidentiality to one client is put at risk and could become relevant to another party, namely the two duties come into conflict then the best course of action may be for the lawyer to withdraw<sup>28</sup> early or resist such a risk. Warm referral (that is where the lawyer paves the way to make it easy for the client to gain help easily from another lawyer) where a real conflict exists ought be undertaken given barriers for client in gaining legal help.

If the rules are not thoughtfully applied, implications arise for access to justice. For example, if each service turns a client away with a remote chance of a conflict (which is on any real scrutiny is a vague and only a remotely connected and therefor where a court is unlikely to find a conflict. This is significant for the client who otherwise might not have access to a lawyer. If the lawyer says there is a conflict and does not actually turn their mind to the specific situation and exercise their discretion, then this can deprive people of access to advice and support. For example, conflict checks are often conducted at intake by untrained receptionists. This can mean that clients may

<sup>25</sup> Portia Cole, ‘You want me to do what? Ethical practice within interdisciplinary collaborations’(2012) 9 (1) *Journal of Social Work Values and Ethics.*, 1–39, 29 and 30–31. Jacqueline St Joan, ‘Building Bridges, Building Walls: Collaboration between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality’ (2001) 7 *Clinical Law Review* 403.

<sup>26</sup> Rule 11.2 of the ASCR (n11).

<sup>27</sup> Rule 12, ASCR VIC (n11).

<sup>28</sup> Rule 11.5 ASCR (n11).

be unable to gain legal help when there is no real conflict. Application of conflict duties needs to be balanced and thought through carefully and not left to client service staff unless they are either carefully trained or have the option of checking with a principal lawyer. The lawyer then ought to check for a real or likely conflict rather than a remote one or one that is unlikely especially in circumstances where there may not be another lawyer available for the client. The author raised this with the Law Council of Australia meeting on 12 August 2014.

The recent Australia Productivity Commission (PC) Inquiry in ‘Access to Justice Arrangements’ has also noted the problem with an overly proscriptive application of conflict rules:

“While conflict of interest rules are important to prevent lawyers acting where they have a real conflict (that is, actual knowledge of two parties’ conflicting legal matters), overly strict application of the rules can affect access to important legal advice where there is only a perceived conflict of interest situations can be managed.”<sup>29</sup>

It also notes that ‘simply a fear or perception of a conflict of interest, and conservative behaviour in response to this, can have a real effect on the amount of pro bono provided. This problem is accentuated in areas of pro bono work that might involve ‘unsympathetic client groups or politically contentious subjects.’<sup>30</sup> The PC concludes conflict of interest situations ‘can be managed . . . so they do not become a barrier to access to justice.’<sup>31</sup> The author’s empirical research discussed below suggests that the PC’s conclusions are apt.

### *Informed Consent*

If the client gives informed consent to share information, it becomes acceptable for the lawyer to act. It is critical that the consent is informed and specific as a client/patient may give informed consent for aspects to be revealed and other aspects to be kept confidential.

A Privy Council case has set out what makes consent informed.<sup>32</sup> Such consent exists as long as the lawyer makes the client aware of all the relevant facts including the existence of the conflict, the disadvantaged of the conflict, the alternative to the conflict, the availability of alternative representation (which as highlighted below is problematic in HJP), the manner in which the lawyer intends to manage the conflict. This can be managed. Most of the HJPs the author examined (including the Bendigo HJP) had systems in place to ensure client consent and trigger a discussion with the client and other professionals in advance. For example, in HJPs, the informed consent may be general in nature to advise the referring psychologist that the client is still gaining legal help but the client may ask that the specific nature of that help be kept confidential. The informed consent may be specific and state that the counsellor can be informed of all the issues so as to support the client. The consent to share confidential information may be variable and change from time to time depending on the way their matter takes shape.<sup>33</sup> It is critical to be vigilant and check in with the client around the extent and parameters of the informed consent.

<sup>29</sup> Australian Productivity Commission. (2015) *Access to Justice Arrangements: Final Report* (Canberra, Australian Government Productivity Commission), Volume 2, 646 and 725, <<http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf>> (Accessed 10 May 2016).

<sup>30</sup> (n29), 822.

<sup>31</sup> (n29), 646 and 725.

<sup>32</sup> *Clark Boyce v Mouat* [1993] NZLR, 641, 646.

<sup>33</sup> See Linda Gyorki *Breaking Down the Silos: Overcoming the Practical and Ethical Barriers of Integrating Legal Assistance into a Healthcare Setting*, Inner Melbourne Community Legal Centre and The Churchill Trust Fellowship, (2013) <[https://www.churchilltrust.com.au/media/fellows/Breaking\\_down\\_the\\_silos\\_L\\_Gyorki\\_2013.pdf](https://www.churchilltrust.com.au/media/fellows/Breaking_down_the_silos_L_Gyorki_2013.pdf)> accessed 27 April 2016.

Similarly, the client can give informed consent for the lawyer to act where there is a conflict and here the conflict becomes acceptable. The test for informed consent for ‘conflict of interest’ is high and for it to be informed the client must be aware of all relevant considerations case law. Academic writers in ethics suggest this might include gaining independent advice of a separate lawyer.<sup>34</sup> This purported need to seek independent advice of a separate lawyer is highly problematic. As noted, if 86% of disadvantaged clients, according to the Australia-wide Law Survey, are currently unable to access one lawyer. The HJP is designed to remedy this. The chances of such clients seeking a further opinion from a second lawyer are unlikely and impractical. This presents a challenge for HJPs. How do they ensure their duties to access to justice and the rule of law in such a situation and how do the competing ethical duties to assist the client and meet their ethical duty resolve itself?

In the Bendigo HJP research 90% of the ten clients interviewed, would have not had access to a lawyer were it not for their referral to the HJP. 40% of these clients reported poor experiences with previous lawyers as the deterrent in them seeking such help with their legal problems.

In some rural areas, there may also not be other lawyers to provide service to the poor, disadvantaged or otherwise excluded than that provided by a legal aid or community lawyer or through the HJP. In some parts of rural and remote Australia the nearest free community lawyer may be several days’ journey away. Lawyers need to consider the likelihood and seriousness of any harm to the interests of each party that may be caused by representing them both/all. Dal Pont<sup>35</sup> states that ‘a prudent lawyer’ will insist on an independent assessment by another lawyer of whether it is in the client’s best interests to keep acting for them.<sup>36</sup> The case law is less proscriptive. Byrne J notes the “fact of existing conflict or the risk of future conflict and the implications of and the risks to which these circumstances may give rise . . . Where the parties to a transaction are, nevertheless, content to proceed on this basis, the solicitor may properly act.”<sup>37</sup>

## ETHICAL RULES AND CURRENTLY EXCLUDED CLIENTS

This article, using the author’s research evaluation of the Bendigo HJP as a case study, explores how HJP have found ways to, not just work ethically, but build a mutual capacity between lawyers and health/allied health professionals. The author’s empirical research over the past decade (especially the last three years) and practice observations (as a lawyer co-located in a health service for ten years)<sup>38</sup> has enabled her to observe that HJPs build understandings of different professional roles and duties of different professionals. Her recent empirical evidence shows a breaking down of barriers and stereotypes of lawyers through closer co-operation between different professionals with a respect emerging that benefits clients/patients.<sup>39</sup> The author’s research also finds that professionals overcome professional differences that might otherwise impede and

<sup>34</sup> Gino Evan Dal Pont, *Lawyers’ Professional Responsibility* (5th Edn, 2013) [7.70–7.90], [8.45].

<sup>35</sup> See Gino Evan Dal Pont *Lawyers’ Professional Responsibility*, 5th Edn (2013), [6.25], also [7.70–7.90], [8.45].

<sup>36</sup> Gino Evan Dal Pont, *Lawyers’ Professional Responsibility* (5th Edn, 2013) [7.70–7.90], [8.45].

<sup>37</sup> *Marron v J Chatham Daunt Pty Ltd* [1998] VSC 110.

<sup>38</sup> For a report during the authors time as Director after being a supervising clinical legal educator in the same setting, See Mary Anne Noone, & Kate Digney, *It’s Hard to Open up to Strangers” Improving Access to Justice: The Key Features of an Integrated Legal Services Delivery Model, research report*, (Melbourne, Australia, Legal Services Board and La Trobe University (2010) <[http://Articles.ssrn.com/sol3/Articles.cfm?abstract\\_id=1799648](http://Articles.ssrn.com/sol3/Articles.cfm?abstract_id=1799648)> (Accessed 9 May 2014).

<sup>39</sup> Liz Curran, ‘Relieving Some of the Legal Burdens on Clients: legal Aid services working alongside Psychologists and other health and social service professionals’ (2008) 20 (1) *Australian Community Psychologist* 47–56.

underscore different professional cultures. This enables seamless service delivery. These settings provide a ‘one- stop shop’ for clients obviating the significant problems for clients in navigating complex service settings. This is detailed below.

It is noted that, the situation of the vulnerable client who had a lawyer they know and trust and where there is a very small pool of available lawyers has never been fully explored by academic commentators. That the clients ‘seek independent legal advice’ on the matter, ordinarily suffices<sup>40</sup> is unrealistic. Distinguishing factors in HJPs are there is no profit being made, all staff are salaried and employed by not for profit agencies with a client focus. The confidential information being passed is not between lawyers and lawyers but lawyers who sit in a health/allied health setting in a context where all the professionals are all acting in the clients’ interests. Gaining access to another independent lawyer is hardly feasible when there are already significant barriers for these HJP clients in seeing a lawyer at all. The Bendigo HJP findings were that most clients seeking help from the HJP had experienced trauma, family violence or have a mental health issue and some not emotionally not ready to engage directly with the law or a lawyer. The only way they will gain help is if they are supported by a ‘trusted intermediary’ such as their drug and alcohol worker or trauma counsellor who can by having a legal secondary consultation (LSC) with the lawyer support or assist them with legal information and to navigate a complex legal system. In this study clients who had multiple and complex problems reported they were anxious and frightened as they did not know their rights/ position. The intervention of the Bendigo HJP is reported for the large proportion of clients interviewed as having a positive impact on their HJP and in offering ‘hope’ as they now have someone to negotiate who knows their legal position and ‘now know where they stand’.

The Consumer Action Law Centre in a submission to the Law Council of Australia (when the ASCR were under consideration in January 2015) highlights the problems with the conflict rules which do not take into account access to justice concerns and suggests a way forward that is worth consideration as follows:

The development of conflict rules has been influenced by conflict of interest case law over time. However, conflict of interest case law is derived from litigation experience, rather than the experience of providing discrete legal services (such as one-off advice or duty services). Consideration of conflict of interest rules tends to focus on conflicts that arise in traditional lawyer-client relationships. Services to provide much needed legal assistance to clients that would otherwise be ‘conflicted out’ from receiving assistance and improve access to justice where only a perceived conflict of interest exists. Lawyer-client relationships. Where a legal firm or CLC provides only discrete legal services to a client, this creates a different type of relationship with a limited retainer and no expectation of ongoing assistance. Rules 10 and 11 of the proposed Conduct Rules fail to exempt the provision of discrete legal services to a client, even where no actual conflict of interest exists . . .

“In calling for access to more ‘unbundled’ legal services, the Productivity Commission has recognised that conflict of interest rules can hinder access to justice where only a perceived, rather than real, conflict of interest exists.<sup>41</sup> The Commission further considered that reforms to the Australian Solicitor Conduct Rules, along with certain Court rules would provide the clarity and the certainty necessary to allow for greater use of unbundling.”<sup>42</sup>

<sup>40</sup> G E Dal Pont, *Lawyers’ Professional Responsibility*, at [7.85].

<sup>41</sup> Consumer Action Law Centre and Financial Rights Legal Centre, 16 January 2014, ‘Public Submissions – Uniform Rules, Law Council of Australia’ <<http://docplayer.net/46488762-Public-submissions-uniform-rules-law-council-of-australia-19-torrens-street-by.html>> (Accessed 17 July 2017) .

<sup>42</sup> (n41).

Solutions have been suggested to the rules in this and other submissions:

“ . . . We support Legal Aid NSW’s submission to the Productivity Commission that the professional conduct rules should include a supplementary rule that recognises the limited lawyer-client relationship that arises in the provision of discrete legal services<sup>43</sup> We recommend that Rule 10 be amended to provide that an information barrier is not required where the former client has only received a discrete legal service from the legal practice and the solicitor does not have actual knowledge of confidential information about that former client that could give rise to a conflict. Further, we recommend that Rule 11 be amended to provide that consent is not required where the client only requires discrete legal services and the solicitor does not have actual knowledge of confidential information held by the legal practice about another current client(s) with a contrary interest in the same or related matter. A supplementary rule to this effect would enable legal firms and public legal assistance services to provide much needed legal assistance to clients that would otherwise be ‘conflicted out’ from receiving assistance and improve access to justice where only a perceived conflict of interest exists.”

There is limited discussion of ethical lawyering in the literature in a setting where it is not run as a business, where clients are not excluded or disempowered, where services are discreet or clients have no access to a pool of lawyers and not access to other lawyers or are overwhelmed by the navigability of the legal system. This is an area, in the author’s view in need of much more attention by academics, regulators, law societies, legislators and policy-makers. There is also rarely a real consumer protection and access to justice prism brought to the ethical frameworks.<sup>44</sup>

#### *Application of Ethical Conduct in a Health Justice Partnership Setting*

This article will now examine the application of some of these ethical conduct rules in HJP settings. Zuckerman observes that ethical conduct can occur in HJP with careful thought, discussion and good processes in place:

“ . . . is the perception, on the part of the hospital or legal aid staff members, that the collaboration poses a conflict of interest, creates an ethical dilemma, or somehow violates the patient’s right to confidentiality. Although it is essential to explore and reinforce the separate obligations of each institution to the patient-family, the ethical and confidentiality issues can be resolved with a clear understanding of the role of the on-site lawyer and regular consultation with the bar association guidelines devised for this purpose.”<sup>45</sup>

The author agrees with Zuckerman. There has been some resistance in some quarters to other than a rigid application to conduct rules with little active discretion given to the consequences for access to justice and true client protection of such rigid adherence. By way of illustration, Kelly<sup>46</sup>, in 2010 in an article discussing the Texas context in the United States, highlights some of the extreme positions that can be held that run counter to enabling the HJP reach to clients. He notes that such resistance to HJP on ethical grounds ignores the ways in which ethical conduct rules can be facilitated whilst still operating in a HJP. In this author’s view the two need not be exclusive of

<sup>43</sup> Legal Aid NSW, *Submission to Productivity Commission Access to Justice Inquiry* <[http://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0011/18479/submission-access-justice.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0011/18479/submission-access-justice.pdf)> (Accessed 10 May 2016).

<sup>44</sup> See discussion, Consumer Action Law Centre, (30 May 2016) ‘Lawyers and Referrer Conflict—an underrated risk’ <<http://consumeraction.org.au/lawyers-referrer-conflict-underrated-risk/>> (Accessed 2 October, 2016).

<sup>45</sup> Barry Zuckerman et al, ‘Why Paediatricians Need Lawyers to Keep Children healthy’ (2004) 114 (1) *Pediatrics*, 224–228.

<sup>46</sup> Michael Kelly “Comment: Ethical Issues Associated with Multi-Disciplinary Practice in Texas”, (2010) 41 *St Mary’s Law Journal*, 733–776 at 774–776. Castles in Australia has scepticism on the matter of ethics in MDP. See Margaret Castles ‘Possibilities for MD Collaboration in Clinical Practice: Practical Ethical Implications for Lawyers and Clients’ (2008) 34 (1) *Monash Law Review*, 116–146.

each other. Kelly has noted that while ethical concerns deserve attention, they should not lead the Bar to prohibit HJP (or as they are called in the United States, Medical Legal Partnerships (MDPs)). He argues that there are benefits in MDP. The author has seen similar resistance. By way of example, in Australia, at a professional development training in April 2016 on MDP a member from a large private law firm on a panel discussing ‘Ethics and HJP’, warned that HJP were problematic in terms of the ethical rules of conduct and advised that they could not operate without significant risk in view of conflict rules and client confidentiality. This author’s research provides an empirical basis that supports Kelly’s view that there are benefits of HJP and that, as Zuckerman suggests, ethical considerations can be resolved by discussion and clear understanding of roles and the instigation of processes that manage ethical issues. It is hoped given the evidence base emerging, such resistance can be ‘hit on the head.’

The evidence emerging is that HJP and MDP are effective and efficient ways of reaching people who would otherwise not gain legal help, building professional capacity and responsiveness and, as a result, improve health and wellbeing outcomes for clients. Sacrificing this for a stringent and sometimes dubious, slavish application of ethical rules would be a shame. Traditional lawyering sees lawyers in their law offices waiting for clients to make the appointment. It also assumes their professional supports are able to identify problems as legal and refer. The empirical evidence from the Legal Services Research Centre in the United Kingdom and the Australia-wide Law Survey contradicts this<sup>47</sup> showing that a significant portion of the community who are most at risk and disadvantaged cannot gain legal help. New innovative approaches to lawyering, such as HJP are needed that are collaborative, less risk averse and that these can be mindful of ethical pitfalls and ‘work’ around these. The data on clients of the Bendigo HJP revealed that they are complex and more often than not have more than one legal problem and a multitude of other health and social welfare problems. They often feel judged and lack trust in services. They will seek help when they feel they are not judged, where they are respected and where there is service responsiveness. Appointments are problematic – time and place can be critical to engagement especially for people who have experiences of trauma or negative previous experiences of the legal system.

Tobin Tyler who has experience of the operations of HJP in the USA, has come to a similar view as the author that ethical issues can be worked through and the reasons for such ethical rules may even be the subject of a more determinative and thoughtful application of ethical protection:

“Sharing of information between a physician and a lawyer in a medical-legal partnership may most effectively facilitate problem-solving. But lawyers and physicians must be careful to maintain their ethical obligations to their clients and patients. Learning about and discussing the differences in professional ethical rules for doctors and lawyers facilitates understanding of both the potential constraints caused by them, but also the principles that underlie them.”<sup>48</sup>

<sup>47</sup> Alexy Buck, Nigel Balmer and Pascoe Pleasence ‘Social exclusion and civil law: experience of civil justice problems among vulnerable groups’, (2005) 39 (3) *Social Policy & Administration*, 302–322; Alexy Buck, Pascoe Pleasence and Nigel Balmer ‘Do citizens know how to deal with legal issues? Some empirical insights’, (2008) 47 (4) *Journal of Social Policy*, 661–681 and Christine Coumarelos, Deborah MacCourt, Julie People, Hugh McDonald, Zhigang, Reiny Iriana and Stephanie Ramsey (2012) *Access to Justice and Legal Needs: Legal Australia Wide Survey Legal Need in Australia*, (Sydney, Law and Justice Foundation of New South Wales). <[http://www.lawfoundation.net.au/ljf/site/templates/LAW\\_AUS/\\$file/LAW\\_Survey\\_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Australia.pdf)> (Accessed 10 June 2014).

<sup>48</sup> Elizabeth Tobin-Tyler ‘Allies Not Adversaries: Teaching Collaboration to the next Generation of Doctors and Lawyers to Address Social Inequality’, Roger Williams University School of Law Faculty Articles (2008). Article 17, 249. 32, 2. <[http://lsr.nellco.org/cgi/viewcontent.cgi?article=1017&context=rwu\\_fp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1017&context=rwu_fp) 2016, January 21> (Accessed 10 April 2016).



## ETHICS AND LEGAL SECONDARY CONSULTATIONS

One area of activity emerging as a significant part of effective HJP work is Legal Secondary Consultations (LSC). LSC are where the lawyer offers a non-legal professional/support worker legal or information or advice on the legal processes (what happens at court, giving evidence and writing reports), ethics or professional obligations or guides them through tricky situations. LSC has emerged from the author's HJP research as a critical tool for ensuring access to legal help for professionals as they support client. Additionally, these can be essential for the professionals themselves in working out their own ethical obligations and the parameters of those obligations. For example, a psychologist asked the author (when she was a lawyer in an HJP) in a quick LSC whether they were required to hand over confidential information to a government department. The government department had advised the psychologist they were required to do so as their program was funded by the department. The author was able to advise the psychologist, that not only should he not hand over the confidential information, but that it would be a breach of his ethical rules. The psychologist was relieved as 'it had felt wrong' and then was able to relay the information to other members of their team. LSC are emerging as a critical method of building the professional capacity of health/ allied health professionals as they can be timely, responsive, 'opportunistic' forms of giving legal advice, information at points in time where quick information is important to time poor professionals.

The empirical evidence both in Bendigo and the material emerging from the Legal Service Board in Victoria which funds eight HJPs<sup>49</sup> has underlined the value to HJP staff of secondary consultations. LSC are critical to the success of an HJP and in reaching clients who would otherwise not seek or get legal help. The evidence suggests the LSC are helping workers to help clients, understand the legal system. Also professionals can get advice on their own obligations both in ethical and legal contexts which increases professional confidence and as it is useful for other clients extends reach of the HJP, build on knowledge, corrects misunderstandings. In the Bendigo study in eighteen in-depth interviews with health/allied health professionals 81.9% 'strongly agree' there is huge value to them in LSC and 18.2% 'agree'. (A 100% positive view on the value of LSC). Some selected quotes from the research on the value of LSC include:

## Social Workers:

"Having a solicitor accessible made it easier for me as a counsellor not to be drawn into giving advice outside of the area of expertise. As lawyer is available and easy to access the client readily accepted this re-direction and did not press me to give the authors opinion of contact arrangements."

"It is efficient and time effective to have colleagues from other disciplines and lawyer co-located as I can attend walk past lawyer's office and know when she is free to speak to me or we can schedule a suitable time. This saves times and more efficient and effective for us both."

## Counsellor:

"I use the advice I received all the time now. I will talk to Lawyer when a client has a legal issue and they/I don't know what to do about it."

<sup>49</sup> Liz Curran, Sue Ball and Cindy Wong and the Victorian Legal Services Board and Commissioner (2016) Health Justice Partnership Development Report. <[http://www.lsb.vic.gov.au/documents/Report-Health\\_Justice\\_Partnership\\_Development-2016.PDF](http://www.lsb.vic.gov.au/documents/Report-Health_Justice_Partnership_Development-2016.PDF)> (Accessed 25 August 2016).

In the Bendigo HJP research, LSC, as they are often short in duration, which for time poor professionals with significant caseloads, can be key. In addition, the research revealed a significant proportion of professionals consistently reported using LSC to test the lawyer before making a referral and therefore as critical to building trust. For example, a number of research participants noted that clients with a heightened sense of stress or who suffer from trauma would not be referred unless the health/ allied health professional had sounded out the lawyer first. This has also emerged in other research evaluations that the author has advised on.<sup>50</sup> LSC have seen the health/allied health gain guidance on their own ethical dilemmas and gain legal content and frameworks.

81% of service allied health and health professionals interviewed stated LSC gave them confidence to broach legal issues with their clients, enabled them to affirm their knowledge and that they were themselves acting appropriately in terms of their own legal and ethical obligations. LSC was often opportunistic which was critical when clients needed immediate support. In addition, rather than providing poor advice or no legal help at all LSC enabled the health/allied health professionals to explore client problems and check in with an expert thus minimising ethical risks. The participants in the Bendigo research and in the Consumer Action Evaluation of their Worker Support Advice Line in 2016<sup>51</sup> note that they use LSC it to check in and verify facts, for their own personal peace of mind and to reduce their stress.

In the Bendigo HJP research the health/allied health professionals reported their own confidence had increased due to LSC. They often used LSC for more than one client and share the knowledge from their LSC with others in their team thus reaching far more clients than the initial LSC.

Participants reported that they feel they have been able to strengthen their own ethical position as when something feels wrong they can quickly check it with a lawyer. By way of illustration this comment was made in April 2015 in the In Depth Interview in *Community Health Nurse*:

“I now know that sometimes when the Department says it’s a ‘no’ to my client that they may be wrong and I feel better able to question it as the legal advice shows me a ‘no’ is often a ‘maybe’.”

## LAWYERS AND HEALTH JUSTICE PARTNERSHIPS

Tobin-Tyler as noted above, has observed that the lawyer needs to be a problem solver. Lawyers in HJP will not be effective if they see the law narrowly as a technical application of laws and rules. They need to be able to work with others, problem solve, see the context and wider implications and the very reasons for the existence of the ethical rules of conduct. As noted earlier, merely slavishly stating ‘we can’t do this because of this rule’, rather than working through the issue to resolve a client’s problems holistically and in an ethical manner will not assist clients of HJP who the ethical rules are designed to protect. Essential is the approach the lawyer takes. Rather than a narrow legal technician or a ‘zealous advocate’ different styles of lawyering need to be taken for different settings. A lawyer, as problem solver and good communicator, has been critical to the success of the Bendigo HJP. A significant majority of participants in the qualitative research (18 out of the 20 participants in in-depth interviews including the HJP lawyers) stated that the solutions to ethical and other dilemmas came because

<sup>50</sup> Consumer Action Law Centre (2016) (n3).

<sup>51</sup> Consumer Action Law Centre (2016) (n3).

everyone, lawyer and health/allied health professional alike were focussed on the client outcome this meant the discussions led to proactive solutions.

This Article will now present some of the ethical rules and how HJPs have sought to navigate these client/patient interests appropriately.

## COMMUNICATION OF ETHICAL PARAMETERS BETWEEN PROFESSIONALS

As noted above, the case law in Australia states that client privilege is maintained if the client consultation is for the 'dominant purpose of legal advice'. As noted earlier the author worked for ten years in a community legal centre (CLC) that was co-located in a community health service. It was the first HJP in Australia established in 1975. One of the author's first clients was a frightened, disempowered Somalian (having experienced trauma from the civil war). She had been bullied and was afraid of a perpetrator of family violence. The client requested their Somali social worker be present for support and in attendance for the legal interview. This might have proven problematic, as if the Somali worker sat in, it might be construed as a waiver of client legal privilege (CLP). In such cases, the author would advise the client separately of the implications of the social worker being in attendance. Noting that for their own protection, if they still wished the social worker to sit in, informed consent was important before we could proceed. Only with their consent and with parameters agreed to, would the author then, again, speak separately to the social worker. In the latter conversation, she would explain that the purpose of the interview was for legal advice and that if the social worker were to sit in she would be part of the same privilege and that hence, all communication, was to be confidential. If the social worker agreed the author would ask the worker to sign a memo to this effect. The confidentiality of the legal interview would be reiterated at the beginning and end of the interview and a note made on file. If the social worker had not agreed (which was never the case) then they would not sit in the interview itself. Over time, such discussions and consents with clients and the non-legal professionals became routine and a part of the expectation. So gaining informed consents was part of the process. This meant that any disclosures a client needed to make would be free and frank so they could have full legal advice without a concern of disclosure that might prejudice them. In addition, where there are funding obligations to reveal information to the authorities or where the worker is mandated legislatively to report certain matters such as child abuse these issues need to be fully understood, navigated and worked around. The aim was not to inadvertently prejudice the client's rights but to enable them to have the support they felt they needed given their vulnerability.

### *Practical 'Work Arounds' Emerging from the Research*

Peter Noble<sup>52</sup> wrote a report on HJPs. The participants in his study, he notes, demonstrated a clear awareness of a range of potential professional conduct or practice issues that could impede the operation of multi-disciplinary partnerships. The list of ethical issues to be overcome in HJP he identifies are as follows:

- Safeguarding client confidentiality and privacy.
- Mandatory reporting obligations of health/social workers.

<sup>52</sup> Peter Noble *Advocacy-Health Alliances – Better Health through Medical-Legal Partnership*, Loddon Campaspe Community Legal Centre & The Clayton Utz Foundation, 2012, page 22. <[https://advocacyhealthalliances.files.wordpress.com/2012/08/aha-report\\_general1.pdf](https://advocacyhealthalliances.files.wordpress.com/2012/08/aha-report_general1.pdf)> accessed 26 May 2016.

- Conflicts of frameworks, e.g. best interests, acting on instructions, adopting a rights-based framework.
- Poor communication between partners leading to misunderstanding or hostility.
- Protecting client legal privilege.
- Managing conflicts of interest.
- Managing potential clashes of culture between some legal and some health service professionals due to long-standing mistrust or antipathy (e.g. doctors and lawyers).
- Client clarity on which program is providing what service.
- Conflicts in the correct policy approach to particular issues between partner services.
- Health staff seeking advice in relation to their own work practices or the practices of their employing health service.
- Managing complaints against partners.

This list is helpful and areas where they seem very fraught are in Family Law and the disputes over the care and protection of children. The HJP projects the author has or is involved in evaluating have exposed this. The lawyers have worked with child and family teams in HJPs (for example, in Bendigo and in the Yarra Ranges HJP the ‘Mabel Project’ with maternal and child health nurses<sup>53</sup>). In each service, protocols about careful consideration of information sharing, limiting discussions so they are general in nature and not identifying clients, provision of information only, having initial ‘sounding out’ discussions to test if there is conflict or information that risks being a ‘getting to know you factor’ have been developed and are in place to protect clients and enable ethical conduct.

Non-legal professionals are intelligent and ethically guided too. Sometimes the legal profession overlooks this. If the ethical parameters and reasons for these parameters are clearly understood, professionals are happy to work to find protective protocols after all, the ethical conduct rules are there to protect clients, frustrating as they may be in other professional contexts. Again ‘work arounds’<sup>54</sup> can be found where everyone is clear and careful. Early conflict checks, done quickly and seamlessly can be put in place, separate IT systems are routine in the HJPs the author has or is evaluating:

“I called our main office and confirmed that our practice was not conflicted. I took an hour to speak with this client who was distressed by what she thought were the conditions on the current Interim Accommodation order (IAO). She wanted to know what she could to progress the matter in a way that was favourable to her. I listened to her story and reviewed the order.”<sup>55</sup>

When the author was a co-located practitioner a sign language developed stopping a conversation early. It was clearly understood as staff were trained in what a conflict

<sup>53</sup> Liz Curran is not conducting this project evaluation but has been supporting it by facilitating quarterly ‘evaluation support workshops’ on behalf of the Legal Services Board Victoria which is the funder for the ‘Mabel Project’ which targets mums or would be mums at risk of family violence.

<sup>54</sup> A term used in Linda Gyorki *Breaking Down the Silos: Overcoming the Practical and Ethical Barriers of Integrating Legal Assistance into a Healthcare Setting*, Inner Melbourne Community legal centre and The Churchill Trust Fellowship (2013). <[https://www.churchilltrust.com.au/media/fellows/Breaking\\_down\\_the\\_silos\\_L\\_Gyorki\\_2013.pdf](https://www.churchilltrust.com.au/media/fellows/Breaking_down_the_silos_L_Gyorki_2013.pdf)> (Accessed 27 April 2016).

<sup>55</sup> *Guided Professional Journal Lawyer*, See Liz Curran, ‘Draft Working Paper for a Research and Evaluation Report for the Bendigo Health–Justice Partnership: A Partnership between ARC Justice Ltd and Bendigo Community Health Services’ (December 20, 2016). Available at SSRN: <https://ssrn.com/abstract=2887846> or <<http://dx.doi.org/10.2139/ssrn.2887846>> (Accessed 17 July 2017).

was and why the lawyer had to take care. What cannot be overlooked is the impact for non-legal professionals and in reaching clients of lawyers working in multi-disciplinary practice:

“If someone was acutely distressed there is capacity to get someone else in the room (Professional) to assist. A pre-existing relationship with workers here enables me to refer quickly. The referral professional is just down the corridor which makes the referral easy. I gain a sense of the professional over time and this creates a trusting relationship. The clients see this and understand the trusting relationship between workers. The service is integrated – many vulnerable clients would not otherwise engage with services.” (In-depth Interview with lawyer, Bendigo)

Galowitz also highlights the mindful managing of ethical considerations:

“If the MLP lawyer, the client and the healthcare provider want the healthcare provider to play a more active role, MLP legal staff could request that the healthcare provider actively participate as a member of the client’s legal team at least during the course of the meeting. This could be memorialised through the use of a form developed by the MLP legal staff discussing the role of the healthcare provider with the legal team. For example, the form could indicate that the healthcare provider could be present to help the lawyers identify what health conditions could be exacerbated by social issues (e.g. poor living conditions, lack of utilities). Establishing such a relationship would also help protect healthcare provider notes regarding a patient’s legal issues that are included in the patient’s medical records from being subject to subpoena. Even where a healthcare provider agrees to act as part of the MLP’s legal team, MLPs should still be cautious about including healthcare providers in any conversations or meetings with clients, unless the client has given informed consent to waive the privilege.”<sup>56</sup>

Gyorki,<sup>57</sup> in her Churchill Fellowship Report, canvasses some of the problems discussed in terms of how ethics are managed in HJPs. She has examined a number of case studies in the United States, Canada and the United Kingdom where similarly, ethical issues have been raised and ‘work arounds’ found. For example, at Centre Francophone in Toronto (CFT) clients are given the option of signing a confidentiality waiver so that organisations within CFT can discuss the needs of the client in a multi-disciplinary context. Further, with the client’s consent, the global evaluation form is then faxed to the relevant services throughout the building along with an internal referral form in order to bring about a more holistic model of care for clients. The referral form requests that the person to whom the referral is made contact the referrer within 30 days to provide feedback about the case.<sup>58</sup> Consent is sought from clients by the legal team to share information with other professionals on-site. Referrals to other professionals within the CFT are prepared with the consent of the client. Provided consent is obtained, the person who receives the referral writes some notes on the referral as to whether they are opening the file and the work that they will be able to do to assist the client and they then send it back to the referrer. Further, one caseworker from each of the discrete services at CFT, including a community legal worker, attends the monthly, multi-disciplinary team meetings. Cases are discussed and it is determined how the different professionals can work together.

<sup>56</sup> Paula Galowitz, Jerome Tichner, Paul Tremblay and Steven Blatt, “Ethical issues in Medical-Legal Partnership” in Elizabeth Tobin Tyler et al (eds), *Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership* (Carolina Academic Press, 2011), 158, 173.

<sup>57</sup> Linda Gyorki *Breaking Down the Silos: Overcoming the Practical and Ethical Barriers of Integrating Legal Assistance into a Healthcare Setting*, Inner Melbourne Community Legal Centre and The Churchill Trust Fellowship, (2013), <[https://www.churchilltrust.com.au/media/fellows/Breaking\\_down\\_the\\_silos\\_L\\_Gyorki\\_2013.pdf](https://www.churchilltrust.com.au/media/fellows/Breaking_down_the_silos_L_Gyorki_2013.pdf)> (Accessed 27 April 2016).

<sup>58</sup> (n57), page 47.

In another example, at the Springfield Advice & Law Centre in the United Kingdom, Gyorki notes all clients are asked to fill out a third party authority form to provide feedback. The form lists a number of support staff and clients can cross out those with whom they would prefer that there be no communication. It is at the client's discretion to cross out all the names if they so choose. This authority is valid unless and until the client revokes it.<sup>59</sup> All of these examples alongside those outlined in the author's own research in the Bendigo HJP case study demonstrate that ethical concerns can be managed and processes put in place to minimise the compromising of the client's rights and protect the integrity of the legal system.

Similarly, McGee-Tubb<sup>60</sup> has also written on ethical standards across different professions and how these play out in HJP or MDPs (or MLP in the United States). She notes that there are common ethical values in client counselling and respecting clients' decisions. Like the author, Zuckerman, Kelly and Gyorki, McGee-Tubbs also notes managing ethics in an HJP requires some re-orientation but it is not insurmountable.

### CLEAR COMMUNICATION, PROFESSIONAL ROLES AND TRANSPARENCY

The author's HJP research for the Bendigo project (as demonstrated by the responses to the in-depth interviews with legal and health/allied health professionals and reiterated and verified in the other data collection tools) highlighted the importance of an HJP for clients in accessing legal help. They also identified elements which are essential in reaching otherwise excluded clients. As with the in-depth interviews, the comments in the guided professional journals identify these elements:

"The lawyer demystifies the legal jargon and because the lawyer is here clients don't have to go into a legal office. Some clients won't read legal letters, whereas the lawyer will keep all correspondence on foot. When clients don't read legal correspondence this leads to the myriad issues due to the addiction and apathy by have the lawyer here to deal with the legal issue and assist this scenario is avoided. Simply having the HJP intervention here in terms of interpreting the letters for the client may prevent escalation of a client's issue. I certainly could not provide this legal aspect to the service. Waiting 2 weeks for a reply is not going to assist the client."

and

"Having a lawyer working on-site – Spontaneous helps clients get help quickly Improvement in the client's ability to cope with their problem/s -Varies, particularly with the women. Had we not linked to the lawyer, the women would have been categorically in a worse position."

and

"Clients benefit – talk about how easy it is to walk around to the lawyer. Many clients say they would not have been able to get any legal advice without Lawyer. Most don't have an ability to pay for legal advice. The client need this advice. The clients are so marginalised without assistance the clients will fail. Lawyer gives people hope. The information the lawyers give is correct and assists. Without the service people's suicidality increases people cannot see a way out."

These extracts illustrate that the lawyers in an HJP need to minimize being narrow technicians and avoid jargon and be 'approachable.' Strict applications of ethical rules, out of context, can make working with other professionals in a multi-disciplinary practice

<sup>59</sup> (n57), page 79.

<sup>60</sup> M McGee Tubb 'Ethical Challenges in Client Counselling and Decision-making in Multi-disciplinary practices Serving Elders', Columbia University, (2013) <<http://ssrn.com/abstract=2212887>> (Accessed 6 June 2016) .

very difficult. As the Australian Productivity Commission notes in the extract above, rigid adherence to ethical rules without thought as to the implications can significantly hinder people's access to justice where they are in rural areas or where access to a lawyer is problematic. In Australia, most of the HJPs are set up to assist the 86% who would otherwise not reach a lawyer. Ethical rules of conduct must not be adhered to slavishly but be applied carefully and with a clear risk of breach in a practical sense being evaluated before denying a service. In the *Response to Collaborative Survey* the following comment was published:

“An open dialogue with the health service or social services professional means that the client is better supported as different services are on the same page. It is beneficial to have an extra communication link between a worker and a client, as the worker generally has more contact with the client and often sees the client face to face, making it easier to explain issues that may arise -- particularly when there are mental health and homelessness issues.”<sup>61</sup>

The duty of loyalty espoused in case law in Australia in *Spincode*<sup>62</sup> is, in effect, an automatically imposed broader assurance from lawyer to client that “I will not act against your interests in this or a related matter.”<sup>63</sup> Feedback from the child and family service in the HJP in Bendigo at the very initial Focus Group (FG) with non-professionals in the scoping of the project (the service was in its infancy) in August 2014, highlights the importance of clear communication and transparency in how such ethical conduct rules, such as this one are explained and managed. At the FG, the lawyer was in the room. The health/allied health professionals stated when they were discussing family affairs and risk, sometimes the ‘lawyer was friendly but then would be standoffish’. This discussion made the lawyer realise that it was ‘meaningless to say, I have a conflict of interest without explaining what it is and why it is important for clients or prospective clients’. It is legal jargon. In this instance, the lawyer realized that they had assumed a ‘conflict’ to be common parlance and so, widely understood. At the FG the lawyer noted in future they should not only explain the rule but the broader reasons for it in a legal context. This resonates with the observations of Cole as summarised above.<sup>64</sup>

The example highlights the importance of lawyers clearly explaining in plain English the scope and demarcations and reasons for the existence of the ethical rules to non-legal professionals. It is important that assumptions about knowledge or understanding of the legal system, its operations and ethical rules not be taken for granted. Similarly, lawyers also need to be aware of the ethical paradigms in which health/allied health professionals also work. Debriefs and discussions need to take place. Sharing of differing professional approaches and the reasons for their existence needs to be done not just once, but again and reiterated, explained to new staff and in simple clear terms as to why the protections are for clients in the legal context and how the duty of lawyers in the proper administration of justice can go beyond the immediate client. This builds trust, understanding and relationships with non-legal professionals.

<sup>61</sup> Liz Curran, Final Evaluation Report for the Legal Services Board Victoria – ‘Why Didn’t You Ask?’ – Evaluation of the Family Violence Project of the Loddon Campaspe Community Legal Centre (April 16, 2015). <<http://ssrn.com/abstract=2631378>> or <http://dx.doi.org/10.2139/ssrn.2631378>> (Accessed 12 May 2016).

<sup>62</sup> *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 per Brooking JA (upholding the decision of Warren J (now Warren CJ)).

<sup>63</sup> Source for much of the discussion of the ethical conduct rules is Richard Flemming, Principal at Benelex, member of the Victorian Law Institute’s Ethics Committee. <<https://www.liv.asn.au/Professional-Practice/Ethics/LIV-Ethics-Committee>>. [Accessed 26 June 2016].

<sup>64</sup> Portia Cole, ‘You want me to do what? Ethical practice within interdisciplinary collaborations’, *Journal of Social Work Values and Ethics*, Volume 9, Number 1 (2012), 1–39, 29. <<http://www.jsvwarchives.com/spring12/spr124.pdf>> (Accessed 5 October 2016).

The clear evidence merging from the Bendigo HJP is that as HJPs rely heavily on referrals, legal secondary consultations and practical professional development with the health/ allied health professionals to be effective, if other professionals find lawyers 'arrogant' 'remote' 'unconcerned' or 'difficult to understand or relate to' then the HJP will not be successful as the health/ allied health professionals will not engage. Such engagement is critical if health/allied health professionals are to assist by identifying clients with legal issues and linking their clients to the lawyer thereby reaching clients who are vulnerable and excluded.

Such situations need to be alert to ethical conduct and lawyers need to be careful in explaining their role and why they cannot share information or be privy to such information or in some instances withdraw from acting (hopefully with a referral if possible of the client). Such situations can create professional tension but where understanding of ethical parameters exist these can be resolved. Why is this important? As a mental health professional notes:

"Client stated that she has been able to feel comfortable talking with the lawyer and that if she did not have access to the lawyer then she would not have any access to her child and would not have seen the child again during his childhood years. Invaluable for this client was understanding that she did have rights and that there is a process that can be followed rather than just thinking that all is hopeless and that she started to believe what the child protection where telling her that she is a really poor mother."<sup>65</sup>

In areas where lawyers and health professionals are dealing with families and their children in crisis the need for clarity is even more important. The Law Commission of Ontario has noted that MDP family services present a challenge, given non-legal professionals can be acting for the whole family or a child or a parent. The Commission has asked for better guidance highlighting the challenges of a legal culture (adversarial and closed) 'versus' the caring professionals such as the health/allied health and counselling professions.<sup>66</sup> The building of trust is essential. It should not be forgotten that health and allied health professionals have their own ethical duties such as 'a duty of care' or 'do no harm' obligations to their client/patient. They are not going to trust a lawyer with their vulnerable client if they find the lawyer uncommunicative, standoffish, 'hot and cold' or likely to re-traumatise their client. It is clear from the author's empirical field research that, if the lawyer is like this, then the health/allied health profession is unlikely to refer their client to the lawyer. This defeats the objective of an HJP in reaching clients who need help but would otherwise not get help.

"When you are a general worker, people trust you more easily. People are more likely to tell you about their high risk lifestyle. In capacity as community health nurse can do role and not be coercive. I facilitate the program and clients are more likely to engage. Clients don't feel as though there are consequences if they open up to me. Constantly experiencing stress eventually leads to people to deal with their legal issues. Generally, we give people their medication and say see you later. Within that space we sometimes have the ability engage via informal discussion and to chat about what they are experiencing. People get more motivated to be assertive and proactive."<sup>67</sup>

To have unclear communication and see ethical duties as barriers is not necessary. It can harm the building of these relationships of trust between the legal and non-legal

<sup>65</sup> Guided Professional Journal, Allied Health Professional, Bendigo.

<sup>66</sup> See Law Commission of Ontario 'Professional Challenges for Multi-disciplinary Paths to Family Justice, <http://www.lco-cdo.org/en/family-law-process-call-for-papers-jacobs-sectionIV> (Accessed 5 October 2016).

<sup>67</sup> In-depth Interview with Allied Health Professional, Bendigo, Liz Curran, 'Draft Working Paper for a Research and Evaluation Report for the Bendigo Health–Justice Partnership: A Partnership between ARC Justice Ltd and Bendigo Community Health Services' (December 20, 2016). <<https://ssrn.com/abstract=2887846>> or <<http://dx.doi.org/10.2139/ssrn.2887846>> (Accessed 17 July 2017).



professional, open and frank discussion and a problem-solving attitude can often resolve and clarify ethical dilemmas. As Norton (cited in Tobin-Tyler) observes:

“The problem presented is an atmosphere of distrust, fear and antagonism – not all of which is unfounded. It is the result of a lack of communication; failure of understanding of basic professional objectives, methods and philosophy of the co-professional; and above all, the mystique built up by ever increasing malpractice insurance rates.”<sup>68</sup>

If matters are unable to be resolved ethically then having a back-up of pro bono law firms to refer too is a good step where the ethical duties cannot be discussed. This is discussed in the Evaluation of the Sick Kids Hospital in Toronto.<sup>69</sup>

In an HJP, if the focus is on problem solving and holistic client care, such issues can and have been worked through. For instance, in the Bendigo HJP study all the professionals using the HJP noted they now openly discuss how they can work together and communicate in ways where the lawyer could report back with client consent.

Professional boundaries and resistance between different disciplines in most HJPs, the author has or is evaluating or in which she has worked, have been overcome through clearer communication. Lawyers have learned to explain their duties more clearly rather than make assumptions about what people know. They have also been mindful of staff turnover and the need to reinforce and reiterate professional ethics and ‘work arounds’ in LSC and Professional Development sessions. The evidence from the Bendigo HJP study is that such discussions have opened up a greater respect, as it is not just about lawyers explaining their professional ethics, but that they also learn about the professional ethics of the non-legal professionals with whom they work. Each profession learns from each other. Ethical rules for health/allied health professionals need not clash if they are clearly articulated, understood and frameworks are instigated through IT, Intake processes, specific client and professional consent forms that are clear about what information is to be shared and with whom and in what circumstances.<sup>70</sup> Such attitudes are shown to enable everyone to focus on the main game which is, helping the clients. ‘Work arounds’ can eventuate through problem solving approaches, dialogue and benefit and contribute to holistic client care which is what HJP’s are all about. Cole provides some good advice when he states,

“The ultimate goal is to transition from the question ‘You want me to do what?’ to ‘What pathway will I use to navigate through ethical tensions in order to enhance the clients’ best interest and well-being?’ Application of an ethical decision-making model in a law clinic setting should be encouraged. A concerted effort among those involved in interdisciplinary training may increase the probability of professionals’ engaging in sound ethical practice irrespective of complex realities on the ground.”<sup>71</sup>

With these questions Cole provides a different paradigm to the application of ethical concerns (which the Bendigo HJP and Gyorki examples discussed above seem to

<sup>68</sup> Martin Lloyd Norton (1971). Development of an interdisciplinary program of instruction in medicine and law, , 46(5) *Journal of Medical Education*, 405–11. Cited by Elizabeth Tobin-Tyler. “Allies not adversaries: Teaching collaboration to the next generation of doctors and lawyers to address social inequality.” Roger Williams University School of Law Faculty Articles. Article 17 (2008). Retrieved from <[http://lsr.nellco.org/rwu\\_fp/17](http://lsr.nellco.org/rwu_fp/17)> 2. See also Bendigo Loddon Campaspe Community Legal Centre 2015.

<sup>69</sup> Tim Roberts and Janet Currie *PBLO at SickKids: A Phase II Evaluation of the Medical Legal Partnership between Pro Bono Law Ontario and SickKids Hospital Toronto, Final Report* (2012) Focus Consultants, Victoria, Canada. <<http://www.probono.net/va/search/item.451249>> (Accessed 21 January 2016).

<sup>70</sup> See for example ‘Starting a Health Justice Partnership Toolkit’ 2016 <<http://www.justiceconnect.org.au/sites/default/files/HJPs%20Toolkit%20final%2020150908%20low%20res.pdf>> (Accessed 12 June 2016).

<sup>71</sup> Portia Cole, ‘You want me to do what? Ethical practice within interdisciplinary collaborations’, (2012), Vol 9 (1) *Journal of Social Work Values and Ethics*, 1, 36. <<http://www.jswearchives.com/spring12/spr124.pdf>> (Accessed 5 October 2016).

indicate are already occurring in HJPs), establishing a mindset of why something is possible, rather than what is not possible. This approach might minimise resistance to HJP in some circles, perhaps enabling a clearer focus of what is in the clients' interest rather than an opaque adherence to ethical rules without an effective appraisal of context and client reality.

## CONCLUSION

The author agrees with Tobin-Tyler who states:

“Rather than focus on the divide between the professions over medical-malpractice lawsuits, some legal and medical practitioners and educators have begun to focus on what the professions have in common and what they have to offer one another. In fact, lawyers and doctors share many professional values. They both value professional autonomy and decision-making; both have a fundamental fiduciary duty to the individual client or patient . . . ”<sup>72</sup>

What remains confusing and vexed is the inability of the ethical rules and duties to be construed in a context of limited legal aid services and client complexity that present significant barriers to them seeking help. Ethical rules are historically predicated on traditional models of legal practice, between lawyers and for profit legal practices where the client pays for a legal services and there are other lawyers they can go to for help due to the supply. As this article has shown this is problematic. More academic and regulatory exploration of the ethical rules, in a context of access to justice, is needed.

The research discussed in this article demonstrates how, legal and health/ allied health professionals in HJPs, motivated by the need to reach clients who were otherwise not gaining legal help, have worked together due to their focus on holistic client care to overcome barriers and work through issues so as at the same time able to comply with ethical codes of conduct.

The author is not suggesting this is easy however, this article has shown, ‘work arounds’ that are ethical that involve preparatory work and processes in an HJP, can be developed to protect clients and ensure ethical duties are balanced and attained. Sometimes lawyers can forget the ethical rules do not exist to protect the legal profession or to maintain a monopoly on legal service delivery but are there for the protection of clients and the proper administration of justice. As the data and examples from the research discussed in this article have shown, the clear communication, transparency and explanations of why ethics exist are key. Confidential information need not be revealed or aspects of it can be protected to enable the client to gain the supports that they need in a confusing array of processes. Conflict of interest, client privilege and client confidentiality can and have been managed in HJPs.

