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Introduction

Maria Sonam, Editor-in-Chief

The Oxford University Undergraduate Law Journal was founded with a view to facilitating and reinforcing the already strong academic ethos in the study of law at the University of Oxford. It has the aim of providing students a platform from which to explore legal topics pertaining to the UK jurisdiction which are germane to the Jurisprudence curriculum; encouraging and promoting excellence in learning, debate and independent thought. This is further reflected in the democratising 'by the students, for the students' set-up, upon which the Journal is based.

In order to withstand the contemporary legal and political challenges that face us, in tandem with the increasing commercialisation of the legal profession, it is important to reinstate and engage with those values and skills which go to the heart of good study and good advocacy; analytical rigour, argumentative clarity and confidence in originality. The Editors, Oxford Law Faculty members and the OUULJ Honorary Board hope that this Journal will help to achieve the culture described. Although this project is in its infancy, we envisage that the Journal will become entrenched in the way that the Jurisprudence course is delivered. To this end, the Tutor Recommendation Scheme, whereby tutors will encourage strong candidates to make submissions, will be particularly instrumental in implementing OUULJ's objectives of contributory learning.

I sincerely hope that OUULJ becomes a longstanding publication at the University of Oxford and that it provides students with an arena to engage with the most contentious issues of our day without curriculum constraints. Indeed, the Journal was conceived on the premise that we should not underestimate the contribution that the youngest legal minds can make to academic thought.

I would like to take this opportunity to thank our Board members for their support and enthusiasm for this project and also Timothy Endicott and Jonathan Herring of the University of Oxford Law Faculty for their active endorsement of OUULJ and their positive reception to its proposal.

Yours sincerely,

Maria Sonam (Hertford College)
Founder and Editor-in-Chief

English Law and the Doctrine of Abuse of Rights

Mateusz Krauze[1]

Does English law recognise a doctrine of abuse of rights? Surprisingly little attention has been paid to this question. Both judicial opinion and academic commentary are scarce. The general opinion seems to be that, in contrast to many continental systems (which recognise an overarching doctrine of abuse of rights), such a concept is foreign to English law. This paper will attempt to clarify the assumptions underlying this opinion and will argue that the differences between the English and continental approaches are overemphasised. It will be contended that the continental approach is less coherent than is generally accepted and that the doctrine of abuse of rights, by virtue of its presence in an increasing number of areas, is an important principle in English law.

In the first stage of the discussion, the concept of abuse of rights will be elucidated with reference to two continental legal systems (French and German) and the jurisprudence of the Court of Justice of the European Union ('CJEU'). The differences between the national concepts and the European concept will justify the claim that there is no longer, if there ever was, any coherent continental approach to abuse of rights. In the second stage, an attempt will be made to (re)interpret the English law on secret trusts and on lawful act duress as premised on a doctrine of abuse of rights. Finally, the possible further expansion of the abuse of rights in English law by means of the General Anti-Avoidance Rule ('GAAR') aimed at dealing with tax avoidance will be explored.

England and the Continent – a false opposition?

There is no authoritative, universal understanding of what constitutes abuse of rights. The concept can only be elucidated by looking at the rules of particular jurisdictions. A more detailed analysis of certain national systems will be presented in the next section but the following preliminary remarks should provide a sound foundation for the discussion. What is common to the approaches taken by most continental systems is that abuse of law (regardless of how it is defined) does not enjoy legal protection. This is most forcefully expressed in Article 2 of the Swiss Civil Code: 'l'abus manifeste d'un droit n'est pas protégé par la loi'.[2] However, that is where the consensus runs out. As will be seen, there are differences not only in how the abuse of rights is defined, but also in the consequences which follow from the abuse of rights. Contrary to what might be expected, the foundations of the doctrine are rarely contained in some sweeping general statements of principle, but have often been read into provisions that on their literal interpretation would be incapable of bearing such a meaning.

Early English case law contains some dicta which appear to suggest reluctance to adopt the language of abuse of rights. In *Waterer* v *Freeman*[3] the court affirmed the principle that even if imprisonment is procured by forgery, an act which in that context was expressly referred

1 Harris Manchester College.
2 'The manifest abuse of a right is not protected by the law'.
3 (1619) 80 ER 412.

to as 'abuse of law',[4] the sentence cannot be avoided in spite of being 'untruly' procured. A more modern example of similarly unfavourable judicial attitude can be found in the famous dictum of Lord Halsbury in *Bradford v Pickles:*[5] '[i]f it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it'. As a result, it is generally accepted that the English recognition of the doctrine of abuse of rights is of limited overall utility.[6] It is indeed hard to deny that an overarching doctrine has never been expressly recognised. However, it will be contended that some implicit support can be found for a principle of abuse of rights serving as a useful explanatory tool, if not a firm theoretical foundation, for many areas of English law. In other words, an argument can be made that while the English judges have never recognised a principle of abuse of rights as an organising principle of the whole legal system, there is nonetheless a growing number of areas in which it operates. Aside from certain recognised instances where the concept is already used, such as in the law of nuisance[7] and abuse of process,[8] at least two more can be added. As will be argued below, both the law on secret trusts and the rules on lawful act duress are capable of being interpreted as being informed by the principle of abuse of rights.

The English approach that has just been outlined is traditionally contrasted with the approach taken by the civil law, whereby many civilian systems are said to operate a general principle of abuse of rights.[9] While it is certainly true that the doctrine of abuse of rights figures prominently in many civil law systems, it is seldom grounded in broad, all-encompassing provisions of general application. One of the arguments of this article will be that there are more similarities than differences between the English and continental approaches. In civilian systems, chiefly two categories of rules can be distinguished: those which have subsequently been judicially interpreted as addressing the issue of abuse and those that deal with abuse of rights overtly by explicitly mentioning the concept. For present purposes it will be more useful to focus on the former category because this approach bears a greater resemblance to the way in which abuse of rights has developed in English law.

Abuse of rights – elucidating the concept

To better understand the multi-faceted nature of abuse of rights, it will be instructive to take a look at two important jurisdictions where the concept of abuse of rights is quite widely used: France and Germany. In France, abuse of law is generally considered to stem from the general rule on civil liability contained in Art 1382 of the French Civil Code which is said to affix responsibility to the author of any harm, so as to limit the abusive exercise of rights or powers.[10] On its face Art 1382 does not contain any explicit reference to abuse of rights, but its broad statement of principle was used by the French courts[11] to develop the doctrine of abuse of rights. As a result, French law imposes sanctions on the use of a right if the use ex-

4 Ibid. 412.

5 [1895] AC 587 (HL), 594.

6 M. Byers, Abuse of Rights – An Old Principle, A New Age, (2002) 47 McGill L.J. 389, 397: 'abuse of rights is of limited utility in those legal systems and those areas of law in which the rights themselves have been framed in precise or qualified terms'.

7 *Hollywood Silver Fox Farm v Emmett* [1936] 1 All ER 825 (KBD).

8 *Johns v Gore Wood & Co.* [2002] 2 AC 1.

9 M. Taggart, Private Property and Abuse of Rights in Victorian England (OUP 2002) 145.

10 Byers (n 6) 392.

11 DP 1917. 1. 79 Case *Coquerel v Clément-Bayard.*

ceeds the limits of reasonable use and enforcement of the right.[12] On this approach, an abuse of rights can generally be said to occur when a person who has the right to choose between several legal paths to reach a particular result exercises the right, but in doing so acts with malice or an otherwise improper motive.[13] Over the years, the criteria to determine whether there has been an abuse of law have varied and compounded to form a set of general guidelines dealing with two main forms: (a) social abuse and (b) intentional abuse aimed to harm a third party.[14] Social abuse encompasses deliberate actions carried out to divert the intended operation of a law in order to achieve a result that the legislature would not have intended. Intentional abuse aimed to harm a third party is, as name implies, the use of a right (or rights) with the sole intention of harming a specific third party.[15] It will be important to bear these two categories in mind when we proceed to analyse the law on secret trusts and lawful act duress. At this stage we can tentatively map these two categories on to two areas of English law. First, social abuse with its emphasis on achieving a result that is contrary to that intended by Parliament can be used to characterise the attempt of a trustee under a secret trust to act inconsistently with the will of the testator. Second, the category of intentional abuse would encompass the attempts of A to put lawful yet illegitimate[16] pressure on B as a means of obtaining an advantage at the expense of B.