HJP’s are reaching those people who legal services have otherwise excluded and effort is worth it to ensure the rule of law is real through true and meaningful access to justice.

Rather than seeing ethical rules of conduct as reasons why one cannot assist clients of an HJP, the author has argued it is important to remember ethical rules exist for client protection. It is this that should inform the responses to how to act on the ethical rules. Issues of limited access to justice, client disempowerment and trauma and the need for legal help being available to people who would otherwise be excluded are factors that need to inform ethical decision-making. Not to do so can also be unethical.

<sup>72</sup> Elizabeth Tobin-Tyler, “Allies Not Adversaries: Teaching Collaboration to the next Generation of Doctors and Lawyers to Address Social Inequality”, Roger Williams University School of Law Faculty (2008). Article 17, 249, 2. <[http://lsr.nellco.org/cgi/viewcontent.cgi?article=1017&context=rwu\\_fp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1017&context=rwu_fp)> (Accessed 21 January 2016).

# EUROPE – IN SEARCH OF A SOUL? ARTICLE 17 TFEU AND ITS FUNCTIONING

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## ABSTRACT

This article critically analyses the structure, functioning and development of the dialogue between the European Union and churches, religious associations and communities, and philosophical and non-confessional organisations (Article 17 of the TFEU dialogue). It outlines the history of the dialogue, its current structure and the impact of the European Ombudsman's 2013 decision on the alleged failure by the European Commission to correctly implement Article 17.

## INTRODUCTION

“If in the next ten years we haven't managed to give a soul to Europe, to give it spirituality and meaning, the game will be up”.<sup>1</sup>

It has been almost 25 years since Jacques Delors, the President of the European Commission outlined the importance of giving a soul to Europe. This has been attempted, at the institutional level, through the dialogue between the European Union and churches, religious associations and communities, and philosophical and non-confessional organisations. Although this dialogue has evolved from informal contacts to a structured scheme of meetings, with a legal basis in Article 17 of the Treaty on the Functioning of the European Union, it is unclear if it has, in fact, become a real instrument of democratic participation or has rather remained a formal tool with little measurable impact or policy outcome.

This contribution seeks to analyse the structure, functioning and development of the dialogue between the European Union and churches, religious associations and communities, and philosophical and non-confessional organisations (Article 17 dialogue). In order to do so, it will outline the history of the dialogue, its current structure (dialogue partners, criteria for eligibility as an interlocutor, the requirement of openness, transparency and regularity), and the manner in which it has been impacted by the 2013 decision of the European Ombudsman on the alleged failure by the European Commission to correctly implement Article 17.

Four main observations will be made. First, that the eligibility criteria to become a dialogue partner under Article 17 are unclear and contradictory: in practice, the European Commission applies different standards for secular and Humanist non-governmental organisations, on the one hand, and religious non-governmental organisations, on the other, overall favouring the former. Second, that contrary to the requirement of openness and transparency, EU institutions make publicly available very little information regarding priority topics for discussion and the substance of meetings that take place under Article 17. Third, that the regularity of the dialogue appears not to go beyond and above formal meetings, as there is no concrete outcome and follow up to these meetings.

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<sup>1</sup> Jacques Delors, President of the European Commission, Speech to the Churches, Brussels, 4 February 1992.

Fourth, that the recent developments indicate a decrease in the importance of and an obscuring of what the Article 17 dialogue entails.

Overall, despite the apparent strengthening of the legal status and structural elements, the dialogue under Article 17 is experiencing a weakening of structure, a dilution of substance, and an inconsistency of criteria for participation. This is why this contribution will finally set out a number of recommendations to strengthen the implementation of Article 17 in order to increase its impact, efficiency and the level of participatory democracy.

## ARTICLE 17 TFEU – THE HISTORY

The section seeks to offer an overview of the history of Article 17, and how the dialogue between the European Union and churches, religious associations and communities, and philosophical and non-confessional organisations was initiated.

Article 17 of the Treaty on the Functioning of the European Union (TFEU), placed under the section entitled “The Democratic Life of the Union”, has no direct or indirect predecessor in the former European Community Treaties, but rather “has evolved from earlier informal contacts to a more structured system of regular meetings, underpinned by a solid legal basis”.<sup>2</sup>

A number of initiatives inspired the dialogue. Some commentators refer to 1982, “when the European Commission took its first steps to formalise exchanges dating back in 1960s by appointing a special adviser with the task of liaising with the churches”.<sup>3</sup> In 1992 this initiative took a more concrete form in the project entitled “A soul for Europe”, advanced by the President of the European Commission, Jacques Delors. This had the aim of moving beyond an economically-oriented Union, and of:

... giving a spiritual and ethical dimension to the European Union ... In the wake of this, A Soul for Europe was founded in 1994. The intention was to involve religious communities in dialogue with European institutions ... the European Commission encouraged the religious communities to present projects: meetings, seminars, social activities, etc., meant to contribute to the *recognition and understanding* of the ethical and spiritual dimension of European unification and politics.<sup>4</sup>

The criteria for membership in this project referred primarily to representativeness:

Every organisation that *officially represents a religious or philosophical tradition with a European structure* can become member of A Soul for Europe. The organisations are also to have the weight of the whole institution of their religious or philosophical community behind them and therefore carry a mandate from that institution. In the future, there will probably be two kinds of membership: full member or associate member.<sup>5</sup>

Subsequently, there were attempts to include a provision on religious communities in the Treaty of Amsterdam (1999). Organisations representing non-confessional, Humanist,

<sup>2</sup> Magdalena Pasikowska, ‘At a Glance: The EU Institutions and Inter-Religious Dialogue’ (European Parliamentary Research Service March 2015).

<sup>3</sup> Patrick Roger Schnabel, ‘Dialogue under Article 17 (TFEU): Origins, Development and Future Perspectives’ (2014) 75 BEPA Monthly Brief, 2 <[http://aei.pitt.edu/55816/1/n75\\_june\\_2014.pdf](http://aei.pitt.edu/55816/1/n75_june_2014.pdf)> accessed 9 December 2016.

<sup>4</sup> Bureau of European Policy Advisers (BEPA), ‘Dialogue with Religions – Archives GOPA’ (BEPA, 22 October 2010) <[http://ec.europa.eu/dgs/policy\\_advisers/archives/activities/dialogue\\_religions\\_humanisms/sfe\\_en.htm](http://ec.europa.eu/dgs/policy_advisers/archives/activities/dialogue_religions_humanisms/sfe_en.htm)> accessed 5 December 2016 (emphasis added).

<sup>5</sup> *Ibid* (emphasis added). Initially, there were six members: Commission of the Bishops’ Conferences of the European Community (COMECE), Church and Society Commission of the Conference of European Churches, Orthodox Liaison Office, Conference of the European Rabbis, European Humanist Federation, and Muslim Council for Co-operation in Europe.

and secular views were against such a provision, arguing firstly that the dialogue with civil society was sufficient, and secondly that churches and religious organisations should not be granted special participatory status.<sup>6</sup>

In the end, Declaration No 11 on the status of churches and non-confessional organisations was annexed to the Treaty of Amsterdam,<sup>7</sup> and stated:

The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

The European Union equally respects the status of philosophical and non-confessional organisations.

Shortly after this, a Reflection Group on the Spiritual and Cultural Dimension of Europe was established in 2003 at the initiative of the President of the European Commission, Romano Prodi. It fed into the Convention which drafted the EU Constitutional Treaty, the goal being “to reflect upon issues relating to values that are relevant for European Unification”.<sup>8</sup> The Reflection Group’s work was taken on by the Commission’s Group of Policy Advisors (GOPA), which later became the Bureau of European Political Advisors (BEPA). BEPA was replaced, during the Juncker Commission, by the European Political Strategy Centre (EPSC), whose task was, *inter alia*, to establish contacts with churches, religious, and philosophical associations.<sup>9</sup>

The drafting process of the Treaty Establishing a Constitution for Europe (TECE) triggered debates regarding religion, religious freedom, and the religious heritage of Europe. Two main points marked the debate in this regard: a) the idea to have an explicit mentioning of the “European Christian heritage” in the draft Constitution, and b) the dialogue of the Union with churches, philosophical, and non-confessional organisations (what became article I-52 TECE).<sup>10</sup>

References to different cultural and philosophical traditions were suggested. Member of the European Parliament Joachim Würmeling, for example, proposed that the new Treaty include the following: “The Union’s values include the values of those who believe in God as a source of truth, justice, good and beauty as well as of those who do not share such a belief but respect these universal values arising from other sources”.<sup>11</sup> This proposal gathered the signature of nineteen stakeholders, but was opposed prominently by French President Jacques Chirac and Belgian Foreign Affairs Minister Louis Michel.

While TECE did not ultimately include a reference to God, Christianity, or the Christian roots of Europe,<sup>12</sup> it did take the language directly from Declaration 11, by mentioning in Article 51 that:

<sup>6</sup> ‘European Humanist Federation – No to Special Rights for Churches in the EU’ (*Humanist Federation*) <<http://Humanistfederation.eu/our-work.php?page=no-to-special-rights-for-churches-in-the-EU>> accessed 12 October 2016. In May 2003 many environmentalists, Humanists, and reproductive rights groups, led by the Catholics for a Free Choice Europe and the European Humanist Federation, formed a coalition trying to influence secularist conventionnels to reject Draft Article 37, saying it was not compatible with secularism. See, in this sense, Andrew Smith, ‘Divisions over the Place of Religion in the Treaty Establishing a Constitution for Europe’ (*Lancaster University*) <<http://www.lancaster.ac.uk/staff/kallis/EURO100/page4/files/Seminar%204%20article.pdf>> accessed 5 December 2016.

<sup>7</sup> Declaration on the Status of Churches and Non-confessional Organisations. For more, see Rudolf Geiger / Daniel-Erasmus Khan and Markus Kotzur (eds.), *European Union Treaties: A Commentary* (C.H. Beck Hart 2015), 234–236.

<sup>8</sup> (n2).

<sup>9</sup> Since 2005 it was involved in organizing annual high level meetings between the EU institutions and religious representatives. These high-level meetings expanded since 2009 to representatives of philosophical and non-confessional organisations, such as the Humanists, freethinkers, or freemasons.

<sup>10</sup> Magdalena Pasikowska-Schnass, ‘The EU Institutions and Dialogue with Non-Confessional Organisations’ (European Parliamentary Research Service November 2015). France and Belgium strongly opposed any reference to God or Christianity in the Treaty Preamble. Conversely, representatives of religious bodies advocated for provisions on the status of churches and dialogue with EU’s institutions.

<sup>11</sup> Smith (n6) 5.

<sup>12</sup> *Ibid.*

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contributions, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.<sup>13</sup>

This reference in the TECE had the role of recognizing the importance of the ongoing dialogue between EU institutions and churches, religious associations, philosophical and non-confessional organisations. The rejection of the TECE by the 2005 referenda in the Netherlands and in France did not prevent the dialogue from continuing. The President of the European Commission, Manuel Barroso, met Christian, Jewish, and Muslim leaders on 12 July 2005 and representatives of the European Humanist Federation (EHF) on 9 November 2005. A number of subsequent meetings took place, involving the leaders of the three monotheistic religions in Europe (Christianity, Judaism, and Islam), Conference of European Churches (CEC-KEK)<sup>14</sup>, the Bishops' Conferences of the European Community (COMECE),<sup>15</sup> and the delegation of liberal and adogmatic obedience (freemasons).<sup>16</sup>

When the TFEU was adopted and came into force in December 2009, the provisions referring to religious and non-confessional organisations were integrated without any change as Article 17. This development is noteworthy, since it marked the transition of the dialogue from a more informal basis to a legally binding obligation enshrined in the Treaty. The strengthening of the legal basis was welcomed by churches,<sup>17</sup> which expected Article 17 (3) to allow a “deepening and widening (of) existing dialogue practice”,<sup>18</sup> and to bring additional value to the dialogue by “including all levels like working contacts, consultations, dialogue seminars . . . to the high-level meetings of religious and political leaders – and should also be open to new forms as the process of mutual exchange develops”.<sup>19</sup>

Although secular, Humanist, and non-confessional organisations were included as formal dialogue partners under Article 17, they were critical of the inclusion of the dialogue in the TFEU. A letter sent by the EHF to the European Commission states clearly that the EHF had been “campaigning for many years *against* the adoption of what is now Article 17”.<sup>20</sup> The main reason behind this is that Article 17 (1) seemingly offered a preferential treatment to churches and more generally to the role of religion

<sup>13</sup> Draft Treaty Establishing a Constitution for Europe [2003] OJ C169/01, Article 51.

<sup>14</sup> CEC-KEK is a fellowship of around 114 Orthodox, Protestant, Anglican, and Old Catholic Churches from all around Europe, and 40 national council of churches and organisations which work in partnership. CEC-KEK was founded in 1959 and has offices in Brussels and Strasbourg. For more information, see ‘Who We Are’ (CEC) <<http://www.ceceurope.org>> accessed 23 November 2016.

<sup>15</sup> COMECE comprises Bishops delegated by the Catholic Bishops' Conferences of the 28 Member States of the European Union. COMECE was founded in 1980. It was preceded by the European Catholic Pastoral Information Service (1976–1980). For more information, see ‘Who We Are’ (COMECE) <<http://www.comece.eu/site/en/whowere>> accessed 23 November 2016.

<sup>16</sup> ‘Dialogue with Religions, Churches and Communities of Conviction – Activities – Bureau of European Policy Advisers’ (EC) <[http://ec.europa.eu/dgs/policy\\_advisers/activities/dialogues\\_religions/events\\_en.htm](http://ec.europa.eu/dgs/policy_advisers/activities/dialogues_religions/events_en.htm)> accessed 12 October 2016.

<sup>17</sup> Patrick H Daly, ‘Article 17 TFEU – The Contribution of the Church to the EU’ (2014) 75 BEPA Monthly Brief, 4 <[http://aei.pitt.edu/55816/1/n75\\_june\\_2014.pdf](http://aei.pitt.edu/55816/1/n75_june_2014.pdf)> accessed 9 December 2016.

<sup>18</sup> COMECE – CEC, ‘Article 17 of the Treaty on the Functioning of the European Union: General Considerations on the Implementation of the Dialogue Foreseen by its Paragraph 3’ (2010) <[http://www.comece.eu/dl/qkrrJKJKoKkkJqx4KJK/20100521\\_COMECE-CSC\\_CEC\\_joint\\_position\\_Art.17.pdf](http://www.comece.eu/dl/qkrrJKJKoKkkJqx4KJK/20100521_COMECE-CSC_CEC_joint_position_Art.17.pdf)> accessed 9 December 2016, 2.

<sup>19</sup> *Ibid* 5.

<sup>20</sup> The EHF is quoted by Jorge Cesar das Neves writing on behalf of the European Commission to David Pollock, EHF, letter BEPA/JCdN D(2009) 129, Brussels (12 February 2009).

in society. Because of the advocacy of such groups, the high level meetings with the European Commission expanded in 2009 to include representatives of philosophical and non-confessional organisations, such as the Humanists, freethinkers, and freemasons.

The European Commission currently organises high level meetings twice per year: once with religious leaders, and once with representatives of the Humanists, freethinkers and freemasons. They take place separately and on different topics. Besides the high level meetings, there are also formal dialogue seminars which can be proposed by any participant and taken on board by the European Commission and Parliament. Therefore, while the high level meetings are reserved to religious leaders and to representatives of the Humanists, freethinkers and freemasons, dialogue seminars are open for all.

### ANALYSIS OF ARTICLE 17

Against this historical background, the following section of this paper seeks to analyse the Article 17 dialogue, by focusing on the elements set out in Article 17 (3): dialogue partners, eligibility criteria, and on the requirements of openness, regularity and transparency. In order to assess these characteristics and the extent to which they are respected, recourse will be made to the complaint submitted by the EHF to the European Ombudsman, opened in 2011 and concluded in 2013, and which concerned an alleged failure by the European Commission to implement correctly Article 17.

#### *Criteria for Eligibility as Dialogue Partners*

Article 17 sets out three main participants: a) the European Union, b) churches and religious associations and communities, and c) philosophical and non-confessional organisations.

Article 17 (3) refers to the “Union” without substantiating which institution, body and/or specialised agency should be involved in the dialogue with churches, confessional, and non-confessional organisations. Traditionally, the dialogue has been carried out with the European Commission (as currently the dialogue is the responsibility of First Vice President Frans Timmermans),<sup>21</sup> the European Parliament (under the responsibility of Vice President Antonio Tajani), and the Council. The wording of Article 17 (3) implies that other EU institutions or bodies could participate in the dialogue. This would allow flexibility for the dialogue to be carried out with the relevant partner, depending on the specific area of concern, issue, and legal responsibility at hand. In this sense, the responsible coordinator for the dialogue between the Commission and the other partners under Article 17, Katharina von Schnurbein,<sup>22</sup> has mentioned that “the dialogue will remain flexible with view to its structure, instruments and dialogue possibilities”.<sup>23</sup>

The manner in which Article 17 and the 2013 Guidelines on the Implementation of Article 17 TFEU (Guidelines on Article 17) are formulated entails a clear difference between the dialogue of the EU with churches and religious associations and communities, on the one hand, and with philosophical and non-confessional organisations, on

<sup>21</sup> The adviser responsible for the dialogue within the Commission has been relocated from the former Bureau of European Policy Advisers to the Directorate General for Justice and Consumers.

<sup>22</sup> As to the date of the submission of this article, Katharina von Schnurbein held the office of the coordinator of Article 17 Dialogue in the European Commission.

<sup>23</sup> Katharina von Schnurbein, ‘A Living Dialogue’ (2014) 75 BEPA Monthly Brief, 9 <[http://aei.pitt.edu/55816/1/n75\\_june\\_2014.pdf](http://aei.pitt.edu/55816/1/n75_june_2014.pdf)> accessed 9 December 2016.

the other. The dialogue is dependent on their “identity” and “specific contribution”. But, while the eligibility criteria for the Article 17 dialogue are clear for churches, they are not so for the other participants, especially in terms of registration at domestic level and representativeness.

### *Registration at Domestic Level*

Article 17 respects the status of the dialogue partners under national law and does not require a specific registration in order to be eligible.

In an attempt to clarify the manner in which Article 17 should be implemented, the 2013 Guidelines on Article 17 state:

Dialogue partners can be churches, religious associations or communities as well as philosophical and non-confessional organisations that are recognised or registered as such at national level and adhere to European values. There is no official recognition or registration of interlocutors at a European level.

The Guidelines on Article 17 bring a nuance to the registration requirement. Whereas Article 17 only talks about the prohibition of harmonization regarding the status under national law of churches and religious associations or communities, the Guidelines on Article 17 say that such organisations should be “recognised or registered *as such*” under national law.<sup>24</sup> This seems to suggest that if a religious association is registered *as such* under domestic law, it cannot argue to be a church, for example, when engaging with EU institutions. The practical difference between these two qualifications is significant because, for example, church leaders attend the annual high level meetings with the European Commission, but religious associations can only participate, in principle, in dialogue seminars.<sup>25</sup>

Moreover, the requirement of registration, as an element for eligibility of dialogue partners, is far from being clear or consistently applied in practice. An instance which shows the symptomatic lack of coherence in this regard is the Humanist associations and organisations. While the EHF is registered in the Transparency Register of the European Union<sup>26</sup> under Section III (Non-governmental organisation), its Belgian affiliate Unie Vrijzinnige Verenigingen (deMens.nu) is registered under section V (Organisations representing churches and religious communities). It is rather peculiar that a Humanist group (which generally advocates *against* an alleged dominant position of religion in society) could qualify as a religious community. Under this heading, and despite its specificity and beliefs, the Humanist group can take part in the dialogue as a religious community, together with churches and religious communities. This would contradict Article 17 (3) which speaks about the *identity* and *specific contribution* of each dialogue partner under the two sections: churches and religious associations or communities, on the one hand, and philosophical and non-confessional organisations, on the other.

<sup>24</sup> Even before the adoption of the Guidelines on Article 17, the European Commission had embraced this interpretation that dialogue partners should recognise as such at national level and should adhere to European values. This is clear from the Commission’s position expressed to the European Ombudsman in his inquiry into complaint 2097/2011/RA against the European Commission, ‘Decision of the European Ombudsman in his Inquiry into Complaint 2097/2011/RA against the European Commission’ (*European Ombudsman*) <[http://www.ombudsman.europa.eu/en/cases/decision\\_faces/en/49026/html.bookmark](http://www.ombudsman.europa.eu/en/cases/decision_faces/en/49026/html.bookmark)> para 14, accessed 5 December 2016.

<sup>25</sup> For an overview of who participates in the high level meetings and who organises seminar dialogues within Article 17, see the History of the dialogue over the years ‘Dialogue under Article 17: Dialogue with Churches, Religious Associations or Communities and Philosophical and Non-Confessional Organisations – European Commission’ (*BEPA*) <[http://ec.europa.eu/archives/bepa/activities/outreach-team/dialogue/index\\_en.htm](http://ec.europa.eu/archives/bepa/activities/outreach-team/dialogue/index_en.htm)> accessed 5 December 2016 and ‘Dialogue with Churches, Religious Associations or Communities and Philosophical and Non-Confessional Organisations’ (*European Commission* 23 November 2016) <[http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=50189](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50189)> accessed 5 December 2016.

<sup>26</sup> ‘Transparency Register’ (*European Commission*) <<http://ec.europa.eu/transparencyregister/public/consultation/search-ControllerPayer.do?declaration=pensee%20libre&search=search&locale=en#en>> accessed 5 December 2016.



The religious and confessional partners under Article 17 (COMECE, CEC – KEK, the European Jewish Congress, Muslim communities, Hindu, Sikh associations and the Church of Jesus Christ of Latter-day Saints – Mormons) are all registered in the Transparency Register under Section V (Organisations representing churches and religious communities). However, the philosophical and non-confessional organisations participating in the dialogue are registered in a less consistent manner. Besides the contradictory situation of the European Humanist Federation and the Unie Vrijzinnige Verenigingen, Egalité Laïcité Europe (EGALE) and the Grande Loge Indépendante et Souveraine des Rites Unis (GLISRU) are registered under Section IV (Think tank, research and academic institutions), while Grande Orient de France (G.O.D.F.), Grande Loge de Belgique (GLB), Association Européenne de la pensée libre (AEP-EU) are registered under Section III (Non-governmental organisation).

In private meetings, representatives of the European Commission have stated that religious organisations registered domestically as non-governmental organisations could not qualify as dialogue partners under Article 17 because they are not registered *domestically* as religious associations, and that they are already represented by churches. However, even a brief analysis of the registration of non-confessional organisations shows that there is no strict equivalence regarding the formal registration and the shared ethos of the entity at issue. Since it is not necessary for non-confessional organisations to register *as such* under domestic law (and can be registered generally as non-governmental organisations), *mutatis mutandis*, it is not necessary for religious organisations to be registered *as such* under domestic law either. A religious organisation can be registered as a non-governmental organisation and still participate in the Article 17 (1) dialogue (religious associations or communities). And this is rightly so, because formal domestic registration might have different names and categories, which do not fall entirely under the categories outlined by Article 17 – the purpose of which is *not* the harmonization of such registrations.

Not only can such a religious organisation registered as a non-governmental organisation participate in Article 17 (1), but it could also qualify under Article 17 (2), namely “philosophical organisation”. This conclusion is derived from a basic textual interpretation of Article 17 (2), which does not make any distinction between religious, secular, Humanist or other philosophical conviction. The only requirement that could be reasonably derived is the existence of clear philosophical convictions which guide the work of the organisation. These convictions can be reflected, for example, by the Mission and Goals, Statement of Faith, or requirements for membership.

Although the *status quo* of the dialogue does not seem to support this interpretation, it is unclear on what basis the European Commission favours secular and Humanist philosophical beliefs over other philosophical beliefs (including religious, theistic or moral philosophical beliefs). Even assuming *arguendo* that the European Commission is trying, in practice, to strike a balance between a prong setting out religious dialogue partners (Article 17 (1)), and one setting out non-religious dialogue partners (Article 17 (2)), it still does not achieve in practice the presumed goal. In fact, it excludes religious organisations (registered as non-governmental organisations) from both paragraphs 1 and 2 of Article 17, on the false pretext that: a) they are not religious organisations registered *as such* domestically, and b) that religious philosophical organisations are not included in Article 17 (2). However, the European Commission does not apply the same standards for Humanist and secular organisations, which can: a) be registered under a different name domestically (such as a non-governmental organisation), and b) who

participate in the dialogue on the basis of Article 17 (2), with no check regarding the consistency, and coherence of their philosophical convictions.

Against this background of unclear eligibility criteria, the question on the delimitation between interlocutors under Articles 17 and 11 TEU arises. In other words, it is not clear who is eligible for an institutionalised dialogue with the EU under Article 17, and what exactly differentiates them from the more informal dialogue partners of the EU under Article 11 TEU. Article 11 TEU regulates generally the dialogue with civil society and states that:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

Some commentators mentioned that under Article 17, “EU institutions acknowledge the fact that those stakeholders represent a significant voice in society and are often of a specific nature, one that goes beyond a mere civil society organisation,”<sup>27</sup> that it is “a dialogue of values”,<sup>28</sup> and that it “allows the different actors to bring their specificity into it”.<sup>29</sup> While this might be true for Article 17, it also (at least partly)<sup>30</sup> applies to the dialogue under Article 11. There, too, partners of dialogue should bring their own specificity and should represent a significant voice in society.

The more straightforward difference between Article 11 and Article 17 is the manner in which the dialogue is conducted. Article 17 is a vertical dialogue, meaning that the dialogue takes place with EU institutions. The options of participation are more limited and institutionalised (annual high level meetings; formal dialogue seminars proposed by the participants and taken on board by the European Commission and Parliament). Conversely, Article 11 is a horizontal dialogue among different actors which go beyond EU institutions; this acts as a catch-all ground for a wide variety of initiatives, briefings, submissions, and event proposals on topics that go beyond strict EU policy areas.<sup>31</sup>

### *Representativeness*

Compared to the “A soul for Europe” initiative, which had placed great emphasis on representativeness and mandate, Article 17 does not set out conditions for becoming a partner to the dialogue. Its general wording seems to suggest that any religious association or community, and philosophical and non-confessional organisation can participate.

The Guidelines on Article 17 bring a novel condition, the adherence to European values, which seeks to complement the “specific contribution” mentioned by Article 17.

<sup>27</sup> (n22) 8.

<sup>28</sup> Johannes Pichler, ‘Civil Dialogue and Participatory Democracy in the Practice of the European Union Institutions’ (2015) European Economic and Social Committee, 38, <<http://www.eesc.europa.eu/resources/docs/qe-02-15-397-en-n.pdf>> accessed 9 December 2016.

<sup>29</sup> ‘COMECE Factsheet Dialogue with the EU Institutions, EU’s Competences, Church’s Vision, COMECE Contribution’ (2010), <[http://www.comece.eu/dl/LtnsJmoJKLJqx4KJKJmMJKNO/0\\_Factsheet\\_Dialogue\\_with\\_EU\\_EN.pdf](http://www.comece.eu/dl/LtnsJmoJKLJqx4KJKJmMJKNO/0_Factsheet_Dialogue_with_EU_EN.pdf)> accessed 9 December 2016.

<sup>30</sup> The capacity of the Dialogue to bring the specificity of the partners into it is more fully respected under Article 17 mainly because of its more limited number of participants. This does not entail however that the Dialogue is more efficient or more participatory.

<sup>31</sup> See also Pichler (n28) 15, who considers that Article 17 is ‘not participatory democracy in its genuine popular sense’.

Commission officials interpret the latter as the contribution made by churches, religious associations or communities, philosophical and non-confessional organisations to *European values*.<sup>32</sup> In this understanding, a Catholic organisation might not qualify as an interlocutor, since its specific contribution is already represented by the leaders of the Catholic Church in high level meetings with the European Union.<sup>33</sup> Equally, Bahá'í could also not fulfil the conditions to become a partner of dialogue, because of their allegedly limited contribution to European values.

However, this narrow understanding of representativeness effectively excludes dialogue partners who could bring specific expertise and input. For instance, a Catholic doctors' association can bring – in dialogue seminars – an expertise different from, but perhaps equally important as that of the representatives of the Catholic Church. A religious employees' association can bring a different focus (its specificity) than that of the Churches, since it could, for example, focus specifically on the issue of the reasonable accommodation of employees in certain contexts. A religious organisation focusing on the persecution of Christians in Iraq and Syria could bring first hand evidence into how the EU institutions should integrate better policies to deal with refugees coming to Europe.

There is a need for the European Commission and other EU institutions to clarify the criteria for participation in the dialogue under Article 17, more precisely the criteria for registration and the representativeness criteria. For the time being, the churches' participation in the high level meetings and in seminar dialogues is clear. Less clear is to what extent and what criteria allows religious associations, confessional, non-confessional or philosophical organisations to participate in the dialogue.

Additionally, there is a clear need to implement more fully the principle of participatory democracy. The European Commission considers that this expression:

aims to . . . give churches, religious communities, and philosophical and non-confessional organisations the opportunity to make known and publicly exchange their views in all areas of Union action.<sup>34</sup>

This would allow entities with well-established ethos and expertise to become partners to the dialogue with EU institutions under Article 17. Likewise, it would facilitate EU institutions to receive valuable input into initiatives, policies and current matters which require specialised knowledge.

## QUALITY OF THE DIALOGUE

This section seeks to analyse the required quality of the dialogue, as set out by Article 17 (3): “open, transparent and regular”.<sup>35</sup>

In order to properly assess these characteristics, it is necessary to look into the complaint submitted by the EHF to the European Ombudsman, opened in 2011 and concluded in 2013.<sup>36</sup> The inquiry of the European Ombudsman and the insight into the European Commission's interpretation of Article 17 are important to understand

<sup>32</sup> Private encounters with Commission officials.

<sup>33</sup> This interpretation was given by Commission officials during private encounters.

<sup>34</sup> Ombudsman Complaint 2097 / 2011 / RA against the European Commission, opened on 15 November 2011, Decision on 25 January 2013 para 19.

<sup>35</sup> These notions appear in both Article 17 (3) TFEU and Article 11 (2) TEU.

<sup>36</sup> (n34).

the quality that the dialogue under Article 17 should have. The investigation outlined a number of inconsistencies, which triggered the adoption of the Guidelines on Article 17 in 2013.

### *Background to the Ombudsman complaint*

The case concerned the alleged failure by the European Commission to correctly implement Article 17. It was submitted to the European Ombudsman, an impartial body who “investigates complaints about poor administration by EU institutions or other EU bodies,”<sup>37</sup> and who, in cases of maladministration, launches investigations, informs the institution concerned, makes effort to reach an amicable solution or, as a last resort, makes recommendations. If such recommendations are not accepted by the institution who was responsible for maladministration, the European Ombudsman ultimately draws up a special report to the European Parliament, which must take action.

The EHF argued that: a) the European Commission’s refusal to organise a dialogue seminar on the topic proposed by the EHF contradicted the openness of the Article 17 dialogue, and b) the events organised just prior to November 2011 (the date of the submission of the Ombudsman complaint) showed a “consistent bias in favour of religion”, on the part of the Commission.<sup>38</sup>

By way of background, on 28 March 2011 the EHF had presented a written proposal for a dialogue seminar to the European Commission on the topic “Competing Rights Issues in Europe”. The issues that the EHF wanted to focus on were: “human rights, equality, and non-discrimination arising from the exemptions for ‘churches and other public or private organisations the ethos of which is based on religion or belief’ in Article 4 of the Employment Equality Directive and related matters”.<sup>39</sup> The European Commission had replied on 5 May 2011 and requested EHF to reconsider its proposal, stating that Article 17 mandates it:

. . . to set up dialogue meetings with religious communities and philosophical associations, and not to engage in discussions *about* religion or philosophy. The Commission has no competence in religious or philosophical matters. For this reason, *dialogue meetings focus exclusively on Commission policy initiatives*.<sup>40</sup>

The European Commission added that the Council of Europe is the appropriate forum for a debate on freedom of religion or belief, whereas the Commission would focus more on policy areas such as “financial governance, energy, environment and climate change”.<sup>41</sup>

During the Ombudsman inquiry, the European Commission submitted a letter dating from 2009, in which it outlined a general approach to the dialogue with religious and non-confessional organisations, stating that if EHF experts pursue “an exchange of views with European Commission experts *on Commission policy initiatives*, this dialogue is the right setting . . . ”<sup>42</sup>

<sup>37</sup> ‘European Ombudsman’ (*European Ombudsman*), <[https://europa.eu/european-union/about-eu/institutions-bodies/european-ombudsman\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/european-ombudsman_en)> accessed 3 July 2017.

<sup>38</sup> *Ibid* para 19.

<sup>39</sup> *Ibid* para 2.

<sup>40</sup> (n20) 2 (emphasis added). This is also mentioned by Copy of email from BEPA to EHF, 5 May 2011, mentioned also by the Ombudsman Complaint 2097 / 2011 / RA against the European Commission, opened on 15 November 2011, Decision on 25 January 2013 para 3, emphasis added. All the exchange of emails and resources are found at ‘Humanists : Difficult Dialogue with European Commission’ (*European Humanist Federation* 28 October 2011) <<http://Humanistfederation.eu/news-fhe.php?pages=ehf-complains-to-eu-ombudsman-about-treatment-by-eu-commission>> accessed 5 December 2016, emphasis added.

<sup>41</sup> *Ibid*. Copy of email from BEPA to EHF, 5 May 2011 (emphasis added).

<sup>42</sup> (n 34) para 4 (emphasis added).

The EHF outlined that the Commission had held a full-day dialogue seminar with the churches on 30 March 2012, entitled “Freedom of Religion: A Fundamental Right in a Rapidly Changing World”. Against this background, the EHF argued that “the parameters for choosing the topics of dialogue seminars” are unclear and that it “fails to see why its proposed topic was less a policy matter than the aforementioned dialogue seminar on religious freedom”.<sup>43</sup>

### *Openness*

The openness of the dialogue is generally understood as comprising of all relevant topics on the EU agenda being addressed in a sincere manner which should “allow for the critical engagement of all parties”.<sup>44</sup> Openness is closely related to participatory democracy. In a separate complaint prior to the EHF complaint, the European Ombudsman looked into the provisions of the Lisbon Treaty, and stated that “participatory democracy, based on the principles of equality and transparency, improves citizens’ trust in the EU and the EU administration. Increased trust in the EU and the EU administration is a key element in increasing the effectiveness of the EU and its administration”.<sup>45</sup>

During the Ombudsman inquiry triggered by the EHF complaint, the European Commission argued that Article 17 is a dialogue *with* churches, religious communities, and philosophical and non-confessional organisations and “not a dialogue *about* religion and philosophy”,<sup>46</sup> and which can be structured as follows:

- a) Dialogue meetings focus exclusively on Commission policy initiatives
- b) The reduced number of meetings that can take place each year should concentrate on topics of main priorities of the Commission’s policy agenda. The European Commission argued that this condition was upheld with all dialogue partners on an equal footing and without any discrimination, be they religious communities or philosophical and non-confessional organisations
- c) The approach was to address EU policy matters rather than philosophical or religious ones
- d) Dialogue seminars should aim to address issues that are of wider common interest.<sup>47</sup>

The European Ombudsman did not find this approach problematic. The Ombudsman indicated that it reflects “a more general, and laudable, policy that dialogue conducted by the Commission with civil society should serve as a basis for the institution to collect information and integrate in its reflections various points of view concerning the political priorities on the agenda”.<sup>48</sup>

Additionally, the European Ombudsman mentioned that although it “falls within the Commission’s margin of discretion to determine what it considers the ‘relevant’ topics to be”,<sup>49</sup> it would be preferable, for the sake of clarity, if the European Commission outlines, at the beginning of each year, “its priority topics for discussion in dialogue seminars for the year in question”. In this way, Article 11 would be used to facilitate

<sup>43</sup> *Ibid* para 23.

<sup>44</sup> (n29) 4.

<sup>45</sup> ‘Cases – Recommendations from 2016’ (*European Ombudsman*) <<http://www.ombudsman.europa.eu/en/cases/recommendations.faces>> accessed 5 December 2016.

<sup>46</sup> (n34) para 18 (emphasis added).

<sup>47</sup> *Ibid* para 54.

<sup>48</sup> *Ibid* para 55.

<sup>49</sup> *Ibid* para 53.

discussions with organisations that on topics which the Commission does not consider a priority in the context of Article 17.<sup>50</sup>

On this basis, the European Ombudsman rightly concluded that the Commission “should clarify its practices and rules in this area, and, if necessary, draw up guidelines indicating how exactly it plans to implement Article 17 TFEU”.<sup>51</sup>

Subsequent to this, the 2013 Guidelines on Article 17 managed to shed some light on how the condition of openness would be implemented. According to the Guidelines on Article 17, the openness of the dialogue refers to two aspects: the interlocutors (churches, religious associations or communities, as well as philosophical and non-confessional organisations), and the topics of discussion.

With regard to the latter, the Guidelines emphasise that:

All relevant topics related to the EU agenda can be addressed in this dialogue. Such topics can be raised both by the European Commission and its interlocutors provided both parties agree.

In the light of its policy priorities, the Commission may choose to suggest priority topics for discussion over a certain period of time with different interlocutors. However, this should not prevent both sides from addressing topical issues at any given time.

The topic and format for a specific initiative are chosen jointly by the Commission and the respective interlocutor in a spirit of constructive mutual understanding. The fact that the Commission chooses not to sponsor a particular initiative or the interlocutor prefers not to participate in a specific Commission initiative should not imply that either are in breach of their obligations or do not wish to enter into dialogue.<sup>52</sup>

Within the last year the dialogue focused on topics such as: “Migration, Integration and European Values: Putting Values into Action” (29 November 2016), “The future of the Jewish communities in Europe” (September 2016), “Beyond the refugee crisis: integration of migrants into society and labour market” (December 2015), and “Living together in Europe” (November 2015). During the current parliamentary term, Article 17 dialogue sessions within the European Parliament have focused on religious radicalism and fundamentalism (March 2015), how education contributes to tackling radicalization (November 2015), and the role of women in countering radicalization (April 2016).

The European Commission however still does not publicly announce, nor publish a list of priority topics for discussion over a certain period of time. It is unclear whether this list exists or if the European Commission communicates it internally to a limited group of interlocutors. This hypothesis raises doubts with regard to the transparent character of the dialogue *in practice* and to the introduction of double standards for traditional interlocutors within Article 17 and prospective new partners which may want to engage in the dialogue.

### *Transparency*

The reason why the EHF argued—before the adoption of the Guidelines—that the dialogue under Article 17 is not transparent, referred mainly to an alleged preference showed by the European Commission to religious leaders. The EHF sustained that

<sup>50</sup> *Ibid* para 56.

<sup>51</sup> *Ibid*. Further Remark. The Ombudsman asked the Commission, *inter alia*, is the Commission adopted any internal guidelines or issued any instructions to staff outlining how it should implement Article 17 (3) TFEU. It also asked – concerning issues which fall within the competence of the European Commission – if the Commission has any guidelines determining how it should exercise its discretion in terms of the topics it chooses to discuss under Article 1.

<sup>52</sup> Guidelines on the Implementation of Article 17, point 1.2 <<http://www.eurel.info/IMG/pdf/guidelines-implementation-art-17.pdf>> accessed 9 December 2016.

there is no transparency as to how participants are selected for the meetings, and how the subject areas are decided.<sup>53</sup>

In its complaint to the European Ombudsman, which led to the 2011 inquiry, the EHF argued along the same lines, namely that the dialogue had not been transparent, since the European Commission's website does not upload the speeches made by either EU representatives, or religious leaders; it also does not contain minutes of meetings.<sup>54</sup>

The European Commission argued before the European Ombudsman that the dialogue (in its then form) fulfilled the transparency condition, since there is a “press conference . . . after the annual high level meetings with the Presidents of the EU institutions. Also, a dedicated website lists all the recent events, with programmes, lists of participants, and speeches”.<sup>55</sup> The European Commission also outlined that BEPA replies to questions that are addressed via email or phone.

The European Ombudsman noted that while the European Commission has:

. . . an obligation in certain areas, notably where it exercises investigative and regulatory powers, to take sufficiently detailed notes. However, for meetings of a more general nature, relating to the task of maintaining an open dialogue with civil society . . . extensive formal note taking is not necessary . . . In such cases it should be sufficient for the institution to note the subject matter, the participants, and to give an account of the general content of the meeting. Placing relevant speeches on the Commission's website . . . constitutes another appropriate means of ensuring transparency.<sup>56</sup>

According to the Guidelines on Article 17, the condition of transparency entails that there is a special website where the European Commission uploads the relevant information regarding the dialogue, such as press releases, conferences, and communications.<sup>57</sup>

While it is true that not every meeting or dialogue seminar can be fully documented, the scarcity of information on the high level meetings, conclusions of seminar dialogues or follow-up actions is remarkable. For the time being, the European Commission publishes press releases, communications from press conferences, and the programme of events. There is little information on the substance of *precisely* what is discussed during the high level meetings, whether there are action points that are highlighted as priorities, or the timeline for implementation. Overall, the unclear criteria for selection and participation in Article 17 raises doubts whether we can speak about a truly open and transparent dialogue which acts as an instrument of participatory democracy.

### *Regularity*

Prior to the Guidelines on Article 17, the European Commission explained that the regularity of the dialogue consisted in the Commission organizing:

. . . once a year, two separate informal meetings hosted by the President of the Commission and co-chaired by the Presidents of the European Parliament and of the European Council: one with high level representatives of religious communities and associations and the other

<sup>53</sup> Leigh Phillips, 'Atheists Say EU Privileging Religious Leaders over Non-Believers' (*EU Observer* 30 November 2011) <<https://euobserver.com/social/114456>> accessed 3 November 2016.

<sup>54</sup> (n34) para 26.

<sup>55</sup> 'Dialogue with Churches, Religious Associations or Communities and Philosophical and Non-Confessional Organisations' (*European Commission*) <[http://ec.europa.eu/justice/fundamental-rights/dialogue/index\\_en.htm](http://ec.europa.eu/justice/fundamental-rights/dialogue/index_en.htm)> accessed 9 December 2016.

<sup>56</sup> (n34) para 42.

<sup>57</sup> (n51). See also 'Access to Documents' (*European Commission*) <[http://ec.europa.eu/transparency/access\\_documents/](http://ec.europa.eu/transparency/access_documents/)> accessed 9 December 2016.

with representatives of philosophical and non-confessional organisations, usually on the same topic. The dialogue also entails exchanges of views and meetings with members of the Commission, as well as speeches by the latter.<sup>58</sup>

A contentious issue brought up by the EHF was whether the Commission needs to strike a balance between the meetings with church representatives and non-confessional groups. More specifically, the EHF adopted a rather mathematical approach in arguing that “leaving aside the annual high level meetings . . . 19 meetings out of 26 were with the churches (which) speaks for itself”.<sup>59</sup>

The European Ombudsman addressed the issue, by stating that there is no guidance in Article 17 as to the precise balance which must be struck between the different participants to Article 17. Although a “formalistic approach”, which implies a clear-cut balance between participants would be virtually impossible, if there is an indication that “the Commission’s approach is manifestly disproportionate, there could be a cause for concern.”<sup>60</sup>

The Ombudsman however considered this was not the case at hand.

Subsequent to the Ombudsman Decision, the European Commission tackled this issue in the Guidelines on Article 17:

The European Commission maintains a regular dialogue with interlocutors at various levels in the form of written exchanges, meetings or specific events.

Interlocutors are invited to contribute to the European Union policy-making process through the various written consultation processes launched by the European Commission.

This dialogue may be conducted through *inter alia* informal meetings hosted by the President of the European Commission, bilateral meetings with Commission representatives at all levels and, in particular, meetings with the responsible Adviser for the dialogue with churches, and religious associations or communities as well as philosophical and non-confessional organisations.

Further instruments in this non-exhaustive list may include dialogue seminars and ad-hoc consultation procedures on specific and timely policy issues.

The first part of this provision does not bring light to the dialogue under Article 17, as it speaks about written consultation processes launched by the European Commission, which, given their horizontal nature, would generally fall within Article 11 and not under Article 17. The public consultations launched by the Commission in preparation for the first and second Annual Colloquium on Fundamental Rights (1 October 2015 and November 2016) are a clear example in this sense. They are not part of the Article 17 dialogue, even though they deal remotely with issues concerning religious communities (Islamophobia, Anti-Semitism, the response to “hate speech” laws). The author of this article is not aware of (open) public consultations that the European Commission, or for that matter, any EU institution opened as part of Article 17.

COMECE and CEC-KEK have rightly stressed that “a regular dialogue goes beyond and above sporadic ad-hoc meetings between representatives of churches and EU institutions” and that “with regard to the high-level meetings, the churches have suggested the need for common content preparation prior to the events as well as any subsequent follow-up”.<sup>61</sup>

<sup>58</sup> (n34) para 14.

<sup>59</sup> *Ibid* para 27.

<sup>60</sup> *Ibid* para 41.

<sup>61</sup> (n 29) 4. See also (n17) 5.



This is true and it reflects the need for the dialogue to have a more concrete and measurable impact. Organizing dialogue seminars with no follow up or action points has limited added value in respect of EU policies. For example, the parliamentary dialogue event (1 December 2015, European Parliament) on the topic of “The persecution of Christians in the world – a call for action” was intended to have follow-up written contributions coming from organisations, religious, and non-religious actors. Despite the fact that the overall goal was to pinpoint ways to best address the persecution of Christians, the follow-up contribution has not materialised. No action points resulted concretely, which means that, at least formally, the parliamentary dialogue event had limited impact on a subject matter which should have received an urgent and comprehensive response.

On the basis of the above, this section has highlighted that there is a lack of clarity regarding the criteria for participation as a partner to Article 17 dialogue, especially in terms of registration at domestic level and representativeness. This effectively limits and negatively impacts how the principle of participatory democracy is implemented by Article 17. Furthermore, this section has assessed the openness, transparency and regularity of the dialogue. It has outlined that, contrary to the requirement of openness and transparency, EU institutions make very limited information publicly available concerning priority topics or the substance of meetings that take place under Article 17. Additionally, the regularity of the dialogue is limited to formal meetings with no concrete outcome and follow up. Overall, this indicates a tangible lack of impact of the dialogue under Article 17.

## RECENT DEVELOPMENTS OF THE DIALOGUE

This section will consider two main developments that have become visible over the last couple of years: a) the decrease in the importance of participation and representation, and b) the obscuring of the substance and role of the dialogue. Finally, a number of recommendations to strengthen the implementation of Article 17 will be advanced.

### *Decrease in Importance*

Although the annual meeting with religious leaders is appreciated by church representatives, as being “a significant symbol of the commitment to dialogue with the religious communities within the EU”,<sup>62</sup> it seems to have decreased in importance and in participation over the last years.

The fact that the person responsible for dialogue under Article 17 TFEU has been moved from the Presidential advisory level to the Directorate General (DG Justice and Consumers) level seems to indicate a lowering of the perceived importance of the dialogue within the Commission. This apparent downgrade mirrors the model of the dialogue under article 11 TEU with civil society (based also in DG Justice and Consumers). By placing the dialogue on the same footing as Article 11, it can give the impression that the dialogue is primarily (if not exclusively) focused on enhancing and advancing rights enshrined in the EU Charter of Fundamental Rights, while, in reality, it should cut across all policies of EU institutions that could have relevance to the partners.<sup>63</sup> This misunderstanding is illustrated by the 2016–2020 Strategic Plan of DG Justice and Consumers, which makes reference to the dialogue under Article 17 in

<sup>62</sup> (n17) 5.

<sup>63</sup> For example, although preventing religious radicalization is not placed very clearly under the EU Charter of Fundamental Rights, it is a topic on which Article 17 Dialogue has focused recently.

two places. Firstly, concerning main stakeholder groups regarding *fundamental rights and equality*, when it mentions that the dialogue “allows for an open exchange of views between EU institutions and important parts of European society on EU policies”.<sup>64</sup> Secondly, in the specific objective (under enhanced rights enshrined in the EU Charter of Fundamental Rights, including the rights of the child), it says that “DG Justice will continue the dialogue with churches, religious associations or communities and philosophical and non-confessional organisations under Article 17 TFEU”.<sup>65</sup>

The indication of a lowering in importance of the Article 17 dialogue is supported by one recent development which was announced at the European Commission’s first Fundamental Rights Colloquium (1 October 2015). On that occasion, First Vice President Frans Timmermans announced that the European Commission would appoint two coordinators on combating Anti-Semitism and Islamophobic hatred. The coordinator responsible for Article 17 was, in addition, named as the coordinator on combating anti-Semitism.<sup>66</sup> While these two roles can go together and reinforce each other, it is clear that the additional task and focus, in fact, downgrades the importance of the dialogue from a full-time coordinator to a part-time one. What the exact reasons are and why an additional person was not appointed for this position was not subject to discussion or explained. It is equally unclear what the relationship between the coordinators on anti-Semitism and Islamophobic hatred is.

Furthermore, there is a visible decrease in the level of *representation* of EU institutions at events organised under the umbrella of Article 17. Until 2015 there was a constant presence, at the Annual High Level Group, of the President of the Council and the President of the European Commission. The European Ombudsman mentioned, regarding the implementation of Article 17, that:

... it has become common practice to organise, once a year, two separate informal meetings hosted by the President of the Commission and co-chaired by the Presidents of the European Parliament and of the European Council, one with high level representatives of religious communities and associations and the other with representatives of philosophical and non-confessional associations.<sup>67</sup>

At the high level meeting with philosophical and non-confessional organisations only First Vice President Frans Timmermans took part from the side of the European Commission. At the high-level meeting with religious leaders of 16 June 2015 and of 29 November 2016 two Vice Presidents were present on behalf of EU Institutions (European Commission and Parliament). This seems to contradict the Guidelines on Article 17 which state that the dialogue “may be conducted through *inter alia* informal meetings hosted by the *President* of the European Commission”. *A fortiori*, if informal meetings may benefit from Presidential attendance, formal and regular meetings (such as the high level meeting) should also benefit from high representation coming from at least one EU institution.

### *Blurring of the Lines*

Despite the need for clarification, the dialogue under Article 17 has experienced a blurring of the lines in terms of what it really entails and how it should be carried out.

<sup>64</sup> Commission ‘Strategic Plan 2016–2020’ Ares (2016) 1295393 <[http://ec.europa.eu/atwork/synthesis/amp/doc/just\\_sp\\_2016–2020\\_en.pdf](http://ec.europa.eu/atwork/synthesis/amp/doc/just_sp_2016–2020_en.pdf)> p 5 accessed 9 December 2016 (emphasis added).

<sup>65</sup> *Ibid* 16.

<sup>66</sup> ‘EU Commission Appoints Coordinators on Combating Antisemitism and Islamophobic Hatred’ (*European Commission* 1 December 2015) <[http://ec.europa.eu/justice/newsroom/fundamental-rights/news/151201\\_en.htm](http://ec.europa.eu/justice/newsroom/fundamental-rights/news/151201_en.htm)> accessed 5 December 2016.

<sup>67</sup> (n34) para 14 (Commission’s assessment of the term ‘regular’).

This is visible in the inconsistency with which it has been referred, more recently, as an “inter-religious dialogue”.

For example, the Briefing of the European Parliament entitled “The EU institutions and inter-religious dialogue at a glance” (March 2015) includes Article 17 under the heading of inter-religious dialogue.

Additionally, EU officials involved in Article 17 dialogue have frequently referred to “inter-religious dialogue”. For instance, at the event organised on 24 March 2015 at the European Parliament (“The rise of religious radicalism and fundamentalism and the role of inter-religious dialogue in the promotion of tolerance and respect for human dignity”), First Vice President of the European Commission, Frans Timmermans, referred to the forthcoming high-level meeting with religious leaders under Article 17 as “the inter-religious dialogue”. The invitations to this event also reinforced the interpretation: “I have the pleasure to invite you . . . to the Inter-Religious dialogue foreseen under Article 17 of the Treaty on the Functioning of the European Union”.

The same approach is reflected in the European Parliament. The leaflets and documents distributed during the second parliamentary dialogue event (1 December 2015, European Parliament) on the topic of “The persecution of Christians in the world – a call for action” presented Member of the European Parliament Antonio Tajani as the “Vice President responsible for inter-religious dialogue”, despite the fact that his dossier refers to the implementation of Article 17. The same was mentioned during the latest event organised in the context of Article 17, entitled “The Future of the Jewish Communities in Europe” (27 September 2016).

This inconsistency is not only a mere imprecision of language. It misrepresents the whole substance of Article 17. The dialogue under Article 17 is primarily and substantially a dialogue between *EU institutions*, and churches, religious, confessional and non-confessional organisations, and not a dialogue between religions or between religious organisation, churches and non-confessional organisations.

An important point made especially by the churches is that Article 17 (3) “does not provide the EU institutions with any legal basis for them to organise either dialogue between the actors of paragraph 1 (inter-religious dialogue) or between the actors of paragraphs 1 or 2 . . . It is exclusively up to the Church to decide if, when and how to enter into dialogue with any religious or non-religious actor”.<sup>68</sup> It requires “a Dialogue that allows the different actors to bring their specificity into it”.<sup>69</sup>

It is indeed true that synergies and spill-overs might happen and cross-partners communication might take place, but at no time should this dialogue push out one of the key players in this equation: EU institutions. Otherwise, the dialogue between churches, religious, confessional and non-confessional organisations is downgraded to an even lower status than before the entry into force of the Lisbon Treaty when the level of representation was always coming from the Presidency and the dialogue was *with* EU institutions.

## RECOMMENDATIONS

An issue that needs urgent clarification on the part of the European Commission is the criteria for participation in the dialogue under Article 17. The European Commission primarily, but also other EU institutions, should indicate more thoroughly what conditions a dialogue partner should fulfil under Article 17, and what the delineation between

<sup>68</sup> (n29).

<sup>69</sup> *Ibid.*

dialogue partners under Article 17 and under Article 11 is. For the time being, the churches' participation in the high level meetings and in seminar dialogues is clear. Less clear is to what extent and under what criteria religious associations, confessional, non-confessional or philosophical organisations may participate in the dialogue. This contradicts the openness and transparency of the dialogue, as enshrined in Article 17 and in the Guidelines on Article 17.

Additionally, given the need to implement more fully the principle of participatory democracy, a full-time coordinator needs to be appointed in order to focus exclusively on the dialogue under Article 17. Preferably, the coordinator should be returned to the Presidential advisory level and should not remain at the level of the Directorate General (DG Justice and Consumers), where the dialogue under Article 11 TEU is based. This approach would: a) ensure, through the allocation of more resources and tailored positions, that such a complex dialogue benefits from the structures and configuration it needs, and b) clarify that the dialogue is not exclusively focused on enhancing and advancing rights enshrined in the EU Charter of Fundamental Rights, but deals with EU policy matters and initiatives more generally.

Regarding the setting of the dialogue, this could continue in the well-established forms (annual high level meetings with participation of heightened importance, seminar, briefings), but also in settings involving perhaps smaller groups and tackling cross-cutting issues.<sup>70</sup> The best way to carry out the Article 17 dialogue is separately between churches and religious organisations, on the one hand, and philosophical and non-confessional organisations, on the other. This is clear from the fact that the two sets of partners of dialogue have different assumptions, worldviews and, quite clearly, different propositions. For example, Secularists argue religion has a privileged position in society and that arguments based solely on religion should not be taken into account in policy proposals,<sup>71</sup> whereas churches and religious organisations argue that society should take due account of and should base public policies on core moral principles and ethical values. Having different starting points and clearly different propositions, it is difficult to imagine an efficient manner in which EU institutions could bring together—with the same dialogue channels and processes—both partners simultaneously.

Very importantly, in order to make Article 17 a more effective tool of participatory democracy, it is necessary that the dialogue involvement should go beyond the regular meetings with the Commission and the Parliament. It should involve very actively other institutions as well, such as the Council and the European Parliament more fully, and maintain numerous entry points.

Overall, the dialogue should have a more concrete and measurable impact. Organizing seminar dialogues with no follow up or action points has limited added value to EU policies. One way in which this could be achieved is if dialogue partners are consulted before the European Commission reveals its priorities or the State of the European Union, before the European Parliament is debating certain proposals or advancing reports on issues that are of concern for churches, religious, confessional or non-confessional organisations. The European Parliament should also organise more frequent hearings in order to allow religious and non-religious communities to present their views on specific reports or initiatives that could impact them directly.

The meetings should take place in due time before the strategy or the concrete policy is drafted to allow sufficient time to assess and include the feedback. Then the institutions

<sup>70</sup> (n17) 5.

<sup>71</sup> David Pollock, 'An Ill-Disguised Defence of Religious Privilege' in Marie-Claire Foblets *et al.* (eds.), *Belief, Law and Politics: What Future for a Secular Europe?* (Ashgate 2014) 245–257.

should announce or publish the outcome of the consultation, alongside with a list of priority topics for discussion over a certain period of time. These can be taken up as topics for dialogue seminars. The coordinator of and responsible for the dialogue in the institutions should make judgment calls on the frequency and depth of meetings, on the basis of regular contact maintained with churches, religious, confessional and non-confessional organisations, and keeping in line with the requirements of an open, transparent and regular dialogue. This would alleviate the risk of putting undue burden on the institutions, by imposing a quasi-consultation procedure before every policy action.

By so doing, the dialogue under Article 17 can be strengthened as an instrument available to the Union to engage with religious and non-religious actors; it would also better allow them to feed their experience and input into policy-making.

## CONCLUSIONS

Article 17 builds on the previous informal structures and meetings between European Union officials, church leaders, and representatives of confessional, non-confessional and philosophical organisations. Article 17 is a new development in EU law insofar as it offers a structured scheme of meetings firmly grounded in Treaty law and thoroughly interpreted by the 2013 inquiry of the European Ombudsman and resultant Guidelines on Article 17.

Despite this apparent strengthening of the legal status and structural elements, the dialogue under Article 17 is experiencing a decrease in importance, a weakening of structure, a dilution of substance, and an inconsistency and obscuring of criteria for participation. This is reflected by the fact that it has dropped from a Presidential level, in both coordination and representation of EU institutions, and by a lack of follow up and concrete impact of events organised under the umbrella of Article 17. The EU should tackle – with priority – the dysfunctions of the Article 17 dialogue, unless it wants to send the message that Europe is no longer willing to search for a soul.

# JUDICIAL INDEPENDENCE IN HONG KONG: A GIFT LEFT BEHIND FROM THE COLONIAL TIMES?

HONG YING NGAI, ERIC\*

## ABSTRACT

The world has witnessed how Hong Kong transformed into a global financial city during the colonial era. One legacy of this period is the common law legal system and judicial independence. This article critically analyzes whether this spirit of judicial independence has been safeguarded in the current constitutional framework of the Hong Kong Special Administrative Region (HKSAR).

## INTRODUCTION

### *Colonization as the source of isomorphic mimicry in Hong Kong*

In political science literatures, the term ‘isomorphic mimicry’ was coined to describe the problem where the colonies suffered from the tensions between the systems incorporated by their colonizers and their local social, cultural and traditional legal values.<sup>1</sup> Having been a colony of Britain for more than a hundred of years (from 1841–1997), Hong Kong is by-no-means an exception.

Since 1 July 1997, People’s Republic of China (hereinafter ‘PRC’) has peacefully resumed the sovereignty over Hong Kong. Unfortunately, the problem of ‘isomorphic mimicry’ has not been solved but worsened after the handover. One possible reason is that while the PRC is a civil law country ruled by the Communist Party, Hong Kong is the only common law jurisdiction within the country.<sup>2</sup> Needless to say, the legal tradition and culture of a Communist-led country is very different from that of the common law world. These differences, if not conflicts, between the common law culture inherited from the colonial times and the new legal landscape after the handover are likely to continue to bring in more incidents of ‘isomorphic mimicry’.

In particular, when it comes to the understanding of ‘judicial independence’ and the interpretation of law in court judgments involving *Central-Local relationships where the Central Chinese Authorities have the final say (such as cases involving acts of state)*,<sup>3</sup> it is

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<sup>1</sup> Francis Fukuyama, *Political order and political decay: From the industrial revolution to the globalization of democracy* (Macmillan 2014) 60.

<sup>2</sup> P. Y. Lo, ‘Impact of Jurisprudence beyond Hong Kong’ in Simon N. M. Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: the Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 579.

<sup>3</sup> In spite of the fact that the Hong Kong courts are authorized by the Standing Committee of the National People’s Congress to adjudicate court cases, such empowerment is not unlimited. In accordance with Article 158(1) of the Basic Law, the power of interpreting the Basic Law “shall be vested in the Standing Committee of the National Peoples Congress”.

Perhaps the more important provision is Article 158(3) of the Basic Law, which reflects the principle of “sovereignty” by ensuring the Central Government has the final say when it comes to court cases involving the interpretation of the Basic Law:

*[I]f the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee.*

very obvious that the colony-inherited approaches adopted by the Hong Kong courts and scholars have been somehow disconnected with the social, political and cultural realities of the present-day Hong Kong. Such tensions are particularly prominent if we compare with the approaches adopted by the Chinese authorities and scholars when handling the legal issues.

*The 'One Country, Two Systems' Principle and the role of the Basic Law*

In his famous 1979 statement, the great leader Mr. Deng Xiaoping stressed that while Hong Kong would be handed back to China, the Hong Kong investors should also 'put their hearts at ease'.<sup>4</sup> Following on the heels of Deng's remark, a series of Sino-British negotiations have taken place in the early 1980s. Just as Michael Davies accurately described, the negotiations were very 'difficult' because 'the liberal free-spirited, capitalistic Hong Kong population was not going to be reassured by mere policy promises from a regime many of the justifiably distrusted, and from which their family members may have fled'.<sup>5</sup> In order to ensure a peaceful reunification and to engender loyalty from the Hong Kong population, Deng finally envisioned the renowned 'One Country, Two Systems' principle in late 1984,<sup>6</sup> which embodies three fundamental principles, namely 'sovereignty', 'autonomy' and 'maintenance of the existing system'.<sup>7</sup> Obviously, the principle of 'sovereignty' here refers to the resumption of sovereign power of the PRC. 'Autonomy', on the other hand, reflects paragraph 3 of subsection 2 of the Joint Declaration which provides that Hong Kong would have a 'high degree of autonomy, except in foreign and defense affairs'. 'Maintenance of the existing systems' means that the socialist system of PRC would not be practiced in the Hong Kong Special Administrative Region (hereinafter 'HKSAR'), and Hong Kong's previous capitalist system and its way of life would remain unchanged for a period of 50 years until 2047.<sup>8</sup> Thanks to this innovative approach, the problem of the abovementioned confidence gap has finally been solved,<sup>9</sup> and that the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (commonly known as 'Sino-British Joint Declarations') was finally agreed and signed in 1984.

As a piece of constitutional document of the HKSAR,<sup>10</sup> the Basic Law of the HKSAR (hereinafter 'the Basic Law') was in fact the product of the Sino-British Joint Declaration,<sup>11</sup> which sought to implement the 'One Country, Two Systems' formula.<sup>12</sup> Hence, the Basic Law 'was designed to form the connection between the two systems

<sup>4</sup> Steve Tsang, *A Modern History of Hong Kong* (I. B. Tauris 2007) 215.

<sup>5</sup> Michael Davies, 'The Basic Law, Universal Suffrage and the Rule of Law in Hong Kong' (2015) 38(2) *Hastings International and Comparative Law Review* 275, 279–281.

<sup>6</sup> 'One Country, Two Systems' is the basic national policy of the PRC in handling Hong Kong, Macau and Taiwan problems. For a detailed discussion on the birth of the Basic Law and the 'One Country, Two Systems' principle proposed by Mr. Deng Xiaoping, see: Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 16–45.

<sup>7</sup> *Ibid.*, 43.

<sup>8</sup> Article 5, Basic Law.

<sup>9</sup> Michael Davies, 'The Basic Law, Universal Suffrage and the Rule of Law in Hong Kong' (2015) 38(2) *Hastings International and Comparative Law Review* 275, 280.

<sup>10</sup> While some commentators described the Basic Law as a 'mini-constitution' of Hong Kong, experts Wang Guiguo and Priscilla Leung made it clear that China is not a union or a federation but a unitary country. Hence, the Hong Kong Basic Law cannot be considered as Hong Kong's constitution. For a detailed discussion on this issue, see: Wang Guiguo and Priscilla Leung, 'One Country, Two Systems: Theory into Practice' (1998) 7(2) *Pacific Rim Law & Policy Journal* 279, 296.

<sup>11</sup> Joint Declaration on the Question of Hong Kong (with annexes), 19 December 1984, 1399 *United Nations Treaty Series* 33.

<sup>12</sup> Article 7 and 8 of the Sino-British Joint Declaration provide that all the articles in the Sino-British Joint Declaration and its Annexes were equally binding on both parties and stipulated that its content, in both the main text and Annex I, was to be included in the Hong Kong Basic Law.

and also to define their separation'.<sup>13</sup> However, there are still notable differences, if not conflicts, between the two systems. As such, balancing 'One Country' with 'Two Systems' has never been an easy task.

Throughout the years, the leaders of the Central People's Government (hereinafter 'CPG') of the PRC have been working very hard in nurturing its two SARs.<sup>14</sup> Objectively speaking, the continued economic successes of the two SARs have well-demonstrated the correctness of Mr. Deng's vision. As such, many people believe that the HKSAR has grown to become a 'healthy young adult' under the love of her motherland. Be that as it may, the HKSAR has actually experienced some notable ups and downs during her 'childhood' and 'adolescence', underlined by a number of controversial moments in Hong Kong, which demonstrated that more efforts and time are needed to perfect the experiment of 'One Country, Two Systems'.<sup>15</sup> Among these controversies, the issue of judicial independence has always been one of the most debated matters.<sup>16</sup>

According to Priscilla Leung, a leading Hong Kong constitutional law scholar, Hong Kong is now fully subjected to the sovereign power of the PRC after the handover under the guiding principle of 'One Country, Two Systems'.<sup>17</sup> As far as I understand, this understanding represents the general consensus in the present-day Hong Kong society because promoting the 'One Country, Two Systems' principle has been the major task of the Committee on the Promotion of Civic Education and the Education Bureau for many years. Also, by virtue of Article 158 of the Basic Law, I totally agree with Lin Feng and P. Y. Lo that '[t]he Basic Law gives the final power of interpretation to the [National Peoples' Congress Standing Committee] (hereinafter 'NPCSC'); it is a constitutional reality that the NPCSC enjoys such authority'.<sup>18</sup> Hence, I am confident to say that the legal professionals should be bound to recognize this norm because of their legal knowledge.

At a first glance, it may appear that the so-called "isomorphic mimicry" is groundless in this context because court cases falling outside the autonomy of the Hong Kong courts should have been dealt with by the corresponding Chinese authorities. Unfortunately, it is observed that over the past 20 years, the Hong Kong courts have turned a blind eye on this constitutional requirement by trying to reach their own decisions for several times. Worse still, because the jurisprudential logics behind the common law approaches adopted by the Hong Kong courts (and commentators who brought about the academic debates) are so different from that of the Chinese approaches, most of these decisions were arguably "wrong".

<sup>13</sup> Hualing Fu, Lison Harris and Simon Young, 'Introduction' in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 1.

<sup>14</sup> The two SARs are namely the Hong Kong SAR and the Macau SAR.

<sup>15</sup> To date, there were heated debates on issues like the national security, national flag, political reform and universal suffrage etc.

<sup>16</sup> A notable example is the *Ng Ka Ling* case (see: *Ng Ka Ling & Ors v Director of Immigration* [1999] 2 HKCFAR 4, CFA), being the first substantial case on the interpretation of the Basic Law which came before the Court of Final Appeal, involved litigants who sought to invalidate the legislation enacted by the post-1997 legislature (i.e. the Provisional Legislative Council) on constitutional grounds pertaining not only to the compatibility of the legislation with the Basic Law provisions, but to the legality of the constitution of the body which enacts the legislation as well. The case triggered grave concerns towards judicial independence because Mr. Tung Chee Hua, the Chief Executive at the time, asked for NPCSC's interpretation after the CFA had handed down its final decision. For detailed discussions on this case, see: Lin Feng, 'The Constitutional Crisis in Hong Kong – Is It Over' (2000) 9(2) *Pacific Rim Law & Policy Journal* 281. See also: Tom Clarke, 'Ng Ka Ling v. Director of Immigration; Tsui Kuen Nang v. Director of Immigration; Director of Immigration v. Cheung Lai Wah – One Basic Law, Two Interpretations' (1999) 23(3) *Melbourne University Law Review* 773.

<sup>17</sup> The "One Country, Two Systems" principle was proposed by Mr. Deng Xiaoping as the basic national policy of the PRC in handling Hong Kong, Macau and Taiwan issues. For details, see: Priscilla Mei-fun Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 16–45.

<sup>18</sup> Lin Feng and P. Y. Lo, 'One Term, Two Interpretations: The Justifications and the Future of Basic Law Interpretation' in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 152.



*Recent controversies regarding judicial independence*

In fact, the issue of judicial independence has long been the center of controversy in Hong Kong. For instance, Mr. Zhang Xiaoming, director of the CPG's Liaison Office in the HKSAR, once made an open remark during a symposium which marked the 25th anniversary of the promulgation of the Basic Law that "the Chief Executive (of the HKSAR and its government) enjoys a special legal status beyond the executive, legislative and judicial branches of the government".<sup>19</sup> Notwithstanding that the importance of 'judicial independence' has been repetitively emphasized for six times in Zhang's speech,<sup>20</sup> some concerns over the maintenance of independent judiciary in Hong Kong can still be observed in the public opinion.<sup>21</sup>

Similarly, in June 2014, the State Council issued a White Paper on the practice of 'One Country, Two Systems'.<sup>22</sup> The debatable point in this White Paper is that the State Council has categorized judges and judicial officers in Hong Kong as part of the 'Hong Kong's administrators', who should must fulfil the 'Love the Country, Love Hong Kong' requirement.<sup>23</sup> These two incidents, despite not being judicial decisions made by the relevant authorities, have sparked heated debates in Hong Kong, which centered on whether the judiciary in Hong Kong is (and will be) independent.

Quite recently, the issue of judicial independence has come under the spotlights again. This time, the debate was of a more serious nature because it involved an interpretation by the NPCSC of the Basic Law provision before the High Court of Hong Kong made its decision with regards to a judicial review case. In particular, the judicial review was lodged by the Chief Executive and the Secretary for Justice against two newly young pro-independence lawmakers, namely Sixtus Leung and Yau Wai-ching, on the validity of their oaths. In particular, Leung draped a blue flag with the words "Hong Kong is not China" over his shoulders and crossed his fingers as he held a Bible while he spoke. Yau, on the other hand, laid the same flag on the table in front of her and inserted a curse word into her oath when it was her turn.<sup>24</sup> Worse still, both of them recited the oath in English but appeared to deliberately mispronounce the word China as 'Shina', an old-fashioned Japanese term for the country that is commonly seen as derogatory and insulting.<sup>25</sup>

In light of their failure to follow the prescribed scripts, the Chief Executive and the Secretary for Justice lodged a judicial review against the two, arguing that the two have failed to fulfil Article 104 of the Basic Law, which provides:

"When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."

<sup>19</sup> For an English translation of the full script of Zhang's speech, see: <<http://www.scmp.com/news/hong-kong/politics/article/1858484/zhang-xiaomings-controversial-speech-hong-kong-governance>> (Accessed on 14 July 2017).

<sup>20</sup> *Ibid.*

<sup>21</sup> The feedback on the Mr. Zhang's remark can be found in various local newspapers. For example, see: Yiu Chi-shing, Misinterpretation of Zhang's comments reveals bad faith, *China Daily Hong Kong Edition* (P10, 2015-09-18).

<sup>22</sup> The feedback on the White Paper can be found in various local newspapers. For example, see: Hilary Wong, Law Society defends white paper on 'patriotic' judges, *The Standard* (P 07, 2014-06-17). See also: Kahon Chan, Paper does not intend to interfere with judicial independence, *China Daily Hong Kong Edition* (P01, 2014-06-28).

<sup>23</sup> *Ibid.*

<sup>24</sup> Kelvin Chan, 'Pro-democracy lawmakers defy China at Hong Kong oath taking' in *The China Post* (Hong Kong, 13 October 2016) P01.

<sup>25</sup> *Ibid.*

Before the High Court has made its decision, the NPCSC has managed to interpret this provision, thereby making it clear that lawmakers need to swear allegiance to Hong Kong as part of China. Accordingly, any oath-taker would be disqualified if the oath is not taken ‘accurately and completely’ and will not be allowed to retake the oath.

Such proactive interpretation, however, was seen by some Hong Kongers as political intervention by Beijing to remove two pro-independence lawmakers from the Legislative Council (Legco).<sup>26</sup> In contrast, some Hong Kongers also viewed the NPCSC’s timely interpretation of the relevant provision of the Basic Law as an ideal solution to protect the country’s sovereignty and national pride.<sup>27</sup>

### *Main purposes and methodology of the study*

Driven by these recent controversies and the fascinating nature of the Basic Law of being a ‘hybrid of common law and Chinese law’,<sup>28</sup> I aim to achieve two main goals from this academic discussion.

The *first goal* of this article is to provide a timely evaluation on whether the spirit of judicial independence has actually been acknowledged by the Basic Law drafters. If the answer is yes, the further question would then be ‘how does the design of the Basic Law protect judicial independence?’ To answer this question, a logical step is to clarify what ‘judicial independence’ actually means. I will, therefore, start my discussion with the conceptual basis of judicial independence and to critically analyze the Basic Law’s framework and design.

Bearing in mind the fact that the judiciary has been facing quite a lot of ‘unique’ challenges which stemmed from the nature of the Basic law when it comes to interpretation of the Basic Law,<sup>29</sup> the *second goal* of this article is to shed at least some lights on why the power of interpretation of the Basic Law has been so controversial under the lens of the ‘One Country, Two Systems’ principle. In order to achieve a logical and thorough analysis, the discussion will be divided into three sections. To begin with, I will briefly discuss, from a historical point of view, how common law was engineered into Hong Kong’s DNA. Next, I will then examine the *jurisprudential factors* behind the common law’s approach of legal interpretation and the reason why the Hong Kong courts have showed its reluctance in handing over its adjudicative powers even in cases involving Central-Local Relationships. Moreover, I will also submit my argument that the approach of legal interpretation in the present-day China is actually shaped by the Socialist jurisprudence. Building upon this foundation, I will then point out the differences between the two approaches, and submit my argument that it is high time for the Hong Kong legal community should adjust its attitudes. Finally, a conclusion summarizing my main arguments will be provided.

<sup>26</sup> Joyce Lim, ‘Two Hong Kong officials grilled over Beijing’s view of Basic Law’ *The Straits Times* (Singapore 10 November 2016) World.

<sup>27</sup> Zhou Bajun, ‘NPCSC’s move urgently needed’ *China Daily Hong Kong Edition* (Hong Kong 8 November 2016) P10.

<sup>28</sup> See: Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006). Other scholars also have similar views. For instance, P. Y. Lo described the Basic Law as ‘the two-faced Roman god Janus . . . [having] a duality in that it is law both in the jurisdiction that establishes it (China) and in the jurisdiction it establishes (Hong Kong)’. See: P. Y. Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997* (Hong Kong University Press 2014) 3.

<sup>29</sup> P. Y. Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997* (Hong Kong University Press 2014) 3.

## THE BASIC CONCEPT OF JUDICIAL INDEPENDENCE

*Defining 'Judicial Independence': a difficult task*

It is generally agreed that the management of state affairs under the rule of law denotes the idea that the law is the final standard and principle for determining right and wrong. As such, one can neither challenge the dignity and authority of the legal system, nor to place himself above the law.<sup>30</sup> Yet, one can only realize the management of the state affairs under the rule of law by safeguarding judicial fairness because 'the vitality of the law lies in its execution'.<sup>31</sup> To achieve judicial fairness, judges must establish 'a contemplative judging environment in which they may fully comprehend the essence of laws and make appropriate and reasoned judgments in the pursuit of a just outcome'.<sup>32</sup> In turn, the *sine qua non* is therefore to ensure judicial independence.

At first blush, one may be tempted to conclude the phrase 'judicial independence' as a *cliché* that should sound familiar to all of us. Be that as it may, the truth is that defining judicial independence has long been an uneasy task. Just as Tom Ginsburg vividly described, 'judicial independence has become like freedom: everyone wants it but no one knows quite what it looks like'.<sup>33</sup> On the other hand, Adam Dodek and Lorne Sossin argued that 'it is easier . . . to identify the normative value of judicial independence than it is to define its contents and scope'.<sup>34</sup> So, what are these so-called 'normative value' then?

If we look at the literatures on this area of law, we may realize that there are still different views amongst the leading scholars on how the formula should be formulated.<sup>35</sup> In fact, early in the 18th and 19th century, the concept of judicial independence has been acknowledged by the common law of England as a status of judges *vis-à-vis* the Crown's power.<sup>36</sup> Thanks to the emergence of constitutionalism and legal remedies that could be claimed against the state in the 20<sup>th</sup> century, many jurisdictions also reasserted the necessity of judicial independence.<sup>37</sup> For instance, the Supreme Court of Canada in *Valente v The Queen*<sup>38</sup> noted that judicial independence is 'not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationships to

<sup>30</sup> Yuanyuan Wang, *The Independence of Judges in China and Germany* (Peter Lang 2011) 15.

<sup>31</sup> *Ibid.*, at 30.

<sup>32</sup> *Ibid.*

<sup>33</sup> Tom Ginsburg, 'Judicial Independence in East Asia' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010) 248.

<sup>34</sup> Adam Dodek and Lorne Sossin, 'Introduction' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law 2010) 1.

<sup>35</sup> Different scholars have different views on how the 'normative value' of judicial independence should be. For example, to Peerenboom, the normative value of judicial independence is that it is 'essential to rule of law, good governance, economic growth, democracy, human rights, and geopolitical stability'. See: Randall Peerenboom, 'Introduction' in Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2010) 1.

However, to Dodek and Sossin, the normative value judicial independence is acknowledged 'as a political good, constitutional norm, and foundation for the rule of law'. See: Adam Dodek and Lorne Sossin, 'Introduction' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law 2010) 1.

Contrarily, Peter Russell referred to political science literature and argued that judicial independence embodies two concepts, namely 'the autonomy of judges' and the 'judicial behavior that is considered indicative of judges enjoying a high measure of autonomy'. Peter Russell further described judicial independence as a 'two dimensional relationship'. The first dimension of judicial independence is that 'in terms of the sources of dependency, external controls and influences must be distinguished from internal controls and influences', whereas the second dimension is that 'in terms of the targets of influence or control, the individual judge must be distinguished from the judiciary as a collective whole or institution'. For details, see: Peter Russell, 'Towards a General Theory' in Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (The University Press of Virginia 2001) 6–11.

<sup>36</sup> Among different statutes, the Act of Settlement (1701) was known as a landmark legislation in this regard. See: Martine Valois, *Judicial Independence: Keeping Law at a Distance from Politics* (LexisNexis 2013) 224.

<sup>37</sup> *Ibid.*

<sup>38</sup> [1985] 2 SCR 673.

others, particularly to the executive branch of government that rests on objective conditions or guarantees'.<sup>39</sup> According to Danny Gittings, the last point with regard to 'guarantees' is particularly significant in 'ensuring the courts can function independently, given the executive branch's extensive involvement in the legal process'.<sup>40</sup> Hence, I would describe judicial independence as the notion that judges adjudicate matters coming before them based on the facts and the relevant law impartially, i.e. not affected by any improper influences and pressures.

In order to critically analyze whether the Basic Law is able to ensure judicial independence, I am of the view that it is necessary to refer to the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nations in 1985,<sup>41</sup> which sets out a total of 20 internationally-recognized principles governing judicial independence.<sup>42</sup>

As Yuwen Li nicely summarized, these provisions can be categorized into three 'core components' of judicial independence, namely 'personal independence', 'institutional independence', as well as 'financial independence'.<sup>43</sup> In the following, I will briefly examine each of these components.

### *Personal Independence*

'Personal independence' denotes the terms of office, requirements as to qualifications, as well as the basic rights of judges. According to Principle 10, persons selected as a judicial officer should be individuals of not only ability and qualification in law, but also integrity.<sup>44</sup> Furthermore, Principle 11 provides that '[t]he term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law', whereas Principle 12 stipulates that judges should have guaranteed tenure.<sup>45</sup>

In addition, Principle 16 further provides that judges should enjoy personal immunity from civil suits for improper acts or omissions in the exercise of judicial functions.<sup>46</sup> Such immunity, as Simon Marsden suggested, is vital to '[ensure] immunity from prosecution in the exercise of judicial functions'.<sup>47</sup>

<sup>39</sup> *Ibid.*, at 685.

For more information, see: Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 156 and Peter Wesley-Smith, 'Individual and Institutional Independence of the Judiciary' in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001) 99–101.

<sup>40</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 156.

<sup>41</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> (accessed on 14 July 2017).

<sup>42</sup> While it should be borne in mind that these 20 principles are not meant to be legally-binding in nature, they do serve as useful benchmarks for comparisons and references.

<sup>43</sup> Li Yuwen, *Judicial Independence in China: an attainable principle?* (Eleven International Publishing 2013) 10–12.

<sup>44</sup> Principle 10 provides:

*Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.*

<sup>45</sup> Principle 12 provides that '[j]udges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists'.

In fact, the Canadian Supreme Court in *Valente v The Queen* [1985] 2 SCR 673 also held that 'security of tenure' and 'financial security' are two essential conditions to ensure judicial independence. See also: Li Yuwen, *Judicial Independence in China: an attainable principle?* (Eleven International Publishing 2013) 11.

<sup>46</sup> Principle 16 stipulates that '[W]ithout prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions'.

<sup>47</sup> Simon Marsden, 'Regional Autonomy, Judicial Criticism and the 2005 Interpretation: Judicial Independence in Hong Kong Compromised Again?' (2006) 36 Hong Kong Law Journal 117, 124.

As to the basic rights of judges, Principle 8 prescribes that judges should enjoy the freedom of expression, belief, association so long as such rights are exercised in a manner which complies with the dignity, impartiality and independence of judiciary. Last but not least, Principle 17 stipulates that there should be fair procedures which can handle any charges or complaints against a judge, regarding his or her judicial functions expeditiously.<sup>48</sup>

### *Institutional Independence*

The element of 'institutional independence' deals with the relationship between the court and the government, as well as other state organs.<sup>49</sup> At the outset, Principle 1 makes it clear that it is a fundamental requirement for the state to provide judicial independence in its Constitution or other laws. Moreover, all governmental and non-governmental institutions have to 'respect and observe' judicial independence.<sup>50</sup>

Also, when deciding matters, the judiciary should be impartial in a sense that there should be no 'any restriction, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'.<sup>51</sup> Besides, Principle 3 highlights that the judiciary should be vested with the power over all issues with a judicial nature and is equipped with the exclusive authority to decide whether it is competent, in accordance with the law to make a decision on the issues at stake.

Principles 4 and 6 are also principles under the umbrella of 'Institutional Independence'.<sup>52</sup> On the one hand, Principle 4 stipulates that while there should not be any inappropriate interferences with the judicial process, the judicial decisions should not be revised (except in judicial reviews situations).<sup>53</sup> Principle 6, on the other hand, requires that judicial proceedings should be conducted in a fair manner by the judiciary, and the rights of the parties being respected.<sup>54</sup>

### *Financial Independence*

The element of 'Financial Independence' is provided under Principle 7, which requires that the State should allocate adequate resources to the judiciary, so as to ensure that the judiciary can be able to perform its functions effectively.

## HAS JUDICIAL INDEPENDENCE BEEN ACKNOWLEDGED BY THE BASIC LAW DRAFTERS?

After illustrating the hallmark of judicial independence, the next important step is to examine whether the spirit of judicial independence has been incorporated into the design of Hong Kong Basic Law. To achieve this goal logically, I believe that a three-step inquiry is necessary.

To begin with, I will first identify whether judicial independence has been expressly provided in the Basic Law. If such provisions do exist, I will try to highlight some

<sup>48</sup> Principle 17 denotes that '[a] charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge'.

<sup>49</sup> Li Yuwen, *Judicial Independence in China: an attainable principle?* (Eleven International Publishing 2013) 11.

<sup>50</sup> Principle 1 provides that '[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary'.

<sup>51</sup> Principle 2 of the Basic Principles on the Independence of the Judiciary.

<sup>52</sup> Li Yuwen, *Judicial Independence in China: an attainable principle?* (Eleven International Publishing 2013) 11.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

important implications behind each of these provisions. Next, I will analyze whether there are any provisions in the Basic Law that contribute to the guarantee of an independent judiciary, rather than just to 'saying it'. If it is necessary, I will also compare the Basic Law provisions with the practice before the handover. Last but not least, I will then compare my findings from the design of the Basic Law with the abovementioned 'hallmarks of judicial independence' spelt out in the Basic Principles of Independence of the Judiciary endorsed by the General Assembly of the United Nation in 1985, so as to examine whether the Basic Law is 'up to standard' when it comes to the guarantee of an independent judiciary.

If we look at the Basic Law carefully, it may be quite obvious that 'judicial independence' has actually been expressly provided for in three separate provisions, namely Article 2, Article 19, as well as Article 85 of the Basic Law.<sup>55</sup> In the following, I will revisit these three provisions and critically examine their importance respectively.

#### *Article 2 of the Basic Law*<sup>56</sup>

While it sounds quite straight-forward that independent judicial power is a facet of the high autonomy enjoyed by the HKSAR, it is actually quite worthwhile to address the issue of the 'location' of this provision within the entire Basic Law structure. According to Professor Xiao Wei-yun, a learned drafter of the Basic Law, the first chapter of the Basic Law sets out the 'Main Purpose' ('總則'), embodying the core principles of 'One Country, Two Systems' and the basic policies of the Chinese Government regarding Hong Kong.<sup>57</sup> As such, I believe that having a provision on judicial independence in this chapter demonstrates a very important message, i.e. maintaining judicial independence in Hong Kong is not only a core principle of 'One Country, Two Systems', but also one of the basic policies of the Chinese Government regarding Hong Kong. As such, Article 2 of the Basic Law can be viewed as a piece of reassuring evidence that judicial independence in Hong Kong is being valued by the Chinese Government as well.

#### *Article 19 of the Basic Law*<sup>58</sup>

Similar to the wordings used in Article 2, it is noteworthy from Article 19(1) that the word 'independent' is only used to describe the judicial power granted to HKSAR, rather than the executive and legislative powers. To this end, I believe that there must be some important implications behind.

Here, I agree with some scholars who suggested that the courts are made 'more autonomous' than other governmental institutions.<sup>59</sup> An evidence on this, as Danny

<sup>55</sup> Berry Hsu, 'Judicial Independence under the Basic Law' (2004) 34 Hong Kong Law Journal 279, 280.

<sup>56</sup> The first provision which expressly provides judicial independence is Article 2 of the Basic Law:

'The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and *independent judicial power*, including that of final adjudication, in accordance with the provisions of this Law.' (emphasis added).

<sup>57</sup> Professor Xiao argued that the core principles of 'One Country, Two Systems' and the basic policies of the Chinese Government regarding Hong Kong consist of the following six elements:

- (1) The HKSAR is an inalienable part of the PRC;
- (2) The HKSAR shall enjoy a high degree of autonomy;
- (3) The executive authorities and legislature of the HKSAR shall be composed of local residents;
- (4) The HKSAR shall safeguard the rights and freedoms of its residents and of other peoples in the region;
- (5) The socialist system and policies shall not be practiced in the region, and the previous capitalist system and way of life shall remain unchanged for 50 years; and
- (6) Laws previously in force in Hong Kong shall remain basically unchanged.

For details, see: Xiao Wei-yun, *One country, Two systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press 2001) 88–91.

<sup>58</sup> The first provision which expressly provides judicial independence is Article 19 of the Basic Law. Article 19(1) of the Basic Law provides that the HKSAR 'shall be vested with *independent judicial power*, including that of final adjudication' (emphasis added).

<sup>59</sup> For example, see: Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn, Hong Kong University Press) 146.

Gittings pointed out, is that whereas the Basic Law stipulates that the Central People's Government has 'extensive powers of control over Hong Kong's Chief Executive, and allows the national legislature to return and invalidate laws enacted by the Hong Kong Legislative Council under certain circumstances, it gives China's national judicial system no role at all in the administration of justice in Hong Kong'.<sup>60</sup> Thus, Article 19(1) well-demonstrates the spirit of the 'Two Systems' principle by giving sufficiently-high autonomy to the HKSAR.

However, we should bear in mind that such power, as Wong Yiu-chung correctly noted, can merely be exercised in 'internal affairs that belong to the autonomy of the [HKSAR] but it has no power to interpret provisions about Hong Kong-China relationships'.<sup>61</sup> With regard to foreign affairs, national defense and other matters that fall within the scope of acts of state, I strongly agree with Priscilla Leung that the forceful wordings of Article 19(3) shows that 'the central government will not compromise to delegate any power to the SAR government or court'.<sup>62</sup> Clearly, it is the bottom-line of the 'One Country' principle. By looking at Article 19 holistically, I also realize that Article 19 is actually a conspicuous reflection of an integral design of 'One Country, Two Systems', as the 'two seemingly conflicting concepts' of sovereignty and autonomy have been nicely balanced by granting some autonomy to the SAR on the one hand, while defending the bottom-line of sovereignty on the other hand.<sup>63</sup>

#### *Article 85 of the Basic Law*<sup>64</sup>

As in Article 2 and 19(1), Article 85 also stresses that the judicial power has to be exercised 'independently'. What is more noteworthy from Article 85, however, is that the judicial power is modified by the phrase 'free from any interference'.

To gain a better understanding on the implications of this phrase, I have referred to a wide range of leading literatures. By reconciling the views of experts Xiao Wei-yun,<sup>65</sup> Yash Ghai<sup>66</sup>, Wang Shuwen<sup>67</sup> and Byron Weng,<sup>68</sup> I found that there is actually a general consensus: the judiciary in HKSAR is not only free from interference by the executives and legislatures, but also free from any interference by the courts in the PRC and influence of social forces. In the following, I would like to highlight two particularly important examples of such 'non-interference'.

<sup>60</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 81.

<sup>61</sup> Wong Yiu Chung, 'Introduction' in Wong Yiu Chung (ed), *'One Country, Two Systems' in Crisis* (Lexington Books 2004) 3.

<sup>62</sup> Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 47. Article 19(3) provides that 'The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government' (emphasis added).

<sup>63</sup> Albert C. Y. Ho, 'Autonomy' in Peter Wesley-Smith and Albert H. Y. Chen (eds), *The Basic Law and Hong Kong's future* (Butterworths 1988) 301.

See also: Marius Olivier, 'PRC Sovereignty and Hong Kong SAR Autonomy: A View from Outsider' in Priscilla Leung and Zhu Guobin (eds), *The Basic Law of the HKSAR: From Theory to Practice* (Butterworths 1998) 162–165.

<sup>64</sup> Article 85 provides that '[t]he courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions'.

<sup>65</sup> Xiao Wei-yun, *One country, Two systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press 2001) 96.

<sup>66</sup> Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn, Hong Kong University Press) 146, 314.

<sup>67</sup> Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2nd edn, Law Press China and Joint Publishing 2009) 520.

<sup>68</sup> Byron S. J. Weng, 'Judicial Independence under the Basic Law' in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001) 55.

### *Independent from the courts in the Mainland*

Regarding the possibility of interference by the courts in the PRC, Xiao Wei-yun noted that '[t]he administration of justice by the People's Courts in the autonomous minority nationality areas is supervised and guided by the Supreme People's Court', whereas the 'HKSAR can enact all laws other than those relating to national defense, foreign affairs and a few other national laws, and is only obliged to report to the NPCSC for the record.'<sup>69</sup>

Without having to be 'under supervision and guidance of the Supreme People's Court', the courts of the HKSAR therefore enjoy more judicial autonomy.

### *The ability to stand up challenges from the media*

Apart from this, having the ability to 'stand up challenges from . . . powerful public media' is also essential for upholding judicial independence.<sup>70</sup> The notion that the court is free from interference by other social forces is supported by the case of *Secretary for Justice v Oriental Press Ltd & Others*.<sup>71</sup> In that case, Oriental Daily published various articles vilifying the judiciary, and harassed a judge with paparazzi. By doing so, the chief editor and controller of this local printed media were held liable for 'contempt of court'. The underlying reason for the verdict was that the rule of law is jeopardized by the acts of 'scandalizing the court' and 'interfering with the administration of justice as a continuing process'.<sup>72</sup> Based on this decision, it is also evident that the judiciary in Hong Kong has the ability to stand up challenges against the media.

### *What does 'judicial power' mean in these three provisions?*

Despite these three provisions stipulate that Hong Kong courts enjoy independent judicial power, the meaning of such 'judicial power' is not clear from these provisions.<sup>73</sup> As shown in the precedents from other common law jurisdictions<sup>74</sup> and commentators' remarks,<sup>75</sup> the meaning of 'judicial power' is not easy to understand. In the following, I will try to clarify on what 'independent judicial power' actually means in the context of the Basic Law.

As Hong Kong has a rich common law heritage, and will continue to exercise common law,<sup>76</sup> it may be a good idea to seek hints from the interpretation of other common law

<sup>69</sup> Xiao Wei-yun, *One country, Two systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press 2001) 97.

<sup>70</sup> Byron S. J. Weng, 'Judicial Independence under the Basic Law' in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001) 55.

<sup>71</sup> Court of First Instance, Miscellaneous Proceedings No. 408 of 1998.

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

<sup>73</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 80. See also: Berry Hsu, 'Judicial Independence under the Basic Law' (2004) 34 *Hong Kong Law Journal* 279, 284.

<sup>74</sup> For example, in *Brandy v Human Rights and Equal Opportunity Commission* (1994–1995) ALR 1 (at p.16), the Australian High Court noted the following:

'Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not . . . One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.'

<sup>75</sup> For example, Johannes Chan argued that the meaning of 'judicial power' is 'an extremely difficult concept'. See: Johannes Chan, 'The Judiciary' in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 299.

<sup>76</sup> Article 8 of the Basic Law provides that 'the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region'.



jurisdictions.<sup>77</sup> For example, in the landmark case of *Waterside Workers' Federation of Australia v W Alexander Ltd*,<sup>78</sup> the court noted that judicial power is the power 'to adjudicate between adverse parties as to legal claims . . . and to order right to be done'.<sup>79</sup>

Another way to understand the meaning of 'judicial power' in the context of the Basic Law is to look at the wordings of other provisions of the law itself. By looking at the Chinese text the Basic Law, one may notice that the word used in Articles 2 and 19 is '司法權', whereas the term used in Article 80 is '審判權'. Regarding this difference in translation, both Danny Gittings<sup>80</sup> and P. Y. Lo<sup>81</sup> argued that judicial power naturally means the 'power to adjudicate'. I also agree with Benny Tai that 'adjudicate' may be the best word to denote the judicial power granted to the HKSAR because this term has been repetitively used in various provisions, such as Articles 2, 19(1), 19(3), 84, 158(2) and 158(3) of the Basic Law.<sup>82</sup>

By reconciling the hints from the common law and the wordings of the Basic Law provisions, it is likely that 'judicial power' means 'power to adjudicate', i.e. 'to receive, hear and determine court cases'.<sup>83</sup>

In the light of the importance of these three above-mentioned provisions, it seems that the court and scholars have arrived at general consensus. In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors*,<sup>84</sup> for example, the court noted that the presence of Article 85 of the Basic Law indicates that 'it is the law's evident purpose to entrench the independence of the judiciary'.<sup>85</sup> The Court of Final Appeal (per Ribeiro PJ) also agreed that Articles 2 and 19 are also essential for 'safeguarding judicial independence'.<sup>86</sup>

#### *How does the design of the basic law ensure judicial independence?*

As Barton put, 'an independent judiciary is one that applies the law with impartiality and is not overly influenced by extra-legal factors, such as social, political, or economic implications, in rendering decisions'.<sup>87</sup> However, the prerequisite is that judiciary ought to be vested with sufficient power, so as to ensure its sustained existence and its ability to repel interference from other bodies.<sup>88</sup> In the following, I will critically analyze whether the design of the Basic Law vests judges with such powers and abilities.

<sup>77</sup> P. Y. Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 24.

<sup>78</sup> (1918) 25 CLR 434.

<sup>79</sup> *Ibid.* At pp 463, 465.

<sup>80</sup> Gittings noted that judicial power is likely to mean the 'power to adjudicate'. For details, see: Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 80.

<sup>81</sup> Lo noted that the Chinese expression in Article 80 of the Basic Law 'admits also the English translation of "adjudicative power"'. Furthermore, Lo also argued that while 'the difference is uncontroversial as it can simply be said that the latter Chinese expression directs against the rendering of advisory opinions,' it may also 'suggest the courts' role is limited to quell the controversy and not to assume review of legislation and to declare inconsistencies with the Basic Law for invalidation'. For details, see: P. Y. Lo, *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997* (Hong Kong University Press 2014) 61.

<sup>82</sup> Benny Tai, 'The Jurisdiction of the Courts of the Hong Kong Special Administrative Region' in Alice Lee (ed), *Law Lectures for Practitioners 1998* (Hong Kong Law Journal Ltd. 1998) 68.

<sup>83</sup> *Ibid* 69–73. This understanding of judicial power corresponds with Wang Shuwen's observation that '[the] main functions and duties of the courts are to adjudicate cases of various types'. See: Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2<sup>nd</sup> edn, Law Press China and Joint Publishing 2009) 499.

<sup>84</sup> [2006] 9 HKCFAR 234.

<sup>85</sup> See: P. Y. Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 485.

<sup>86</sup> *Ibid.*, at [45].

<sup>87</sup> Emily Johnson Barton, 'Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong' (2002) 43(2) *Harvard International Law Journal* 361, 363.

<sup>88</sup> R. N. Wilentz, 'Separation of Powers – Judicial Independence in the 1980s' (1997) 49 *Rutgers Law Review* 835, 836.

*The importance of appointing judges independently*

In order for the courts to dispense justice, as well as the function of adjudicating disputes ‘dispassionately’, Anton Cooray et al. argued that one of the most important conditions is that a right caliber of judges must be appointed.<sup>89</sup> Similarly, Johannes Chan also submitted that judicial independence can hardly be achieved if judges are appointed, promoted and dismissed ‘at the pressure of the executive government’.<sup>90</sup>

To this end, I strongly agree with Chan that the system of appointing, promoting and removing judges must be itself independent, so as to ‘minimize the influence of the Executive Government’.<sup>91</sup> Having appreciated the significance of this, the drafters of the Basic Law wisely stipulated that:

“Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors”<sup>92</sup>

On 1 July 1997, an independent commission known as the Judicial Officer Recommendation Commission (hereinafter ‘JORC’) was established under the Judicial Officers Recommendation Commission Ordinance (Cap. 92).<sup>93</sup> The JORC is expected to be an independent body, meaning that it will not ‘favor persons who seem most likely to side with the government’.<sup>94</sup> As the name of the Commission suggests, the role of JORC is recommend the best candidates to fill judicial vacancies.<sup>95</sup>

As to the composition of the JORC, it consists of nine members, namely the Chief Justice (who is the chairman), the Secretary for Justice, and two judges, a solicitor, a barrister, and three lay members appointed by the Chief Executive.<sup>96</sup> The ordinance further provides that the Chief Executive is obliged to consult the Bar Council of the Hong Kong Bar Association (with regard to the appointment of the barrister) and the Council of the Law Society of Hong Kong (with regard to the appointment of the solicitor).<sup>97</sup>

Notwithstanding that JORC is expected to be an independent body, some commentators remain skeptical towards its composition. Accordingly, some commentators worried

<sup>89</sup> Anton Cooray et al., *Constitutional Law in Hong Kong* (Kluwer Law International 2010) 151.

<sup>90</sup> Johannes Chan, ‘The Judiciary’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 306.

<sup>91</sup> *Ibid.*

<sup>92</sup> Article 88 of the Basic Law.

<sup>93</sup> Before the handover, the Judicial Services Commission was the responsible body.

<sup>94</sup> Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd edn, Oxford University Press 1998) 109.