Germany is another major civilian jurisdiction in which the concept of abuse of rights (*Rechtsmissbrauch*) operates. Its origins and scope are, however, different from those of its French counterpart. Under the German law the source of the doctrine is twofold. First, there is the provision requiring good faith in contractual obligations, expressed in Paragraph 242 of the German Civil Code,[17] which over time has been construed to encompass the prohibition of abuse of rights. Second, Paragraph 226 contains the *Schikaneverbot*, which prohibits the exercise of a right if the sole purpose is to cause harm to another person. However, because of the narrowness of the provision, Paragraph 226 is seldom applied.[18] The crucial feature of the German solution is that *Rechtsmissbrauch* has been elevated to the status of a fundamental legal principle that now operates beyond the confines of contractual obligations. The principle stemming from Paragraph 242 has a very broad scope and is applicable to areas like family law, labour law and corporation law as well as procedural law, public law and tax law.[19] Over time, the doctrine has been applied to numerous categories of cases. These include the prohibition on exercising rights which, though valid, were fraudulently acquired; the prohibition on making a claim where what is claimed would have to be given back immediately; and the suspension of rights that were not exercised within a reasonable time, even if they have not legally expired.[20] The German example is instructive in one very important way. It shows that it is not entirely accurate to speak of the civilian systems as possessing a 'generalised abuse of rights doctrine'.[21] The doctrine has grown organically out of a very basic assump-

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12 Z. Prebble and J. Prebble, Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law, Bulletin for International Taxation, April 2009, 158.

13 Ibid.

14 Ibid.

15 Ibid.

16 The possibility of lawful illegitimate acts is discussed in more detail below in relation to lawful act duress, pp. 11-13.

17 Bürgerliches Gesetzbuch (BGBl. I S. 42, ber. S. 2909, 2003 I S. 738).

18 Z. Prebble and J. Prebble (n 12), 153.

19 Ibid.

20 Ibid.

21 Taggart (n 9) 165.

tion that rights ought not to be abused, but there were no firm guidelines as to what it means and how the doctrine should be applied in a specific context. In other words, the content of abuse was not settled within the framework of the original principle. It was the subsequent interpretation that fleshed out the application of the doctrine to specific categories of cases, thereby furnishing its substantive content and arguably making it a principle of the French and German legal systems. Nevertheless, it only acquired its general character by being applied over time across many areas of law. As will be argued later, this is also a development slowly taking place in English law, as evidenced by the plans to introduce the concept of abuse into tax legislation.

Abuse of rights – the approach of the Court of Justice of the European Union

The French and German approaches can be usefully contrasted with the approach taken by the CJEU in the development of the doctrine of abuse of rights granted under EU law. For many years the CJEU had to consider cases in which provisions of Community law were said to have been abusively invoked in order to avoid the application of national law or in order to gain subsidies or refunds under Community schemes. For example, in *Emsland-Stärke*[22] an exporter had claimed an export refund but then immediately re-imported the goods to EU territory, without infringing the letter of the regulation. The 'abuse' was defined as comprising two elements: 'first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of the rules has not been achieved' and 'second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it'.[23] In the line of cases which followed *Emsland-Stärke*, the CJEU developed the doctrine further.[24] Space precludes detailed examination of how the principle was developed but, despite some differences in formulation or emphasis (which were largely a result of different contexts in which the cases arose) there appears to be at least one unifying feature: the provisions in question are used to obtain an advantage that is contrary to the purpose of the provision.[25] Despite certain superficial similarities, the rules on abuse of rights in national legal systems are distinct from the doctrine developed by the CJEU in at least one important way. Unlike the national doctrines, the EU mechanism was created explicitly for the purpose of countering abuse rather than being adapted in a haphazard way from a broader principle not originally intended to deal with such cases.