<sup>95</sup> With regard to the recommendation made by the JORC, one commentator, Berry Hsu, argued that ‘there is no transparency in the appointment process and the Chief Executive is *not* bound to appoint all persons recommended by the [JORC] though he may appoint no other persons’ (italics added for emphasis). The reason for Hsu to raise this concern is because he noticed a difference in the Chinese and English version of the provision in the Basic Law: the Chinese version of the Basic Law states that person recommended by the independent commission ‘are appointed by the Chief Executive’; whereas the English version uses the wording ‘shall be appointed by the Chief Executive’.

For details, see: Berry Hsu, ‘Judicial Independence Under the Basic Law’ (2004) 34 *Hong Kong Law Journal* 279, 289.

On the other hand, experts Simon Young and Antonio Da Roza suggested that the provision’s plain meaning merely suggests that ‘the commission’s recommendation of the candidate is a prerequisite to the candidate’s appointment’. Hence, ‘whether the article has the narrower meaning of the Chief Executive being duty bound to appoint the commission’s recommended candidate is unsettled’. Interestingly, the two experts referred to the language used in the Sino-British Joint Declaration to argue that the Chief Executive is likely to be bound by the recommendation. Accordingly, Annex I, Section III of the Sino-British Joint Declaration states that ‘Judges of the [HKSAR] courts *shall* be appointed by the Chief Executive of the [HKSAR] acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons’ (italics added for emphasis).

For details, see: Simon Young and Antonio Da Roza, ‘The judges’ in Yash Ghai and Simon Young (eds), *Hong Kong’s Court of Final Appeal: the Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 254.

<sup>96</sup> Judicial Officers Recommendation Commission Ordinance (Cap. 92), s.3(1).

<sup>97</sup> *Ibid.*, s3(1A).

that the recommendations of the Bar Council of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong are not binding on the Chief Executive.<sup>98</sup> As such, there is a potential risk of non-compliance. Fortunately, the recommendations in the past were invariably accepted by the Chief Executive.<sup>99</sup> Also, given the influential powers of these two professional bodies, it may be ‘politically unwise’ for the Chief Executive not to accept their recommendations.

The inclusion of the Secretary for Justice and the three lay members also triggered some concern because it may involve ‘political appointments’.<sup>100</sup> Be that as it may, Peter Wesley-Smith, a leading scholar on Hong Kong constitutional law, reassured that ‘political and nepotistic appointments to the Bench will not be made’, provided that Article 92 of the Basic Law is taken seriously.<sup>101</sup>

In accordance with Article 88 of the Basic Law, all judges of the Court of Final Appeal,<sup>102</sup> Court of Appeal, Court of First Instance and the District Court, as well as magistrates, members of the Lands Tribunal, adjudicators of the Small Claims Tribunal, presiding officers of the Labor Tribunal and coroners are all appointed by the Chief Executive, based on recommendation or advice of the Commission. Moreover, article 90 of the Basic Law further provides another level of scrutiny with regard to the appointment of judges of the Court of Final Appeal, the Chief Justice of the Court of Final Appeal, as well as the Chief Judge of the High court, as their appointments must be endorsed by the Legislative Council and reported to the National People’s Congress Standing Committee for the record.<sup>103</sup>

Regarding the appointment process, the former Chief Justice Andrew Li made several open remarks that such process had not been and should never be politicized. In one of these occasions, for example, Li CJ stressed that:

“The Basic Law provides that judges and judicial officers shall be chosen on the basis of their judicial and professional qualities. I have never come across any instance where it was suggested that judges should be chosen on some other basis.”<sup>104</sup>

So far, legislators seemed to have shared the same view as Li CJ, as the endorsements ‘have been made with little fanfare or controversy’.<sup>105</sup>

Unlike the civil law system (including the Mainland China) where there are special institutions specializing in recruiting and training judges,<sup>106</sup> Article 91 of the Basic

<sup>98</sup> Johannes Chan, ‘The Judiciary’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 307.

<sup>99</sup> *Ibid.*

<sup>100</sup> Peter Wesley-Smith, ‘Individual and Institutional Independence of the Judiciary’ in Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press 2001) 109.

<sup>101</sup> *Ibid.*

<sup>102</sup> It is noteworthy that as for the Court of Final Appeal, all judges have to be debarred from practicing law in the HKSAR forever in accordance with s.13 of the Hong Kong Court of Appeal Ordinance. The reason behind this, as Berry Hsu argued, is ‘to minimize conflicts of interest’. See: Berry Hsu, ‘Judicial Independence Under the Basic Law’ (2004) 34 *Hong Kong Law Journal* 279, 297.

<sup>103</sup> By comparing the wordings of Article 90 of the Basic Law with the relevant section in the Sino-British Joint Declaration, one may find that while it is a prerequisite to obtain the endorsement from the legislature, the report to the National People’s Congress Standing Committee occurs only after the appointment is completed. Accordingly, Annex I, Section III of the Sino-British Joint Declaration states that ‘the appointment . . . of principal judges (i.e. those of the highest rank) shall be made by the Chief Executive with the endorsement of the [HKSAR] legislature and reported to the Standing Committee of the National People’s Congress for the record’ (italics added for emphasis).

For further discussion on this, see: Simon Young and Antonio Da Roza, ‘The judges’ in Yash Ghai and Simon Young (eds), *Hong Kong’s Court of Final Appeal: the Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 254.

<sup>104</sup> ‘Chief Justice Andrew Li: Departing with No Regrets’, *Hong Kong Lawyer*, August 2010.

<sup>105</sup> Simon Young and Antonio Da Roza, ‘The judges’ in Yash Ghai and Simon Young (eds), *Hong Kong’s Court of Final Appeal: the Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 255.

<sup>106</sup> *Ibid.*

Law stipulates that the previous system of appointment and removal of members of the Judiciary other than judges shall be maintained.<sup>107</sup> While judges and other members of the Judiciary shall be chosen on the basis of their judicial and professional qualities, they may also be recruited from other common law jurisdictions.<sup>108</sup> Accordingly, Hong Kong follows other common law jurisdictions by appointing judges among experienced legal practitioners.<sup>109</sup> As one commentator noted, being elevated to the bench is not only considered as ‘a natural progression of one’s career in the legal profession’, but also ‘a matter of great prestige’.<sup>110</sup> Hence, it can be expected that those who are being appointed as judges in Hong Kong are the cutting-edge members of the legal profession. The mechanism which allows the recruitment of judges from other common law jurisdictions under Article 92 of the Basic Law is another obvious evidence of the ‘One Country, Two Systems’ principle.

As Hartmann J in *Re Cheng Kai Nam Gary*<sup>111</sup> highlighted, such arrangement is crucial to give continuing effect to the enshrining of the common law in the HKSAR. Since the judicial appointment in the HKSAR draws on the talent and experience of lawyers, judges and jurists from other common law jurisdictions, it is believed that the quality of the judgments which are handed down by the courts can be guaranteed.<sup>112</sup>

Xiao Wei-yun, a learned Basic Law drafter, also acknowledged the apparent advantage of such mechanism: in view of the close ties between Hong Kong and other common law jurisdictions, recruiting competent and professional persons from these jurisdictions would help Hong Kong to maintain its status as an international financial center, as well as to enhance the international image of the legal system of the HKSAR.<sup>113</sup>

By viewing the appointment procedure from an international law perspective, one may also realize that Hong Kong is given high autonomy in appointing judges under the ‘One Country, Two Systems’ framework. As Hannum and Lillich noted, members of the highest local court in autonomous areas elsewhere in the world are often ‘appointed by or with the consent of the sovereign government’.<sup>114</sup>

In contrast, Article 88 of the Basic Law stipulates that the choices of new judges in the HKSAR are essentially dealt with by the JORC. Undoubtedly, the NPCSC has to be notified when it comes to the appointments to the Court of Final Appeal and of the Chief Judge of the High Court. Yet, this notification can be viewed as merely a formality.<sup>115</sup> Under this background, I am optimistic to submit that the Basic Law has actually granted high autonomy to Hong Kong with regard to the appointment of judges. More importantly, it also reflects the core spirit of ‘One Country, Two Systems’ by providing such a mechanism to ensure the booming of common law in the HKSAR and institutional independence.

<sup>107</sup> As Berry Hsu noted, the ‘previous system’ is likely to be the ‘system at the time when China resumed the exercise of sovereignty over Hong Kong, that is the system as it was on 1 July 1997.’ See: Berry Hsu, ‘Judicial Independence Under the Basic Law’ (2004) 34 *Hong Kong Law Journal* 279, 290.

<sup>108</sup> Article 92 of the Basic Law.

<sup>109</sup> Johannes Chan, ‘The Judiciary’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 307.

<sup>110</sup> *Ibid.*

<sup>111</sup> [2002] 2 HKLRD 39, [2002] 1 HKC 41 (CFI).

<sup>112</sup> See also: *Re Flesch QC & Anor* [1999] 1 HKLRD 506 and P. Y. Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 512–513.

<sup>113</sup> Xiao Wei-yun, *One country, Two systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press 2001) 359–360.

<sup>114</sup> Hurst Hannum and Richard Lillich, ‘The Concept of Autonomy in International Law’ (1980) 74 *American Journal of International Law* 858, 869.

<sup>115</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 82.

*Security of Tenure and Removal of Judges*

Ordinary judges in Hong Kong are recruited on a tenure basis. This feature, as Lo and Chui put, is to guarantee that judges are ‘free from political interference’.<sup>116</sup> According to Article 89(1) of the Basic Law, the Chief Executive may remove a judge for inability or misbehavior, on the recommendation of a tribunal appointed by the Chief Justice and consisting of more than three local judges.<sup>117</sup>

Under Article 90(2) of the Basic Law, the removal of any judge on the Court of Final Appeal or the Chief Judge of the High Court must be endorsed by the Legislative Council and reported to the National People’s Congress Standing Committee for the record. With both the executive and legislature involved in the removal decision, this clearly exhibits the existence of ‘check and balances’ between the executive, the legislature and the judiciary under the Basic Law.<sup>118</sup>

If one look at the wordings of the provision more closely, however, it is quite noticeable that there is a phrase of ‘may only be removed for’.<sup>119</sup> In Article 89(2), the word ‘only’ again appears as a limitation on the investigation on the Chief Justice of the Court of Final Appeal.<sup>120</sup> To better understand the significance of this, I believe it is necessary to refer to the drafting history of the Basic Law. To this point, Wang Shuwen revealed that the word ‘only’ was added with purpose: to ensure that judges may not be removed for any reasons other than those exceptional circumstances stipulated under Article 89(1).<sup>121</sup> In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd & Ors*,<sup>122</sup> Ribeiro PJ also acknowledged that the word ‘only’ in Article 89(1) aims at entrenching judicial independence.

While the above discussion shows that Article 89 of the Basic Law has been praised as a measure to entrench judicial independence, there are some criticisms as well. To this end, Danny Gittings criticized that because Article 89 only protects ‘judges’, which literally excludes ‘magistrates and adjudicators in those tribunals that form part of the court system’, the security of tenure of judicial officers is not fully protected.<sup>123</sup> Regarding the removal of judges, Johannes Chan also criticized that the protection of judges under Article 89 is ‘not as strong as’ those applied before the handover because before the handover, any judge removed from office had the right to appeal to the Judicial Committee of the Privy Council, and the tribunal allowed judges from outside Hong Kong to sit in.<sup>124</sup> This observation is somehow true, as the Hong Kong Letters Patent 1917–1995 did provide that judges from the UK and other parts of the British

<sup>116</sup> Stefan Lo and Wing Hong Chui, *The Hong Kong Legal System* (McGraw-Hill 2012) 45.

<sup>117</sup> The definition of ‘local judges’ in this context remains unclear. See: Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 264.

<sup>118</sup> For a detailed analysis on the ‘checks and balances’ system under the Basic Law, see: Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 257–267.

<sup>119</sup> Article 89(1) of the Basic Law states that ‘[a] judge of court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.’

<sup>120</sup> Article 89(2) of the Basic Law states that the Chief Justice ‘may be investigated only for inability to discharge his or her duties, or for misbehavior, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law.’

<sup>121</sup> Wang Shuwen (ed), *Introduction to the Basic Law of the Hong Kong Special Administrative Region* (2<sup>nd</sup> edn, Law Press China and Joint Publishing 2009) 518.

<sup>122</sup> [2006] 9 HKCFAR 234.

<sup>123</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 164.

<sup>124</sup> Johannes Chan, ‘The Judiciary’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 309.

Commonwealth could sit on any panel formed to consider whether a judge should be removed from office.<sup>125</sup>

### *Judicial Immunity*

Justice can be dispensed only if the judges need not fear the consequences of his judgement.<sup>126</sup> Following this common law position that judicial immunity is a crucial aspect of upholding judicial independence,<sup>127</sup> the Basic Law has preserved such principle by granting immunity to judicial officers when performing their judicial functions.<sup>128</sup>

The Court of Appeal in *Ma Kwai Chun v Leong Siu Chung and another*<sup>129</sup> acknowledged that judicial immunity is an indispensable factor to ensure ‘judicial officers deal with cases without bias, favor or fear and to effectively prevent litigants from commencing proceedings against these officers personally’.<sup>130</sup> When discussing the purpose of judicial immunity, the court further referred to a Canadian case of *Royer et al v Mignault*,<sup>131</sup> which held that:<sup>132</sup>

“The purpose of the principle is not, of course, to protect the personal interests of judges, but rather to protect the public interest in an independent and impartial justice system. To this end, judges, in performing their judicial functions, must be able to do so without fear of personal liability for what they say or do in their judicial capacities. Any errors they make may be corrected on appeal (or judicial review, as the case may be), but they should not have to fear that they may be threatened by dissatisfied litigants, or others, with civil actions charging them with malice, bias, or excess of jurisdiction. A judge should not be subject to the influence of personal concerns, conscious or unconscious, when performing his judicial functions.”

In *Tam Mei Kam v HSBC International Trustee Ltd and others*,<sup>133</sup> the Court of Appeal had to decide whether judicial immunity under Article 85 of the Basic Law, reading together with Articles 8 and 18, is absolute or not. To tackle this issue, the court referred to the judgment in *Sirros v Moore & Others*, which provides that ‘it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court’.<sup>134</sup> Based on this precedent, the court then went on to stipulate that a judge, irrespective of whether he or she acted under gross error or negligence, enjoys absolute immune from personal civil liability for any judicial act done in his or her capacity as a judge.

<sup>125</sup> Article XVIA(6)(a) of the Hong Kong Letters Patent 1917–1995.

<sup>126</sup> Anton Cooray et al., *Constitutional Law in Hong Kong* (Kluwer Law International 2010) 151.

<sup>127</sup> The justification of judicial immunity under common law is explained in *Sirros v Moore & Others* [1975] 1 QB 118 at 132G, quoting Lord Tenterden CJ in *Ganett v Stansfield* [1827] LR 3 as follows:

‘This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justices, that being free from actions, they may be free in thought and independent in judgment, as all who administer justice ought to be’.

See also: Yash Ghai, *Hong Kong's New Constitutional Order* (2nd edn, Hong Kong University Press 1999) 316–318.

<sup>128</sup> Article 85 of the Basic Law stipulates that ‘members of the judiciary shall be immune from legal action in the performance of their judicial functions’.

<sup>129</sup> [2001–2003] HKCLRT 286.

<sup>130</sup> *Ibid.*

<sup>131</sup> (1988) 50 DLR (4th) 345.

<sup>132</sup> *Ibid.*, at 352.

<sup>133</sup> CACV 124/2013.

<sup>134</sup> at 140A, per Buckley LJ.

*Adequate remuneration and high social status*

Since the colonial times, judges in Hong Kong have long been well paid.<sup>135</sup> The obvious underlying reason of this is to limit judges' susceptibility to bribery.<sup>136</sup> Hence, it has been recognized as a notable device designed to encourage observance on judicial independence.<sup>137</sup>

Appreciating the significance of this, the Basic Law stipulates that 'judges and other members of the judiciary serving in Hong Kong before the establishment of the [HKSAR] may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favorable than before'.<sup>138</sup> In order to ensure that the terms and conditions of judicial services are 'adequate', an advisory body known as the Standing Committee on Judicial Salaries and Conditions of Services was established.<sup>139</sup> The role of this Standing Committee is three-fold: to review the pay and conditions of service of the judiciary, to conduct an overall review when necessary, and to give advice to the Chief Executive on these matters.<sup>140</sup>

Apart from the adequate remuneration, it is suggested that the high social status enjoyed by judges is also an important factor in ensuring judicial independence. To this end, some Chinese scholars observed that there is a prominent difference between the judges in HKSAR and that in the Mainland China. For example, Zheng Ge suggested that while most judges in Mainland China are members of the Communist Party of China, they are actually viewed as normal civil servants who have to obey superiors' orders; whereas in Hong Kong, the greatest concerns of judges are not how their superiors evaluate their performance, but how the legal community perceive their judgments.<sup>141</sup>

In addition to this, the fancy dress worn by judges, together with the interior design of the courtroom, also play a role in shaping the high social status of judges. As Peter Wesley-Smith put:<sup>142</sup>

"The wigs and gowns worn by judges, combined with the architecture of the courtroom and the solemnity with which proceedings are conducted, are calculated to impress observers with the majesty of the law and the impartiality of its judicial stewardship."

<sup>135</sup> Peter Wesley-Smith, *Constitutional & Administrative law in Hong Kong: Text and Materials* (China and Hong Kong Law Studies 1987) 143.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Article 93 of the Basic Law.

<sup>139</sup> For more information about the Standing Committee on Judicial Salaries and Conditions of Services, see: Johannes Chan, 'The Judiciary' in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 309–310.

<sup>140</sup> *Ibid.*

<sup>141</sup> The Chinese text writes:

‘我國內地法官首先要講政治，不僅大多數法官本身就是黨員，還要在日常工作中貫徹黨的方針政策。這與前面提到過的香港法官不能加入任何政治組織形成鮮明對照。其次，內地法官與其他公務員在激勵機制上並無不同，他們都是官僚系統中的螺絲釘，服從於科層制系統中對上不對下負責的邏輯。香港法官則並未被嵌入到一個等級森嚴的科層機構中。法院的分級基本上是為了保障訴訟當事人的上訴權，而不是體現上下級之間的領導與被領導關係。香港法官最在意的不是“上級領導”如何評價他們的工作，而是法官同人、法學家和律師如何評價他們的判決。最後，香港法律職業群體是一個有內在凝聚力的共同體，凝聚力的來源不僅是利益，還包括專業精神、職業榮譽和知識。’（鄭戈，‘香港司法如何做到無懼無私？’《中國法律評論》2014–3總第1期 76頁）

Zheng-ge, 'To what Extent can Hong Kong Judiciary be Selfless and Fearless?' 2014 (1) *China Law Review* 74, 76. The above text can be translated as follows: 'All judges in Mainland China are linked to politics. As most judges in Mainland China are members of the Communist Party of China, they have to follow the policies of the Party in their daily work. This can be contrasted with the judges in Hong Kong who are not allowed to participate in any political parties or groups. Besides, judges in the Mainland China are actually viewed as normal civil servants who have to obey superiors' orders; whereas in Hong Kong, the greatest concerns of judges are not how their superiors evaluate their performance, but how the legal community (fellow judges, jurists and lawyers) perceive the quality of their judgments. Last but not least, the legal profession in Hong Kong is a cohesive community. The source of such cohesion is not limited to profits, but also professional conduct, pride and knowledge.'

<sup>142</sup> Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (3rd edn, Oxford University Press 1998) 109.

*Is the Basic Law 'up to standard'?*

Based on the above discussion, it appears that the spirits of judicial independence had been duly incorporated into the design of the Basic Law. In the following, I would like to critically analyze whether the Basic Law is 'up to standard' when it comes to safeguarding judicial independence. To do so, I will compare the Basic Law with the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nations in 1985, which is an internationally-recognized benchmark for measuring judicial independence.

As shown in the earlier discussion, Article 92 of the Basic Law stipulates that judges are chosen on the basis of their professional and judicial qualities. This conforms with Principle 10 of the Basic Principles.

Furthermore, Principle 11 and 12 requires secured term of office, adequate remuneration and condition of services. These requirements have also been duly acknowledged by Article 89 (on the tenure of judges) and Article 93 (on adequate remuneration) of the Basic Law. When it comes to the requirement of judicial immunity under Principle 16, the Basic Law again has such mechanism under Article 85.

Be that as it may, it appears that the Basic Law does not have specific provisions on the 'freedoms of expression, belief, association and assembly' for judges, which is a requirement under Principle 8 of the Basic Principle. Yet, as such freedom is granted to all Hong Kong residents under Article 27,<sup>143</sup> judges in Hong Kong should also be protected. Also, the Basic Law does not prescribe any procedures as to charge or complaint against a judge, which is required under Principle 17 of the Basic Principles. However, such procedures have been supplemented under local legislations.<sup>144</sup> As such, it is to fair to argue that the requirements of 'Personal Independence' under the Basic Principles (Principle 8, 10, 11, 12, 16 and 17) has been by-and-large conformed.

When it comes to 'Institutional Independence', it is noticed that at the outset of the Basic Law, there is a provision (Article 2) of the Basic Law that spells out judicial independence, thereby conforming to Principle 1 of the Basic Principles. Notably, the Basic Law actually has repetitively emphasized the incorporation of judicial independence for two more times, as shown in the above discussion on Article 19 and Article 85 of the Basic Law. Moreover, Article 85 also reflects the idea stipulated in Principle 2 of the Basic Principles because it stipulates that the courts of the HKSAR shall exercise judicial power independently and 'free from any interference'. In fact, the Basic Law has also nicely complied with Principle 3, which requires the court to have exclusive jurisdictions on issues that are of judicial nature.<sup>145</sup> Similarly, the Basic Law also has provisions on the requirements of 'non-interference'<sup>146</sup> and 'fair judicial proceedings'<sup>147</sup>, thereby fulfilling Principles 4 and 6. Hence, all the requirements under the umbrella of 'Institutional Independence' have also been satisfied by the Basic Law.

<sup>143</sup> Article 27 of the Basic Law states that 'Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.'

<sup>144</sup> For example, the High Court Ordinance (Cap. 4) has provisions on handling appeals.

<sup>145</sup> Article 84 stipulates that 'the courts of the [HKSAR] shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions'. Also, Article 80 of the Basic Law states that 'the courts of the [HKSAR] at all levels shall be the judiciary of the Region, exercising the judicial power of the Region'.

<sup>146</sup> For instance, Article 85 requires that 'the courts of the [HKSAR] shall exercise judicial power independently, free from any interference'.

<sup>147</sup> Article 87 of the Basic Law prescribes that 'in criminal or civil proceedings in the [HKSAR], the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained'.



Last but not least, despite the Basic Law does not have any specific provisions that deals with ‘Financial Independence’, the well-established Budgetary Arrangements have proven to be effective in ensuring the proper functioning of the judiciary.

To sum up, the most important elements of judicial independence have been duly safeguarded by the design of the Basic Law. However, as Johannes Chan highlighted, another source of controversy regarding HKSAR’s judicial independence lies on the question of ‘who should decide when such a final, authoritative interpretation should be given?’<sup>148</sup> The most important behind such controversy, I believe, is attributed to the fact that the ‘creation of the Basic Law has both civil law and common law bearings’.<sup>149</sup> As such, when it comes to judicial interpretation, one should not neglect the implications behind the different legal traditions in common law and Chinese law.

In the following, I aim to shed some lights to the academic discussion by highlighting some of the significant differences between the common law and Chinese law approach of judicial interpretation. More importantly, I will critically analyze whether the Basic Law has corresponding mechanisms that duly address such differences.

## JUDICIAL INTERPRETATION: ANOTHER SOURCE OF DEBATE

### *The colonial history*

In the late eighteenth century, the major Western powers wanted commercial access to China.<sup>150</sup> At that time, China was in its late stage of the Qing Dynasty. Commonly known as one of the most corrupted and incompetent government in the Chinese history, the Qing Government was compelled by the brutal military coercion to change many of its domestic policies. Among which, one of the most notable policies was the loosening of the customs restrictions, causing a large inflow of opium by the British businessmen.<sup>151</sup>

In view of the prominent hazards brought by the opium trade,<sup>152</sup> the Qing Government decided to impede the flow of opium in the country. However, opium was by far the most lucrative export at the time.<sup>153</sup> Disallowing the exports of opium definitely affected the economic well-being of the greedy British businessmen (and obviously their government). Consequently, the Great Britain launched the First Opium War against China in 1839. Despite the rulers and citizens of China had always believed in the superiority of Chinese civilization,<sup>154</sup> the reality was that its troops kept losing ground when fighting against British’s advanced technologies as a result of the Industrial Revolution.<sup>155</sup> Being defeated in August 1842, the Qing Government had no choice but to sign the ‘Treaty

<sup>148</sup> Johannes Chan, ‘The Judiciary’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 60.

<sup>149</sup> Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 55.

<sup>150</sup> In the late eighteenth century, the Western powers (led by countries like the Britain, Russia, Germany, France and the United States) began their interest in China with the advent of the tea, silk, and opium trades. See: Jennifer Wells, ‘Clashing Kingdoms, Hidden Agendas: The Battle to Extradite Kwok-A-Sing and British Legal Imperialism in Nineteenth-Century China’ (2012) 7(1) *East Asia Law Review* 161, 167.

<sup>151</sup> Stephen Krasner, ‘Organized hypocrisy in nineteenth-century East Asia’ (2001) 1 *International Relations of the Asia-Pacific* 173, 180.

<sup>152</sup> As Johannes Chan explained: “For China, apart from national health concern, there was also grave concern that the opium trade had resulted in huge outflow of silver”. Johannes Chan, ‘From Colony to Special Administrative Region’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 6.

<sup>153</sup> Stephen Krasner, ‘Organized hypocrisy in nineteenth-century East Asia’ (2001) 1 *International Relations of the Asia-Pacific* 173, 180.

<sup>154</sup> Lei Chen, ‘The Historical Development of the Civil Law Tradition in China: A Private Law Perspective’ (2010) 78(1) *Legal History Review* 159, 161.

<sup>155</sup> Johannes Chan, ‘From Colony to Special Administrative Region’ in Johannes Chan and C. L. Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2011) 5.

of Nanjing', ceding the Hong Kong Island to Britain.<sup>156</sup> In 1860, Kowloon Peninsula was further ceded to Britain under the 'Convention of Beijing'. In 1898, the avaricious British Government again forced the Qing Government to sign the 'Convention for the Extension of Hong Kong', compellingly 'leasing' the New Territories for a period of 99 years up to 30 June 1997. These three conventions, commonly known as 'The Three Unequal Treaties', gave the British Government full control over their long coveted Hong Kong.<sup>157</sup>

#### *Engineering the common law system into Hong Kong's DNA*

In fact, at the time when Hong Kong was ceded to Great Britain under the *Treaty of Nanking*, it was a small, traditional Chinese society with around 90,000 of local population.<sup>158</sup> However, just as Berry Hsu described, 'the colonization of Hong Kong by the British marked the beginning of a fundamental transformation in the structure of the indigenous Chinese society'.<sup>159</sup>

The first important step of implementing such a transformation was done in 1843, where the Letters Patent was issued as the first formal source of legal power, endowing Hong Kong with judicial, legislative and executive institutions.<sup>160</sup> At that point, the British common law system was incorporated into Hong Kong's DNA. The method employed by its colonizer, as I would describe, was to disconnect Hong Kong with its Chinese root. One telling example would be the fact that the legal training of virtually all legal scholars, lawyers and judges in Hong Kong has long been based on the common law legal system.<sup>161</sup> Furthermore, while the language of the common law being used in Hong Kong 'is English – and not just English, but the English of English-educated social elites', the use of Chinese has long been discouraged, if not disallowed.<sup>162</sup> After more than a hundred years of implementation, it must be admitted that common law has taken over the traditional Chinese legal cultures and became 'the dominant legal culture of Hong Kong'.<sup>163</sup>

#### *Retaining the common law system after the handover*

Since 1 July 1997, the sovereignty of Hong Kong has returned to the PRC, a civil law country led by the Communist Party of China (hereinafter 'CPC').<sup>164</sup> Yet, because of the deep-rooted culture of common law inherited from the colonial times, the drafters of Basic Law felt compelled to preserve the common law system.<sup>165</sup> However, I strongly

<sup>156</sup> Berry F. C. Hsu, *The Common law system in Chinese context: Hong Kong in transition* (M. E. Sharpe, Inc. 1992).

<sup>157</sup> For details, see: Maria Wai-chu Tam (ed), *The Basic Law and Hong Kong – The 15th Anniversary of Reunification with the Motherland* (Working Group on Overseas Community of the Basic Law Promotion Steering Committee 2012).

<sup>158</sup> Berry F. C. Hsu, *The Common law system in Chinese context: Hong Kong in transition* (M. E. Sharpe, Inc. 1992) 7.

<sup>159</sup> *Ibid.*

<sup>160</sup> Priscilla Mei-fun Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 6.

<sup>161</sup> Berry F. C. Hsu, *The Common law system in Chinese context: Hong Kong in transition* (M. E. Sharpe, Inc. 1992) 95.

<sup>162</sup> As a result, Michael Dowdle argued that the Chinese language is "professionally meaningless in the legal profession" because the number of Chinese-speaking judges is so small. To add on that, I also observe that even today, 18 years after the handover, all of the three law schools still use English as the only language of teaching. For details, see: Michael Dowdle, 'Constitutionalism in the Shadow of the Common Law: The Dysfunctional Interpretive Politics of Article 8 of the Hong Kong Basic Law' in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 62–63.

<sup>163</sup> Berry F. C. Hsu, *The Common law system in Chinese context: Hong Kong in transition* (M. E. Sharpe, Inc. 1992) 4.

<sup>164</sup> Liu Nanping, *Judicial Interpretation in China* (Sweet & Maxwell 1997) 49.

<sup>165</sup> Article 8 of the Basic Law stipulates that "the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region". Being a constitutional document for the HKSAR, the Basic Law was adopted on April 4, 1990 by the Seventh National People's Congress (hereinafter "NPC") of the PRC, and was put into effect on July 1, 1997.

For a detailed discussion on how the Basic Law was drafted, see: Xiao Wei-yun, *One country, Two systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press 2001).

agree with Albert Chen that while the Basic Law is ultimately a piece of ‘Chinese national law’ enacted by the National Peoples’ Congress of China (hereinafter ‘NPC’),<sup>166</sup> ‘it serves as the foundation of the common law in the post-1997 legal system of Hong Kong and is enforced by the courts of Hong Kong’s common law based legal system’.<sup>167</sup> As such, there is no wonder why some scholars have described the Basic law as a ‘hybrid of common law and Chinese law’,<sup>168</sup> or even as ‘the two-faced Roman god Janus . . . [having] a duality in that it is law both in the jurisdiction that establishes it (China) and in the jurisdiction it establishes (Hong Kong)’.<sup>169</sup>

Clearly, the Basic Law was designed connect the two systems (i.e. the common law system and the Chinese Communist legal system), as well as to define their separation.<sup>170</sup> Unfortunately, just as Sir Anthony Mason highlighted, there are drastic differences in terms of their respective jurisprudential logics behind the common law and Chinese law when it comes to statutory and constitutional interpretation.<sup>171</sup> Hence, I believe that the Basic Law drafters have failed to solve the problem of “isomorphic mimicry”.

In the following, I will explore the jurisprudential factors behind the approach of interpreting law adopted by the *Mainland authorities and scholars*.

#### *The influence of Marxism-Leninism jurisprudence in the Chinese law approach*

According to Christine Sypnowich, law is an instrument of class rule under Marxism-Leninism ideologies.<sup>172</sup> Accordingly, the capitalists, being the dominant class in a ‘bourgeois’ society, use law to avoid any interference with their ownership of the means of production.<sup>173</sup> Force, on the other, is used by the state to ensure compliance.<sup>174</sup> Another scholar, Gray Dorsey, argued that under Marxism-Leninism, law is made up of obligations and coercions laid down by the dominant class’s will in order to serve its interests.<sup>175</sup> Similarly, Jianfu Chen described law as ‘a tool to remould the society and to suppress class enemies, to enforce party policy rather than to protect individual rights’.<sup>176</sup> Undoubtedly, this ‘Law and Class Rule’ thesis once had a very influential role in the history of the Soviet Union and the early days of the PRC. However, due to the changes in political and social realities, many commentators believe that the importance of such thesis has diminished.<sup>177</sup>

<sup>166</sup> In *Lau Kong Yung & Ors v Director of Immigration* (1999) 2 HKCFAR 4, Li CJ acknowledged that the Basic Law is a national law of the PRC as it was enacted by the central authorities (i.e. the NPC). Similar views have been echoed by many leading Chinese law scholars. For example, see: Zhenmin Wang, *Central and SAR Relationship: An Analysis of the Structure of Rule of Law* (Tsinghua University Press 2002) 277.

<sup>167</sup> Albert H. Y. Chen, ‘The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives’ (2000) 30(3) Hong Kong Law Journal 380, 381.

<sup>168</sup> See: Priscilla Mei-fun Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006).

<sup>169</sup> P. Y. Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997* (Hong Kong University Press 2014) 3.

<sup>170</sup> Hualing Fu, Lison Harris and Simon Young, ‘Introduction’ in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 1.

<sup>171</sup> Sir Anthony Mason, ‘The common law’ in Simon N. M. Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 329.

<sup>172</sup> Christine Sypnowich, *The Concept of Socialist Law* (Clarendon Press 1990) 16.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Ibid.*

<sup>175</sup> Gray Dorsey, ‘Post-Stalin Soviet Jurisprudence’ (1966) 1(3) *International Lawyer* 378, 380.

<sup>176</sup> Jianfu Chen, ‘The Transformation of Chinese Law -- From Formal to Substantial’ (2007) 37 *Hong Kong Law Journal* 689, 716.

<sup>177</sup> Indeed, in the post-Mao Zedong era, China has shifted its focus on economic development and reform (i.e. to develop the so-called “socialist market economy” through “Reform and Opening-up). Jianfu Chen, ‘The Transformation of Chinese Law -- From Formal to Substantial’ (2007) 37 *Hong Kong Law Journal* 689, 722. See also: Christine Sypnowich, *The Concept of Socialist Law* (Clarendon Press 1990); and Ignazio Castelucci, ‘Rule of Law with Chinese Characteristics’ (2007) 13 *Annual Survey of International & Comparative Law* 35.

While the law's role in class-struggles appears to be irrelevant to the 'isomorphic mimicry' that I have identified at the outset, the Marxism-Leninism jurisprudence is not limited to that facet of law. As Peter Halstead highlighted, Marxism-Leninism also advocates 'the restriction or control of judicial power, so that the furtherance of state objectives would not be impeded'.<sup>178</sup> These 'state objectives', as I believe, refer to the political considerations that play a 'major role in case-by-case judicial or administrative interpretation and enforcement'.<sup>179</sup> Ferdinand Feldbrugge, a leading Russian scholar, also made a similar remark:<sup>180</sup>

"[It is] impossible to understand Soviet law, or communist law generally, without taking into account its political dimension, or to be more explicit, without recognizing that law under those circumstances was almost totally dependent on political determinants."

In fact, many scholars believe that this ideology, commonly known as 'the socialist legality',<sup>181</sup> also represents the present-day Chinese jurisprudence. For instance, Wei Li noted that the legal system has been regarded 'solely as a tool of the Party for securing its tight control of China'.<sup>182</sup> Youyu Zhang, the former vice-president of the Chinese Academy of Social Science and a prominent official jurist, also argued that '[l]aw has to serve politics. What should be included in a constitution depends on whether or not it is advantageous to the present political objectives'.<sup>183</sup>

When it comes to the interpretation of law, I strongly believe that the 'socialist legality' does play a major role. Notably, China adopts the legislative interpretation approach whereby laws in China are interpreted by the legislature.<sup>184</sup> In turn, the PRC courts merely enforce the law.<sup>185</sup> As to the significance of this arrangement, I concur with Sophia Woodman that it reflects 'the Stalinist conception of the role of law in socialist society' by ensuring that the law is 'applied correctly, in the interests of socialism as perceived by the rulers of the state'.<sup>186</sup> Woodman's view has also been supported by Yash Ghai:

"The authentic lineage of the [PRC] rule of interpretation is not the civil law but the Leninist tradition of law and state power. The civil-law rule of interpretation by the legislature was based on a strict application of the separation of powers . . . However, the Marxist rule is based on the rejection of separation of powers and the unification of all state power in the legislature."

Nonetheless, some scholars tried to justify the legislative interpretation approach without referring to the influence of Marxism-Leninism jurisprudence. For example, Zhenmin Wang argued that because the legislature must understand the original legislative

<sup>178</sup> Peter Halstead, *Jurisprudence* (Hodder Education 2005) 82.

<sup>179</sup> Ignazio Castelucci, 'Rule of Law with Chinese Characteristics' (2007) 13 Annual Survey of International & Comparative Law 35, 46.

<sup>180</sup> Ferdinand Feldbrugge, 'The Rule of Law in Russia in a European Context' in Ferdinand Feldbrugge (ed), *Russia, Europe, and the Rule of Law* (Brill 2007) 203.

<sup>181</sup> Ignazio Castelucci, 'Rule of Law with Chinese Characteristics' (2007) 13 Annual Survey of International & Comparative Law 35, 37.

<sup>182</sup> Wei Li, 'Judicial Interpretation in China' (1997) 5 Willamette Journal of International Law and Dispute Resolution 87, 106.

<sup>183</sup> *Ibid.*

<sup>184</sup> Priscilla Mei-fun Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 53.

<sup>185</sup> Under Article 67(1) of the PRC Constitution, the Standing Committee of the NPC exercises the functions and powers '[t]o interpret the Constitution and supervise its enforcement'. Moreover, Article 67(4) also grants the Standing Committee the power and function 'to interpret laws'. See also: Guiguo Wang and Priscilla Mei-fun Leung, 'One Country, Two Systems: Theory into Practice' (1998) 7(2) Pacific Rim Law & Policy Journal 279, 301.

<sup>186</sup> Sophia Woodman, 'Legislative Interpretation by China's NPCSC' in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong's Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 236.

intention the most, it is reasonable for the legislature to exercise its supplementary power of the legislative power to point out the true meaning of the provision.<sup>187</sup> Laifan Lin and Minkang Gu also echoed with this proposition by arguing that it is natural for the legislature ‘to clarify its own legislative intent’.<sup>188</sup> Although these arguments are equally valid, I think that the express ‘promise’ of commitment to Marxism-Leninism in the Constitution implies that the NPC is bound to take political considerations into account when exercising its interpretation power. In the next section, I will present the jurisprudential logic behind the common law’s approach to interpretation.

*The influence of the “rule of law” notion in the common law approach*

According to Yash Ghai, the guiding principle of common law’s approach of interpretation is ‘to give meaning to the text of the law, using the plain meaning of the words’.<sup>189</sup> As such, the courts’ role is “to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language”.<sup>190</sup> The importance of this, as Sir Anthony Mason contended, is to support and reinforce ‘the rule of law with its emphasis on the primacy of the text of the statute’.<sup>191</sup> The key phrase here, as I noticed, is ‘the rule of law’.

Despite I regard colonization as a bad thing in general, I admit that I am bound to agree with Albert Chen that ‘the transplant of English common law to, and the development of a set of legal institutions that supported the rule of law in, Hong Kong is one of the major legacies of British colonial rule in Hong Kong’.<sup>192</sup> The term ‘rule of law’ was coined by the great British jurist and constitutional theorist A. V. Dicey in his book titled *An Introduction to the Study of the Law of the Constitution* published in 1885.<sup>193</sup> However, Lord Bingham noted that Dicey was actually not the person who invented the underlying idea, as such idea ‘can be traced back to Aristotle’.<sup>194</sup>

Lord Bingham acknowledged that differing and broadened concepts of the ‘rule of law’ have been developed over the years.<sup>195</sup> Obviously, it is beyond the scope of this paper to fully examine all the facets of the ‘rule of law’. For the purpose of the present discussion, (i.e. to understand the above-mentioned ‘isomorphic mimicry’), I believe that the following two remarks made by Dicey very relevant. Firstly, Dicey argued that ‘no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary

<sup>187</sup> Zhenmin Wang, *Central and SAR Relationship: An Analysis of the Structure of Rule of Law* (Tsinghua University Press 2002) 155, 277. See also: Zhenmin Wang, ‘From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People’s Congress – An Evaluation of the Legal Interpretive System after the Handover’ (2007) 37 Hong Kong Law Journal 605.

<sup>188</sup> Laifan Lin and Minkang Gu, ‘Interpretation of the Basic Law: Viewpoints from a Pure Jurisprudence’ (2001–2002) 5 Journal of Chinese and Comparative Law 73.

<sup>189</sup> Yash Ghai, ‘Autonomy and the Court of Final Appeal’ in Simon Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 62.

<sup>190</sup> Ramsden and Jones referred to *Director of Immigration v Chong Fung Yuen* (2001) HKCFAR 211 and argued “the interpretation of the Basic Law should be taken ‘purposively’, keeping in mind at all times the role of the Basic Law in supporting the overriding ‘One Country, Two Systems’ approach that granted a high degree of autonomy to the [HKSAR]”. See: Michael Ramsden and Oliver Jones, *Hong Kong Basic Law: Annotations and Commentary* (Sweet & Maxwell 2010) 214.

<sup>191</sup> Sir Anthony Mason, ‘The common law’ in Simon N. M. Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 329.

<sup>192</sup> Albert H. Y. Chen, ‘Rule of Law under One Country, Two Systems: The Case of Hong Kong 1997–2010’ (2011) 6 National Taiwan University Law Review 269, 271.

<sup>193</sup> Michael Dowdle, ‘Constitutionalism in the Shadow of the Common Law: The Dysfunctional Interpretive Politics of Article 8 of the Hong Kong Basic Law’ in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 55.

<sup>194</sup> Tom Bingham, *The Rule of Law* (Penguin Books 2010) 10.

<sup>195</sup> *Ibid.*

courts of the land'.<sup>196</sup> Also, Dicey stressed that while no one is above the law, all are subject to the same law administered in the same courts.<sup>197</sup>

As far as I understand, the common law approach of legal interpretation has reflected these two spirits of the 'rule of law'. Essentially, the fundamental rules of judicial interpretation are designed to enhance the predictability of the outcome of legal disputes.<sup>198</sup> In order to identify the 'ordinary legal meaning', court findings in common law are based on 'written legislation, objective standards, and actual materials rather than the memories or opinions of certain legislators or draftsmen',<sup>199</sup> rather than any governmental or political orders. I believe that the notion of 'all are subject to the same law administered in the same courts' is equally important because under the common law, the court is prohibited to interpret the law arbitrarily so as to put any people in an advantage position.

### *'Isomorphic Mimicry' revealed*

As discussed above, the method of interpretation inherited from the colonial times requires the Hong Kong courts to give meaning to the 'ordinary meaning' of the law without taking other factors, especially governmental and political ones, into account.<sup>200</sup> This method can be contrasted with the Chinese Marxist-Leninist method in the sense that achieving political goals is of the utmost importance in the latter's method.<sup>201</sup> In order to present the 'isomorphic mimicry' resulted from this difference, I would like to use the case of *Ng Ka-ling and others v Director of Immigration* as an example.<sup>202</sup>

The key issue of this case was the question of who had the right of abode in accordance with the Basic Law and whether they could reside in Hong Kong. The applicant relied on Article 24(2) of the Basic Law, which stipulates that Chinese nationals 'born . . . of' a permanent resident had right of abode.<sup>203</sup> Subsequently, the Court of Final Appeal of Hong Kong relied on the common law method of interpretation and held that the right of a child born to parents with the right of abode in Hong Kong was not subject to PRC law on entry into Hong Kong. The court further held that a child had the right of abode in Hong Kong even if he or she was born before the parent obtained the right of abode.

Yet, the Hong Kong (and the PRC) government disliked the ruling. It was feared that more than a million of children in the Mainland would seek to enter and settle in Hong Kong, thereby creating acute social problems.<sup>204</sup> In order to avoid this from happening, the government requested the State Council to interpret the Basic Law. Such interpretation, as Yash Ghai noted, 'amounted to an appeal to the [Standing Committee of the NPC] against the decision of the CFA'.<sup>205</sup> In turn, such interpretation took the government's objective into account and held the otherwise.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

<sup>198</sup> Yash Ghai, 'The Imperatives of Autonomy: Contradictions of the Basic Law' in Johannes Chan and Lison Harris (eds), *Hong Kong's Constitutional Debates* (Hong Kong Law Journal Limited 2005) 40.

<sup>199</sup> Lin Feng, 'The Constitutional Crisis in Hong Kong – Is It Over' (2000) 9(2) *Pacific Rim Law & Policy Journal* 281, 312.

<sup>200</sup> *Ibid.*

<sup>201</sup> Wei Li, 'Judicial Interpretation in China' (1997) 5 *Willamette Journal of International Law and Dispute Resolution* 87, 106.

<sup>202</sup> (1999) 2 HKCFAR 4.

<sup>203</sup> However, a locally enacted legislation restricted the right of abode of a child in the Mainland China born to a parent who had the right of abode in Hong Kong by requiring that child to be subjected to the Mainland procedures and approval for entry into Hong Kong. Moreover, the statute provided that in order for a child to obtain the right of abode by virtue his or her parent's right of abode, he or she had to be born during the period when the parent had a right of abode. See: *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

Obviously, the approach to interpretation adopted by the Chinese authorities is something very different from the common law approach because it was not based on the ‘ordinary meaning’ of the law. Instead, it took the government’s view into account. In view of this approach, many common law scholars criticized it as violating the ‘rule of law’ notion inherited from the colonial times.

Apart from the abovementioned court judgment, the drafting history of the Basic Law actually shows that there were heated debates on the issue of interpretation of the Basic Law as well. As Weiyun Xiao put:<sup>206</sup>

“It can be seen that there are major differences in the power of legal interpretation between the systems on the Mainland and in Hong Kong. Owing to such differences and the worries of many Hong Kong people and since the power of adjudication belongs to the HKSAR, there were arguments during the drafting of Article 158 of the interpretation of the Basic Law.”

Under this background, many leading scholars agree that Article 158 of the Basic Law reflects a compromised outcome of the Basic Law drafters. For instance, Wang Guiguo and Priscilla Leung argued that this provision ‘represents a compromise of the drafters of the Basic Law’ because the NPCSC shall authorize the courts of the HKSAR ‘to interpret on their own, in adjudicating cases, the provisions of the Region’.<sup>207</sup> Jill Cottrell and Yash Ghai also agreed with this proposition.<sup>208</sup>

“This article is a compromise between a combination of two different constitutional traditions. In Hong Kong, the responsibility for constitutional interpretation would lie with the courts. In China, it lies with the NPCSC. The original draft of the Basic Law had provided for only the NPCSC to interpret it, while key Hong Kong members of the Basic Law Drafting Committee had wanted the Hong Kong courts alone to have this power, as the only basis for secure legal guarantees of autonomy.”

In the following, I will critically examine each of the sub-sections of Article 158 in detail.

### *Article 158(1)*

Despite it is generally agreed that Article 158 represents a compromised position amongst the Basic Law drafters, Wu Jianfan, a learned Mainland Basic Law drafter, made a strong remark that the power of interpretation of legislation (including the Basic Law) is vested in the NPCSC.<sup>209</sup> The reason behind this, as Zhenmin Wang explained, is that because the Basic Law is a piece of national law enacted by the central authorities, it would be natural for Beijing to have the final say on its final interpretation.<sup>210</sup> Weiyun Xiao echoed with this view by arguing that because the Basic Law ‘is a fundamental law enacted by the NPC and is a national law’, it ‘should of course be interpreted by the NPCSC’.<sup>211</sup> Furthermore, Xiao stressed that such a constitutional arrangement

<sup>206</sup> Xiao Wei-yun, *One country, Two systems: An Account of the Drafting of the Hong Kong Basic Law* (Peking University Press 2001) 172.

<sup>207</sup> Wang Guiguo and Priscilla Leung, ‘One Country, Two Systems: Theory into Practice’ (1998) 7(2) *Pacific Rim Law & Policy Journal* 279, 302.

<sup>208</sup> Jill Cottrell and Yash Ghai, ‘The Judiciary in Hong Kong’ in Peter Russell and David O’Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (The University Press of Virginia 2001) 217.

<sup>209</sup> Weiyun Xiao and others, Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgement of the Court of Final Appeal in Johannes Chan, Hualing Fu and Yash Ghai (eds), *Hong Kong’s Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000) 57.

<sup>210</sup> Wang Zhenmin, *Central and SAR Relationship: An Analysis of the Structure of Rule of Law* (Tsinghua University Press 2002) 277.

<sup>211</sup> See: Weiyun Xiao, ‘A Brief Discussion of the judgments of the Court of Final Appeal and the NPCSC Interpretation’ (2001–2002) 5 *Journal of Chinese and Comparative Law* 93.

‘reflects the unity and sovereignty of the state . . . [and] the principle of “One Country, Two Systems”’.<sup>212</sup>

In fact, the Hong Kong courts agreed with this proposition. In *Lau Kong Yung & Ors v Director of Immigration*,<sup>213</sup> Li CJ also acknowledged that the NPCSC is vested with the function and power to interpret laws under Article 67(4) of the PRC Constitution. More importantly, Li CJ acknowledged that the Basic Law, being a national law, is subject to this power.

However, Sir Anthony Mason NPJ also admitted that this ‘cultural shock’ is ‘inevitable’ especially when the text and structure of Article 158 is ‘viewed in the light of the context of the Basic Law as the constitution for the HKSAR embodied in a national law enacted by the PRC’.<sup>214</sup>

In the Hong Kong academia, there is also a general consensus that the interpretation power of the Basic Law is vested in the NPCSC. For example, Priscilla Leung noted that the central authority holds the ‘stick of final interpretation of the Basic Law’.<sup>215</sup> Leung also noted that the definite wordings of Article 158(1) is a reflection of the mentality that the final power of interpretation of the Basic Law cannot be compromised.<sup>216</sup> This mentality, as Leung argued, has been insisted by the Central Government ‘right from the beginning’.<sup>217</sup>

On the other hand, Danny Gittings also noted that ‘it is now generally accepted that Article 158(1) also gives the Standing Committee a free-standing power to interpret any provision in the Hong Kong Basic Law – including those on issues within Hong Kong’s autonomy – without waiting a referral from the Court of Final Appeal’.<sup>218</sup> Similarly, Benny Tai commented that ‘the courts of the HKSAR can only exercise their autonomous powers under the shadow of an all-power sovereign’.<sup>219</sup>

Nonetheless, Gittings argued the knowledge that NPCSC has the power to issue an interpretation would hang ‘like a shadow over the Hong Kong court’.<sup>220</sup> In other words, he worried that the CFA may be constrained from ruling in a way with which the NPCSC disagrees.<sup>221</sup>

### *Article 158(2)*

Despite the strong and definite wordings of Article 158(1) aims to vest the power of interpretation to the NPCSC, Article 158(2) provides that the NPCSC has delegated this power to the Hong Kong courts to decide cases within the limits of autonomy.

One particularly noteworthy point, as Bing Ling highlighted, is that ‘under Article 158(2), the relationship between the NPCSC courts in regard to the power of interpretation is that of *shouquan*’.<sup>222</sup> Ling further stressed that the authorization of the Hong Kong courts to interpret the Basic Law under this provision ‘differs from that general authorization by the NPC in that it is a specific authorization by the NPCSC, which

<sup>212</sup> *Ibid.*

<sup>213</sup> (1999) 2 HKCFAR 4.

<sup>214</sup> *Ibid.*

<sup>215</sup> Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 36.

<sup>216</sup> *Ibid.*, 47.

<sup>217</sup> *Ibid.*

<sup>218</sup> Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 84.

<sup>219</sup> Benny Tai, ‘The Judiciary’ in Wai-man Lam, Percy Luen-tim Lui and Wilson Wong (eds.), *Contemporary Hong Kong Government and Politics* (Hong Kong University Press, 2nd edn, 2012) 81.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> Bing Ling explained that the word ‘*shouquan*’ (‘授權’) refers to either ‘authorization’ or ‘delegation of powers’. See: Bing Ling, ‘Subject Matter Limitation on the NPCSC’s Power to Interpret the Basic Law’ (2007) 37(2) Hong Kong Law Journal 619, 633.



thus put the SAR courts in a special legal relationship with the NPCSC'.<sup>223</sup> Since 'in Chinese public law whereby an entity that delegates its public power to another is at least presumed to have been precluded from having or exercising the delegated power', Ling submitted an interesting proposition that 'the NPCSC *must* be held to be without the power to interpret the provisions within the limits of the SAR autonomy' (emphasis added).<sup>224</sup> If this proposition is correct, it can actually be viewed as a very reassuring message that the autonomy of Hong Kong is guaranteed. More importantly, it reflects the design of 'One Country, Two Systems' being nicely articulated.

Having said that, Priscilla Leung observed that the meaning of the phrase 'the limits of autonomy' has not been expressly spelt out in the Basic Law.<sup>225</sup> To this end, Leung argued that there is 'a lot of room for the exercise of discretion or power of interpretation' with regard to this phrase.<sup>226</sup> Hence, it may be useful to read the provision together with Article 158(3), which will be duly discussed below.

### *Article 158(3)*

Article 158(3) provides that in situations involving the responsibilities of the Central People's Government<sup>227</sup> or Central-local relationships, then the CFA, before making its decision, shall seek an interpretation from the NPCSC.

Here, the use of word 'shall' in Article 158(3) has an important implication.<sup>228</sup> Priscilla Leung argued that the word 'shall' implies 'an instruction, or an obligation to perform by law'.<sup>229</sup> Sharing the same view with Leung, Shao Tianren explained that the power of interpretation is not an inherent power of the CFA, but 'delegated to the CFA by the NPCSC'.<sup>230</sup> As such, Shao argued that the scope of interpretation was subject to restrictions: 'whenever a provision of the Basic Law touched upon affairs which were the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region, the CFA had to seek an interpretation from the [NPCSC] in accordance with law, and the interpretation of the NPCSC was binding'.<sup>231</sup>

### *Some 'isomorphic mimicry' remained*

Notwithstanding that the above discussion demonstrates that the design of the mechanism of interpretation under Article 158 has acknowledged the fundamental difficulty of reconciling the interpretive systems in common law and Chinese civil law, certain degree (despite much lower than that in the original draft of the Basic Law) of 'cultural shocks' can still be caused.

In *Lau Kong Yung & Ors v Director of Immigration*,<sup>232</sup> Sir Anthony Mason NPJ made the following remark:

*[T]he expression in adjudicating cases [in Article 158 of the Basic Law] makes it clear that the power of interpretation enjoyed by the courts of the Region is limited in that way and differs from the general and free-standing power of interpretation enjoyed by the Standing*

<sup>223</sup> *Ibid*, 634.

<sup>224</sup> *Ibid*, 634–635.

<sup>225</sup> Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 48.

<sup>226</sup> For a discussion on what is 'outside the limits of autonomy', see: *Ibid*.

<sup>227</sup> Such as issues related to foreign policy and national defense issues.

<sup>228</sup> In fact, many other provisions in the Basic Law also used the word 'shall'. For example, Article 23 of the Basic Law also uses the word 'shall': '[t]he [HKSAR] shall enact laws on its own to prohibit any act of treason . . .'

<sup>229</sup> Priscilla Leung, *The Hong Kong Basic Law: Hybrid of Common law and Chinese law* (LexisNexis 2006) 55.

<sup>230</sup> Weiyun Xiao and others, *Why the Court of Final Appeal Was Wrong: Comments of the Mainland Scholars on the Judgement of the Court of Final Appeal in Johannes Chan, Hualing Fu and Yash Ghai* (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press 2000) 57.

<sup>231</sup> *Ibid*.

<sup>232</sup> [1999] 3 HKLRD 778.

*Committee under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law. This conclusion may seem strange to a common lawyer . . .*<sup>233</sup>

In the meantime, the interpretation system under Article 158 of the Basic Law has also been unfamiliar to China's civil law tradition as well.<sup>234</sup> According to Cheng Jie, Mr. Qiao Xiaoyang, a high-profile NPCSC spokesperson, once remarked that the NPCSC will exercise its power of interpretation 'cautiously'.<sup>235</sup> Cheng believed that this remark has two folds of implications: 'one the one hand, when the NPCSC encounters direct conflict [with the Hong Kong courts], it would adopt a cautious attitude; on the other hand, the NPCSC has made it clear that it has the power of interpretation'.<sup>236</sup>

In light of Mr. Qiao's remark, I am of the view that the Central Authority has acknowledged the controversial nature of interpreting the Basic Law. More importantly, the mechanism of interpretation is still developing. In order to grasp a 'better' approach and balance the concerns from both Hong Kong and Beijing, it would be pragmatic to adopt such a cautious attitude.

### *Applauses and criticisms on Article 158*

Regarding this compromised position under Article 158 of the Basic Law, there are both applauses and criticisms.

Wang Zhenmin praised Article 158 as a 'brilliantly designed special system of interpretation of laws that fused the system of Mainland China of the legislature interpreting laws with the system of Hong Kong of the courts interpreting laws and satisfied the demands of both "one country" and "two systems" at the same time'.<sup>237</sup>

Besides, while Wang Guiguo and Priscilla Leung are also in favor of this provision, they also pointed out that it can be a 'challenge' to the 'One Country, Two Systems' policy. The two learned experts noted:<sup>238</sup>

"On the one hand, the provision observes the constitutional requirement that only the [NPCSC] has the power to interpret the laws of China. On the other hand, it requires the [NPCSC] to delegate, in so far as the Basic Law is concerned, the interpretation powers to the courts of Hong Kong in adjudicating cases. Thus, many of the existing interpretive powers of the Hong Kong are preserved."

In contrast, regarding the phrase 'affairs which are the responsibility of the Central People's Government, or [which] concern . . . the relationship between the Central Authorities and the Region', Simon Marsden criticized there is a lack of clarity in the meaning of such expression as it has not been clearly defined under the Basic Law.<sup>239</sup>

<sup>233</sup> *Ibid.*, 820–821.

<sup>234</sup> Wang Guiguo and Priscilla Leung, 'One Country, Two Systems: Theory into Practice' (1998) 7(2) *Pacific Rim Law & Policy Journal* 279, 306.

<sup>235</sup> Cheng Jie, 'On Hong Kong's Judicial Power in a Dual Track Politics' (2006) 5 *China Legal Science* 47, 49. (in Chinese) 程潔, '論雙軌政治下的香港司法權 憲政維度下的再思考' (2006) 5《中國法學》47, 49. The quotes here are translated from the original Chinese text, which states: '全國人大常委會通過發言人明確表示, 將謹慎運用解釋權。此項資訊一方面清晰地傳達出全國人大常委會對正面衝突的慎重態度, 另一方面則重申了對自己解釋權的保留。換言之, 全國人大常委會以非剛性的承諾表示了對香港司法機構的尊重。' ("The spokesperson of the NPCSC made it clear that the power of interpretation will be exercised with care. Such message, on the one hand, clarifies that when the NPCSC encounters direct conflict [with the Hong Kong courts], it would adopt a cautious attitude; on the other hand, the NPCSC has made it clear that it has the power of interpretation. In other words, NPCSC promised to respect the Judiciary of Hong Kong.")

<sup>236</sup> *Ibid.*

<sup>237</sup> Wang Zhenmin, *Central and SAR Relationship: An Analysis of the Structure of Rule of Law* (Tsinghua University Press 2002) 273.

<sup>238</sup> Wang Guiguo and Priscilla Leung, 'One Country, Two Systems: Theory into Practice' (1998) 7(2) *Pacific Rim Law & Policy Journal* 279, 302.

<sup>239</sup> Simon Marsden, 'Constitutional Interpretation in Hong Kong: Do Common Law Approaches Apply When the National People's Congress Standing Committee Interprets the Basic Law' (2006) 2006 *Lawasia Journal* 99,101.

Besides, in light of the Stalinist roots of the legislative interpretation approach adopted by the NPCSC and the reality that Hong Kong is a part of the PRC, Sophia Woodman worried that ‘the NPCSC will continue to use interpretation to resolve political controversies in Hong Kong to ensure the “correct” implementation of the Basic Law’.<sup>240</sup> Accordingly, Woodman argued that ‘interpretation is an escape clause, allowing the entry of the principle of democratic centralism and party rule into the Hong Kong policy’.<sup>241</sup>

## CONCLUSION

### *Judicial independence is a key feature of the Basic Law*

Having examined the design of the Basic Law in a detailed and objective manner, I strongly believe that judicial independence is, without any doubt, a cardinal feature of the Basic Law. With the repetition of the reference to exercising independent judicial power by these three provisions, plus the fact that having judicial independence in the first chapter of the Basic Law, it is clear that National People’s Congress and the Basic Law drafters were highly determined in upholding judicial independence.

A thorough examination on the Basic Law’s design also demonstrates the conformity with the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nations in 1985. In fact, there is no signs suggesting that the Basic Law was modelled on these sets of guiding principles. However, a large degree of conformity shows that the Hong Kong Basic Law does fulfil the so-called ‘international standard’.

### *Isomorphic mimicry in judicial interpretation: ‘One Country, Two Systems’*

The mechanisms of judicial interpretation between the common law and the Chinese civil law is so different. While article 158 represents a compromised position of the drafters, some ‘residual’ isomorphic mimicry remain, which are stemmed from the fundamental design of the ‘One Country, Two Systems’ principle.

Notwithstanding that the Basic Law has been implemented into HKSAR for 20 years, there are still much lessons for both the PRC and the HKSAR to learn and experiment. Under the new legal order after 1997, the Hong Kong courts and scholars cannot expect the Chinese authorities to adopt the same approach as theirs when interpreting the Basic Law provisions. Yet, as Albert Chen noted, ‘under the principle of “One country, two systems”, Hong Kong must accept the practice as a necessary consequence of the marriage of the Common Law and Civil Law systems’.<sup>242</sup> Hence, one must recognize the reality the colonial-inherited method of interpretation is not applicable to the Chinese authorities.

With regard to judicial independence in Hong Kong, Hong Kongers should be reassured that the constitutional framework of our Basic Law does incorporate the important elements of judicial independence, and has met the United Nation’s standard. Hence, it is fair to say that the Hong Kong courts are ‘safeguarded’ when adjudicating court cases within its autonomy.

When it comes to cases that involve Central-local relationships or the responsibilities of the CPG, however, the NPCSC has the final call. No doubt, certain degrees of

<sup>240</sup> Sophia Woodman, ‘Legislative Interpretation by China’s NPCSC’ in Hualing Fu, Lison Harris and Simon Young (eds), *Interpreting Hong Kong’s Basic Law: The Struggle for Coherence* (Palgrave Macmillan 2007) 238.

<sup>241</sup> *Ibid.*

<sup>242</sup> Albert H. Y. Chen, ‘The Interpretation of the Basic Law – Common Law and Mainland Chinese Perspectives’ (2000) 30(3) Hong Kong Law Journal 380, 408.

'isomorphic mimicry' remain when it comes to the two different approaches adopted in judicial interpretation by the common law courts and the NPCSC. Nevertheless, the fundamental element of the Basic Law is to balance the two distinctive principles of 'One Country' and 'Two Systems'. Hence, being a Special Administrative Region of the PRC, the autonomy of HKSAR should not, by any means, override the sovereignty of our motherland. The legal community and the general public in Hong Kong should always respect that the PRC authorities have the ultimate sovereign power to interpret laws that fall within the scope of their responsibilities.

At the same time, the PRC should also be faithful and confident in the SAR's autonomy. As such, both the Mainland and HKSAR should always bear in mind that only by respecting the 'One Country, Two Systems' principle can Hong Kong continue its legacy and prosperity.

## CASE NOTES AND COMMENTARY

*The address for submission of case notes is given at the beginning of this issue*

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### IN FAINT PRAISE OF THE DEROGATING WILL

The UK, ECHR derogation, and *Smith v. MOD*<sup>1</sup>

*Social peace is a two-sided affair. Ultimately our societies depend on shared bonds and mutual understanding. From time to time, voices do speak in terms which are not helpful to the rule of law.*<sup>2</sup>

#### INTRODUCTION

Reducing the country's human rights obligations has been officially mooted by various UK governments over the years. Although legislative change is not considered to be imminent,<sup>3</sup> a flavour of the rising irritation at human rights obligations, voiced in official British circles, is easily located within the most contentious environment for human rights law in Britain: the extra-territorial effect and application of the European Convention on Human Rights (ECHR), and most particularly, of ECHR applicability during Council of Europe Member State deployments of their armed forces overseas. This development has become especially contentious in Britain in recent years, due to the fairly-frequent deployment of its armed forces overseas, not least in Afghanistan and Iraq.<sup>4</sup> Therefore, this short discussion seeks to overview some of the legal implications of human rights legislative change in a post-EU, or 'Brexit', UK,<sup>5</sup> in which EU- and ECHR-related human rights obligations may both disappear or be greatly diminished.

On the basis of official British irritation at human rights, it may come as little surprise to some that, in what was potentially a first step towards eventual legislative change to

<sup>1</sup> [2013] UKSC 41, on appeal from [2011] EWHC 1678 QB; [2012] EWCA Civ 1365.

<sup>2</sup> Owen Boycott, 'British Supreme Court Justice makes veiled attack on Donald Trump' *The Guardian* (London, 8 March 2017) <<https://www.theguardian.com/law/2017/mar/08/british-supreme-court-justice-makes-veiled-attack-on-donald-trump>> accessed 21 May 2017 (quoting Lord Mance, 'Speech', the Bahamas, February, 2017).

<sup>3</sup> Rebecca Hacker, 'Minister Confirms Indefinite Delay In Plans to Replace Human Rights Act' (*RightsInfo*, 25 January 2017) <[http://rightsinfo.org/plans-replace-human-rights-act-put-hold/?utm\\_source=Weekly+Updates&utm\\_campaign=a25f304044-Weekly\\_Newsletter\\_Test4\\_22\\_2015&utm\\_medium=email&utm\\_term=0\\_5de50f2649-a25f304044-115312793](http://rightsinfo.org/plans-replace-human-rights-act-put-hold/?utm_source=Weekly+Updates&utm_campaign=a25f304044-Weekly_Newsletter_Test4_22_2015&utm_medium=email&utm_term=0_5de50f2649-a25f304044-115312793)> accessed 21 May 2017. See, eg, Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', September 2014 <<https://assets.documentcloud.org/documents/1308660/protecting-human-rights-in-the-uk.txt>> accessed 21 May 2017.

<sup>4</sup> See Christian Tomuschat, 'Human rights and international humanitarian law' [2010] 21(1) EJIL 15, 16 (the most fundamental of all human rights is the individual's right to life). In agreement, *Bugdaycay v. SOS Home Department* [1987] Parliamentary Archives, HL/PO/JU/18/247, 13, <<http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1986/3.html&query=bugdaycay&method=boolean>> accessed 21 May 2017.

<sup>5</sup> Parliamentary Joint Committee on Human Rights (JCHR), *The human rights implications of Brexit: Conclusions and recommendations*, 16 December 2016 <<http://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/69502.htm>> accessed 21 May 2017; *Brexit Activities (ongoing)*, BIICL <<http://www.biicl.org/brexit>> accessed 21 May 2017; Tobias Lock, 'What does Brexit have to do with human rights?', OUP blog, 13 June 2016 <<https://blog.oup.com/2016/06/brexit-human-rights-law/>> accessed 21 May 2017.

current standards of substantive human rights coverage, the then Conservative Party-led government, on 4 October 2016, expressly declared its intention to derogate in future overseas deployments and operations from its human rights commitments to British military personnel, 'if possible, in the circumstances that exist at that time'.<sup>6</sup> The then government's two main rationales were linked: the military should not be unduly hampered by fear of litigation, in general, when planning military operations and deploying its personnel overseas, and the government should not be exposed, in particular, to 'vexatious' human rights litigation in such a context, which has in fact occurred during recent deployments in Iraq and Afghanistan, and which has been highly-expensive. To clarify the latter point, military-linked litigation has arisen during recent deployments overseas of British forces, and has been generated either by the death or injury of British military personnel themselves, or by the death or injury of persons whom British personnel have detained and/or imprisoned.

The extra-territorial extension abroad of the ECHR is fairly recent,<sup>7</sup> while, in contrast, securing the rights of serving British military personnel has developed only slowly, over many years, starting with the Crown Proceedings (Armed Forces) Act 1987, which statute finally allowed service personnel to sue the Ministry of Defence (MOD) for negligence.<sup>8</sup> Since then, a recognition, both in law and amongst the public, has grown that governmental responsibility for arbitrarily-inflicted death or injury of, or by,<sup>9</sup> British military personnel, including when on active duty overseas, is in fact the proper subject of express rights obligations. In turn, the ECHR, as a 'living instrument',<sup>10</sup> is interpreted teleologically, such that its eventual, extra-territorial extension should not be overly-surprising. Moreover, inasmuch as the English courts, since 1998, have had direct jurisdiction over claims arising under the ECHR brought in Britain,<sup>11</sup> and that the UK has recently engaged in numerous military adventures overseas, it was always only a matter of time before ECHR applicability would gradually be extended by the

<sup>6</sup> News story, 'Government to protect Armed Forces from persistent legal claims in future overseas operations' (London, Ministry of Defence, 4 October 2016) <<https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>> accessed 21 May 2017; Peter Walker and Owen Boycott, 'Plan for UK military to opt out of European convention on human rights' *The Guardian* (London, 4 October 2016) <<https://www.theguardian.com/uk-news/2016/oct/03/plan-uk-military-opt-out-european-convention-human-rights>> accessed 21 May 2017. In December 2015, the Defence Minister indicated a similar intention. See, eg, Sam Grant, 'The Government Wants to Limit Human Rights Of Soldiers. Don't They Deserve Protecting?' (*RightsInfo*, 8 May 2016) <<http://rightsinfo.org/government-wants-limit-human-rights-soldiers-acting-abroad-dont-soldiers-families-deserve-protection/>> accessed 21 May 2017.

<sup>7</sup> Including, inter alia, the territorial context utilised in *Soering v. UK* (1989) 11 EHRR 439 [86]; the spatial model used in *Bankovic v. Belgium* (2001) 11 BHRC 435; and, the physical model used in *R (Al-Skeini) v. SOS for Defence* (2011) 53 EHRR 589.

<sup>8</sup> *Mathews v. MOD* [2003] UKHL 4 [7]. See *Smith (No. 2)* (n 1) [179] (Carnwath L citing HC Deb 13 February 1987, vol 110, cols 567–609), regarding the same intent behind the Crown Proceedings (Armed Forces) Act 1987 s 2(2), and the Reserve Forces Act 1980. Today, the Armed Forces (Pension and Compensation) Act 2004 provides the military's statutory no-fault compensation scheme.

<sup>9</sup> See, eg, Saxon Norgard, 'Key Things You Need To Know About the Important New Iraq War Test Case' (*RightsInfo*, 13 September 2016) <[http://rightsinfo.org/five-things-need-know-new-al-sadoon-judgment/?utm\\_source=Weekly+Updates&utm\\_campaign=30f12c5352-Weekly\\_Newsletter\\_Test4\\_22\\_2015&utm\\_medium=email&utm\\_term=0\\_5de50f2649-30f12c5352-115312793](http://rightsinfo.org/five-things-need-know-new-al-sadoon-judgment/?utm_source=Weekly+Updates&utm_campaign=30f12c5352-Weekly_Newsletter_Test4_22_2015&utm_medium=email&utm_term=0_5de50f2649-30f12c5352-115312793)> accessed 21 May 2017 (overview of *Al-Saadoon & Ors v The Secretary of State for Defence & Ors* [2016] EWCA Civ 811, 9 September 2016).

<sup>10</sup> First noted by the European Court of Human Rights in *Tyler v UK* App no 5856/72 (ECtHR, 25 April 1978) Series A no 26. See George Letsas, 'The ECHR as a Living Instrument: Its Meaning and its Legitimacy', SSRN, March 14, 2012, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2021836](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836) accessed 22 May 2017.

<sup>11</sup> Due to Parliamentary sovereignty, s 2 Human Rights Act 1998 (HRA) only requires UK courts to 'take into account' the rulings of the Strasbourg Court when they are interpreting ECHR rights, and s 3(1) HRA requires UK courts to read and give effect to UK legislation in a way which is compatible with Convention rights 'so far as it is possible to do so'. See, eg, Liberty, 'Briefing on Derogations and the Human Rights Act', September 2016, <<https://www.liberty-human-rights.org.uk/sites/default/files/campaigns/resources/Liberty%20Briefing%20on%20Derogations%20and%20the%20Human%20Rights%20Act.pdf>> accessed 22 May 2017; Daniel Charity, 'Supreme Court President: UK Human Rights are not a "Power Grab" by Judges' (*RightsInfo*, 17 March 2017) <<https://rightsinfo.org/supreme-court-human-rights-laws-judges/>> accessed 21 May 2017.

Strasbourg Court (the European Court of Human Rights, or ECtHR) to include such operations.<sup>12</sup> Soon afterwards, the ECHR Article 2 ‘right to life’, specifically, of service personnel deployed on active duty overseas, was expressly acknowledged by Britain’s highest court – the UK Supreme Court – in 2013, in *Smith & Ors. (No. 2) v. Ministry of Defence No. 2*.<sup>13</sup>

The recently-announced ‘presumption to derogate’ is the Conservative Party-led, UK government’s riposte,<sup>14</sup> which, to an extent, reflects the deep unease also voiced in certain military and political circles, regarding the appropriateness of extending individual rights protections to, and in, dangerous, operational environments. Lingering questions as to the proper balance, between Britain’s international human rights obligations, and its obligations under International Humanitarian Law (IHL), during military deployments, make the matter even more complex.<sup>15</sup> This short discussion thus critically considers the legal implications of the government’s future ‘presumption to derogate’ in a post-EU, ‘Brexit UK’,<sup>16</sup> in which many existing human rights obligations are likely to be diluted, or even disappear.<sup>17</sup> As such, it is speculated that the recent announcement of a ‘presumption to derogate’ in future is in fact designed to lay the groundwork for wider legislative change, including British withdrawal from the ECHR, and/or the repeal of the Human Rights Act 1998 (HRA), as currently threatened,<sup>18</sup> and to normalise reductions in rights coverage, in general.

The structure of the discussion is as follows. After a preliminary outline of what derogation entails, the government’s stated rationales for its ‘presumption to derogate’ in future are critically considered. The ‘vexatious litigation’ argument currently being employed by the government to support derogation is then contextualised by means of a discussion of the *Smith (No. 2)* case.<sup>19</sup> It is concluded that, inasmuch as the extra-territoriality of ECHR obligations during military deployments overseas is now widely acknowledged (if not universally accepted), the legal extension of human rights availability *at all times* has exacerbated existing frictions between law and politics, accelerated a wider debate as to rights coverage, exposed a disturbing normalising of rights downgrades, and carries real dangers for the future in terms of public accountability and the rule of law.<sup>20</sup>

<sup>12</sup> Being acknowledged ‘exceptionally’ in *Bankovic v. Belgium* [2001] (n 7) [71], and on grounds of ‘physical and legal control’ in *R (Al-Skeini) v. SOS for Defence* [2011] (n 7) [137]. See Marko Milanovic, European Court Decides Al-Skeini and Al-Jedda’ (*EJIL: Talk!*, 7 July 2011) <<http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>> accessed 21 May 2017.

<sup>13</sup> (n 1).

<sup>14</sup> See, eg, Marko Milanovic, ‘UK to Derogate from the ECHR in Armed Conflict’ (*EJIL: Talk!*, 5 October 2016) <<http://www.ejiltalk.org/uk-to-derogate-from-the-echr-in-armed-conflict/>> accessed 21 May 2017.

<sup>15</sup> Specifically, IHL permits lawful killing, while the ECHR generally does not. Regarding the interplay of the two legal regimes, see Nico Shrijver and Larissa van den Herik, ‘Leiden Policy Recommendations on Counter-Terrorism and International Law’, 1 April 2010, ss 1–2 [56]–[68] <<http://www.uni-koeln.de/jur-fak/kress/Materialien/Chef/HP882010/LeidenPolicyRecommendations1April2010.pdf>> accessed 22 May 2017.

<sup>16</sup> See (n 5).

<sup>17</sup> See, eg, Angela Patrick, *Mapping the Great Repeal: European Union Law and the Protection of Human Rights*, Thomas Paine Initiative Paper, October 2016, <<http://www.ariadne-network.eu/wp-content/uploads/2015/03/Mapping-the-Great-Repeal-Thomas-Paine-Initiative-November-2016.pdf>> accessed 22 May 2017; Tobias Lock, *The EU and Human Rights*, Royal Society of Edinburgh Briefing Paper, May 2016, 7, <<https://www.rse.org.uk/cms/files/advice-papers/2016/The%20EU%20and%20Human%20Rights.pdf>> accessed 22 May 2017.

<sup>18</sup> Heather Stewart, ‘Ministers put British bill of rights plan on hold until after Brexit’, *The Guardian* (London, 29 December 2016) <<https://www.theguardian.com/law/2016/dec/29/ministers-put-british-bill-of-rights-plan-on-hold-until-after-brexite>> accessed 22 May 2017 (Conservatives want to withdraw from the ECHR and to repeal the HRA).

<sup>19</sup> (n 1).

<sup>20</sup> Consider, eg, the Regulation of Investigatory Powers Act 2000), which came into force alongside the HRA 1998, and establishes the Investigatory Powers Tribunal. In *Regina (for Privacy International) v. I.P.T.* [2017] EWHC 114, Leggatt J queried the consistency of RIPA s 67(8) with the rule of law, as the Act originally afforded no right of appeal from the IPT.

### Derogation

Derogation from the ECHR is permitted as per Article 15, which provides as follows:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture and of inhuman or degrading treatment], 4(1) [prohibition of slavery or servitude], and 7 [prohibition of *crimen sine lege*], shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.<sup>21</sup>

Member states are also allowed to derogate from the International Covenant on Civil and Political Rights (ICCPR) 1966, as per Article 4 of that instrument.<sup>22</sup> While neither the ECHR nor the ICCPR define specifically what is meant by a ‘public emergency threatening the life of the nation’,<sup>23</sup> the following four requirements were developed and clarified in 1969 by the Council of Europe’s Commission on Human Rights:<sup>24</sup> the emergency must be actual or imminent; its effects must involve the whole nation; the continuation of the community’s organised life must be threatened; and, the crisis or danger being experienced must be ‘exceptional’, that is to say, that ordinary measures or restrictions for maintaining public safety, health and good order are clearly inadequate. Further, the burden of proof in establishing that such a ‘public emergency’ exists is on the derogating state party.<sup>25</sup>

As per Article 15(1), and taking Article 15(2) into account, any measures adopted must not be inconsistent with the derogating state’s other international law obligations; Article 15(3) implies that derogation must be ‘temporary’, lasting no longer than absolutely necessary, as the consequences of derogation impact on individuals, who lose their full, ‘peacetime’ enjoyment of certain rights. So far, so clear, but practice varies, and with many governments since 9/11 placing increasing emphasis on *anticipating* risks,<sup>26</sup> the traditional parameters (and duration) of state emergency derogation have become rather more ambiguous. It is in this ‘anticipatory’ climate that the UK announced its ‘presumption to derogate’ in future, in October 2016.

<sup>21</sup> See ECHR Press Unit, ‘Factsheet: Derogation in time of emergency’ (February 2017) <[http://www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf)> accessed 22 May 2017. See also JCHR (n 5) ‘Written evidence’, Council of Europe, Rapporteur on States of Emergency (Raphael Comte), ‘Written evidence to the JCHR: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights (DRO0003’, 29 March 2017) <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/publications/>> accessed 22 May 2017.

<sup>22</sup> The UK is a party.

<sup>23</sup> A phrase first interpreted in 1961, in *Lawless v. Ireland* (No. 3) App no 332/57 (A/3) (ECtHR, 1961).

<sup>24</sup> See the *Greek Case*, Council of Europe, European Commission of Human Rights, Report of the Sub-Commission, Vol I Pt 1 (1969) <<file:///C:/Users/Admin/AppData/Local/Temp/001-73020.pdf>> accessed 22 May 2017.

<sup>25</sup> *Ibid.* cf Raphael Comte (n 21).

<sup>26</sup> See, eg, J. McCulloch and S. Pickering, ‘Pre-crime and counter-terrorism: imagining future crime in the “war on terror” [2009] 49(5) BrJ Crim 628. See also Council of Europe, *Annual Activity Report 2016: A critical turning point, not business as usual, for human rights in Europe* (Strasbourg, 26 April 2017) <<http://www.coe.int/fr/web/pristina/-/a-critical-turning-point-not-business-as-usual-for-human-rights-in-europe>> accessed 22 May 2017.



Council of Europe Member States which have derogated recently, albeit for domestic contexts alone, include Turkey and France,<sup>27</sup> each having filed a series of formal notices of derogation with the Secretary General of the Council of Europe, after first declaring ‘states of emergency’. France initially filed on 20 November 2015,<sup>28</sup> in response to terrorist attacks in Paris, on 13 November. As these terrorist atrocities have been followed by other terrorist incidents elsewhere in France, the government has extended and broadened its derogation, through to and beyond the country’s Presidential elections, which took place on 7 and 23 May 2017,<sup>29</sup> and the French legislative elections, currently scheduled for 11 and 18 June.

Turkey’s emergency derogation occurred after the country experienced a failed political coup attempt led by the state’s military on 15 July 2016,<sup>30</sup> the aftermath of which caused serious domestic upheaval. It followed France in declaring derogations on 21 July 2016,<sup>31</sup> 11 October 2016,<sup>32</sup> and 3 January 2017,<sup>33</sup> which impacted on its human rights obligations;<sup>34</sup> on 23 January 2017, it also communicated the establishment of a domestic Inquiry Commission on the State of Emergency Measures.<sup>35</sup> Similar to France, Turkey has not specified precisely which ECHR articles it was derogating, although it did so for its ICCPR derogation,<sup>36</sup> nor has it been explicit as to how the derogations

<sup>27</sup> As of the time of writing, Belgium has not derogated from the ECHR, despite three coordinated suicide bombings on 22 March 2016, two occurring at Brussels airport, and the third, at Maalbeek metro station. The attacks have prompted Belgium, inter alia, to enact new counterterrorism laws and regulations, carry out raids, deploy more soldiers in major cities, etc. *Grounds for Concern, Summary*, Human Rights Watch <<https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterror-responses-paris-and-brussels-attacks>> accessed 22 May 2017.

<sup>28</sup> See, eg, Marko Milanovic, ‘France Derogates from ECHR in the Wake of the Paris Attacks’ (*EJIL: Talk!*, 13 December 2015) <<http://www.ejiltalk.org/france-derogates-from-echr-in-the-wake-of-the-paris-attacks/>> accessed 21 May 2017.

<sup>29</sup> Concerning subsequent derogation extensions on 19 February 2016, 20 May, 25 July and 19 December, which presumably is still in force, as the Council of Europe has not notified Member States of its discontinuance, as of 25 May 2017. See Council of Europe, *France – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification – JJ8285C Tr./005–202 (Strasbourg, 22 December 2016) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2450299&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>30</sup> See, eg, Politics, ‘Council of Europe Secretary General: Turkey has a right to “derogate” ECHR’, *Daily Sabah* (Ankara, 24 July 2016) <<http://www.dailysabah.com/politics/2016/07/24/council-of-europe-secretary-general-turkey-has-a-right-to-derogate-echr>> accessed 22 May 2017.

<sup>31</sup> Council of Europe, *Turquie – Communication relative à la Convention de sauvegarde des Droits de l’Homme et des Libertés Fondamentales*, STE n° 5, Notification – JJ8190C Tr./005–192 (Strasbourg, 25 juillet 2016) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2436911&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>32</sup> Council of Europe, *Turkey – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification – JJ8239C Tr./005–199 (Strasbourg, 18 October 2016) <<https://wcd.coe.int/ViewDoc.jsp?p=&Ref=NotificationJJ8239C&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>33</sup> Council of Europe, *Turkey – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification – JJ8289C Tr./005–203 (Strasbourg, 6 January 2017) <<https://wcd.coe.int/ViewDoc.jsp?p=&Ref=NotificationJJ8289C&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>34</sup> After which tens of thousands of public employees, including military personnel, were sacked or suspended from their posts, and/or arrested. See, eg, *Zihni v. Turkey* App no 59061/16 (ECTHR 385, 8 December 2016): claim dismissed, as ‘no special circumstances’ absolved the applicant’s non-exhaustion of domestic remedies, although the emergency measures did not permit appeal. See Emre Turkut, ‘Has the European Court of Human Rights Turned a Blind Eye to Alleged Rights Abuses in Turkey?’ (*EJIL: Talk!*, 28 December 2016) <<http://www.ejiltalk.org/has-the-european-court-of-human-rights-turned-a-blind-eye-to-alleged-rights-abuses-in-turkey/>> accessed 21 May 2017. See generally Council of Europe (Venice Commission), *Opinion No. 865/2016, on Emergency Decree Laws Nos. 667–676 Adopted Following the Failed Coup of 15 July 2016*, CDL-AD(2016)037, 9–10 (Strasbourg, December 2015) <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)037-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)037-e)> accessed 22 May 2017.

<sup>35</sup> Council of Europe, *Turkey – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification – JJ8311C Tr./005–204 (Strasbourg, 31 January 2017) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2452623&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>36</sup> Stating ‘In this process, measures taken may involve derogation from obligations under the International Covenant on Civil and Political Rights regarding Articles 2/3, 9, 10, 12, 13, 14, 17, 19, 21, 22, 25, 26 and 27, as permissible in Article 4 of the said Covenant’. UN, *Turkey: Notification under Article 4(3)*, Depository Notification C.N.580.2016.TREATIES-IV.4 (New York, 21 July 2016) <<https://treaties.un.org/doc/Publication/CN/2016/CN.580.2016-Eng.pdf>> accessed 22 May 2017.

would take effect.<sup>37</sup> However, dissimilar to France, the Council of Europe Human Rights Commissioner on 15 February 2017 urged the Turkish government to lift the state of emergency.<sup>38</sup> Therefore, it can be seen that, should the UK derogate, it would not be alone in the current climate in taking such a step. As for derogation in relation specifically to military deployments, there is also some precedent. Ukraine, in June 2015, similarly notified the Council of Europe of the Ukraine's derogation in relation to its ongoing, border fighting with Russia,<sup>39</sup> followed by further extensions registered at the Council of Europe on 5 November 2015,<sup>40</sup> 1 July 2016,<sup>41</sup> and 3 February 2017.<sup>42</sup>

Otherwise, the Council of Europe website notes that eight ECHR state parties have derogated in the past,<sup>43</sup> including the UK. The UK is also among four ECHR state parties which have been required by the ECtHR to justify their derogation measures.<sup>44</sup> As ECHR derogation is not entirely an unchallengeable, sovereign act, it might be thought the UK might exercise due caution to ensure it fulfilled the necessary conditions *prior to* declaring an emergency and seeking to derogate from the ECHR. Instead, it appears the UK has chosen to pre-empt concrete 'events', and announce its 'presumption to derogate' in future, *in advance*, which is highly unusual, if not deeply off. The government appears 'anticipatorily' to be doing what any ECHR (and ICCPR) state party has the flexibility to do, but only *in response* to a 'public emergency threatening the life of the nation', and regarding which derogation is factually both 'absolutely necessary' and 'proportionate'.<sup>45</sup>

### *The 'Presumption to Derogate'*

It is worth reiterating that the issue of derogation arises in a context of recent, human rights protections for British military personnel deployed overseas. Prior to *Smith*

<sup>37</sup> Instead, stating that emergency measures 'may' result. See, eg, Martin Scheinin, 'Turkey's Derogation from Human Rights Treaties – an Update' (*EJIL: Talk!*, 18 August 2016) <<http://www.ejiltalk.org/turkeys-derogation-from-human-rights-treaties-an-update/>> accessed 21 May 2017.

<sup>38</sup> Council of Europe, Commission for Human Rights, *Urgent measures are needed to restore freedom of expression in Turkey* (Strasbourg, 15 February 2017) <<http://www.coe.int/en/web/commissioner/-/urgent-measures-are-needed-to-restore-freedom-of-expression-in-turkey>> accessed 22 May 2017. In response, see *Observations by the Turkish authorities on the Commissioner's Memorandum on freedom of expression and media freedom in Turkey*, CommDH/GovRep(2017)2 (Strasbourg, 15 Feb 2017) <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/GovRep\(2017\)2&Language=lanEnglish&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH/GovRep(2017)2&Language=lanEnglish&direct=true)> accessed 22 May 2017. See also Council of Europe Commissioner for Human Rights (Nils Muižnieks), *Memorandum on freedom of expression and media freedom in Turkey*, CommDH(2017)5/ (Strasbourg, 15 Feb. 2017) <[https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH\(2017\)5&Language=lanAll&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CommDH(2017)5&Language=lanAll&direct=true)> accessed 22 May 2017; Emre Turkut (n 34). See also *Annual Activity Report 2016* (n 26), in which the Council of Europe criticises the recent tendency of derogating Member States to effect a 'quasi-automatic prolongation of states of emergency and derogations from the Convention', ostensibly to fight terrorism.

<sup>39</sup> Council of Europe, 'News: Ukraine derogation from European Convention on Human Rights', (Strasbourg, 10 June 2016) <[http://www.coe.int/en/web/secretary-general/news/-/asset\\_publisher/EY1BJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fsecretary-general%2Fnews%3Fp\\_p\\_id%3D101\\_INSTANCE\\_EY1BJNjXtA5U%26p\\_p\\_lifecycle%3D0%26p\\_p\\_state%3Dnormal%26p\\_p\\_mode%3Dview%26p\\_p\\_col\\_id%3Dcolumn-4%26p\\_p\\_col\\_count%3D1](http://www.coe.int/en/web/secretary-general/news/-/asset_publisher/EY1BJNjXtA5U/content/ukraine-derogation-from-european-convention-on-human-rights/16695?inheritRedirect=false&redirect=http%3A%2F%2Fwww.coe.int%2Ffr%2Fweb%2Fsecretary-general%2Fnews%3Fp_p_id%3D101_INSTANCE_EY1BJNjXtA5U%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1)> accessed 22 May 2017.

<sup>40</sup> Council of Europe, *Ukraine – Declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, Notification – JJ8034C Tr./005–186 (Strasbourg, 5 November 2015) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2380047&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>41</sup> Council of Europe, *Ukraine – Declaration related to the Convention on the Protection of Human Rights and Fundamental Freedoms*, ETS No. 005, Notification – JJ8172C Tr./005–190 (Strasbourg, 1 July 2016) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2435663&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>42</sup> Council of Europe, *Ukraine – Declaration related to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No. 5, Notification – JJ8318C Tr./005–205 (Strasbourg, 3 February 2017) <<https://wcd.coe.int/ViewDoc.jsp?p=&id=2452899&Site=COE&BackColorInternet=F7F8FB&BackColorIntranet=F7F8FB&BackColorLogged=F7F8FB&direct=true>> accessed 22 May 2017.

<sup>43</sup> Albania, Armenia, France, Georgia, Greece, Ireland, Turkey and the United Kingdom. 'Factsheet' (n 21) 2.

<sup>44</sup> *Ibid*, for a brief overview of the cases in which the four states parties were asked to justify derogation measures.

<sup>45</sup> See, eg, Raphael Comte (n 21).

(No. 2),<sup>46</sup> UK common law imposed no special duty of care on the government (in tort or otherwise) to protect its military personnel.<sup>47</sup> The MOD is subject to ordinary employment duties to provide a safe system of work, including supervision, training, equipment, competent colleagues, and so on, such duties' have not been extended traditionally to personnel when engaged with the enemy, and the MOD is also exempt from criminal prosecution in such circumstances.<sup>48</sup> On the other hand, as the armed forces fall within the definition of a public authority, they are expected to comply with national and international law, including human rights law.<sup>49</sup> Obviously, there are 'different moral valences in human rights law and the laws of war – the key difference being the role of military necessity in the latter',<sup>50</sup> yet a long-standing, tacit recognition, that the nature of military service and the use of armed force entail restrictions on the civilian rights of service personnel endures, such that, until recently, any 'entitlement' to human rights or other special protections for service personnel, most notably their right to life, has had to await case law, judicial activism, and a high number of military-related damages actions against the UK Government,<sup>51</sup> whether brought by British military personnel, by those they have detained and/or imprisoned, and/or by their families.

Such litigation in turn has required the ECtHR and the English courts to grapple with applying the ECHR extra-territorially in military environments. While this litigation has been highly contentious, of particular concern are the UK government's stated rationales for its future 'presumption to derogate', which rests in part on a basis other than a 'public emergency threatening the life of the nation'. Specifically, the government emphasises that a 'presumption of derogation' in future would be intended to 'protect British troops serving in future conflicts' from what the government terms an 'industry of vexatious' and 'persistent legal claims', costing millions of pounds, and thus, to avoid 'undermin[ing] the operational effectiveness of the Armed Forces'.<sup>52</sup> The financial nature of these rationales makes doubly-mystifying the qualifying phrase 'if possible in the circumstances that exist at that time', other than, perhaps, implying the possibility of an adverse ECtHR opinion or two, and one wonders what the government has in mind in terms of the 'impossible'. Be that as it may, by indicating officially that the government 'may' derogate during future *military* deployments abroad, the government begins to

<sup>46</sup> (n 1).

<sup>47</sup> A situation somewhat altered by s 7 HRA, and since influenced by *Osman v. UK* 23452/94 [2009] 29 EHRR 245.

<sup>48</sup> Nonetheless, the Health and Safety Executive can issue Crown enforcement notices and issue a Crown censure in lieu of criminal proceedings. Anthony Forster, 'British judicial engagement and the juridification of the armed forces' [2012] 88(2) International Affairs 283, 291 n. 41, citing, inter alia, *Mulcahy v Ministry of Defence* [1996] EWCA Civ 1323; *Multiple Claimants v. MOD* [2003] EWHC 1334; *MOD v. Radclyffe* [2009] EWCA Civ. 635.

<sup>49</sup> *Ibid* 286, citing Richard Ball (citation omitted). See also Geir Ulfstein, *Interpretation of the ECHR in the Light of Other International Instruments*, PluriCourts Research Paper No. 15–05 (June 17, 2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2619592](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619592)> accessed 22 May 2017.

<sup>50</sup> Miles Jackson, 'The Fog of Law' (*EJIL: Talk!*, 21 April 2015) <<https://www.ejiltalk.org/the-fog-of-law/>> accessed 21 May 2017. See also Tomuschat (n 4) (absence of remedies in IHL necessitates the intervention of the ECtHR).

<sup>51</sup> See, eg, Monica Feria-Tinta, 'Extra-Territorial Claims in the "Spider's Web" of the Law? UK Supreme Court Judgment in *Ministry of Defence v Iraqi Civilians*' (*EJIL: Talk!*, 25 May 2016) <[www.ejiltalk.org/extra-territorial-claims-in-the-spider-s-web-of-the-law-uk-supreme-court-judgment-in-ministry-of-defence-v-iraqi-civilians/](http://www.ejiltalk.org/extra-territorial-claims-in-the-spider-s-web-of-the-law-uk-supreme-court-judgment-in-ministry-of-defence-v-iraqi-civilians/)> accessed 21 May 2017 (14 lead claimants, in claims by over 600 Iraqi citizens, alleging unlawful detention and/or physical maltreatment at the hands of British armed forces in Iraq between 2003 and 2009). But see Peter Walker, 'Iraq war claims unit to be shut down, says UK defence minister', *The Guardian* (London, 10 February 2017) <<https://www.theguardian.com/world/2017/feb/10/iraq-war-claims-unit-to-be-shut-down-says-uk-defence-secretary>> accessed 21 May 2017; Owen Bowcott, 'Phil Shiner: steep fall from grace for leading human rights lawyer', *The Guardian* (London, 2 February 2017) <<https://www.theguardian.com/law/2017/feb/02/phil-shiner-steep-fall-from-grace-leading-uk-human-rights-lawyer-iraq>> accessed 21 May 2017; Robert Mendick, 'Top lawyer facing criminal enquiry over "bribes" paid to Iraqis over abuse claims against British troops', *The Telegraph* (London, 3 August 2016) <<http://www.telegraph.co.uk/news/2016/08/03/top-lawyer-facing-criminal-inquiry-over-bribes-paid-to-iraqis-br/>> accessed 21 May 2017 (claims Iraqi civilians were bribed to bring abuse claims against British soldiers; bribes allegedly disguised as publicly-funded legal aid expenses).

<sup>52</sup> News story (n 6).

normalise the derogation process within a ‘patriotic’ (rather than strictly ‘defensive’) context, which risks entrenching ‘temporary’ emergency security laws, diluting the rule of law, and conditioning the public at large to expect less in general from governmental duties of care.

The gravity of these and related dangers led the UK Parliament’s Joint Committee on Human Rights (JCHR) to respond rapidly by letter to the Defence Secretary’s October 2016 announcement. In it, the JCHR posed a series of probing questions, and a separate request for specific data and detail as to the alleged ‘vexatious’ and ‘persistent legal claims’ on which a future ‘presumption to derogate’ might be based.<sup>53</sup> The government was requested to quantify its claims of ‘vexatiousness’, to provide actual numbers of claims which have been brought, settled, determined and/or dismissed by a court, and to account for the actual amounts paid in legal aid and compensation resulting from the wars in Afghanistan and Iraq. The JCHR targeted most of its 25 questions in the letter’s Annex at the specific requirements of Article 15 ECHR, eg, the exigencies of ‘war or other public emergency threatening the life of the nation’, and the requirement that derogation must be ‘strictly required’ by these exigencies, and consistent with other international obligations. The JCHR reminded the Defence Secretary that, as per Article 15(2), some rights cannot be derogated, and the JCHR inquired specifically regarding the total number of claims brought under non-derogable Articles 2 and 3 ECHR, as well as under Article 5 (the right to liberty), the latter having an exhaustive list of possible exceptions.<sup>54</sup> Additional questions concerned whether adequate judicial and Parliamentary scrutiny of a ‘presumption to derogate’ in future would be available, and the likely implications of derogation on the wider European system of rights enforcement.<sup>55</sup>

The Defence Secretary, in his initial response on 22 November, avoided answering many of the JCHR’s questions, stating only that they could not yet be answered ‘because the Government has only announced an intention to derogate, not an actual derogation’.<sup>56</sup> Consequently, the government was reluctant to engage in hypothetical debate in advance of a relevant situation arising. The response of 22 November also acknowledged that a future derogation would need justification ‘in the precise circumstances of the particular military operation in question’,<sup>57</sup> and, therefore, that the government was only indicating its desire in future to secure sufficient flexibility. In the JCHR’s response to this letter, on 16 December, the JCHR Chair reminded the government that

The last time the UK derogated from the ECHR, in the wake of 9/11, the derogation received little parliamentary scrutiny and was later found to be incompatible with the ECHR by both the UK’s highest court and the European Court of Human Rights.<sup>58</sup> This

<sup>53</sup> JCHR, *Letter: The Government’s Proposed Derogation from the ECHR*, 13 October 2016, <<http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/Letter-to-Defence-Secretary-re-proposed-derogation-from-ECHR-131016.pdf>> accessed 21 May 2017.

<sup>54</sup> See, eg, Council of Europe/European Court of Human Rights, *Guide on Article 5 of the Convention: Right to Liberty and Security* (Strasbourg, 2014) <[http://www.echr.coe.int/Documents/Guide\\_Art\\_5\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf)> accessed 22 May 2017.

<sup>55</sup> A response by 4 November was requested. JCHR, *Letter* (n 53).

<sup>56</sup> Parliamentary Business, JCHR, *Enquiry Background: ECHR: Committee launches inquiry into Government’s proposed derogation*, 16 December 2016 <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/echr-derogation-launch-16-17/>> accessed 21 May 2017.