As will be demonstrated below, the English approach is much closer to the national concept. It should, however, be noted that the doctrine of abuse of EU law is of course part of the UK legal order by means of the doctrine of direct effect, thus widening even further the scope of applicability of rules informed by the doctrine of abuse of rights. The comparison between

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22 Case C-110/99 *Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569.

23 Para 39.

24 Case C-367/96 *Alexandros Kefalas and Others v Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE)* [1998] ECR I-02843; Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise* [2006] ECR I-01609; Case C-419/02 *BUPA Hospitals Ltd and Goldsborough Developments Ltd v Commissioners of Customs & Excise* [2006] ECR I-01685.

25 P. Lasok, Abuse of Rights in EC Law – Origins and History, Paper presented at the Bar European Group Annual General Meeting in Ljubljana, Slovenia, June 2006, 7 (available at: http://www.monckton.com/docs/library/AbuseRightsJune06PL.pdf).

the concepts also shows that the alleged 'continental tendency towards systemic coherence'[26] is little more than a myth. In many aspects the national concept of abuse of rights is not much more coherent than the rules dealing with similar problems found in the English legal system. Rather, the veneer of coherence in the continental systems is furnished by explicit acknowledgement of a unifying principle which in practice serves merely to justify decisions in very different categories of cases, as evidenced by the German example. Similarly, the origins of the French doctrine also undermine the claim that civilian legal systems generally tend to display a 'systemic coherence'. Moreover, the statutory sources that gave birth to it both in Germany (especially Paragraph 242 of the German Civil Code) and in France (Article 1384 of the French Civil Code) cannot be said to have been intended by their respective draftsmen to prevent the abuse of rights.

The discussion so far has allowed us to clear the conceptual ground and it is now possible to move to the second part of the argument. It will be contended that at least two areas of English law surprisingly share many features with the civilian national concepts properly understood. As signalled in the beginning, the argument will be supported by reference to two areas of English law: secret and trusts and lawful act duress. They will be considered in turn.

English law – welcoming the abuse of rights after all?

Under the general rule of trusts law, all express trusts stipulated to take effect on the settlor's death must be in the form required by the Wills Act 1837. Secret trusts constitute an exception to this rule. If the settlor has consulted the intended trustee and obtained his agreement to the projected trust before transferring the property in question, a secret trust will arise.[27] Various explanations have been presented to account for the operation of the law. On one account, secret trusts are express trusts, but are not afflicted by their failure to comply with the Wills Act because they take effect from the time of the agreement, which is necessarily before the testator's death. Thus, they are inter vivos and the Wills Act is inapplicable to them: they operate dehors the will. Another line of argument seeks to explain secret trusts on the basis of the equitable maxim 'equity will not permit a statute to be used as an instrument of fraud'.[28] Such a result, the argument goes, would occur if the settlor's intended express trust was held ineffective when he has transferred the property in question to the trustee after securing the trustee's agreement to hold it on the trust, as the law requires.[29]

Both interpretations have their shortcomings.[30] The weaknesses of the 'dehors the will' theory have already been explored elsewhere. Suffice it to say for the present purposes that its fatal flaw consists in confusing 'outside the will' with 'outside the Wills Act'.[31] The dehors theory needs – and fails – to demonstrate the truth of the latter proposition and too often ends up resting merely upon the former, which is wholly inadequate as a justificatory argu-

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26 Taggart (n 9) 157.

27 It should be noted that the category of secret trusts is further subdivided into fully secret trusts and half-secret trusts. However, for the present purposes nothing turns on this distinction so they will be jointly referred to as secret trusts.

28 *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206-7; *Re Duke of Marlborough* [1894] 2 Ch 133, 141.

29 S. Gardner, Introduction to the Law of Trusts (3rd ed., Clarendon Press) 97.

30 Discussed in more detail: Ibid. 96.

31 P. Critchley, Instruments of fraud, testamentary dispositions, and the doctrine of secret trusts, (1999) 115 L.Q.R. 631, 641.

ment.[32] Reconceptualising secret trusts as grounded in the doctrine of abuse of rights has the advantage of avoiding the shortcomings of the dehors theory since the premise on which the doctrine of abuse of rights is based is wholly distinct from the one underpinning the dehors theory. Moreover, it also deals with the criticism levelled at the fraud theory while at the same time maintaining a coherent foundation for the operation of secret trusts and obviating the need to refer to the concept of constructive trust.