<sup>57</sup> *Ibid.*

<sup>58</sup> A reference to *A and Others v. the UK* Appln no 3455/05 (Grand Chamber, 19 February 2009) <<http://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-2638619-2883392%22%7D%7D>> accessed 22 May 2017, in which the UK Supreme Court had previously deemed detention without trial only of foreign terrorist suspects to be discriminatory. cf Owen Boycott, ‘Thatcher gave way on dropping powers to detain terrorists, files show’, *The Guardian* (London, 30 December 2016) <<https://www.theguardian.com/politics/2016/dec/30/margaret-thatcher-gave-way-on-dropping-terrorist-detention-powers-northern-ireland>> accessed 21 May 2017.

time, the Government's case for intending to derogate rests on a number of assertions which need to be rigorously tested.<sup>59</sup>

The JCHR also opened-up the discussion to the public, inviting their written submissions by 31 March 2017, extended to 7 April, in order for Parliament to hear and understand the public's views and any concerns there may be regarding the government's announced intention. However, the Committee has now closed this inquiry due to the snap calling of a General Election on 8 June 2017, which necessitated the dissolution of Parliament on 3 May 2017, at which point all current Select Committees ceased to exist.<sup>60</sup> Otherwise, the most recent response to the JCHR from the Defence Secretary was dated 28 February 2017, and published by the JCHR on 1 March 2017, and as the current JCHR has indicated, at the time of writing, that 'if an inquiry on this subject is held in the future, the Committee may refer to the evidence already gathered as part of this inquiry'.<sup>61</sup> The details of the Defence Secretary's most recent correspondence are now briefly summarised.

### *The Government Memorandum*

The Defence Secretary's response to the JCHR of 28 February confirms 'that no decision has been taken as to whether in the context of any particular future military operation it would or would not be appropriate to derogate', and that 'everything possible will be done to facilitate early Parliamentary scrutiny if and when we decide to derogate'.<sup>62</sup> It notes with approval that the UK Supreme Court acknowledges the 'analytic and practical difficulties' of extending the jurisdiction of the ECHR 'into realms for which it was not designed', and he reiterates that it is not yet 'possible to provide sufficient detail to allow meaningful scrutiny now of the likely justification of future decisions'.<sup>63</sup> Nonetheless, accompanying this brief response is a short 'Government Memorandum', in which the government seeks to justify more completely a future derogation. Via sections entitled 'Policy Rationale', 'Legislation', 'Conditions for Derogation', 'Operational Effectiveness and NATO', 'Legal Claims', and 'Compensation', the Memorandum concludes that, although the UK Supreme Court has modified its approach, and begun to modify human rights in operational environments, to which IHL must apply,<sup>64</sup> it was less clear whether the ECtHR would always be similarly inclined. Hence, a 'presumption to derogate' in future operations would be warranted, to fill a perceived need for 'a

<sup>59</sup> JCHR *Enquiry Background* (n 56).

<sup>60</sup> At the time of writing, the Enquiry is now terminated, due to the snap General Election scheduled for 8 June 2017. Parliamentary Business, JCHR, *Enquiry status: concluded*, <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/government-proposed-echr-derogation-16-17/publications/>> accessed 21 May 2017. See also Ed Bates, 'Extra-territorial derogations from the ECHR for future armed conflicts involving the UK?', *ukstrasbourgsptlight*, 31 March 2017 <<https://ukstrasbourgsptlight.wordpress.com/2017/03/31/extra-territorial-derogations-from-the-echr-for-future-armed-conflicts-involving-the-uk/>> accessed 22 May 2017 (written submission to the JCHR, but not yet published as of 15 April). As of 9 August 2017, the Inquiry has not been re-opened.

<sup>61</sup> *Enquiry status* (n 60); Secretary of State for Defence, *Letter to the Chair of the JCHR*, 28 February 2017 <[http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301\\_SoS\\_to\\_Chair\\_re\\_Derogation.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2016-17/170301_SoS_to_Chair_re_Derogation.pdf)> accessed 22 May 2017.

<sup>62</sup> *Letter* (n 61), annexed Government Memorandum [2] and [4], respectively.

<sup>63</sup> *Ibid* [3] and [4], respectively.

<sup>64</sup> The Defence Secretary considers such cases as the following to be 'helpful': *Mohammed & Ors v MOD* [2017] UKSC 1 & [2017] UKSC 2; and, joined appeals in *Serdar Mohammed & Al-Waheed v. MOD* [2017] UKSC 2; both concerned UN-mandated peacekeeping operations in Iraq and Afghanistan. In *Mohammed & Ors*, the Court agreed the government was not liable in tort for wrongful detention or treatment; the acts in question had been Crown acts of state, taken during foreign military operations. In *Waheed*, the Court approved the detention of prisoners for periods exceeding 96 hours when necessary for imperative security reasons, as implicitly authorised by UN Security Council resolutions; ECHR Article 5 could 'accommodate' this, but procedures must comply with Article 5(4). See, eg, Shaheed Fatima, QC, 'UK Supreme Court Judgment on Extra-Territorial Detention in Iraq and Afghanistan' (*Just Security*, 17 January 2017) <<https://www.justsecurity.org/36407/uk-supreme-court-judgment-extra-territorial-detention-iraq-afghanistan/>> accessed 22 May 2017.

clear legal framework' in such situations,<sup>65</sup> i.e., IHL alone would be applicable in such situations.

The Memorandum admits that the UK would be the first ECHR state party to derogate in respect of its overseas activities.<sup>66</sup> Whilst maintaining that the case for derogating is 'obvious', the Memorandum also constitutes the first time the government has publicly provided somewhat more detailed reasons for its allegations that extending ECHR extra-territoriality to military deployments overseas had adverse impacts. Moreover, while 'the UK's position has always been that IHL regulates armed conflict',<sup>67</sup> in order to use lethal force, and detain lawfully, the ECtHR's own guidance in relation to the meaning of 'war' is cited with approval: 'any substantial violence or unrest short of war likely to fall within the scope of the second limb of article 15(1), "a public emergency threatening the life of the nation"'.<sup>68</sup> The section entitled 'Operational Effectiveness and NATO' concentrates on the former, as not all NATO countries are party to the ECHR.<sup>69</sup>

The Memorandum highlights that practical difficulties are encountered with human rights in operational environments, including potential negative effects on the morale, fighting power and operational effectiveness of military personnel, and the risk of military witnesses relapsing with PTSD and other psychological difficulties during ECHR Article 2-compliant investigations.<sup>70</sup>

However, the sections entitled 'Legal Claims' and 'Compensation' form by far the bulk of the Memorandum. Pointing to the Conservative Party 2015 election manifesto and a Written Ministerial Statement of 10 October 2016, the government's commitment to prevent 'persistent' human rights during overseas military operations is maintained,<sup>71</sup> but the Memorandum defends the government's position. It asserts that, of some '1400 judicial review applications against the Ministry of Defence relating to the Iraq conflict', 'only a tiny minority' of the compensation claims 'have been accompanied by full documentation'.<sup>72</sup> The absence of evidence that has plagued many of the claims brought under common law is highlighted, and it is asserted 'that a number of claimants had changed their stories halfway through their cases'.<sup>73</sup>

As for government pay-outs to litigants, it is tersely noted that 'the Ministry of Defence has settled over 300 wrongful detention claims on a tariff basis, according to length of detention' – a policy decision made after the ECtHR judgment in *Al Jedda v United Kingdom*,<sup>74</sup> in which the Court found no lawful authority to detain Iraqi civilians during non-international phases of UK operations in Iraq: lawful detention required prior UN Security Council authorisation, which had not occurred. Subsequently, however, the

<sup>65</sup> Government Memorandum (n 62) [17].

<sup>66</sup> *Ibid* [3].

<sup>67</sup> *Ibid* [4]. Contrast *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Rep 1996, 22 (human rights protections do not cease during armed conflict); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (2004) ICJ Rep, 136 (the facts determine whether some rights arise under IHL, human rights, or both legal regimes). Consider also *Bankovic* (n 7) ('piecemeal' applicability of the ECHR, if relevant). Government Memorandum (n 62) [6], entitled 'Legislation', notes mainly that any derogation order would be subject to Parliamentary debate and approval.

<sup>68</sup> Government Memorandum (n 62) [8]. [6] cites the 'ECtHR Guide on Article 15 of the ECHR'.

<sup>69</sup> *Ibid* [10].

<sup>70</sup> *Ibid* [9]. See, eg, *R (on the application of Smith) (Respondent) v SOS for Defence (Appellant) and another* [2010] UKSC 29 (inquests must satisfy ECHR Article 2 procedures).

<sup>71</sup> Government Memorandum (n 62) [14].

<sup>72</sup> *Ibid* [11]. [12] refers to the 'now-defunct Public Interest Lawyers'.

<sup>73</sup> *Ibid* [16] n 6, citing *R (Al-Saadoon & ors. n 9)*, regarding altered testimonies.

<sup>74</sup> *Ibid* [62] [15 n 8] citing (2011) 53 EHRR 23. See also (n 11), cf Nick Cohen, 'Nobody, not even British soldiers, should be above the law', *The Guardian* (London, 23 January 2016) <<https://www.theguardian.com/commentisfree/2016/jan/23/british-soldiers-should-not-be-above-law>> accessed 22 May 2017 (mistreatment of 1,514 Iraqis alleged, including 280 who died; MOD has paid out £20m in 326 cases without admitting liability).

Court, in *Hassan v United Kingdom*,<sup>75</sup> had in fact qualified this stance: the safeguards of IHL and the ECHR during armed conflicts co-exist, but issues surrounding prisoners of war and detainees must be determined by IHL in line with the security risks. This judicial change-of-heart leads the Memorandum to state that '[i]t is therefore inaccurate to characterise the settlement of those claims as an acceptance of wrongdoing on the part of the UK'.<sup>76</sup>

The Memorandum concludes that a clear legal framework is needed for operational and strategic decision-making, thus implying that the 'presumption to derogate' is aimed squarely at a future intention to make IHL, alone, the legal framework applied to overseas military deployments.<sup>77</sup> Overall, this response to the JCHR may placate those critical of the high financial costs and compensatory damages incurred during recent overseas deployments.<sup>78</sup> In contrast, the case of *Smith v. MOD (No. 2)* [2013],<sup>79</sup> concerning the Article 2 'right to life' of serving military personnel seems particularly apposite to illustrate the ground-breaking nature of ECtHR extra-territoriality, as the Supreme Court acknowledged and reinforced for domestic law purposes.<sup>80</sup> Most crucially, the Supreme Court recognised that, when the time arrives to assess whether the government owes duties of care to all those under its power and control, the same considerations apply to claims brought under ECHR Article 2 as to common law tort claims, including for its serving military personnel.<sup>81</sup>

### *Smith v. UK (No. 2)* [2013]

The issue of a future ECHR derogation, designed to pre-empt human rights in favour of IHL during active military deployments overseas, runs counter both to 'teleological' Strasbourg case law on extra-territoriality,<sup>82</sup> and to notions of human rights 'universality'. In turn, the influence of the Strasbourg law prompted the UK Supreme Court majority decision in *Smith v. UK (No. 2)*,<sup>83</sup> and foreshadows the recent and highly-

<sup>75</sup> Government Memorandum (n 62) [16 n 9] citing (2014) 38 BHRC 358.

<sup>76</sup> *Ibid* [16].

<sup>77</sup> *Ibid* [17].

<sup>78</sup> See, e.g. See Tom Tugendhat and Laura Croft, *Policy Exchange: The Fog of Law: An introduction to the legal erosion of British fighting power*, Appendix C (Policy Exchange, 18 October 2013) <<https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf>> accessed 22 May 2017, and, its follow-up, Richard Ekings, Jonathan Morgan and Tom Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat* (Policy Exchange, 2015), <<https://policyexchange.org.uk/wp-content/uploads/2016/09/clearing-the-fog-of-law.pdf>> accessed 22 May 2017. Additional publications and links from the Policy Exchange on the topic may be found at <<http://www.policyexchange.org.uk/component/search/?searchword=fog%20of%20law&searchphrase=exact&limit=20>> accessed 22 May 2017. See also the Corporate Manslaughter and Corporate Homicide Act 2007, which, while not applicable to the battlefield, has 'caused anxiety in the MOD', by allowing juries 'to consider the attitudes, policies, systems and accepted practices within the organisation. Forster (n 48) 291 (citations omitted).

<sup>79</sup> In *Smith (No. 2)* (n 1), the UK Supreme Court took extensive account of the long line of Strasbourg case law which has culminated in the extra-territorial reach of the ECHR.

<sup>80</sup> The course of which caused much legal commentary. See, eg, Case Comment, Slapper, 'The right to life on the battlefield' [2010] 74(5) JCrImL 383; Case Comment, 'Right to life – jurisdiction – British troops dying or being injured whilst on active military service in Iraq' [2011] 109(Jul) Human Rights Updater 6; P. Ronchi, 'The borders of human rights' [2012] 128(Jan.) LQR 20; Case Comment, 'Claims involving Armed Forces: duty of care owed by Ministry of Defence' [Dec/Jan 2012–13] PI Comp 10; Case Comment, Jonathan Morgan, 'Negligence: into battle' [2013] 72(1) Cambr LJ 14; Case Comment, 'Tort: Smith v Ministry of Defence [2012] EWCA Civ 1365, [2013] 2 WLR 27 (CA (Civ Div))' [2013] Public Law 171; Case Comment, Mullender, 'Military operations, fairness and the British state' [2014] 130(Jan) LQR 28.

<sup>81</sup> Until *Smith (No. 2)* (n 1), nothing in domestic jurisprudence 'suggest[ed] that in parallel with the statutory cause of action', common law claims for breaches of human rights have also developed. Brice Dickson, 'If the Human Rights Act were repealed, could the common law fill the void?', Oxford Human Rights Hub, 27 November 2013 <<http://ohrh.law.ox.ac.uk/if-the-human-rights-act-were-repealed-could-the-common-law-fill-the-void/>> accessed 22 May 2017.

<sup>82</sup> Including, inter alia, *Bankovic* (n 7).

<sup>83</sup> Due, as per *R (on the application of Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20], Bingham L, to the duty of the national court 'to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less'. See Paula Giliker, 'The Influence of EU and European Human Rights Law on English Private Law' [2015] 64(2) ICLQ 237 s IV(C).

critical Iraq Inquiry Report, which notes both that the consequences of the 2003 invasion and subsequent military occupation of Iraq are still being felt,<sup>84</sup> and that many serving British personnel still experience service-related problems.<sup>85</sup> Regardless, the evolution of extra-territoriality has been hotly contested throughout,<sup>86</sup> and consequently prompted a number of ‘accommodations’ to be made by the ECtHR in order to adjust the IHL-ECHR balance,<sup>87</sup> such that one could suppose that extra-territoriality might be viewed more favourably.

Be that as it may, in *Smith (No. 2)*, breach of the government’s duties of care under tort negligence and Article 2 ECHR were alleged, due to inadequate military training and/or equipment. The claims arose out of the deaths of three soldiers and the injuries of another two, while serving in the British Army in Iraq between 2003 and 2006.<sup>88</sup> The Court was asked to deal mainly with three issues: whether two of the deaths (inadequate equipment) were within ECHR Article 1 jurisdiction, whether the UK owed Article 2 ‘positive’ duties to all the deceased soldiers, and whether the doctrine of combat immunity constituted a defence to the negligence claims (inadequate equipment, technology and training). A majority in the Supreme Court allowed the separate claims in tort and Article 2 ECHR,<sup>89</sup> and narrowly construed the defence of combat immunity to cover only active military operations or action immediately preceding combat,<sup>90</sup> thus denying the MOD’s contention that the doctrine should be extended to cover both training and equipment procurement. The Court considered this would be excessive, as pre-theatre training and equipment procurement decisions can occur far in advance of operations.<sup>91</sup>

A 4–3 majority emphasised that the same considerations applied for both the tort negligence and ECHR claims, and established for the first time in British law that military personnel deployed on active overseas operations could sue the government under both standards of duties of care. This it did cautiously, however, exempting ‘high level’ decisions and the actual conduct of operations from review,<sup>92</sup> and cautioning that all such matters would need further investigation as to their surrounding facts and evidence.<sup>93</sup> Even so, a ‘middle ground’ remained, albeit one carrying a wide margin of appreciation, ‘where it would be reasonable to expect the individual to be afforded the protection of the article’.<sup>94</sup> Seemingly anticipating the reasons for the current

<sup>84</sup> See, eg, The Iraq Inquiry: Report [2016], Vol 6 ss 6.3 and 11, and s 14, <<http://www.iraqinquiry.org.uk/the-report/>> accessed 22 May 2017.

<sup>85</sup> *Ibid* passim. See also Holly Watt, ‘More than 2500 soldiers jailed last year’ *The Guardian* (London, 18 March 2017) <<https://www.theguardian.com/uk-news/2017/mar/18/uk-armed-forces-veterans-prison-population-mental-health-issues>> accessed 22 May 2017 (‘concerns about post-conflict mental health issues’).

<sup>86</sup> See, eg, *The Fog of Law* (n 78).

<sup>87</sup> Consider Case Note, Cedric De Koker, ‘*Hassan v United Kingdom*: The Interaction of Human Rights Law and International Humanitarian Law with regard to the Deprivation of Liberty in Armed Conflicts’ [2015] 31(81) *Utrecht JInt & EurL* 90; Marko Milanovic, ‘*Hassan v. United Kingdom*, IHL and IHR, and Other News in (Extra-)Territoriality and Shared Responsibility’ (*EJIL: Talk!*, 18 December 2013) <<http://www.ejiltalk.org/hassan-v-united-kingdom-ihl-and-ihrl-and-other-news-in-extra-territoriality-and-shared-responsibility/>> accessed 21 May 2017.

<sup>88</sup> For a brief but reasonably comprehensive overview of the case, see Alexia Solomou, ‘Case Comment: *Smith & Ors v. MOD* [2013] UKSC41, UKSC blog, June 2013 <<http://uksclublog.com/case-comment-smith-ors-v-ministry-of-defence-2013-uksc-41/>> accessed 22 May 2017.

<sup>89</sup> *Smith (No. 2)* (n 1) [101].

<sup>90</sup> *Ibid* [83] – [100].

<sup>91</sup> The EU Commission scrutinises Member States’ procurement decisions. Directive 2009/81/EC of 13 July 2009 is designed specifically to bring procurement ‘inside’ the Internal Market. See the Commission Communication on the European Defence and Security Sector adopted on 24 July 2013, COM(2013)0542, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52013DC0542>> accessed 22 May 2017. See also Martin Trybus, ‘The tailor-made EU Defence and Security Procurement Directive: limitation, flexibility, descriptiveness, and substitution’ [2013] *EL Rev* 3.

<sup>92</sup> *Smith (No. 2)* (n 1) [176] (Lord Hope).

<sup>93</sup> *Ibid* [64] – [66] and [76] – [81].

<sup>94</sup> *Ibid* [76].



government's proposal of a future 'presumption to derogate', the Court warned that this 'middle ground' should not be utilised to impede the work of the military, or to provoke, through the threat of litigation,<sup>95</sup> a 'defensive approach' to strategic and procurement issues or to tactical and combat stages when equipment is being deployed. It also cautioned against imposing 'unrealistic or excessively burdensome' standards on military commanders.<sup>96</sup>

In contrast, the minority did not wish to extend the duties either of Article 2 ECHR or of common law negligence into what they argued was a new field.<sup>97</sup> Moreover, human rights and tort negligence should remain quite separate in British law, rather than converge. Indeed, a preference was noted for deciding the case entirely in tort negligence, with its familiar parameters of practical 'reasonableness'. Therefore, the minority would have rejected the Article 2 claims because of the political nature of military matters, including training and equipment procurement decisions, which require the (*political*) allocation of available resources. Arguing that Article 2 ECHR should be engaged, if at all, only for systematic, not operational failures,<sup>98</sup> it was made clear that Article 2 ECHR should not be extended to errors in the chain of command or relate to the conduct of operations. It was also 'unclear how far the two substantive [framework and operational] duties are separated, with middle ground between them, or, form part of a continuum covering almost every aspect of state activity'.<sup>99</sup>

In summary, *Smith (No. 2)* well-illustrates how polarised the arguments become when there is a choice between legal frameworks when states employ military force. The gradual erosion of Crown and combat immunities, of political control over when and where to deploy the military, of military control over training, and of political and military control over equipment procurement and operational planning, all collided in the case. The breakthrough of more extensive duties of care to military personnel deployed overseas on active service, and the recognition that a 'middle ground' exists in which they may bring litigation,<sup>100</sup> encourages not only greater public and judicial scrutiny of military deployments in general, but also necessitates more official caution in particular, as already promoted by numerous EU directives and other measures<sup>101</sup> intended to increase transparency and avoid both protectionism and possible corruption.<sup>102</sup>

The former 'fixed points' of reference of military life, as noted by Forster,<sup>103</sup> which once ensured 'the hierarchical and impenetrable nature of the armed forces',<sup>104</sup> have long been due for modernisation, while the 'golden shield' of military immunity has

<sup>95</sup> *Ibid* [100] (Lord Hope). See [120], [131] and [147] ([Lords Mance and Wilson] and [153] (Lord Carnwath).

<sup>96</sup> *Ibid* [99].

<sup>97</sup> *Ibid* [157] (Lord Carnwath dissenting). See generally [153] – [188].

<sup>98</sup> *Ibid* [106] (Lords Mance and Wilson dissenting). See generally [102] – [152].

<sup>99</sup> *Ibid* [104] (Lord Mance dissenting).

<sup>100</sup> *Ibid* [64] – [66] and [76] – [81].

<sup>101</sup> See, eg, Johan Joos and Sam Voet, European Defence and Security Procurement: difficulties and action points' (*Eversheds Brussels*, February 2015) <<http://www.eversheds-sutherland.com/documents/global/belgium/Eversheds-Brussels-Procurement-e-Briefing-February-2015.pdf>> accessed 22 May 2017.

<sup>102</sup> cf TFEU Article 346(1)(b), which permits exemption for 'essential interests of its security which are connected with the production or trade in arms, munitions and war material'. See UK Government Explanatory Memorandum, *The Defence and Security Public Contracts Regulations 2011* [5] <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/35925/dsd\\_govt\\_awareness\\_guide.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35925/dsd_govt_awareness_guide.pdf)> accessed 22 May 2017.

<sup>103</sup> (1) Governmental responsibility for the legality of British uses of force, (2) Crown and combat immunity from liability, (3) restrictions on civilian rights of military personnel, (4) a separate military judicial system, permitting 'the right to be different', and (5) the inability of the family and friends of military personnel to challenge MOD decisions, 'especially the appropriate levels of prior training, equipment and command responsibility'. Forster (n 48) 284–285.

<sup>104</sup> *Ibid* 299.

vanished.<sup>105</sup> In their place is the rule of law, already ‘accommodating’ the ECHR to the battlefield necessities reflected in IHL. On this basis, normalising military derogations in future would not assist in desired ‘clarity’.<sup>106</sup> On the contrary, the government’s response, via its proposed ‘presumption to derogate’ in future, appears designed mainly to prevent greater public, departmental and/or judicial scrutiny over the government’s deployments of armed force,<sup>107</sup> and with it, to block individual rights litigation, coroners courts,<sup>108</sup> resort to employment tribunals by military personnel, and so on, even though (or because) such forms of redress are vital in deterring impunity, malpractice and gross negligence.<sup>109</sup>

The many controversies surrounding recent deployments of British service personnel abroad, particularly in non-self-defence contexts or ‘wars of choice’,<sup>110</sup> along with the availability of litigation, demands for public enquiries and so on, which publicise the symptoms *and* causes of public disquiet, and which place greater pressure on politicians to pause longer when deciding to utilise the military instrument, have all proven crucial to the health and maintenance of vibrant British democratic institutions.<sup>111</sup> Therefore, and in view of the fact that there is as yet no guarantee that the UK will remain a Member State of the ECHR in future,<sup>112</sup> the alternative realities, had cases such as *Smith (No. 2)*, and public inquiries such as Chilcot<sup>113</sup> or Al-Sweady,<sup>114</sup>

<sup>105</sup> *Ibid* 286, quoting James Burke (citation omitted).

<sup>106</sup> *Ibid* 297–299 (asserting, at 299, that ‘rights-based systems bring with them permanent instability’).

<sup>107</sup> As regulated by the Inquiries Act 2005, the typology of which is described in Andrew Forster, ‘The military, war and the state: testing authority jurisdiction, allegiance and obedience’ [March 2011] 27(1) *Defense and Security Analysis* 55, 58. See, eg, the Hutton Enquiry in 2004 (regarding the death of MOD scientist David Kelly), the Deepcut Review in 2006 (deaths of four recruits at the Deepcut army barracks), the Nimrod Review in 2009 (loss of aircraft in Afghanistan), the Saville Enquiry in 2010 (Bloody Sunday), the non-statutory, independent Mull of Kintyre inquiry in 2011 (RAF Chinook helicopter crash of 1994), the Gage Inquiry in 2011 (death of Baha Musa in Iraq in 2003), and more recently, the Chilcot Report in July 2016 (Iraq war).

<sup>108</sup> See, eg, Natasha Holcroft-Emmess, ‘Military’s Deepcut Failings Exposed in Inquest Made Possible by the Human Rights Act’ (*RightsInfo*, 3 June 2016) <<https://rightsinfo.org/militarys-deepcut-failings-exposed-inquest-made-possibly-human-rights-act/>> accessed 21 May 2017 (Article 2 ECHR engaged in the alleged suicide of Private Cheryl James at the Deepcut army barracks). Enhanced investigations were introduced in *R v HM Coroner for Western Somersetshire, ex parte Jean Middleton & Secretary of State for Home Department (Interested Party)* [2004] UKHL 10.

<sup>109</sup> Forster (n 48) 286–295. See also Clearing the Fog of Law Executive Summary (n 78) 7 (regarding the increase in litigation brought against the MOD).

<sup>110</sup> See, eg, E. Chadwick, ‘No comity in error: asylum and “wars of choice”’ [2005] 44(12) *Revue de Droit Militaire et de Droit de la Guerre* 51.

<sup>111</sup> Reminding the government it may not ‘simply assert interests of state or the public interest and rely upon that as a justification for the commission of wrongs’, as per *Bici v MoD* [2004] EWHC 786 (QB) (Elias J citing *Entick v Carrington* (1765) 19 Howell’s State Trials 1029).

<sup>112</sup> See, eg, D. Harris, M. O’Boyle, E. Bates and C. Buckley, ‘Putting the Potential UK Withdrawal from the ECHR into Perspective’, *ECHR Blog*, 14 August 2014 <<http://echrblog.blogspot.co.uk/2014/08/putting-potential-uk-withdrawal-from.html>> accessed 22 May 2017.

<sup>113</sup> See, eg, N. Hopkins, ‘MoD left UK forces in Iraq ill-equipped amid lack of plan, Chilcot Report says’, *The Guardian* (London, 6 July 2016) <<https://www.theguardian.com/uk-news/2016/jul/06/mod-left-uk-forces-in-iraq-ill-equipped-amid-lack-of-plan-chilcot-report-says>> accessed 21 May 2017; J. Rozenberg, ‘The Iraq war enquiry has left the door open for Tony Blair to be prosecuted’, *The Guardian* (London, 6 July 2016) <<<https://www.theguardian.com/commentisfree/2016/jul/06/iraq-war-inquiry-chilcot-tony-blair-prosecute>> accessed 21 May 2017 (real and material criticisms of preparation, planning, process); Natasha Holcroft-Emmess and Adam Wagner, ‘Could Tony Blair Be Charged With War Crimes And Other Important Chilcot Inquiry Questions’ (*RightsInfo*, 6 July 2016) <[http://rightsinfo.org/chilcot-inquiry-iraq-war-releases-report/?utm\\_source=Weekly+Updates&utm\\_campaign=7174b4c3d1-Weekly\\_Newsletter\\_Test4\\_22\\_2015&utm\\_medium=email&utm\\_term=0\\_5de50f2649-7174b4c3d1-115312793](http://rightsinfo.org/chilcot-inquiry-iraq-war-releases-report/?utm_source=Weekly+Updates&utm_campaign=7174b4c3d1-Weekly_Newsletter_Test4_22_2015&utm_medium=email&utm_term=0_5de50f2649-7174b4c3d1-115312793)> accessed 21 May 2017.

<sup>114</sup> *Al-Sweady inquiry report*, Gov.UK (London, Ministry of Defence, 17 December 2014) <<https://www.gov.uk/government/publications/al-sweady-inquiry-report>> accessed 22 May 2017 (compiled by former high court judge, Sir Thyne Forbes, 17 December 2014). See, eg, Tim Wood, ‘“A Few Rotten Apples”: A Review of Alleged Detainee Abuse by British Personnel in Iraq Following the Al Sweady Inquiry. Is There Still a Case to Answer?’ [2016] 21(2) *JCon & SecL* 277; Richard Norton-Taylor and Owen Bowcott, ‘Baha Mousa report criticises “cowardly and violent” British soldiers’, *The Guardian* (London, 8 September 2011) <<https://www.theguardian.com/world/2011/sep/08/baha-mousa-report-british-soldiers>> accessed 21 May 2017; Richard Norton-Taylor, ‘British troops accused of executing civilians’, *The Guardian* (London, 23 February 2008) <<https://www.theguardian.com/uk/2008/feb/23/military.iraq>> accessed 21 May 2017; Richard Norton-Taylor, ‘What is the al-Sweady enquiry?’, *The Guardian* (London, 17 December 2014) <<https://www.theguardian.com/uk-news/2014/dec/17/what-is-al-sweady-iraq-inquiry-key-points>> accessed 21 May 2017.

and, indeed, the Deepcut Review,<sup>115</sup> not occurred, do not bear close scrutiny.

## CONCLUSION

This brief discussion considered the Conservative Party-led government's stated intention in October 2016 to derogate from the ECHR during future military deployments overseas. The government sought to justify this on the need for greater legal 'clarity' during such deployments. However, this stated purpose is partly rationalised by a desire to reduce the costs of rights litigation which arise during military operations overseas, so must be queried on many levels. Further, safeguarding the human rights of all by erasing the rights of some is fundamentally counter-intuitive: human rights form a protective shield for everyone, rather than just for some, against government abuse. When the government states it is seeking to avoid the 'vexatious' litigation of recent military deployments, it disregards the fact that some litigation has also been brought for the arbitrary and/or negligently-inflicted death or injury of British military personnel themselves, as well as for the alleged, unlawful detention and/or imprisonment of others. If the government resents having settled 'hundreds' of claims for wrongful detention, etc., it surely is worth remembering the conditions which led to that litigation in the first place. Finally, it is difficult to understand why the armed forces – a public authority – should not be expected to comply with national and international law, including human rights law, to the extent to which they are able.

The case of *Smith (No. 2)* well-illustrates these points, and underscores how and why the slow erosions of Crown and combat immunities, and of political and military control over when, where and how to use the military instrument, have long been overdue. The 'middle ground' left, albeit cautiously, by the UK Supreme Court for potential litigation in future is thus a salutary reminder of the virtuous – and necessary – clash of interests at stake. Public and judicial scrutiny of military decision-making, the ability to seek and obtain legal redress, and so on, must be maintained in a society where due care and regard are paid by those in power to the populations they purport to represent, regulate and protect. If not, a 'presumption to derogate' in future can only be viewed as a measure to normalise fewer rights, and to condition the public to expect less, never more, from those to whom their security and well-being are entrusted.

## EPILOGUE

The 'snap' U.K. general election of 2017 took place on Thursday, 8 June, after two major terrorist attacks in Manchester and London. The governing Conservative Party, hoping to strengthen its working Parliamentary majority of 17 seats, instead lost this majority, forcing the party to form a minority government. Additional support for key House of Commons votes was secured by the Party under a 'confidence and supply deal' with the Democratic Unionist Party (10 seats), agreed in exchange for additional funding of

<sup>115</sup> *The Deepcut Review*, Gov.UK (29 March 2006) <<https://www.gov.uk/government/publications/the-deepcut-review>> accessed 22 May 2017 (chaired by Nicholas Blake, QC). See, eg, Natasha Holcroft-Emmess, 'Military's Deepcut Failings Exposed in Inquest Made Possible by the Human Rights Act' (*RightsInfo*, 3 June 2016) <<http://rightsinfo.org/militarys-deepcut-failings-exposed-inquest-made-possibly-human-rights-act/>> accessed 21 May 2017 (Article 2 ECHR engaged in the alleged suicides at the Deepcut army barracks between 1995 and 2002). See also BBC News, 'Cheryl James: Deepcut soldier's death was suicide, coroner rules' (Surrey, 3 June 2016) <<http://www.bbc.co.uk/news/uk-england-surrey-36438786>> accessed 22 May 2017; Katie Jukes, 'Second Fresh Investigation Into Deepcut Barracks Death Triggered by Human Rights Act' (*RightsInfo*, 17 October 2016) <<http://rightsinfo.org/human-rights-require-proper-inquests/>> accessed 21 May 2017.

£1 billion for Northern Ireland (among other benefits). This election result effectively maintains the previous uncertainty regarding British human rights laws.

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# USER-GENERATED CONTENT ON THE INTERNET, AND INTERMEDIARY LIABILITY FOR THE DISSEMINATION OF UNLAWFUL COMMENTS IN THE EUROPEAN COURT OF HUMAN RIGHTS

*Delfi AS v. Estonia* (2016) 62 EHRR 6 (ECtHR)

(The President, Judge Spielman; Judges Casadevall, Raimondi, Villiger, Karakaş, Ziemele, Zupančič, Sajó, Bianku, Tsotsoria, De Gaetano, Nußberger, Laffranque, Sicilianos, Jäderblom, Spana, Kjølbros)

## INTRODUCTION

During the last decade, the European Court of Human Rights has been called on to consider the potential conflict between freedom of expression protected under article ten and the right to reputation protected as part of private life under article eight on an almost continual basis.<sup>1</sup> However, as a medium of communication that has the potential to reach a wider audience than ever before, the Internet introduces new considerations to the finding of an appropriate balance.

Indeed it is on this basis that the decision in *Delfi AS v. Estonia (Delfi)* is of wide reaching importance, because it marks the first time that the European Court of Human Rights has been called on to consider the authorship of user-generated content on Internet news websites, and the potential liability of the site provider for the dissemination of unlawful speech. Analysis of the *Delfi* decision demonstrates the Court's difficulty in balancing the rights under article ten and eight more generally, but specifically so in relation to user-generated content through the Internet.

## FACTS

The applicant company are the owners of the *Delfi* news portal, one of the largest news websites in Estonia. They publish in the region of 330 news articles a day, attracting up to 10000 reader comments, which are most commonly posted under pseudonyms.<sup>2</sup>

*Delfi* had a notice-and-take-down system in place, whereby readers could mark a comment as *leim* (meaning insulting or inciting hatred). Once *Delfi* had received such a notice the comment would be removed. There was also an automatic filter in place, which deleted comments that contained certain key words. A victim of defamation could also contact *Delfi* directly and the comment would be removed immediately. *Delfi* had also provided 'Rules of Comment' in an attempt to regulate the conduct of commenters, which also functioned as a disclaimer stating that comments did not reflect the views of the company, and that the authors of the comments would be responsible for their content.

On the 24<sup>th</sup> January 2006, *Delfi* published an article entitled 'SLK destroyed Planned Ice Road.' SLK are a public limited company who provide a ferry service between Estonian mainland and certain islands, and the Ice roads are public roads over the frozen sea providing access between the mainland and islands during the Winter.<sup>3</sup> The

<sup>1</sup> For example, see Stijn Smet, 'Freedom of Expression and the Right to Reputation: Human Rights in Conflict' (2010–2011) 26 *American University International Law Review* 183, Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' (2009) 1 *Journal of Media Law* 49.

<sup>2</sup> *Delfi AS v. Estonia* (2016) 62 EHRR 6, para 11.

<sup>3</sup> *Ibid*, para 16.

article reported that in changing its routes, SLK had delayed the building of the ice roads. Over a period of 24 hours the article attracted 185 comments, 20 of which were identified as containing personal threats and were offensive against L, the sole and majority shareholder of SLK.<sup>4</sup>

On the 9<sup>th</sup> March 2006, L's lawyers requested that *Delfi* remove the offensive comments and claimed damages of approximately 32000 Euros.<sup>5</sup> That same day *Delfi* removed the offensive comments, but refused the claim for damages. Consequently, L brought a civil suit against *Delfi*.

At first instance the domestic Court found in favour of *Delfi*, holding that the comment area should be distinguished from the journalistic activities on the basis that the administration of the comment area was conducted on a mechanical and passive nature, therefore the company was not under an obligation to monitor the comments.<sup>6</sup> Furthermore, liability was excluded under the Information Society Services Act 2004, which implemented the European E-Commerce Directive.<sup>7</sup> L successfully appealed and the case was remitted to the Court of first instance.

On remittance the Court found in favour of L, as it deemed the Information Society Services Act 2004 inapplicable and relied instead on the Obligations Act 2002, awarding L approximately 320 Euros in damages.<sup>8</sup> It held that the systems put in place by *Delfi* were insufficient and did not adequately protect the personality rights of others, and consequently *Delfi* was the publisher of the comments. *Delfi* unsuccessfully appealed this decision to the Estonian Supreme Court.<sup>9</sup>

The applicant company appealed to the European Court of Human Rights on the basis that their article ten right to freedom of expression had been violated by holding them liable for the comments posted on their website. In its judgment on 10<sup>th</sup> October 2013, the Chamber held that the restriction on *Delfi's* freedom of expression was a justified and proportionate response. In its decision, the Chamber gave regard to the context of the comments, the measures applied by *Delfi* to prevent or remove defamatory comments, the liability of the actual authors, and the consequences of the domestic proceedings.<sup>10</sup> As the article had given rise to the defamatory comments and contained a matter of general public interest, the Chamber considered that it was foreseeable that it could result in the posting of defamatory comments.<sup>11</sup> *Delfi* had exercised caution to avoid being held liable, however, the automatic filtering and notice-and-take-down system had not been sufficient to prevent this. Furthermore there was no realistic opportunity of bringing a civil claim against the actual authors due to the difficulty in identifying and pursuing them. The Chamber also considered 320 Euros to be a moderate amount of damages. *Delfi* then appealed this decision to the Grand Chamber.

### *Judgment of the Grand Chamber*

The Grand Chamber noted at the outset that this was the first time it had been called on to consider the publication of user-generated content on an Internet news website.<sup>12</sup> Consequently, it is a decision that has wide reaching implications particularly for free

<sup>4</sup> *Ibid*, para 17.

<sup>5</sup> *Ibid*, para 18.

<sup>6</sup> *Ibid*, para 23.

<sup>7</sup> *Ibid*, para 23.

<sup>8</sup> *Ibid*, para 26–27.

<sup>9</sup> *Ibid*, para 30.

<sup>10</sup> *Ibid*, para 64.

<sup>11</sup> *Ibid*, para 65.

<sup>12</sup> *Ibid*, para 111.

speech and defamation on the Internet; a fact that the Court readily acknowledged.<sup>13</sup> Because of the potential implications, the Court limited its decision to the particular facts of the case. The most important being that *Delfi* was a professionally managed news portal website, and the impugned comments predominantly constituted hate speech.<sup>14</sup>

The Grand Chamber agreed that there had been an interference with the applicant company's article ten right to freedom of expression.<sup>15</sup> Having regard to the Obligation Act 2002, the Civil Code of Conduct, and the Estonian Constitution, the Grand Chamber was satisfied that it was foreseeable that a media publisher running an Internet news portal could be held liable for uploading unlawful comments.<sup>16</sup> Furthermore, as a professional company *Delfi* was in a position to assess the risks related to its activities and the consequences they entailed.<sup>17</sup> The Grand Chamber was also satisfied that the measure pursued the legitimate aim of protecting the rights and reputation of others.

In assessing whether the interference was necessary in a democratic society, the Court reiterated the importance of freedom of expression in a democratic society, and the essential role played by the journalistic press in a democracy, and it also noted the important role played by the Internet.<sup>18</sup> The Grand Chamber also reiterated its case law surrounding hate speech, in that certain speech will not be protected under article ten by virtue of article 17, which provides that activities that have as their aim the destruction of the rights and freedoms contained within the convention will not be protected. Therefore, certain expression will not fall under the protection of article 10 on the basis that it contravenes the principles of the European Convention on Human Rights.<sup>19</sup>

In considering the proportionality of the interference and whether the reasons identified by the Estonian Supreme Court were relevant and sufficient, the Grand Chamber agreed with the approach adopted by the Chamber and the relevant aspects they had identified. These being the context of the comments, the liability of the author of the comments, the measures adopted to remove and prevent the comments, and the consequences for *Delfi*.

In assessing the context of the comments, the Grand Chamber attached particular weight to the nature of the *Delfi* news portal. In particular the court highlighted that it was a professionally operated site that was run on a commercial basis with comments actively encouraged, and the comment count directly contributed to the generation of revenue for the company.<sup>20</sup> The Court also attached particular weight to the high degree of control that the company exercised over the comments, particularly as once a comment had been posted it was no longer under the original author's control, and could only be edited or removed by *Delfi*.<sup>21</sup> It was therefore clear that the company's involvement in the comments went beyond that of a passive, technical service provider.

In relation to the liability of the original authors of the comments posted on *Delfi*'s website, the Court reiterated the importance of allowing anonymity on the Internet in order to encourage freedom of expression, but emphasised the importance of balancing this against the rights and freedoms of others.<sup>22</sup> The Court held that the measures in

<sup>13</sup> *Ibid*, para 110.

<sup>14</sup> *Ibid*, para 117.

<sup>15</sup> *Ibid*, para 118.

<sup>16</sup> *Ibid*, para 128.

<sup>17</sup> *Ibid*, para 129.

<sup>18</sup> *Ibid*, para 133.

<sup>19</sup> *Ibid*, para 136.

<sup>20</sup> *Ibid*, para 144.

<sup>21</sup> *Ibid*, para 145.

<sup>22</sup> *Ibid*, para 147.

place to identify the original authors were inadequate, because it would have been difficult for L to pursue litigation against the commenters.<sup>23</sup> Furthermore, as *Delfi* was in a financial position to be able to pay damages it was not disproportionate to allow L a remedy against *Delfi*.

The Grand Chamber then considered the measures taken by the applicant company in removing and preventing the defamatory comments. In its reading of the Supreme Court's judgment it considered that there was nothing to suggest that the Supreme Court had intended to restrict the applicant company further by requiring them to prevent defamatory comments from being uploaded. The Grand Chamber therefore proceeded on the basis that the removal of the comments without delay after publication would have been enough to escape liability.<sup>24</sup> The Court noted that the applicant company had used a disclaimer and an automatic filter system; however, the filter system had failed to remove the comments in question, which had compromised *Delfi's* ability to remove the comments.<sup>25</sup> The Court also considered it important that the applicant company was in a better position to monitor the comments than a potential victim, and therefore in a better position to remove defamatory comments.<sup>26</sup>

Finally, in considering the proportionality of the consequences for the applicant company, the Court stated that 320 Euros was not a disproportionate amount of damages and the interference had not required the applicant company to change its business model.<sup>27</sup> Furthermore, in the domestic decisions following *Delfi*, companies had not been required to pay damages; removal of the comments was deemed sufficient.

In their concluding remarks the Grand Chamber reiterated the facts that had been important in reaching their decision. These being the extreme nature of the comments, which had been posted in response to the article published, and the insufficiency of the measures taken to remove and identify the commenters.<sup>28</sup> The Court therefore concluded that the imposition of liability on *Delfi* had been based on relevant and sufficient reasons, and consequently there was no violation of article ten.

## COMMENTARY

This decision marks the first time that the European Court of Human Rights has been called on to consider the potential liability of Internet intermediaries for the uploading of unlawful user-generated content, and the decision clearly has wide-reaching implications, particularly for freedom of expression and defamation on the Internet. The potential impact of the decision prompted a strong reaction from a number of third party interveners. The level of debate surrounding this topic is perhaps best demonstrated in the diametric views opined in the concurring and dissenting opinions of this decision.

In their concurring opinion, Judges Raimondi, Karakas, De Gaetano and Kjølbro agreed with the overall decision, but criticised the case specific approach adopted by the Court because they felt that the Court had not clearly stated the underlying principles that had led to the finding of no violation. However, because of the duties and responsibilities inherent in the exercise of freedom of expression under article ten, the liability of a news portal for the dissemination of clearly unlawful speech, if they knew

<sup>23</sup> *Ibid*, para 151.

<sup>24</sup> *Ibid*, para 153.

<sup>25</sup> *Ibid*, para 156.

<sup>26</sup> *Ibid*, para 158.

<sup>27</sup> *Ibid*, para 161.

<sup>28</sup> *Ibid*, para 162.



or ought to have known of its existence, was not incompatible with article ten. Indeed the Judges argued that ‘not being aware of such clearly unlawful comments for such an extended period of time almost amounts to wilful ignorance, which cannot serve as a basis for avoiding civil liability’.<sup>29</sup>

As a previous advocate for the importance of personality rights,<sup>30</sup> Judge Zupančič continued this argument in his concurring opinion, suggesting that freedom of expression should be curbed in favour of the personality rights of others. In particular he strongly criticised the lack of responsibility shown by *Delfi*, stating that ‘to enable technically the publication of extremely aggressive forms of defamation, all this due to crass commercial interest, and then to shrug one’s shoulders, maintaining that an Internet provider is not responsible for these attacks on the personality rights of others, is totally unacceptable’.<sup>31</sup>

In contrast, in their dissenting opinion, Judges Sajó and Tsotsoria criticised the judgment as a departure from previous case law. In opposition to Judge Zupančič they argued that ‘to find that responsibility of the press (or of any speaker, for that matter) is enhanced by the presence of an economic interest does not sit comfortably with the case law’.<sup>32</sup> They were also critical of the liability system placed on *Delfi*, which they said amounted to ‘collateral censorship’.<sup>33</sup>

The problems surrounding user-generated content, such as the ‘trolling’<sup>34</sup> of other users and the use of comments to abuse other people,<sup>35</sup> the difficulties identifying anonymous users,<sup>36</sup> and the permanence and availability of information once disseminated<sup>37</sup> are also an area of wide public interest. These issues continue to provoke concerns about the general lack of control on the Internet and the World Wide Web, indeed because the Internet infrastructure is largely privately controlled and falls outside of Governmental control.<sup>38</sup>

One of the most interesting aspects of the decision is the relative ease with which the Court accepts an intermediary as a publisher of the comments, despite the recognition that there remain clear differences between a traditional media publisher and a news intermediary, the Court fails to truly distinguish between the two. Of particular importance is the control exercised by *Delfi* over the comments, in that once they are uploaded they fall outside of the author’s control and can only be edited by the applicant company. The Court also found that *Delfi* should have foreseen the type of comments this article could generate given the topic of general public interest. This essentially moves away from a traditional requirement of actual knowledge to the lesser

<sup>29</sup> *Ibid*, Joint Concurring Opinion of Judges Raimondi, Karakas, De Gaetano and Kjølbros, para 15.

<sup>30</sup> For example, see *Von Hannover v Germany* (2005) 40 EHRR 1, Concurring Opinion of Judge Zupančič.

<sup>31</sup> *Delfi* (n ii) Concurring Opinion of Judge Zupančič.

<sup>32</sup> *Ibid*, Joint Dissenting Opinion of Judges Sajó and Tsotsoria, para 28.

<sup>33</sup> *Ibid*, Joint Dissenting Opinion of Judges Sajó and Tsotsoria, para 2.

<sup>34</sup> Flame trolling has been defined as the ‘posting of messages online that are intended to be provocative, offensive or menacing’. Jonathon Bishop, ‘The Effect of De-Individualisation of the Internet Troller on Criminal Procedure Implementation: An Interview with a Hater’ (2013) 7(1) *International Journal of Cyber Criminology* 28, 28.

<sup>35</sup> Danielle Keats Citron, ‘Civil Rights in our Information Age’ in Saul Levmore and Martha C Nussbaum eds. *The Offensive Internet: Speech, Privacy and Reputation* (Harvard University Press 2010) 32. See also; Sandra Leville, ‘Research Reveals Huge Scale of Social Media Misogyny’ (The Guardian 26 May 2016) <<https://www.theguardian.com/technology/2016/may/25/yvette-cooper-leads-cross-party-campaign-against-online-abuse>> accessed on 4 November 2016.

<sup>36</sup> Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press 2014) 57.

<sup>37</sup> Daniel J Solove, ‘Speech, Privacy, and Reputation on the Internet’ in Saul Levmore and Martha C Nussbaum (eds) *The Offensive Internet: Speech, Privacy and Reputation* (Harvard University Press 2010) 16.

<sup>38</sup> Daniel J Solove, *Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press 2007) 110. Brian Leiter, ‘Cleaning Cyber-Cesspools: Google and Free Speech’ in Saul Levmore and Martha C Nussbaum eds. *The Offensive Internet: Speech, Privacy and Reputation* (Harvard University Press 2010) 156.

requirement of constructive knowledge, and as the dissenting opinion argues creates strict liability for the dissemination of such comments.<sup>39</sup> However, it is clear that the level of control exercised is beyond that of a mere technical service provider. Even Judges Sajó and Tsotsoria in their dissenting opinion describe the applicant company as an active intermediary, demonstrating that the role of the company in the dissemination of the comments cannot be described as passive in any way.<sup>40</sup> It is therefore fair to argue, as Judge Zupančič did in his concurring opinion, that it is unacceptable for an intermediary to provide the technical support to upload the highly unlawful comments, but argue it should have no responsibility for the dissemination of such comments.<sup>41</sup>

The commercial interest of the organisation is also an important factor in the decision of the Court, particularly as the comments generated have a direct nexus to revenue. The Court's preoccupation with the commercial interests of *Delfi* is perhaps reflective of wider concerns. Indeed on the basis that the Internet is largely an area of private enterprise outside of Governmental control, it is conceivable to require intermediaries to exercise a certain level of responsibility whilst maintaining the fundamental interests of freedom of expression. Within the Dissenting Opinion the invisible controls underlying the Internet by private and public regulators were emphasised, arguing that the imposition of liability created private censorship in that intermediaries would be forced to censor certain user-generated content. However, the Court emphasises that this decision should not be interpreted as requiring intermediaries to prevent publication of such comments, but to remove without delay unlawful comments once they become aware of them. Furthermore, the applicant company was in effect already attempting to censor information with the use of the automatic filter; however, its inadequacy was clear, as it had failed to identify the impugned comments. It therefore demonstrates awareness on the part of *Delfi*, that a duty of care was owed to potential victims and measures should have been in place to remove potentially damaging comments.

The Court also reiterated the importance of the Internet for the dissemination of information, and the growing importance of user-generated content, and therefore limited its decision to the specific facts of the case, excluding other internet forums in which content is not provided by the intermediary, such as Facebook, Twitter and YouTube. However, this distinction has the potential to muddy the waters with regard to freedom of expression because, as the Dissenters argued, it has the capacity to create greater protection of speech when it is opined as a hobby as opposed to a commercial operation.

The Court was also keen to highlight the permanence of information once uploaded to the Internet, and importantly emphasised the aggravating effects unlawful speech may have on the Internet, thereby suggesting that stronger controls may be needed to limit certain types of unlawful speech on the Internet, particularly hate speech. The Dissenters suggested that the Court had failed to analyse whether the comments amounted to a real threat and emphasised the crucial role comments played in the exchange of ideas on the Internet and within democracy itself. However, it could equally be argued that the democratic value of the Internet is somewhat limited when the dissemination of certain types of speech has the effect of silencing particular individuals within a sphere that is suggested as enhancing free speech.

Whilst the Court is mindful of the unprecedented platform that the Internet provides for freedom of expression and the important role of anonymity for free discussion on the Internet, it is clear that this must be balanced against other rights. In this decision

<sup>39</sup> *Delfi* (n ii) Joint Dissenting Opinion of Judges Sajó and Tsotsoria.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, Concurring Opinion of Judge Zupančič.

it appears that the Court has placed greater emphasis on the protection of the rights and reputation of others, than freedom of expression, particularly due to the nature of the speech involved. However, interestingly the Court stops short of suggesting that the article eight right to privacy has come into play, stating that for the article eight right to protection of reputation to be engaged, the attack must be made in a manner causing serious prejudice to the personal enjoyment of private life. Nevertheless, it could be argued that the dissemination of clearly defamatory comments over the Internet could be serious enough to prejudice the personal enjoyment of private life, as is suggested by Judge Zupančič in his concurring opinion when he argues that freedom of expression should be limited as soon as it negatively affects another person's reputational integrity.

## CONCLUSION

It is clear that the European Court of Human Rights has adopted a rather confused approach in its analysis of the *Delfi* decision. Indeed there are a number of considerations that appear to dominate the discussion adopted by the Court, such as the commercial position of the company, and the inadequacy of the measures in place to monitor user comments. In adopting this case-specific approach the Court fails to truly clarify what the law is within this tricky area. Furthermore, the decision adds another level of confusion into the potential conflict between freedom of expression protected under article ten and the right to protection of reputation as part of private life under article eight. However, it must be remembered that this is the Court's first decision involving user-generated content on the Internet. It is also clear that the Court will be called on to consider this area again in the future, because the Internet provides an obvious clash between freedom of expression and the right to protection of reputation.

JODI HALL\*

# THE UK'S ANTI-RADICALISATION PREVENT DUTY

## INTRODUCTION

One of the biggest threats faced by Western nations in the twenty first century is terrorism. However, while previous terrorist attacks were committed by foreign nationals, more recent terrorist atrocities have been committed by a state's own radicalised nationals for a global cause. This was seen in the London Bombings in 2005 where 52 individuals were killed, the 2011 Norway Attacks where 77 individuals were slaughtered, bombings in Ankara and Suruç in 2015 in which 208 people were killed and the attacks in Paris and Brussels that left 165 dead. Alongside the domestic threat of terrorism, citizens of Western nations have headed overseas to Iraq and Syria to fight for so-called Islamic State.

To respond to these threats, governments around the world have introduced measures to prevent radicalisation occurring and, where it has already occurred, to de-radicalise individuals. The United Kingdom's approach is known as 'Prevent'. Prevent is one of four pillars of the UK's response to terrorism known as CONTEST.<sup>1</sup> Prevent was introduced as part of CONTEST in 2003 and was subsequently revamped in 2006, 2009 and 2011.<sup>2</sup> In 2015, the Conservative Government believing more needed to be done to tackle radicalisation introduced section 26 of the Counter-Terrorism and Security Act 2015 which creates a general duty that requires that: 'A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism'. This piece critically discusses aspects of the duty.<sup>3</sup>

## SPECIFIED AUTHORITIES

Specified authorities are listed in Schedule 6 Part 1 and include: local government;<sup>4</sup> criminal justice bodies (such as prisons);<sup>5</sup> education bodies (which includes nurseries, schools and universities);<sup>6</sup> health and social care bodies;<sup>7</sup> and the police.<sup>8</sup> The Secretary of State has the power to extend the list of authorities subject to the duty in certain circumstances.<sup>9</sup> These bodies are subject to the duty as it is thought that they are most likely to notice if individuals are becoming radicalised as they have frequent and regular contact with large sections of the public.

<sup>1</sup> HM Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (HM Government 2003).

<sup>2</sup> HM Government, *Countering International Terrorism: The United Kingdom's Strategy* (HM Government 2006); HM Government, *Pursue Prevent Protect Prepare: The United Kingdom's Strategy for Countering International Terrorism* (HM Government 2009); HM Government, *Prevent Strategy* (HM Government 2011).

<sup>3</sup> It draws on David Barrett, 'Tackling radicalisation: the limitations of the anti-radicalisation Prevent duty' (2016) 5 *European Human Rights Law Review* 530.

<sup>4</sup> This includes county/district councils in England; the Greater London Authority, London borough councils; the Common Council of the City of London; the Council of the Isles of Scilly; a county council or county borough council in Wales; and any person exercising a function of a best value authority under section 1(2) of the Local Government Act 1999 by virtue of direction by the Secretary of State (under section 15).

<sup>5</sup> This includes the governor/director of a prison in England and Wales; the governor/director of a young offender institution or secure training centre; the principal of a secure college; and the provider of probation services.

<sup>6</sup> This includes the proprietors of both state and independent schools and nurseries, further education colleges, universities and childminders.

<sup>7</sup> These include an NHS Trust, NHS Foundation Trust, Local Health Board in Wales, a Community Health Council in Wales and the Board of Community Health Councils in Wales.

<sup>8</sup> This includes a chief officer of police, the British Transport Police, a Port Police Force, the Common Council of the City of London, a police and crime commissioner, the Mayor's Office for Policing and Crime and the Civil Nuclear Police Authority.

<sup>9</sup> Counter-Terrorism and Security Act 2015 ss 26(4), 27.

However, this is not true of all authorities specified. For example, individuals may rarely visit hospitals and if they do, the majority of patients are not frequent or regular users. In contrast, GPs, which members of the public are more likely to have contact with, are excluded from the duty. Alongside GPs, there are a wide variety of third sector bodies that are not subject to the duty (e.g. charities, youth groups, religious organisations). Although it is understandable that the duty was not extended to non-public bodies, it is actually these excluded bodies who are likely to prove more effective than the specified authorities at noticing signs of radicalisation and taking action to de-radicalise them. This is because many of the specified authorities are formal settings and so individuals who are becoming more extreme are liable to take care to hide their radical views. In contrast, in more relaxed settings (such as youth groups etc) individuals are more likely to be themselves and hence more openly exhibit signs of radicalisation. Although, non-specified authorities are encouraged to work with public bodies to tackle radicalisation, they are not required to do so, which potentially limits the effectiveness of the Prevent duty.

Furthermore, the Prevent duty requires specified authorities to focus upon the individual causes of radicalisation (such as feelings of alienation or humiliation, identity problems or interaction with similar individuals). It however, ignores societal factors that cause radicalisation (e.g. a lack of socio-economic opportunities).<sup>10</sup> Thus, white pupils receiving free school meals (who are most likely to grow up to support far right organisations) are low achievers at school (72% fail to obtain 5 A\*-C grades at GCSE) and 50% of Muslims currently live in poverty (cf 18% of society as a whole).<sup>11</sup> It will be impossible to counter radicalisation if specified authorities are only focusing on individual factors while no action is taken to tackle the societal factors such as socio-economic inequality (high poverty levels have not changed in over a decade).<sup>12</sup>

## PREVENTING INDIVIDUALS FROM BEING DRAWN INTO TERRORISM

Specified authorities are required to have due regard to prevent individuals from being drawn into terrorism. Yet, it is not clear from the wording exactly what specified authorities are required to do which gives them a large amount of discretion. There is training provided (in the form of a Workshop to Raise Awareness of Prevent) however this has been criticised for being similarly vague.<sup>13</sup> The repercussions of not complying with the duty are potentially severe though, for example schools can be taken over by the government.<sup>14</sup> The vagueness of the duty plus the potentially severe repercussions for non-compliance has meant that there are numerous accounts of it being discharged in a heavy handed way in order for authorities to ensure they have complied. For example, a four-year-old was alleged to have been referred to authorities by her nursery under the

<sup>10</sup> W. Laqueur, "The Terrorism to Come" (2004) (Aug-Sept) *Policy Review* 51; O. Roy, *Globalised Islam: The search for a new Ummah* (London: Hurst & Co, 2004); L. Wadgy, "The Psychology of Extremism and Terrorism: A Middle-Eastern Perspective" (2007) 12(2) *Aggression and Violent Behaviour* 141; K. Christmann, "Preventing Religious Radicalisation and Violent Extremism: A Systematic Review of the Research Evidence" (London: Youth Justice Board, 2012), p. 23; A. Schmid, "Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review" (The Hague: International Centre for Counter-Terrorism, 2013), p. 4.

<sup>11</sup> T. MacInnes and others, *Monitoring poverty and social exclusion 2015* (York: Joseph Rowntree Foundation 2015), p. 88; A. Heath and Y. Li, "Review of the relationship between religion and poverty – an analysis for the Joseph Rowntree Foundation" (2015) 1/2015 *Oxford Centre for Social Investigation Working Paper* 1/2015, 13

<sup>12</sup> Adam Tinson and others, 'Monitoring poverty and social exclusion 2016' (Joseph Rowntree Foundation 2016).

<sup>13</sup> L. Blackwood, N. Hopkins and S. Reicher, "From Theorizing Radicalization to Surveillance Practices: Muslims in the Cross Hairs of Scrutiny" [2015] *Political Psychology* 8.

<sup>14</sup> HM Government, *Revised Prevent Duty Guidance for England and Wales* (HM Government 2015) 12.

Prevent duty. This was because when her teacher asked her what she was drawing and she responded that it was a drawing of her father preparing a cucumber, rather than cucumber the teacher heard ‘cooker-bomb’.<sup>15</sup> Additionally, a Muslim university student was allegedly quizzed by a security guard for a reading a course book on terrorism in the library.<sup>16</sup> Finally, a hospital nurse was quizzed by senior managers and counter-terrorism police after she started wearing a headscarf.<sup>17</sup>

A particular problem with the duty is that although it potentially applies to all individuals, in reality, the guidance and hence authority action has focused heavily upon Muslims and has underestimated the threat of right wing terrorists. Right wing terrorists pose a different threat to Muslim terrorists, with them being much more likely to be lone actors (57% of lone actor terrorist attacks in the UK have been committed by right-wing perpetrators compared to 35% that were religiously inspired).<sup>18</sup> These attacks are largely motivated by immigration policy, a wish to inspire patriotism and to counter ‘Islamisation’. Right-wing perpetrators raise particular concerns as only 15% exhibit changes in behaviour (cf 50% of religiously inspired perpetrators). Consequently, greater focus and efforts are needed to recognise and address radicalisation in right-wing individuals. Yet the Prevent duty and the guidance underpinning it focus almost exclusively on Muslims. This is counter-productive as the disruption and attention given to innocent Muslims under the duty could potentially lead to resentment and thus potentially, the very thing it is meant to prevent, radicalisation.

## ENFORCEMENT

An additional potential problem with the Prevent duty concerns enforcement. The Prevent duty utilises the ‘due regard’ standard from the public sector equality duty<sup>19</sup> and possesses the same limitation that failure to comply with the duty does not confer an action at private law.<sup>20</sup> However, this has not prohibited actions utilising judicial review to challenge non-compliance under the public sector equality duty.<sup>21</sup> In contrast to the public sector equality duty, where marginalised groups (e.g. the disabled, women etc.) have utilised judicial review to require public bodies to consider their needs, it is unlikely that individuals undergoing a process of radicalisation would bring judicial review proceedings arguing specified authorities should do more to prevent them being drawn into terrorism. Instead, what is more likely, is that far right groups argue that authorities are not doing enough to tackle the threat posed by Muslims. Thus the duty risks providing a legitimate forum for these groups to argue their extreme views. Whether they are able to bring judicial review proceedings depends on whether they are granted standing or not. This requires that they have ‘sufficient interest’ in the matter.<sup>22</sup> *Fleet Street Casuals* suggests that, as these far right groups are not personally affected

<sup>15</sup> Rights Watch (UK), ‘Preventing Education? Human Rights and UK Counter-Terrorism Policy in Schools’ (Rights Watch 2016) 45.

<sup>16</sup> Open Society Justice Initiative, *The UK’s PREVENT Counter-Extremism Strategy in Health and Education* (Open Society Foundation 2016) 97.

<sup>17</sup> Open Society Justice Initiative, *The UK’s PREVENT Counter-Extremism Strategy in Health and Education* (Open Society Foundation 2016) 103.

<sup>18</sup> C. Ellis and others, *Lone-Actor Terrorism: Analysis Paper* (London: Royal United Services Institute, 2016), p. 10; C. Ellis and R. Pantucci, *Lone-Actor Terrorism: ‘Leakage’ and Interaction with Authorities* (London: Royal United Services Institute, 2016), p. iv.

<sup>19</sup> Equality Act 2010, s 149.

<sup>20</sup> Counter-Terrorism and Security Act 2015, s 34; Equality Act 2010, s 156.

<sup>21</sup> E.g. *R (Brown) v Secretary of State for Work & Pensions* [2008] EWHC 3158 (Admin).

<sup>22</sup> Supreme Court Act 1981, s 31(3).

by decisions under the Prevent Duty, they will only have standing if the public body acted with impropriety or the issue is serious enough to warrant judicial attention.<sup>23</sup> In *World Development Movement*, standing was granted to a body not personally affected by a decision because the issue was serious enough to warrant judicial attention. This conclusion was reached due to the seriousness of the allegations, the strength of the claimant's case, the absence of an alternative challenger and the expert and informed character of the claimant.<sup>24</sup> In relation to challenging a public body's failure to have due regard to preventing terrorism it can be argued that it is serious enough to warrant judicial attention (failure to have due regard could ultimately result in a terrorist attack) and there is nobody else to challenge the decision. Consequently, although courts have a great deal of discretion and so may use this to prevent far right groups challenging public authorities (which in itself far right groups can utilise as propaganda to recruit more members),<sup>25</sup> on the basis of *Fleet Street Casuals* and *World Development Movement*, far right groups can argue that they have a legitimate case for possessing sufficient interest required for standing. This possibility has only arisen due to the introduction of the Prevent legal duty.

## CONCLUSION

Preventing individuals from becoming radicalised and committing terrorist atrocities both at home and abroad is a legitimate interest of the UK Government. Additionally, it makes sense to recruit other bodies to assist with this important task. However, introducing a vague legal duty, with minimal support and potentially serious implications for non-compliance is not the best way to address it. It has focused efforts on the bodies often least able to observe the signs of radicalisation and take effective action. The duty has also targeted identifying individual causes of radicalisation and has ignored societal factors that contribute to radicalisation such as socio-economic inequality. Additionally, the vague nature of the duty and the potentially severe repercussions for non-compliance has led to over-implementation and has heavily focused on Muslims while underestimating the threat posed by far right extremists, both of which are more likely to increase rather than decrease radicalisation. Finally, the introduction of Prevent as a legal duty has potentially provided a legitimate legal forum for far right groups to share their extreme Islamophobic views.

What is the ideal solution? It is argued that a better approach would be to persevere with the previous Prevent strategy. This would place specified authorities and non-specified authorities on an equal footing, recognising the potentially important role both have to play. It would remove the potential problem of far right groups using the courts to spread their hateful views and it would reduce the pressure on specified authorities to over comply with the duty and all the extreme results this produces. The strategy was not perfect though as it still focused heavily on Muslims and on individual factors that lead to radicalisation while ignoring societal ones. It is submitted though that the strategy can be improved to increase focus upon far right groups and create opportunities for disadvantaged groups. Additionally, it is flexible, allowing bodies to use discretion and reconcile it with other commitments that they may have. In this way Prevent would

<sup>23</sup> *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 662, 644.

<sup>24</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386; M. Elliott and R. Thomas, *Public Law* (Oxford University Press, 2014), 528.

<sup>25</sup> H. Barnett, *Constitutional and Administrative Law* (Routledge, 2015), 613.

strike a fair balance between preventing radicalisation and terrorism while respecting the rights of UK nationals.

DAVID BARRETT\*



## A CURIOUS CASE OF HK JUDICIAL REVIEW ON APPEAL PROCEDURES, ONE TOO MANY?

*Sam Woo Marine Works Ltd. v. The Incorporated Owners of Po Hang Building*  
Unrep., FACV No. 10 of 2016 (Court of Final Appeal, 29 May 2017)  
(CJ Ma, Ribeiro PJ, Tang PJ, Fok PJ, Gleeson NPJ)

### INTRODUCTION

On 29 May 2017, the Court of Final Appeal handed down judgment affirming that the provision under s 63B of the District Court Ordinance (Cap 336) (“DCO”) does not infringe Article 82 of the Basic Law. S 63B relates to the limited right of appeal from District Court decisions in civil cases. It provides that no appeal lies in the Court of Appeal’s decision to refuse or grant leave. Article 82 of the Basic Law materially prescribes that “The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region . . .”. Mr. Justice Ribeiro PJ, delivering the leading judgment, held that the restrictions imposed do not go beyond what is reasonably necessary and is proportionate to the achievement of the identified legitimate aims.

### FACTS

The facts of the case can be briefly summarized. The appellant shop owner erected fixtures in the common parts of a multi-storey building. The respondent incorporated owners commenced proceedings against the appellant in the District Court alleging breach of deed of mutual covenant. The appellant failed to file a defence in time and leave to file pleadings out of time was refused. It was held that the appellant’s defence of adverse possession was not reasonably arguable and leave to appeal to the Court of Appeal was subsequently refused by the trial judge. Leave for appeal against the refusal to the Court of Appeal was conducted on paper and then *viva voce* but proved unsuccessful. Further leave to the Court of Final Appeal was sought and dismissed due to the finality provision under s 63B. Justice Lam VP, giving judgment of the court, held that s 63B was consistent with Article 82 of the Basic Law as a proportionate restriction and operates as a restricting provision. The Court of Final Appeal was tasked to determine the constitutionality of s 63B and the jurisdiction of the court to entertain appeals from a judgment of the Court of Appeal refusing leave to appeal to it.

### RULING

Justice Ribeiro observed that Article 82 does not confer constitutional rights of appeal to the final court on litigation parties.<sup>1</sup> Nonetheless, restrictions on rights of appeal have a limiting effect on the Court’s constitutional power of final adjudication and cannot be arbitrarily imposed.<sup>2</sup>

The immediate question relates to the nature of the restrictions imposed, if any. The appellant unsuccessfully argued<sup>3</sup> that s 63B is inconsistent with and trumped by the sections 19 and 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance (Cap 484)

<sup>1</sup> Para 12.

<sup>2</sup> Para 14.

<sup>3</sup> Para 18.

(“HKCFAO”), the combined reading of which, it was submitted, indicated that the Court of Final Appeal’s discretionary jurisdiction<sup>4</sup> to hear appeals extends to decisions of the Court of Appeal as to whether or not leave to appeal against the latter should be granted.<sup>5</sup> Even if the inconsistency is accepted, applying the *lex posterior* rule that earlier provisions give way to the latter, Justice Ribeiro held that the DCO amendments, which included s 63B, enacted in 2008, overrode sections 19 and 22(1)(b), enacted on 1 July 1997.<sup>6</sup> S 63B in essence qualified s 22(1)(b) as a finality provision.

The more fundamental issue pertains to the combined meaning of sections 63(1), 63A(2) and 63B of the DCO. Justice Ribeiro relied on the House of Lords in *Lane v Esdaile*<sup>7</sup> where it was held on a purposive construction that the requirement to obtain leave from the Court of Appeal regarding a first instance judgment was “intended as a check to unnecessary or frivolous appeals” and would be rendered absolutely illusory should an appeal from a refusal of leave to appeal be allowed.<sup>8</sup> It is observed this line of reasoning had since been refined and applied for more than a century<sup>9</sup> by the UK courts as well as in HK.<sup>10</sup> Drawing from the above discussion, Justice Ribeiro held that sections 63(1), 63A(2) and 63B “plainly intended . . . to enable the Court of Appeal to filter out unnecessary, unmeritorious or frivolous would-be appeals”,<sup>11</sup> thus operating as an express finality provision.<sup>12</sup>

Turning to the constitutional validity of s 63B, Justice Ribeiro applied the four-step test of legitimate aim, rational connection, necessity and fair balance. In statutory construction, the overall scheme of sections 63(1), 63A(2) and 63B must be considered in context with other relevant provisions.<sup>13</sup> The scheme was held to facilitate the twin aims of screening out cases with no reasonable prospects of success so as to promote the proper and efficient use of judicial resources as well as maintaining reasonable proportionality between litigation costs and the amounts at stake by restricting the levels of appeal.<sup>14</sup> It was further accepted that the scheme as mentioned is rationally connected to those two broad aims.<sup>15</sup>

With regard to necessity, the appellant’s argument that s 63B constitutes an absolute ban and therefore fails the proportionality test was rejected. The authorities relied on by the appellant were distinguished from the facts of this case in that the DCO provisions do not constitute a *total* ban on appeals.<sup>16</sup> The breadth of the Court of Appeal’s vetting and refusal power is checked by conditions of demonstrated reasonable prospects of success or, failing that, other reasons in the interests of justice.<sup>17</sup> Cases which satisfy those conditions can expect to be allowed leave for a final appeal to be heard by the Court of Final Appeal.<sup>18</sup>

<sup>4</sup> Para 17.

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

<sup>6</sup> Paras 20, 22.

<sup>7</sup> [1891] AC 210.

<sup>8</sup> Para 26.

<sup>9</sup> Para 28.

<sup>10</sup> Paras 27–29. *Cf. Ex p Stevenson* [1892] 1 QB 609 (CA); *Sarfraz v Disclosure and Barring Service* [2015] 1 WLR 4441 (CA); *HLF v MTC* (2004) 7 HKCFAR 167.

<sup>11</sup> Para 31.

<sup>12</sup> Para 32.

<sup>13</sup> Para 35.

<sup>14</sup> Paras 36–37.

<sup>15</sup> Para 41.

<sup>16</sup> Para 48.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

The appellant further argued that the Court of Final Appeal ought to exercise its own filtering rules in lieu of delegating the screening process to the Court of Appeal.<sup>19</sup> Counsel for the appellant took the argument in stride and argued that the Court of Final Appeal was bound to vet every application for leave of appeal from even the smaller tribunals.<sup>20</sup> This argument was summarily rejected as it wrongly assessed unconstitutionality simply on the end result of the filtering process being assigned without considering the legitimate aims as identified and then some.<sup>21</sup> It is a complete departure and misapplication of the proportionality analysis.<sup>22</sup>

The remaining test of fair balance was easily met as it is plainly in the general interest to avoid wastage of judicial resource and promote economy in litigation and the Court's effective exercise of final adjudication.<sup>23</sup>

## COMMENTARY

The decision as-is is plainly correct. The primacy of ensuring effective and efficient operation of the judicial process is evident from an array of procedural safeguards from case management rules, adverse cost orders for delay and incompetent time-keeping to the strict compartmentalization of applicable forums and tiers of appeals commensurate to claims of varying nature and scale. This is a firm and succinct justification of the Court's delegation of power to avoid undue burdens in the administration of its powers of final adjudication.

What is more curious is perhaps the ease at which the appellant's proportionality arguments proceeded to the highest judicial authority despite their apparent lack of merit. Under s 22(1)(b) of the HKCFAO, the Court of Final Appeal may hear a case if there involves in the appeal a question of great general or public importance or otherwise. Where leave for appeal is refused by the Court of Appeal, the CFA Appeal Committee will consider whether any of the conditions under s 22(1)(b) is satisfied. Chief Justice Ma, Justice Tang PJ and Justice Fok PJ, presiding over the Appeal Committee for this case, handed down a barebones, one-page judgment granting leave for the two aforementioned questions to be heard.<sup>24</sup>

It is important to bear in mind the *caveat* that it is not unusual<sup>25</sup> for the CFA Appeal Committee to hand down barebones judgments granting leave pursuant to oral hearings and/or written submissions. This should nonetheless commonsensically only be done pursuant to the identification of questions which readily and evidently satisfy the criterion of great, general and public importance. It is good sense and commendable judicial practice that more cogent reasons and justifications are given in cases of ambiguity and even on questions that scale either side of the threshold.

This approach is consistent with the spirit under Rule 7 under the Hong Kong Court of Final Appeal Rules (Cap 484A) ("HKCFAR") which states that:

"(1) Where the Registrar is of the opinion either on the application of the Respondent or of his own motion that an application discloses *no reasonable grounds for leave to appeal*,

<sup>19</sup> Para 49.

<sup>20</sup> Para 50.

<sup>21</sup> Paras 51–52.

<sup>22</sup> Para 53.

<sup>23</sup> Para 54.

<sup>24</sup> Unrep. FAMV No. 21 of 2016 (Court of Final Appeal, 19 August 2016).

<sup>25</sup> *Poon Ka Man Jason v Cheng Wai Tao* Unrep. FAMV No. 22 of 2015 (Court of Final Appeal, 5 August 2015); *Registrar of Hong Kong Institute of Certified Public Accountants v Wong Tak Man Stephen* Unrep. FAMV No. 51 of 2016 (Court of Final Appeal, 277 April 2017).

or is frivolous or fails to comply with these Rules, he may issue a summons to the applicant calling upon him to show cause before the Appeal Committee why the application should not be dismissed.

(2) The Appeal Committee may, after considering the matter, order that the application be dismissed or give such other directions as the justice of the case may require.” (*emphasis added*)

Underlying the passage as outlined is a recognition that cases meriting a determination before the Court of Final Appeal must, amongst other things, contain reasonable grounds and not be frivolous. Here, an assessment of whether frivolity or grounds not reasonably arguable exist necessarily entails a discussion of Justice Lam VP’s judgment<sup>26</sup> as mentioned above where further leave to the Court of Final Appeal was first dismissed.

In his judgment, Justice Lam dismissed the Appellant’s submission that the finality condition was an “unintended consequence” of the Civil Justice (Miscellaneous Amendments) Ordinance 2008 as the finality position had been subsisting long before the Reform.<sup>27</sup> The Appellant made a further submission that the *Lane v Esdaille* rule had been significantly impaired by a Privy Council decision in *Campbell v the Queen*,<sup>28</sup> arguing that the alternative approach to grant special leave to appeal is applicable.<sup>29</sup> That argument was rejected. Justice Lam observed that *Campbell* was concerned with the Judicial Committee Act that is irrelevant to the present appeal pertaining to the HKCFAO, which, in any event, contains materially different phrasing.<sup>30</sup> Further, with regard to the Appellant’s attempts at making comparisons, Justice Lam opined that drawing analogies between the Court of Final Appeal and the Privy Council is ill-advised considering that the latter had jurisdiction over the entire Commonwealth whereas the former is Hong Kong specific and, in context, more comparable to the House of Lords.<sup>31</sup>

What is more significant is that s 63B had faced similar constitutional challenges in the past.<sup>32</sup> In fact, the grounds relied on in that previous case were broadly similar to those now pleaded in *Sam Woo Marine Works* and were made by the same counsel.<sup>33</sup> With this in mind, Justice Lam placed much emphasis on the judgment by Justice Tang VP (as he then was) in *The Housing Society v Wong Nai Chung*<sup>34</sup> throughout different parts of his judgment.<sup>35</sup>

In *Wong Nai Chung*, Justice Tang VP relied on<sup>36</sup> *A Solicitor v The Law Society of Hong Kong and Anor*<sup>37</sup> concerning legislative limits on the Court of Final Appeal’s power of final adjudication, which held that:

“[the limitations] are plainly valid . . . to prevent the Court at the apex of the judicial system from being unduly burdened with appeals so as to enable it to focus on appeals,

<sup>26</sup> *The Incorporated Owners of Po Hang Building v Sam Woo Marine Works Ltd* [2016] 2 HKLRD 1068.

<sup>27</sup> Paras 10–11.

<sup>28</sup> [2011] 2 AC 79.

<sup>29</sup> Paras 12–13.

<sup>30</sup> Para 15.

<sup>31</sup> Paras 17–18.

<sup>32</sup> Para 10. Cf *Hong Kong Housing Society v Wong Nai Chung* Unrep., HCMP NO. 880 of 2009, (22 Sep 2010, Court of Appeal) (Tang VP as he then was).

<sup>33</sup> *Ibid.*

<sup>34</sup> Unrep., HCMP NO. 880 of 2009, (22 Sep 2010, Court of Appeal) (Tang VP as he then was).

<sup>35</sup> Paras 7, 10, 22.

<sup>36</sup> Para 13.

<sup>37</sup> (2003) 6 HKCFAR 570.

the judgments on which will be of importance to the legal system. And it is clear that the limitations are reasonably proportionate to that purpose. *Indeed, it could be argued that further limitation may be valid.*<sup>38</sup> (emphasis added)

Justice Tang followed with an unequivocal confirmation of the constitutional validity of s 63B.<sup>39</sup> His Lordship further observed that if the refusal of leave to appeal to the Court of Appeal is not final, read together with s 22(1)(b) of the HKCFAO and s 34B(4) (aa) of the High Court Ordinance (Cap 4) (“HCO”), it would mean that either three judges in the Court of Appeal or three Appeal Committee judges of the Court of Final Appeal would be engaged to screen a voluminous amount of leave applications. In either case, it would incur excessive burden on both courts, not to mention substantial costs to litigation parties.<sup>40</sup> The action is then dismissed. Subsequently, further constitutional challenge seeking leave to appeal from *Wong Nai Chung* was summarily dismissed by the Court of Final Appeal due to the lack of prospect for success in the main issue.<sup>41</sup>

## CONCLUSION

As is evident, the constitutionality of s 63B has long been subjected to enduring and rigorous intellectual scrutiny. It is, with respect, difficult to give reasonable weight to the Appellant’s arguments in the Court of Final Appeal. This is ever more noteworthy when legal representation has unsuccessfully advanced similar arguments in the various proceedings. It is verily believed that the Appellant’s constitutional challenge in *Sam Woo Marine Works* should not have proceeded to the Court of Final Appeal stage, particularly in view of the legitimate aim of screening out cases with no reasonable prospects of success so as to promote the proper and efficient use of judicial resources. The screening function via the CFA Appeal Committee ought to be assiduously applied to prevent unmeritorious claims. It is indeed high time we put the constitutional controversy over s 63B to rest.

GRIFFITH CHENG\*

<sup>38</sup> *A Solicitor at para 36.*

<sup>39</sup> Para 24.

<sup>40</sup> Paras 30–31.

<sup>41</sup> *Wong Nai Chung v Housing Society* Unrep., FAMV No. 33 of 2010 (21 January 2011, Court of Final Appeal).

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## ILLEGAL AGREEMENTS AND PUBLIC POLICY

*Mirza v. Patel* [2016] UKSC 42, (S.C.), (Lords Neuberger, Mance, Kerr, Clarke, Wilson, Sumption, Toulson, Hodge and Lady Hale)

### INTRODUCTION

The maxim *ex turpi causa non oritur actio* (an action does not arise from a base cause) is premised on the notion that the courts will not assist a claimant who founds his claim on an immoral or illegal act. The principle, however, which seeks to discourage fraud, has had a notable exception when the claimant voluntarily withdraws from an illegal transaction before the illegal purpose has been wholly or partly carried into effect. In *Patel v Mirza*,<sup>1</sup> the Court of Appeal held that the exception could apply equally to cases where the withdrawal takes place because the illegal agreement can no longer be performed because of events outside the control of the parties.

The illegality doctrine has, however, since been more fully explored by the Supreme Court in *Mirza v Patel*<sup>2</sup> (on appeal from the Court of Appeal) who has effectively abandoned the so-called “reliance test” adopted by the House of Lords in *Tinsley v Milligan*<sup>3</sup> in favour of a policy-driven approach requiring the court to consider a range of relevant factors in deciding whether the claimant should be allowed to recover his money despite the illegal transaction.

### FACTS

The defendant, Salman Mirza, was a foreign exchange broker who had offered the claimant, Chandrakant Patel, and their mutual friend, George Georgiou, the opportunity to use his spread-betting account to bet on the movement of Royal Bank of Scotland (RBS) shares. The claimant had paid the defendant £620,000 on hearing that the defendant had contacts with the bank who could supply advance information about a statement anticipated to be made by the Chancellor of the Exchequer about the Government’s investment in the bank which would affect the bank’s share prices.

The plan was that the defendant would use the money, along with his own, to bet on the Investor’s Gold Index on movements in the quoted share price over a specified period using insider information. As it turned out, the defendant did not place any bets because the Government statement never materialised. The money was later mistakenly paid to Mr Georgiou. Unable, however, to recover from Mr Georgiou, the claimant sought to recover the money from the defendant as money paid for a consideration which had wholly failed and/or that it was held by the defendant on a resulting trust for him.

At first instance,<sup>4</sup> Mr Donaldson QC (sitting as a deputy judge of the High Court) held that the claim was barred by illegality because it was founded on an illegal agreement which sought to take advantage of insider information. Moreover, the relief could not be granted as the claimant had not withdrawn from the agreement voluntarily before its implementation became frustrated. In his view, the rationale for the defence of *locus*

<sup>1</sup> [2014] EWCA Civ 1047.

<sup>2</sup> [2016] UKSC 42.

<sup>3</sup> [1994] 1 AC 340.

<sup>4</sup> [2013] EWHC 1892 (Ch).

*poenitentiae* was missing where the illegal purpose is not achieved because it is frustrated other than by the action of the claimant.

### COURT OF APPEAL DECISION

On appeal,<sup>5</sup> the majority (Rimer and Vos LJ) concluded that the deputy judge had been correct to find that the claimant needed to rely on the illegal arrangement, aimed at achieving a profit from the movement of the RBS shares by using insider information,<sup>6</sup> in order to make out his claim. According to Rimer LJ, it was apparent that the claimant was positively relying on the illegal agreement in order to support his claim for the return of the money. Vos LJ, agreeing, added that the claimant had pleaded, relied upon and succeeded (in the deputy judge's judgment) in establishing the illegal agreement and could not now be heard to say that he could have succeeded as well had he not done so.<sup>7</sup>

Gloster LJ, however, felt unable to agree with the majority on the primary issue of whether the claimant had to rely on the illegality in order to found his claim for recovery of the money. In her Ladyship's view, the correct approach was to consider the *ex turpi causa* rule by reference to a number of policy considerations underlying the rule. So far as the present case was concerned, no insider information was ever received or used and no insider dealing ever took place. More importantly, the claimant was not seeking to enforce the criminal conspiracy entered into between the parties – on the contrary, his claim was to recover the money which he originally deposited with the defendant in circumstances where no bets were placed and the consideration under the contract had wholly failed. Significantly, he was not seeking to recover any benefit from his own wrongdoing. Moreover, the obvious consequence of denying recovery to the claimant would be to allow the defendant (as the more blameworthy agent) to profit disproportionately from the illegal agreement.

The Court of Appeal, however, was unanimous in reversing the deputy judge's decision on the application of the *locus poenitentiae* defence. According to Rimer LJ, the decision in *Bigos v Bousted*,<sup>8</sup> relied on heavily by the deputy judge, was distinguishable in so far as it was concerned with the frustration of the illegal agreement because of the other party's refusal to perform it. It did not assist in resolving the issue where the illegal purpose had become impossible of performance by reason of a change of circumstances beyond the control of either of the parties to the illegal contract. On this point, it was open to the claimant to rely on the wholly unperformed illegal agreement because no distinction was to be made between "(a) cases where the withdrawal is from an illegal agreement which is no longer needed for the purpose for which it was designed, and (b) where the withdrawal is from an illegal agreement that cannot be or is anyway not going to be performed."<sup>9</sup> In his Lordship's view, to recognise such a distinction would require proof of "genuine repentance" on the part of the withdrawer – something which was emphatically rejected by Millett LJ in the earlier case of *Tribe v Tribe*,<sup>10</sup> who confined the defence to cases where the claimant "has withdrawn from the transaction before the illegal purpose has been wholly or partly carried into effect."<sup>11</sup>

<sup>5</sup> [2014] EWCA Civ 1047.

<sup>6</sup> Insider dealing is an offence under s.52 of Part V of the Criminal Justice Act 1993. It may also amount to a conspiracy contrary to s.1 of the Criminal Law Act 1977.

<sup>7</sup> [2014] EWCA Civ 1047, at [102].

<sup>8</sup> [1951] 1 All ER 92.

<sup>9</sup> [2014] EWCA Civ 1047, at [45].

<sup>10</sup> [1996] Ch 107.

<sup>11</sup> *Ibid.*, at [134]–[135].

The other members of the Court took a similar approach. Vos LJ<sup>12</sup> concluded that a claimant may take advantage of the exception to the illegality principle:

“. . . if he voluntarily withdraws from an illegal transaction under which property has been transferred, without the need for genuine repentance, before the fraud or the illegal purpose has been wholly or partly carried into effect.”

In the present case, it was apparent that the transfer of money only allowed the defendant “to be ready to undertake”<sup>13</sup> the illegal insider dealing. On this analysis, the payment of the money did not by itself “wholly or partially carry the illegal purpose into effect, since it remained open to [the defendant] to withdraw from the transaction and to reclaim his funds at any time before the shares were purchased with the benefit of insider information.”<sup>14</sup> Moreover, since the reason for the withdrawal is irrelevant, there was no justification for drawing a distinction between “withdrawal from an illegal agreement that is no longer needed . . . and withdrawal because the illegal agreement can no longer be performed.”<sup>15</sup>

Similarly, according to Gloster LJ, the *locus poenitentiae* defence did not depend on the “vague and subjective concept of genuine ‘repentance’ or ‘withdrawal’ prior to the time at which the illegal agreement no longer is, or appears to be, capable of performance”.<sup>16</sup> The simple fact in the present case was that the illegal purpose had not been carried into effect. The bet on the RBS shares was never placed and all that happened was that the £620,000 was received by the defendant in his private bank account.<sup>17</sup>

### CRITICISM OF THE RELIANCE TEST

The so-called “reliance rule”, stated by the House of Lords in *Tinsley*, has been the subject of much debate. It has been criticised for producing uncertainty as to the exact meaning of reliance and for precluding the courts from paying attention to the policies underlying the illegality defence. The Law Commission, in its final report, *The Illegality Defence*,<sup>18</sup> considered that the rule applied in *Tinsley* was arbitrary in differentiating between situations where a presumption of resulting trust and a presumption of advancement arose. The rule generated different results which were entirely fortuitous depending on the relationship of the parties. In an earlier report, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*,<sup>19</sup> the Commission recommended the abandonment of the rule altogether in favour of granting the courts a discretion to declare a contract or trust illegal or invalid. The Commission also identified a number of potentially relevant factors to be applied in determining whether a claim should be disallowed by reason of illegality.

As we saw earlier, the deputy judge in *Mirza*, held that the claimant’s right to recover the money paid to the defendant was unenforceable because he had to rely on his own illegality to establish it, unless he could have brought himself within the exception of

<sup>12</sup> [2014] EWCA Civ 1047, at [113].

<sup>13</sup> *Ibid*, at [116].

<sup>14</sup> *Ibid*, at [116].

<sup>15</sup> *Ibid*, at [116].

<sup>16</sup> *Ibid*, at [96].

<sup>17</sup> *Ibid*, at [95]. In the words of Gloster LJ: “Other than the illegal agreement itself, nothing illegal actually occurred”.

<sup>18</sup> (2010), Law Com. 320.

<sup>19</sup> (1999), Law Com. CP, No. 154.



*locus poenitentiae*. In the Court of Appeal, the majority agreed with the deputy judge on the reliance issue, but disagreed with him on the application of the exception. The minority view of Gloster LJ, however, was to reject the *Tinsley* approach and to consider instead whether the policy underlying the rule which made the contract illegal would be stultified by allowing the claim to succeed. In addressing that issue, her Ladyship applied, as we have seen, a number of factors including the degree of connection between the wrongful conduct and the claim made and the disproportionality of disallowing the claim to the unlawfulness of the conduct. This so-called “range of factors” approach has much to recommend it, not least because it permits flexibility and allows the court to reach a result having regard to a variety of policy considerations underlying the illegality doctrine – it has been adopted in other Commonwealth jurisdictions, notably, Australia, Canada and the United States.

### CRITICISM OF THE *LOCUS POENITENTIAE* DEFENCE

In *Tribe v Tribe*,<sup>20</sup> a father transferred company shares to his son as a means of safeguarding them from his landlord who had required substantial repairs to be carried out on two properties occupied by the company. In the event, the father was not required to carry out the repairs and sought to recover the shares from his son. The father was allowed to recover the shares. The Court of Appeal held that, since the illegal purpose had never been carried out, the father could adduce evidence of the agreement that the son would hold the shares on a bare trust for him pending settlement of the repairs claim and thereby rebut the presumption of advancement. Although the *transaction* (i.e., the transfer of shares) had been carried into effect, the *purpose* had not since the landlord had not actually been deceived by the transaction. This was the view taken by Nourse L.J. The same conclusion was reached by Millett L.J., although he stated the principle in much broader terms – it would be open to the transferor to voluntarily withdraw from the transaction before the purpose had been wholly (or partly) performed. Moreover, a voluntary withdrawal did not require genuine repentance. The underlying rationale for the *locus poenitentiae* doctrine was to encourage withdrawal from a proposed fraud before it was implemented. This was in itself a desirable end just as the converse rule serves justice by discouraging fraud in the first place by refusing to provide assistance to a claimant who seeks to found his action on an illegal act.

Despite its apparent merits, the approach taken by Millett L.J. has been the subject of criticism, not least because it is unclear at what point the transaction has been carried into effect so as to prevent a withdrawal. The notion that a withdrawal can take place before the illegal purpose has been only *partly* carried into effect only adds to this uncertainty and confusion. Moreover, the superficiality of seeking to draw a distinction between the *transaction*, on the one hand, and the *purpose* on the other, inevitably leads to fine and artificial distinctions. Surely, in *Tribe*, the illegal purpose had, in every sense, been carried out once the shares had been transferred to the son. After all, this had the effect of divesting the father of all interest in the shares. On one view, the illegal purpose was to deceive creditors, but an equally plausible interpretation is that the father’s purpose was to make it look as if he no longer owned the shares by transferring them to his son. Although there was no deception, there can be no denying that the father had clearly fulfilled *that* purpose.

<sup>20</sup> [1996] Ch 107.

Interestingly, the point was addressed briefly in *Mirza* in the Court of Appeal, where Vos LJ<sup>21</sup> noted that property could be transferred under an illegal transaction without the illegal purpose of the transaction being wholly or partly performed. He said:<sup>22</sup>

“The transfer of the property may, in some circumstances, be properly regarded as simply preparatory and unconnected to the illegal purpose that was ultimately in view.”

Like *Tribe*, therefore, where the creditors had never been told of the transfer, the transfer of money in *Mirza* merely allowed the defendant the *opportunity* to further the criminal conspiracy without actually (wholly or partly) carrying the illegal purpose into effect. As his Lordship observed, “no shares were purchased here, and no information was obtained.”<sup>23</sup>

### SUPREME COURT RULING

The Supreme Court unanimously dismissed the defendant’s appeal and allowed the claimant to recover the £620,000 which he had paid to the defendant. This was done, however, by adopting a public policy analysis similar to that applied by Gloster LJ in the Court of Appeal. In so doing, the Supreme Court has overruled the decision in *Tinsley*.

According to the majority of their Lordships, (Lords Toulson giving the leading speech with whom Lady Hale and Lords Kerr, Wilson and Hodge agreed) the essential rationale of the illegality doctrine was that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In assessing whether the public interest would be harmed in this way, it was necessary for a court to consider: (1) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim; (2) any other relevant public policy on which the denial of the claim may have an impact; and (3) whether denial of the claim would be a proportionate response to the illegality. Moreover, within that framework, various factors might be relevant, including the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties’ respective culpability.<sup>24</sup>

So far as the question of *locus poenitentiae* was concerned, this was no longer relevant because it assumed importance only because of the wrong approach to the issue whether the claimant was entitled to the recovery of his money enunciated in *Tinsley*. In place of the reliance rule and the limited exception to it, a person who satisfies the ordinary requirements of a claim in unjust enrichment will not now be debarred from recovering money paid by reason of the fact that the consideration which has failed was an unlawful consideration. So far as the present appeal was concerned, it was apparent that the claimant satisfied those requirements. Moreover, he was not prevented from enforcing his claim simply because the money he sought to recover was paid for an unlawful purpose. In particular, there were no circumstances suggesting that enforcement of his claim would undermine the integrity of the justice system.<sup>25</sup> Accordingly, the claimant was entitled to the return of his money.

A dissenting view, however, was expressed by three of the Law Lords who preferred to dismiss the appeal on conventional principles. Lord Mance called for “a limited

<sup>21</sup> [2014] EWCA Civ 1047, at [114].

<sup>22</sup> *Ibid*, at [114].

<sup>23</sup> *Ibid*, at [116].

<sup>24</sup> [2016] UKSC 42, at [120], per Lord Toulson.

<sup>25</sup> *Ibid*, at [121], per Lord Toulson.

approach to the effect of illegality”<sup>26</sup> focusing on the need to avoid inconsistency in the law. In his view, replacing the current law with an “open and unsettled range of factors”<sup>27</sup> would only create more problems for future courts. In his Lordship’s words:<sup>28</sup>

“What is apparent is this approach would introduce not only a new era but entirely novel dimensions into any issue of illegality. Courts would be required to make a value judgment, by reference to a widely spread melange of ingredients, about the overall ‘merits’ or strengths, in a highly unspecified non-legal sense, of the respective claims of the public interest and of each of the parties.”

Lord Clarke, adopting a similar stance, expressed concern that the court’s power to deny recovery on the ground of illegality should be limited to well-defined circumstances. In his view, there was no need to replace that approach with an open-ended discretionary jurisdiction<sup>29</sup> which was “far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights.”<sup>30</sup> The correct approach, in his view, was to “address the problem by supplying a framework of principle which accommodates legitimate concerns about the present law.”<sup>31</sup> Lord Sumption, again in similar vein, acknowledged that the reliance test, if devoid of the arbitrary requirements associated with the equitable presumptions of resulting trust and advancement, was sound in principle. This was because:

“First, it gives effect to the basic principle that a person may not derive a legal right from his own illegal act. Second, it establishes a direct causal link between the illegality and the claim, distinguishing between those illegal acts which are collateral or matters of background only, and those from which the legal right asserted can be said to derive. Third, it ensures that the illegality principle applies no more widely than is necessary to give effect to its purpose of preventing legal rights from being derived from illegal acts.”<sup>32</sup>

In his Lordship’s view, therefore, justice could still be achieved by the application of the *Tinsley* doctrine without the necessity of revolutionising the law. An entirely discretionary approach, on the other hand, based on a range of evolving factors, converts “legal principle into an exercise of judicial discretion, in the process exhibiting all the vices of ‘complexity, uncertainty, arbitrariness and lack of transparency’ which [the majority of the Supreme Court] attributes to the present law.”<sup>33</sup>

## CONCLUSION

The flexible “range of factors” approach taken by the majority<sup>34</sup> of the Supreme Court opens the way for a structured analysis of the facts in a given case which hopefully will promote, rather than detract from, consistency in this area of law. As Lord Kerr

<sup>26</sup> *Ibid*, at [192].

<sup>27</sup> *Ibid*, at [192].

<sup>28</sup> *Ibid*, at [206].

<sup>29</sup> *Ibid*, at [214].

<sup>30</sup> *Ibid*, at [217].

<sup>31</sup> *Ibid*, at [217].

<sup>32</sup> *Ibid*, at [239].

<sup>33</sup> *Ibid*, at [265].

<sup>34</sup> As we have seen, Lords Sumption, Mance and Clarke dissented. In their view, the range of factors approach converted the legal principle in *Tinsley* into an exercise of discretion and required the courts to make value judgments about the respective claims of the parties. For that reason, it was unjustified and not necessary to achieve substantial justice in most cases.

observed, it also has “the added advantage of avoiding the need to devise piecemeal and contrived exceptions to previous formulations of the illegality rule.”<sup>35</sup>

What essentially the Supreme Court has done is to replace a rule of principle (enunciated in *Tinsley*) with an expression of policy. The weighing of rival policy considerations is now the proper approach in determining whether a defence of illegality should be allowed to succeed. In the words of Lord Neuberger (agreeing in principle with Lord Toulson’s analysis):<sup>36</sup>

“When faced with a claim based on a contract which involves illegal activity (whether or not the illegal activity has been wholly, partly or not at all undertaken), the court should, when deciding how to take into account the impact of the illegality on the claim, bear in mind the need for integrity and consistency in the justice system, and in particular (a) the policy behind the illegality, (b) any other public policy issues, and (c) the need for proportionality.”

Undoubtedly, this marks a significant change in the law, not least because the policy factors identified by the majority of the Supreme Court will now be used to influence an essentially new discretionary jurisdiction as to whether a claimant should be entitled to the return of his money or property. It remains to be seen, however, whether this “revolutionary”<sup>37</sup> approach will lead to clarity or serve as a tool for further complexity and arbitrariness by simply substituting “a new mess for an old one”.<sup>38</sup>

PROFESSOR MARK PAWLOWSKI\*

<sup>35</sup> *Ibid*, at [123].

<sup>36</sup> *Ibid*, at [174].

<sup>37</sup> *Ibid*, at [264], per Lord Sumption.

<sup>38</sup> *Ibid*, at [265], per Lord Sumption.

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## BOOK REVIEWS

*Book reviews and books for reviewing should be sent to the address given at the beginning of this issue*

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### INTELLECTUAL PROPERTY LAW AND GRAFFITI: GLORIFIED VANDALISM OR A LEGITIMATE CULTURAL MOVEMENT?

*Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* by MARTA ILJADICA, Hart Publishing, 2016, 1<sup>st</sup> Edition, 310pp, Hardcover, £56, ISBN: 978-1-84946-777-3, ePub, 978-1-50990-202-6

*Copyright is for losers.*

Banksy in Wall and Piece (2006)<sup>1</sup>

### INTRODUCTION

Graffiti writing is a form of social expression encompassing a wide range of activities – from simple tags of identity, to scrawled expressions of protest and politics, sometimes in very rough locations. It remains a controversial and illicit form of literary expression, which despite having existed since ancient times, is considered vandalism if created without permission. This is because it is usually created in urban public space and its visibility means that it affects whole communities rather than just the creator or the owner of a tangible property.<sup>2</sup> What determines whether it is wrong or right for a graffiti writer to vandalize property with writing that some feel has literary merit? Indeed, cities spend millions of pounds to erase its existence at the tax payer's expense and graffiti crew are regularly sentenced to jail for causing criminal damage. Yet, since 2008 leading museums such as London's Tate Modern have curated graffiti displays by internationally renowned personalities such as Blu from Bologna, Faile from New York and Sixeart from Barcelona. Meanwhile, world-renowned British graffiti creator Banksy chooses to keep his identity secret to remain free to create his graffiti unfettered. It is important for graffiti creators to ensure their individually stylized work is highly visible and placed in prominent locations to ensure maximum exposure – this is not always welcome if the graffiti writer paints without permission, which is the norm. 'Graffiti isn't graffiti really unless it's illegal' according to one writer interviewed by the author.<sup>3</sup>

<sup>1</sup> Banksy, *Wall and Piece* (1st edition, Century 2006).

<sup>2</sup> M Hallsy and A Young, 'The Meanings of Graffiti and Municipal Administration' (2002) 35(2) Australian and New Zealand Journal of Criminology 165, 167.

<sup>3</sup> M Iljadica, *Beyond Copyright: Regulating Creativity in the Graffiti Subculture* (Hart Publishing 2016) 30.

## CONTENT

The intellectual property law issue is this: although copyright law provides legal protection for qualifying literary and artistic works, it essentially operates as a legal ‘privilege’ and as such, unlawful graffiti works are not deemed to warrant legal property rights and protection. Increasingly however, legal scholars such as Celia Lerman<sup>4</sup> argue that copyright law should extend to graffiti works because copyright should be neutral and only be concerned with protecting expression, rather than excluding a creative work due to transgressions related to the physical embodiment.<sup>5</sup> The author of *Copyright Beyond Law*, Marta Iljadica, Lecturer in Law at the University of Southampton, shares this view. She states at the outset that:

... this book is about a creative process and its attendant norms; it seeks to demonstrate that much of creativity and many of the pleasures of creation and belonging exist beyond copyright ...<sup>6</sup>

The premise of her book is that despite the lack of formal copyright protection, creators within the graffiti sub-culture creators have nevertheless devised ways and means of informally regulating their creativity along the lines of copyright to protect against unauthorised copying. In other words, Iljadica’s work explores how graffiti creators protect their work when copyright protection law is not available. She explains that informal rules have developed within the group (a ‘code’, ‘morals’ or ‘etiquette’). For example, the sanction for breaking the rules includes partially or fully painting over or destroying another’s work.<sup>7</sup> *Copyright Beyond Law* offers a deeper insight and understanding of the graffiti subculture with a focus on graffiti writing (as distinguished from street art). The book presents findings from the author’s empirical research to show that graffiti writers informally regulate their creativity through a system of norms that are remarkably similar to many copyright and moral rights law concepts.

In terms of structure, the book is divided into different parts called ‘panels’. Panel I: Context sets out the origins and history of graffiti writing. It provides the context for the informal graffiti rules, copyright laws and an overview of the methodology which includes fieldwork, data collection and semi-structured interviews with graffiti creators. In Chapter 2, the author ably grapples with the traditional justifications for subsistence of copyright protection, creativity and the commons, as well as the concept of the public domain. A deeper examination might have included weighing up the opposing views, public policy debates, legal ethics and modern morality to enrich the analysis. The author could perhaps have drawn on discussions that more often occur in the trade mark and patent law fields, both of which regularly exclude marks or subject matter from protection on public policy and moral grounds.

In Panel II: Form, Panel III: Copying and Panel IV: Reputation, copyright and moral rights law is applied to graffiti writing and critically analysed. To evaluate the existence of an alternative normative framework, the author draws broadly on the legal literature on copyright and creativity, as well as the sociological literature on graffiti writing. Essentially, Iljadica presents a comparative analysis of the graffiti rules with existing copyright and moral rights law (especially attribution, false attribution and integrity). She describes how ‘graffiti rules’ have developed and explains their copyright law parallels. This includes the requirement of writing letters (subject matter); appropriate

<sup>4</sup> Lawyer and Professor of Intellectual Property Law, Universidad Torcuato Di Tella, Buenos Aires, Argentina.

<sup>5</sup> C Lerman, ‘Protecting Artistic Vandalism: Graffiti and Copyright Law’ (2013) Vol.2, No. 2 Journal of Intellectual Property and Entertainment Law.

<sup>6</sup> *Supra* n[3], A Note on Pictures.

<sup>7</sup> *Supra* n [5], p 32.

placement (public policy and morality exceptions for copyright subsistence and the enforcement of copyright); originality and the prohibition of copying (originality and infringement by reproduction); and the prohibition of damage to another writer's works (the moral right of integrity). Precisely how the 'graffiti rules' intersect and converge with concepts enshrined in both copyright and moral rights law are clearly and succinctly studied. This is the most analytical part of the book and interesting legal issues arise. Chapter nine considers the prohibition within the subculture on damaging or destroying another writer's work as analogous to the moral right of integrity. Chapter ten, Part V: Interactions considers the issue of the reproduction and dissemination of graffiti writing by third parties outside the subculture. The author's perceptive analysis sheds light on the creation of subculture-specific commons and the limits of copyright law in incentivising graffiti writers, while noting the dearth of effective remedies for unauthorised use, copying or destruction.

In the concluding pages, the two approaches, namely the law and the graffiti rules, are juxtaposed to consider how the graffiti subculture may contribute to the potential reform of modern copyright and moral rights law. Iljadica questions whether there is room for copyright law to capture aspects of the graffiti rules in order to regulate graffiti writing as a new category of literary work. Interestingly, she suggests that potential new copyright exceptions (a form of fair dealing that allows for some copying without infringing the creator's rights) could make the public placement of works a key factor in determining whether the reproduction and dissemination of graffiti works is justified.

## CONCLUSION

Graffiti writing remains a highly polarised phenomenon. Preserving graffiti writing and protecting it against unauthorised reproduction is a growing concern amongst creatives and within the graffiti subculture. Is it time for copyright and moral rights law, essentially intangible property rights, to protect certain aspects of graffiti writing? It is refreshing to read the work of an intellectual property academic who genuinely sheds light on the status quo. Just as loss of life and bodily injury have more weight than loss of property, the status quo appears to be that as a matter of normative ethics and morality, criminal damage to tangible property trumps potential intellectual property rights of graffiti writers. At the heart of ethics is a concern about others, beyond self-interest. In some cities, graffiti and street art have been legalized, within limits, and valued as a form of social expression.<sup>8</sup> Contemporary policymakers now commission work for the creation of graffiti for mural projects that focus on the artistic merit of graffiti, providing creators places to show case their work. That fact that work is commissioned in the mainstream show that graffiti is increasingly recognized as a legitimate art form as well as being used in a positive way for the community. The website Legal Walls contains a database of 1470 legal graffiti murals around the world that graffiti creators can use to find a platform for their work.<sup>9</sup>

In conclusion, this book ticks many boxes. The topic is controversial; has an impact on the wider community; has scholarly value and will ultimately be a useful resource for policy makers and the courts.

DR JANICE DENONCOURT\*

<sup>8</sup> This includes places such as: Hozier Lane in Melbourne, Australia; Warsaw, Poland; Tenov, Prague; Queens, New York and Venice, California USA; Paris, France; Taipei, Taiwan; Rote Fabrik, Zurich, Switzerland; Sydhavnen, Copenhagen, Denmark; Burghausen, Germany.

<sup>9</sup> See <https://legal-walls.net/> [Accessed 23 June 2016].

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# THE QUISTCLOSE TRUST – A WELCOME FACILITATOR OF CORPORATE RESCUE?

REBECCA CLARKE\*

## INTRODUCTION

This article analyses the role of the Quistclose trust<sup>1</sup> in the context of a business rescue culture. This is an area worthy of examination because Quistclose trusts are contentious and invoke a lot of debate,<sup>2</sup> but they also provide a final opportunity for financial aid<sup>3</sup> to a struggling company.

The article begins with an outline of corporate rescue in the United Kingdom before moving on to an examination of *Barclays Bank Ltd v Quistclose Investments Ltd*.<sup>4</sup> The project will address important cases both prior to and after *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>5</sup> identifying the key arguments that are used that could impact on the encouragement of a Quistclose trust to facilitate corporate rescue. The article then addresses the additional arguments that have been raised by academics, that focus on the use of Quistclose trusts in assisting corporate rescue. We will then consider how the Quistclose trust is treated in other jurisdictions and offer suggestions for possible reforms. Finally, whether the Quistclose trust is a welcome facilitator of corporate rescue will be critically analysed.

## CORPORATE RESCUE

Prior to the decision of *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>6</sup> there were few rescue measures available for a company in financial difficulties.<sup>7</sup> The solutions were winding up or receivership.<sup>8</sup> The tough economic times in the 1970s created a public interest in an investigation into procedures that were available for struggling companies.<sup>9</sup> As a consequence, the Cork Committee was formed to lead this investigation.<sup>10</sup> The committee presented their findings in the Cork Report<sup>11</sup> in 1982.<sup>12</sup> The report found that the law did not really provide any methods to help rescue a financially struggling company.<sup>13</sup> This report then led to the Insolvency Act 1986<sup>14</sup> which introduced

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<sup>1</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

<sup>2</sup> Clare Stanley and Jack Watson, 'A question of trust: the Quistclose trust – clarity at last,' (2015) 3 CRI 106, 107.

<sup>3</sup> Sarah Wilson, *Todd & Wilson's Textbook on Trusts and Equity* (12 edn, OUP 2015) 462; Michael Smolyanksy, 'Reining in the Quistclose Trust: a Response to *Twinsectra v Yardley*' (2010) 16 T & T 558, 566.

<sup>4</sup> (n1).

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

<sup>6</sup> *Ibid.*

<sup>7</sup> Lusina Ho, Philip Smart, 'Quistclose and Romalpa: Ambivalence and contradiction' (2009) 39 HKLJ 37, 46.

<sup>8</sup> *Ibid.*

<sup>9</sup> Paul J.Omar and Jennifer Gant, 'Corporate rescue in the United Kingdom: past, present and future reforms' (2016) *Insolv L J* 24, 42.

<sup>10</sup> *Ibid* 43.

<sup>11</sup> Secretary of State for Trade, *Insolvency Law and Practice: Report of the Review Committee Reference the Cork Report* (Cmnd 8558, 1982).

<sup>12</sup> Omar and Gant (n 9) 43.

<sup>13</sup> *Ibid* 44.

<sup>14</sup> Roy Goode, *Principles of Corporate Insolvency Law* (4<sup>th</sup> edn, Sweet & Maxwell 2011) 12.



the company voluntary arrangement<sup>15</sup> and administration;<sup>16</sup> procedures that focused on providing assistance to a struggling company to help their longevity.<sup>17</sup>

The Insolvency Act 1986 was then supplemented by the Insolvency Rules 1986<sup>18</sup>, which provide procedure for the options governed by the Insolvency Act.<sup>19</sup> Over time the Act and the Rules have been amended. On 6 April 2017 the new Insolvency Rules<sup>20</sup> came into force which aims to codify the many previous amendments.<sup>21</sup>

There are also other discussions on further developments such as a procedure of freezing debts to creditors for three months in order to help a company regain their financial stability.<sup>22</sup>

Pre-dating the Insolvency Act 1986 is the case of *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>23</sup>, which developed the Quistclose trust. Parmar has argued that this shows the judiciary encouraging lending in order to rescue a company.<sup>24</sup> Interestingly, the Cork Report<sup>25</sup> does not discuss the use of the Quistclose trust, but does recognise that the trust exists.<sup>26</sup> Instead the report focuses on other trusts used in the commercial context<sup>27</sup> but does find that these trusts should exist alongside the insolvency law.<sup>28</sup> It is, therefore difficult to know how Parliament views the Quistclose trust. Parmar also shares the view that, “it’s unclear whether the legislators endorse this extra level of protection for lenders in corporate rescue situations”.<sup>29</sup> Nevertheless these developments in legislation and in equity show that corporate rescue has become paramount in the United Kingdom.

## THE QUISTCLOSE TRUST

The Quistclose trust takes its name from the key case, *Barclays Bank Ltd v Quistclose Investments Ltd*.<sup>30</sup> It will be explained that this nature of trust existed prior to this case, but its recognition by the House of Lords re-emphasised its use.

*Barclays Bank Ltd v Quistclose Investments Ltd*<sup>31</sup> arises out of the insolvency of Rolls Razor Ltd. The company had resolved that the shareholders would receive a dividend of 120%.<sup>32</sup> Rolls Razor, however, had no funds to pay this dividend.<sup>33</sup> The company

<sup>15</sup> Insolvency Act 1986 pt 1, Sch A1.

<sup>16</sup> Insolvency Act 1986 pt 2, Sch B1.

<sup>17</sup> Omar and Gant (n 9) 45.

<sup>18</sup> SI 1986/1925.

<sup>19</sup> Goode (n14) 21.

<sup>20</sup> Insolvency Rules 2016, SI 2016/1024.

<sup>21</sup> Ben Jones, Claire Black, ‘The Insolvency Rules 2016: worth the wait?’ (2016) 6 CRI 221.

<sup>22</sup> Pennington Manches LLP: Séamus Gray and Tristan Cox, ‘The Insolvency merry-go-round’ (*Lexology*, 7 February 2017) < <http://www.lexology.com/library/detail.aspx?g=c5e341b9-e8f7-4093-9ab0-ad33cca5138b> > accessed 14 February 2017.

<sup>23</sup> (n 1).

<sup>24</sup> Deepa Parmar, ‘The uncertainty surrounding the Quistclose Trust – Part Two’ (2012) 9 Int C R, 202.

<sup>25</sup> Secretary of State for Trade, *Insolvency Law and Practice: Report of the Review Committee Reference the Cork Report* (n11).

<sup>26</sup> *Ibid* [1044].

<sup>27</sup> *Ibid* [1047].

<sup>28</sup> *Ibid* [1073].

<sup>29</sup> Parmar (n 24) 202.

<sup>30</sup> (n1).

<sup>31</sup> (n1).

<sup>32</sup> *Ibid* 578.

<sup>33</sup> *Ibid*.

had already exceeded the limit on its overdraft with Barclays Bank, so had to turn to alternative credit, which led to a loan from Quistclose Investments Ltd.<sup>34</sup> Upon receiving the loan, Rolls Razor sent a letter to Barclays requesting the bank to open a dividend share account and asked for the cheque to be placed in to that account, which was only to be used to pay the upcoming dividend.<sup>35</sup> Rolls Razor could not gather further funds to supplement the loan from Quistclose Investments to pay the dividend and unfortunately went into voluntary liquidation.<sup>36</sup> The dividends were not paid and Barclays used the money that was in the dividend share account to offset the overdraft.<sup>37</sup> Quistclose Investments, however, argued, they had a proprietary right to the money because it was held on trust for them.<sup>38</sup>

The House of Lords were left to decide whether the loan was also a trust in favour of Quistclose if the loan was not used to pay the shareholders and if so, did Barclays have notice of this arrangement?<sup>39</sup>

Lord Wilberforce gave the leading judgment. He reasoned that when money is lent with a mutual intention that the loan will not become part of the general assets of the borrower and is only lent for the specific purpose,<sup>40</sup> then the arrangement will give rise to a primary trust for the loan to be used as required<sup>41</sup> (i.e. paying the shareholders) and then in the event that the primary trust fails then a secondary/resulting trust is created in favour of the lender.<sup>42</sup> Applying this principle to the facts, Lord Wilberforce found that there was an intention to form a secondary trust in favour of Quistclose Investments, therefore they were entitled to the money.<sup>43</sup> The bank was bound by the trust as it was held the letter gave them notice.<sup>44</sup>

#### *How Can The Quistclose Trust Help Facilitate Corporate Rescue?*

The Quistclose trust helps to facilitate corporate rescue because it provides an alternative funding method for a company that cannot offer any other security to a lender because there is a charge over all assets, or it has exceeded its overdraft with the bank.<sup>45</sup> This opportunity is due to the court's use of equity in the common law in commercial contracts.

#### *Cases Prior To Barclays Bank Ltd V Quistclose Investments Ltd<sup>46</sup>*

As previously mentioned, the nature of this trust existed in earlier case law, which supported the use of a trust to encourage saving a struggling borrower but also to protect a lender. In his judgment, Lord Wilberforce analyses 19<sup>th</sup> Century cases such as *Toovey v Milne*,<sup>47</sup> which had held that money lent for a specific purpose does not belong to the

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* 579.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* 580.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* 582.

<sup>44</sup> *Ibid.*

<sup>45</sup> Ewan McKendrick, 'Commerce' in William Swading (ed) *The Quistclose Trust: Critical Essays* (Hart Publishing 2004) 152; Sarah Wilson, *Todd & Wilson's Textbook on Trusts and Equity* (12 edn, OUP 2015) 462

<sup>46</sup> (n 1).

<sup>47</sup> (1819) 2 B & Ald 683.

borrower, but is instead a trust in favour of the lender.<sup>48</sup> These cases were not binding on the House of Lords but it allowed Lord Wilberforce to infer his line of reasoning.<sup>49</sup>

Professor Bridge has highlighted that the earlier cases often involved an emergency.<sup>50</sup> For example in *Toovey v Milne*,<sup>51</sup> the money was paid so that the bankrupt could be released from prison. Furthermore *Edwards v Glynn*<sup>52</sup>, showed the use of this trust in corporate rescue when *Toovey v Milne*<sup>53</sup> was applied to a situation where money was lent to save a bank from collapse.

Reliance on these authorities from the 19<sup>th</sup> Century shows the House of Lords confirming their relevant use in the 20<sup>th</sup> Century.<sup>54</sup> By refocusing on this area of equity, it can be said that the court is willing to expand the use of the trust in more recent times. This shows that the court recognised that the trust has the benefit of encouraging lending to rescue a company.

### ASPECTS OF THE QUISTCLOSE TRUST CAUSING UNCERTAINTY

*Barclays Bank Ltd v Quistclose Investments Ltd*<sup>55</sup> has been targeted by academics, because the trust does not conform with traditional trust law, which consequently raises doubt over its legal certainty. These issues are relevant to decide whether the Quistclose trust is a welcome facilitator of corporate rescue because the Quistclose trust can only assist if it is a valid trust without scepticism.

#### *Where Does The Beneficial Interest Lie?*

Firstly Lord Wilberforce did not explain who has the beneficial interest in the primary trust or, “. . . where the beneficial interest was to lie pending the use of the money for the specified purpose”.<sup>56</sup> This is important because without knowing where the beneficial interest lies, one cannot understand or advise who can enforce the trust.<sup>57</sup> Without knowing this information, there is no practical use in using the trust to facilitate corporate rescue.

There is also concern as to what happens if the loan under the primary purpose trust is not to pay a group of people but to buy some kind of tangible object (an abstract purpose), who becomes the beneficiary then?<sup>58</sup> This becomes important because in English trust law, a trust that was made only for a purpose would be void because there has to be persons as beneficiaries.<sup>59</sup> If the Quistclose trust cannot be used when the purpose is abstract, then the use of the Quistclose trusts to assist in corporate rescue would be limited to only creditors or parties.

<sup>48</sup> *Ibid* 684.

<sup>49</sup> *Quistclose* (n1) 589.

<sup>50</sup> Michael Bridge, ‘The Quistclose trust in a world of secured transactions’ (1992) OJLS 333, 348.

<sup>51</sup> (n 47).

<sup>52</sup> (1859) 2 E & E 29.

<sup>53</sup> (n 47).

<sup>54</sup> P J Millett, ‘The Quistclose Trust: Who can enforce it?’ (1985) 101 LQR 269, 274.

<sup>55</sup> (n 1).

<sup>56</sup> Michael Haley and Laura McMurtry, *Equity & Trusts* (4<sup>th</sup> edn, Sweet & Maxwell 2014) 62.

<sup>57</sup> Millett (n 54) 269.

<sup>58</sup> *Twinsectra Ltd v Yardley and Others* [2002] UKHL 12, [2002] 2 AC 164 [79].

<sup>59</sup> Haley and McMurtry (n 56) 62.

### *Has Case Law Resolved This Issue?*

Firstly cases such as *Re Northern Development Holdings*<sup>60</sup> and *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd*<sup>61</sup> were bound by the decision in *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>62</sup> but viewed the beneficial interest in suspense until the borrowed money was used for the purpose.<sup>63</sup> This was criticised by Lord Millett then writing as a Q.C. that this was unorthodox.<sup>64</sup> The problem therefore remained unsolved. In the later case of *Re EVTR Ltd*,<sup>65</sup> the Court of Appeal did not make any comments or objections on the fact that the primary trust was used for an abstract purpose of buying factory equipment. Thus clarity was still needed.

The most helpful view to solving this issue was put forward in Lord Millett's article.<sup>66</sup> His view finally finds its way into case law in his obiter in *Twinsectra Ltd v Yardley and Others*.<sup>67</sup> He reasons that the beneficial interest is always held by the lender under one resulting trust.<sup>68</sup> He removes the primary and secondary trust so that the issue as to where the beneficial interest lies in between the primary purpose trust being carried out is avoided. Instead the resulting trust works so that when the money is lent, the borrower only has a power in using the money for the purpose. If the purpose becomes impossible to perform, then the resulting trust ensures that the money is returned to the lender because the power that the borrower had becomes irrelevant.<sup>69</sup> This then allows for money to be lent for an abstract purpose because it means that there will always be a person as a beneficiary.<sup>70</sup> It can be said therefore that this does resolve the uncertainty around the beneficial interest.

It can be argued that Lord Millett's reasoning is influenced by corporate rescue. This can be evidenced by how he highlights that by leaving the beneficial interest always with the lender it fits with "commercial reality".<sup>71</sup> This is plausible because if the lender always has the beneficial interest, it means they are always protected almost like a secured creditor in an ordinary commercial dealing. This creates the view that this development to the Quistclose trust facilitates corporate rescue because it encourages lending by emphasising that the lender will always be protected as they retain the beneficial interest throughout.

### *When Does The Primary Purpose Fail?*

Lord Wilberforce has also been criticised because it is argued that as in theory the shareholders could have still been paid, so the primary purpose could be carried out.<sup>72</sup> It is therefore questionable why the primary trust had failed.<sup>73</sup> This is an important issue in assessing whether the Quistclose trust is a welcome facilitator of corporate rescue. This is because it is important to be clear on when the trust fails so that the lender understands at what point they are entitled to their money being

<sup>60</sup> CA 6 October 1978.

<sup>61</sup> [1985] Ch. 207 (CH).

<sup>62</sup> (n1).

<sup>63</sup> *Carreras Rothmans* (n61) 223.

<sup>64</sup> Millett (n 54) 282.

<sup>65</sup> (1987) 3 BCC 389 (CA).

<sup>66</sup> Millett (n 54) 284.

<sup>67</sup> [2002] UKHL 12, [2002] 2 AC 164.

<sup>68</sup> *Ibid* [100].

<sup>69</sup> *Ibid*.

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

<sup>71</sup> *Ibid* [81].

<sup>72</sup> Millett (n54) 276.

<sup>73</sup> *Ibid*.

returned to them; without clarity on this issue, this could deter lending for corporate rescue.

#### *Has Case Law Resolved This Issue?*

This issue was resolved by Lord Millett in *Twinsectra Ltd v Yardley and Others*.<sup>74</sup> In coming to this decision he recognises that corporate rescue is the reason why the loan is lent, but this is only the motive.<sup>75</sup> For example, Lord Millett uses *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>76</sup> to demonstrate that the purpose was to pay the dividend but the motive behind this was so that the company could keep trading.<sup>77</sup> But because the company is insolvent, the lender wants their money back because the motive fails.<sup>78</sup> He therefore reasons that the purpose must be the motive of saving the company.<sup>79</sup>

Under his resulting trust analysis, Lord Millett reasons that if the resulting trust is in the lender's favour, they have the control as a beneficiary to stop the borrower using their power to use the money for the specific purpose, if the lender views that there is no point to the money being used for the purpose (e.g. not using the money for the purpose of paying the creditors because the company has become insolvent).<sup>80</sup>

This analysis is useful in providing support for using the Quistclose trust as a facilitator of corporate rescue. This is because it fits into trust law principles, which means it can be accepted as a valid arrangement. It could also encourage lending because the lender is reassured that they have the full control over their money, as they can stop the arrangement when they view that the motive of saving the company cannot be achieved.

#### *Is The Trust An Expressed Or Implied Trust How To Decide If The Parties Intended To Form A Trust?*

Lord Wilberforce's judgment has been attacked for, "... an undeniable element of artificiality in the assertion that such an elaborate trust can be inferred simply from the mutual intention of the parties".<sup>81</sup> This leads to the point that it is not clear whether the primary and secondary trusts are expressed or implied trusts.<sup>82</sup> This issue links to how the court decides whether the parties intended to form a trust.<sup>83</sup> This is because if the trust is expressed there has to be an explicit intention from the settlor to form a trust, whereas a resulting trust is found on, "... presumed intention"<sup>84</sup> of the settlor. The categorisation becomes relevant when the courts consider whether there was an intention to form a trust.<sup>85</sup>

This negatively impacts on the use of Quistclose trusts as a facilitator of corporate rescue because with this uncertainty it can become difficult on advising parties on whether a Quistclose trust will be found,<sup>86</sup> which could deter lenders from relying on the Quistclose trust.

<sup>74</sup> (n 67).

<sup>75</sup> *Ibid* [98].

<sup>76</sup> (n1).

<sup>77</sup> *Twinsectra* (n 67) [98].

<sup>78</sup> *Ibid*.

<sup>79</sup> Millett (n 54) 288.

<sup>80</sup> *Twinsectra* (n 67) [98].

<sup>81</sup> Smolyanksy (n 3) 559.

<sup>82</sup> Haley and McMurtry, (n 56) 62.

<sup>83</sup> Amber Lavinia Rhodes, 'Quistclose trust's detrimental effect on commercial transactions' (2013) 27 *Tru L I* 179, 180.

<sup>84</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 708.

<sup>85</sup> Rhodes (n 83) 179.

<sup>86</sup> McKendrick (n 45) 151–152.

### *Has Case Law Resolved This Issue?*

From Lord Millett's characterisation of the trust as a resulting trust, this leads to his conclusion that the lender only needs to show an intention to not pass the beneficial interest to the borrower, as opposed to evidence that the lender wished to retain all of the beneficial interest.<sup>87</sup> Furthermore, the lender does not subjectively have to intend to create a trust, the trust is instead inferred from the agreement.<sup>88</sup> (In other words, evidence that the money is lent to the borrower for a specific purpose and the money is not at their free disposal supports an intention to form the trust).<sup>89</sup>

This resulting trust analysis has been argued by Penner as, "a recipe for a largely unfettered discretion in the court to find trusts in commercial circumstances on flimsy evidence about what might have been absent to A's [the settlor's] mind as opposed to determining the true intentions of the parties".<sup>90</sup> This is a well recognised argument supported by Smolyanky who argues that, "the inquiry must always be directed at ascertaining who the parties actually intended to be the beneficial owner".<sup>91</sup> These arguments are plausible because the above test from Lord Millett is quite vague and a lot depends on how the court judges the evidence. Lord Millett has also been criticised for not providing more detail for the lower courts on how this test is applied in practice.<sup>92</sup>

### *Why Is This Criticism Such An Issue?*

This is such a problem because firstly there is an argument<sup>93</sup> that the Quistclose trust should not be classified as a resulting trust because it does not fit into the two categories of resulting trust principles as set out in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.<sup>94</sup>

Secondly Lord Millett's analysis is an issue for some practitioners and academics such as Rhodes because the implied trust undermines commercial certainty because the trust can be found by the courts without the parties actually expressing this in their contractual agreement.<sup>95</sup> Rhodes instead advocates for an express trust so that certainty can be restored.<sup>96</sup> An express trust is currently used in Australia, (in which the primary and secondary trust is seen as "... an express trust of two limbs"<sup>97</sup>). This suggestion shows that Quistclose trusts are not a welcome facilitator of corporate rescue because they do not fit in with ability for parties to be able to develop important, certain and sophisticated contracts.

Rhodes' argument against the implied resulting trust is plausible based on support from an article by barrister, Keith Robinson,<sup>98</sup> who discusses the Quistclose trust in the judgement of first instance and appeal of *Kingate Global Fund Ltd v Knightsbridge (USD) Fund Limited et al*<sup>99</sup> heard in Bermuda. Knightsbridge had paid into the

<sup>87</sup> *Twinsectra* (n 67) [92].

<sup>88</sup> *Ibid* [71].

<sup>89</sup> *Ibid* [68].

<sup>90</sup> James Penner, 'Lord Millett's Analysis' in William Swading (ed), *The Quistclose Trust: Critical Essays*, (Hart Publishing 2004), page 54.

<sup>91</sup> Smolyanky (n 3) 561.

<sup>92</sup> Stanley and Watson (n2) 107.

<sup>93</sup> Smolyanky (n 3) 565; Deepa Parmar, 'The Uncertainty Surrounding the Quistclose trust- Part One (2012) 9 Int C R 137, 141.

<sup>94</sup> [1996] 2 WLR 802.

<sup>95</sup> Rhodes (n 83) 179 – 180.

<sup>96</sup> *Ibid* 179.

<sup>97</sup> *In Re Australian Elizabethan Theatre Trust* 102 ALR 681 [26].

<sup>98</sup> Keith Robinson, 'Madoff meets Quistclose' (2011) 17 T&T 668.

<sup>99</sup> (2010) 12 ITELR 850; [2009] SC (Bda) 39 Civ (Bermuda).

Kingate Global Fund, which was indirectly controlled by the infamous, Bernard L. Madoff Investment Securities LLC.<sup>100</sup> The fund became insolvent upon the arrest of Mr Madoff.<sup>101</sup> Robinson discusses how the Court of Appeal in Bermuda, found that the money paid into the fund was protected by a Quistclose trust and thus returnable to Knightsbridge.<sup>102</sup>

Robinson's criticises the court for reasoning that there was an implied term in the parties' agreement that the money should be segregated, when the money was not segregated.<sup>103</sup> Robinson argues that this interpretation was an error of the court and the use of equity jeopardises commercial agreements.<sup>104</sup> He takes the view that if that those are the terms upon which the parties wanted to contract, then they had the opportunity to do so and thus the court should not infer it.<sup>105</sup> This outcome is evidence that the resulting trust reduces commercial certainty, which really weakens the appeal of using the Quistclose trust to assist corporate rescue because it does not seem fair on the other parties for the trust to be able to exist. It can therefore be questioned whether it would be better for the Quistclose trust to be an express trust as it would then reduce the court's role in interpreting the commercial agreement.

#### *Has Any Recent Case Law Resolved This Problem?*

Stanley and Watson<sup>106</sup> argue that the recent cases of *Raymond Bieber & Others v Teathers Ltd (In Liquidation)*<sup>107</sup> and *Challinor v Juliet Bellis & Co*<sup>108</sup> show that the courts are taking a more stringent approach in finding intention to create a Quistclose trust.<sup>109</sup> The authors argue that in both cases there is evidence of the court emphasising the importance of objective evidence in finding intention, something absent in previous case law.<sup>110</sup>

To support this finding they note that in *Raymond Bieber & Others v Teathers Ltd (In Liquidation)*<sup>111</sup> that it was crucial that the trust would make sense in light of the contractual documents. Indeed, in the case the trust did not correspond with the contractual documents and the Quistclose trust could not be found. Stanley and Watson also draw upon the fact that *Challinor v Juliet Bellis & Co*<sup>112</sup> makes clear that context should not be used as a weapon of undermining the document as to find a Quistclose trust,<sup>113</sup> thus suggesting a preservation of the parties freedom to contract on their terms. Stanley and Watson conclude that these cases show that, "there is now a heavy burden on claimants who wish to assert a proprietary claim under a Quistclose trust".<sup>114</sup> This is a plausible argument, as they have shown that the courts are emphasising the importance of clear and objective evidence to form a trust, which was not as detailed in *Twinsectra* and the earlier authorities. It is also understandable why it is a desired development for Stanley

<sup>100</sup> *Kingate Global Fund Ltd v Knightsbridge (USD) Fund Limited et al* (2010) 12 ITEL 850 [3].

<sup>101</sup> *Ibid* [3].

<sup>102</sup> Robinson (n98).

<sup>103</sup> *Ibid* 676.

<sup>104</sup> *Ibid* 675.

<sup>105</sup> *Ibid* 673.

<sup>106</sup> Stanley and Watson (n 2).

<sup>107</sup> [2012] EWCA Civ 1466.

<sup>108</sup> [2015] EWCA Civ 59, [2015] WLR (D) 57.

<sup>109</sup> Stanley and Watson (2012) 109.

<sup>110</sup> *Ibid*.

<sup>111</sup> (n 107).

<sup>112</sup> (n 108).

<sup>113</sup> *Ibid* [70]; Stanley and Watson (n 2) 109.

<sup>114</sup> Stanley and Watson (n 2) 109.

and Watson as they were counsel who represented the parties who wished to defeat the notion of a Quistclose trust.<sup>115</sup>

*What Does This Development Mean For The Quistclose Trust As A Welcome Facilitator Of Corporate Rescue?*

Stanley and Watson's article suggests that there is now an attitude from the courts of adopting Australia's express form of Quistclose instead of an implied trust.<sup>116</sup> This will please academics such as Rhodes.<sup>117</sup> In reality, however, Glister has raised the view that in both forms the court finds the trust based on a similar analysis on the same factors.<sup>118</sup> This is plausible because after all Stanley and Watson suggest the test the courts are now using is similar to Australia *but* Quistclose is still called a resulting trust.<sup>119</sup> Maybe it is the express trust label that will make lawyers in the commercial field more content?

In any event, by emphasising objective evidence of an intention to form a trust, this development could encourage the use of the Quistclose trust in corporate rescue because it means that it will become easier to advise the parties. Also the trust will not receive as much criticism as this development preserves commercial certainty.

## THE PRACTICAL PROBLEMS WITH QUISTCLOSE TRUSTS

The following part of this project will now move away from the issues that have stemmed from case law and will focus more upon arguments that deal with the practical implications and problems that influence deciding whether or not Quistclose trusts are useful in facilitating corporate rescue.

*Does The Quistclose Trust Create A False Appearance Of Solvency?*

There is an argument by Lusina Ho and Philip Smart<sup>120</sup> that despite receiving the financial benefit of the loan under a Quistclose trust it could jeopardise receiving further investments. This is because the loan creates a picture of solvency which is not really true as the money will soon be used for its purpose, or if the purpose is of course impossible to perform this money will be returnable to the lender. This, however is unknown to any further investors because as a Quistclose trust is not a security that would be registered for further investors to see.<sup>121</sup>

This is a plausible argument as it has been recognised by other commentators. Arthur Chan argues that despite the encouragement of Quistclose trusts to create a survival line for the company, this causes a detriment to other creditors.<sup>122</sup> This is because the third party creditors are left to make decisions on a misleading picture of solvency. He highlights that these decisions include, the third party creditor allowing debt because they believe the company can repay due to the false appearance of solvency.<sup>123</sup> This is an important argument because this could affect the survival of the creditor's business, meaning using the Quistclose trust to facilitate corporate rescue for one company has the risk of indirectly destroying another.

<sup>115</sup> Challinor (n 108).

<sup>116</sup> Stanley and Watson (n 2) 109.

<sup>117</sup> Rhodes (n 83).

<sup>118</sup> Jamie Glister, 'The role of trusts in the PPSA' (2011) 34 UNSWLJ 628, 641.

<sup>119</sup> Challinor (n 108) [56].

<sup>120</sup> Ho and Smart (n 7).

<sup>121</sup> *Ibid* 47.

<sup>122</sup> Arthur Chan, 'The tree that was not meant to be – The Quistclose trust moving on from the Twinsectra model and why it may never be an established transactional arrangement' (2015) 9 HKJLS 1, 23.

<sup>123</sup> *Ibid*.



On the other hand, there is an argument that this disadvantage to using Quistclose trusts to help corporate rescue can easily be defeated. This is because as Professor Bridge argues, a false picture of solvency is not created, as the money is often used in an emergency for the borrower to pay creditors, then the time frame of the money actually being within the borrower's assets is short.<sup>124</sup> This argument has also been supported by other academics such as Deepa Parmar.<sup>125</sup>

If the time frame is short, this would mean that the argument raised by Chan of the creditors allowing debts,<sup>126</sup> becomes irrelevant. Based on this analysis, the false appearance of solvency can be said not to be an issue and thus the Quistclose trust remains a steady mechanism of facilitating corporate rescue.

### *Does The Quistclose Trust Conflict With And Undermine Insolvency Law?*

As discussed previously Ho and Smart have made the point that when the House of Lords decided *Barclays Bank Ltd v Quistclose Investments Ltd*,<sup>127</sup> corporate rescue was not sophisticated in the United Kingdom.<sup>128</sup> A company in financial difficulties would have been wound up.<sup>129</sup> One questions therefore whether in light of the other options that are now available, whether the use of Quistclose is an outdated arrangement of providing a financial life line? Perhaps in 1970, the introduction of the Quistclose trust to encourage saving a company was a welcome development by the courts because Parliament had not provided any other options?

One of the options now available to help corporate rescue is the company voluntary arrangement,<sup>130</sup> which gives the company an opportunity to arrange a scheme of payments to creditors so as to give the company time to regain solvency and stability.<sup>131</sup> The arrangement, however, does not offer an injection of capital that a lender could provide under a Quistclose trust, which suggests that lending under a Quistclose trust is still required to provide finance.

Another procedure aimed at improving corporate rescue is administration,<sup>132</sup> which works on the basis of an administrator coming to the company with the primary aim to rescue the company.<sup>133</sup> Finance can be made available, as opposed to a company voluntary arrangement. Although, as Roy Goode observes it is not always a great prospect to new creditors, due to the structure of priority in payment once administration is over.<sup>134</sup> This means that perhaps a loan, under a Quistclose trust would be more attractive, as the lender would ensure their return. Another issue is administration can cause a poor reputation of the company as it becomes public that the company is struggling financially.<sup>135</sup> Despite the introduction of pre-pack administration which aims to avoid this affect,<sup>136</sup> a Quistclose trust, however, can provide finance without public attention.

<sup>124</sup> Bridge (n 50) 348, 361.

<sup>125</sup> Parmar (n 24) 206–207.

<sup>126</sup> A Chan (n 122).

<sup>127</sup> (n 1).

<sup>128</sup> Ho and Smart (n 7).

<sup>129</sup> *Ibid.*

<sup>130</sup> (n 15).

<sup>131</sup> Susan McLaughlin, *Unlocking Company Law* (3<sup>rd</sup> edn, Routledge 2015) 218.

<sup>132</sup> (n 16).

<sup>133</sup> Insolvency Act 1986, Schedule B1, Paragraph 3.

<sup>134</sup> Goode (n 14) 458.

<sup>135</sup> McLaughlin (n 131) 425.

<sup>136</sup> *Ibid.*

A further issue is the argument that the Quistclose trust undermines the payment of creditors if the company is wound up.<sup>137</sup> Smolyanksy argues that because of the proprietary claim that the trust creates, the lender has more protection than a secured or unsecured creditor.<sup>138</sup> Smolyanksy argues that the Quistclose trust therefore fails the *pari passu* rule.<sup>139</sup> He argues that this is unwelcome because *pari passu* is so important in insolvency law.<sup>140</sup> From this argument it can be said that the Quistclose trust is not a welcome facilitator of corporate rescue because in the event that the rescue does not succeed, the impact on insolvency law is undesired.

There is also the further argument that the Quistclose trust undermines insolvency law because it prefers other creditors, which goes against the Insolvency Act.<sup>141</sup> As Stevens explains the trust creates a preference because if the purpose of the trust was to pay a group of creditors, then that group of creditors have been preferred as opposed to the other creditors.<sup>142</sup> Stevens uses the case of *Carreas Rothmans Ltd v Freeman Mathews Treasure Ltd*<sup>143</sup> to support this point. He argues that the arrangement that Carreas Rothmans Ltd used to pay their sums owed to Matthews Treasures Ltd was a preference because the money was to pay a certain group of *their* creditors. Stevens then argues that this is a preference because those creditors are in a better position than the others.<sup>144</sup>

From this analysis it can be shown that using a Quistclose trust to encourage corporate rescue, can co-exist alongside the insolvency law procedures of a company's voluntary arrangement and administration. But when the purpose fails and the borrower becomes insolvent, the Quistclose trust then conflicts with insolvency law and negatively impacts on other creditors, which is not desired.<sup>145</sup> It is on this basis that Quistclose undermines insolvency law, which makes Quistclose unwelcome in facilitating corporate rescue. However, it would be a useful empirical study to analyse how many companies do become insolvent despite the loan under the Quistclose trust as this could then determine how much of an issue the Quistclose trust makes to insolvency law, as it is relatively few, then the device does not undermine insolvency law and can continue to be a welcome facilitator of corporate rescue.

### *Is The Quistclose Trust A Welcome Facilitator Of Corporate Rescue In The Context Of Public Policy?*

Despite the flaws in legal reasoning that have been discussed in this project, there is strong support for the approach that the courts have taken based on public policy grounds. For example, Professor Bridge argues that the case of *Re EVTR Ltd*<sup>146</sup> is evidence of the court upholding the use of the Quistclose trust in the transaction because there was no other alternative remedy for the lender.<sup>147</sup> This can show therefore that the courts want to encourage lending, and will in return offer protection to the lender.

<sup>137</sup> Rhodes (n 83) 179.

<sup>138</sup> Smolyanksy (n 3) 564.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> Insolvency Act 1986, s 239.

<sup>142</sup> Robert Stevens, 'Insolvency' in William Swading (ed), *The Quistclose Trust: Critical Essays*, (Hart Publishing 2004) 160.

<sup>143</sup> (n 61).

<sup>144</sup> Stevens (n 142) 162.

<sup>145</sup> Smolyanksy (n 3) 564.

<sup>146</sup> (n 65).

<sup>147</sup> Bridge (n 50) 354.

Often the reason why the courts are keen to allow the Quistclose trust is because by rescuing a company, it saves the livelihood of the company's employees.<sup>148</sup>

Furthermore, academic Gary Watt also accepts that part of the policy behind the Quistclose trust is to save the company's employees but also to keep the company going so other companies have the benefit of dealing with that company.<sup>149</sup> Watt argues against the Quistclose trust when it only benefits an individual.<sup>150</sup> Watt cites *Cooper v PRG Powerhouse Ltd*<sup>151</sup> as evidence of this point. This argument shows that Quistclose trust is valued for its role that it can play in saving a company and its wider community but it is not desired to solely benefit an individual. Therefore the Quistclose trust should be encouraged but confined to corporate rescue.

### *Has The Quistclose Trust Been Seen As A Welcome Facilitator Of Corporate Rescue In Other Jurisdictions?*

Chan has argued that, "the application of the Quistclose trust in emerging economies across the commonwealth serves to highlight its value in commercial transactions".<sup>152</sup> His reference to "emerging economies" refers to Malaysia, where he demonstrates that Lord Millett's analysis in *Twinsectra Ltd v Yardley and others*<sup>153</sup> of the Quistclose trust has been adopted.<sup>154</sup> Evidence of the choice of other jurisdictions to adopt the Quistclose trust suggests that the benefits of its role to assist in aiding corporate rescue must have been recognised. Furthermore if the trust is being used in developing economies this could suggest that the trust is not an outdated device in facilitating corporate rescue but one that is still needed despite legislative developments in the rescue culture.

As discussed above, Australia also has the Quistclose trust, but it has developed as a form of express trust, unlike the implied trust in England.<sup>155</sup> New Zealand and Canada also recognise the Quistclose trust but instead view it as constructive trust.<sup>156</sup> Even though these jurisdictions have developed the Quistclose trust in their own way, it still shows a recognition which adds to why there is a need for the Quistclose trust.

In neighbouring Scotland, however, the Quistclose trust has not been recognised. Gretton argues that this is partly due to the issue that equity does not have a need to interfere in the common law.<sup>157</sup> He argues that in England, equity is needed to relieve the harshness of the common law, whereas Gretton states that Scottish law is sufficient without equity having to intervene.<sup>158</sup> Moreover, the legal culture is different, he explains that the courts in England are eager to protect the lender whereas in Scotland, the courts wish to protect the third party creditors.<sup>159</sup> Additionally insolvency law is considered very highly in Scotland.<sup>160</sup>

The negative effects that a Quistclose trust can have on third party creditors (e.g. less returns on a winding up because the lender under the Quistclose trust takes back

<sup>148</sup> Sarah Wilson, *Todd & Wilson's Textbook on Trusts and Equity* (12<sup>th</sup> edn, OUP 2015) 462.

<sup>149</sup> Gary Watt, *Trusts & Equity* (7<sup>th</sup> edn, OUP 2016) 162.

<sup>150</sup> *Ibid.*

<sup>151</sup> [2008] EWHC 498 (Ch), [2008] BCC 588.

<sup>152</sup> Brandon Dominic Chan, 'The enigma of the Quistclose trust' (2013) 2 UCL JL and J 34.

<sup>153</sup> (n 67).

<sup>154</sup> Brandon Dominic Chan (n 152) 34.

<sup>155</sup> *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681. (Australia).

<sup>156</sup> Brandon Dominic Chan (n 152) 33.

<sup>157</sup> George Gretton, 'Scotland' in William Swading (ed), *The Quistclose Trust: Critical Essays*, (Hart Publishing 2004) 176.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid* 178.

<sup>160</sup> *Ibid.*

their money) would be highly unwelcomed by the Scottish law. This leads to the view that Quistclose trusts would not be seen as a welcome development in assisting corporate rescue in Scotland but more as an unwelcome interference to insolvency law. This analysis has also shown that insolvency law is very important in Scotland, whereas in England insolvency law is still developing. It could be said, therefore that maybe in the future, English legal culture could also value insolvency law more strongly, which could see a decline in the use of the Quistclose trust. On the other hand, as noted by Gretton equity has more of a role to play in England,<sup>161</sup> which could suggest that the courts would still encourage the Quistclose trust to facilitate corporate rescue.

### REFORMS THAT COULD BE MADE TO THE QUISTCLOSE TRUST THAT COULD IMPROVE THE TRUST AS A WELCOME FACILITATOR OF CORPORATE RESCUE

To address this issue it is useful to look at the possible reforms that have been suggested by Parmar that allows for the Quistclose trust to exist but curbs the potential for the judiciary to be free to find a Quistclose trust.<sup>162</sup> Her proposal includes, “instructing the courts to look for a positive intention to retain the beneficial interest in the funds and to place an emphasis over form, urging the courts to look at the surrounding situations”.<sup>163</sup> It is important to note that Parmar wrote her article in 2012, prior to the development made in *Challinor v Juliet Bellis & Co*,<sup>164</sup> which as discussed above, suggest that the court are heading in this proposed direction anyway.

Furthermore, she makes the argument that the evidence required for a party to rely on the trust should differ on the size of the company and legal team, so that more evidence is required if it is a big company or a sophisticated legal team.<sup>165</sup> This is based on her view that they should be in a position to know better so they should have explicitly referred to a Quistclose trust in the agreement.<sup>166</sup> One could argue that this proposal could discourage lending money under the Quistclose trust to big companies, out of fears that the loan will be subject to strict scrutiny by the courts. It is, however, understandable why Parmar suggests this proposal as the impact on finding a Quistclose trust to a large company could also impact significantly on their creditors. This proposal, nevertheless, could create more uncertainty to the Quistclose trust as it could create a sliding scale of what evidence is required based on the size of the company, which makes court decisions vulnerable to inconsistency. It is therefore submitted that this proposal would not assist in making the Quistclose a welcome facilitator of corporate rescue.

Parmar also argues that these reforms are better than the alternative possibility of controlling the Quistclose trust by restricting the lender's rights in the insolvency procedure. This is because this is unfair on those who wanted the benefit of a trust and also would defeat the idea of the Quistclose trust encouraging corporate rescue.<sup>167</sup> It is submitted that this is a valid argument as the two above suggested reforms would still allow the Quistclose trust to assist in facilitating corporate rescue but, weakening the lender's rights, would completely deter lending under this trust.

<sup>161</sup> Gretton (n 157) 176.

<sup>162</sup> Parmar (n 24) 207–208.

<sup>163</sup> *Ibid* 207.

<sup>164</sup> (n 103).

<sup>165</sup> Parmar (n 24) 207.

<sup>166</sup> Parmar (n 24) 208.

<sup>167</sup> *Ibid* 208.

## CONCLUSION

It is submitted that based on the above analysis, the Quistclose trust is a welcome facilitator of corporate rescue. This is because despite the legal debate over the Quistclose trust, further case law has shown that issues are slowly being resolved and the trust is not such a legal paradox as it may once have been.

Furthermore, the Quistclose trust does not conflict with other corporate rescue procedures such as the company voluntary arrangement and administration. Instead it is submitted that the Quistclose trust supplements these procedures, which suggests it still has a role to play, despite sophisticated insolvency law. The Quistclose trust has, however, been seen to undermine elements of insolvency law such as the *pari passu* rule, but this only presents a problem if the corporate rescue fails.<sup>168</sup>

On balance it seems that in a culture that aims to encourage corporate rescue, it would be wrong to exclude the possibility of using a Quistclose trust to help facilitate corporate rescue, since the trust clearly has value in providing an alternative source of finance to save a struggling company, which could otherwise collapse.<sup>169</sup>

<sup>168</sup> Smolyansky (n 3).

<sup>169</sup> I am grateful to Susan McLaughlin for her supervision and feedback of this essay and to Juliette Grant for her feedback. Any errors are my own.