The doctrine of abuse of rights can be used in the following way to explain the operation of secret trusts. The theory of abuse of rights treats reliance by the trustee on the Wills Act in order to keep the property for himself as abusing those provisions in the sense of going against their purpose. This is a good example of the use of the French doctrine of social abuse, whereby the trustee acts to divert the intended operation of the law in order to achieve a result that the legislature would not have intended. As a result, the formality requirements under the Wills Act are disapplied and the trust remains valid. The advantage of this interpretation over the reasoning based on fraud is that it meets the objections raised against the latter. Gardner has rightly criticised the use of the word 'fraud' as having 'certain unusual features' in this context.[33] First, it does not necessarily imply deceit. Second, it does not necessarily imply that the trustee himself will gain. By casting the justification in terms of abuse we can avoid stretching the semantic resources of language in this way. Abuse relates to the use of the legal instrument, so there is nothing unusual in the fact that there is no need either for deceit or for the trustee to gain as a result of abuse.

Another point made by Gardner is that the label 'fraud' is inapt because the trustee might be keen to comply with the agreement, but encounter difficulties.[34] He provides the following example. The trustee of a fully secret trust has become bankrupt. He wishes to operate the trust, but his creditors maintain that it is ineffective for lack of formality, so that the property has come to him absolutely and as a result they can take it to pay off his debts to them. Reference to fraud is clearly inadequate to explain why a trust has arisen in such circumstances. In contrast, by relying on the doctrine of abuse we can provide an explanation: the trust arises to prevent the abuse of the Wills Act by the creditors. While 'fraud' remained centred on the person of the testator as the subject of fraud (it was fraud on him that was supposed to be prevented), abuse shifts the emphasis to the legislative provision in question. The creditors in Gardner's example cannot be said to have defrauded anyone in any meaningful way. However, they can be said to have abused the Wills Act by relying on it to defeat the intention of the testator. This is precisely the result that the doctrine of abuse of rights seeks to prevent.

The second area of English law that can be said to operate on the principles of the doctrine of abuse of rights is lawful act duress. Lawful act duress has been described as a form of 'threat and demand', whereby one contracting party (A) proposes to exercise his or her own lawful rights, liberties, or powers in support of his specific demand in a manner unwelcome to another contracting party (B) or to B's disadvantage, typically in a way calculated to 'exploit' B's peculiar vulnerability to being pressed in the circumstances.[35] It should be noted at the outset how closely this understanding aligns with the French subtype of abuse described as

32 Ibid. 641.
33 Gardner (n 29) 96.
34 Ibid.
35 R. Bigwood, Throwing the baby out with the bathwater? Four questions on the demise of lawful act duress in New South Wales, (2008) 27 U. Queensland L.J. 41, 41.

intentional abuse. Indeed, it will be contended that precisely because of its very narrow field of application, the doctrine of lawful act duress is particularly well-suited to be interpreted in terms of abuse of rights.

At least two categories of cases can be distinguished that discuss lawful act duress as a possible justification and are pertinent to the current analysis: threats akin to blackmail and threats not to contract.[36] It might be objected that blackmail is an unlawful activity and so it cannot be meaningfully included in the category of lawful acts. This objection can be met in two ways. First, the category contains threats akin to blackmail, and therefore is not limited to acts that would normally be caught by s 2(1) of the Theft Act 1968. Second, and more importantly, the mere assertion that blackmail is illegal tells us nothing about why it is so. It is therefore instructive to look at the reasons why blackmail is a crime in the first place. This will reveal that the rationale for criminalisation of blackmail resembles very closely the reasoning underpinning the doctrine of abuse of rights. As was rightly observed by Lamond, writing on the rationale for blackmail, there is nothing per se wrong in mowing the lawn on a weekend morning, even though a neighbour finds this activity annoying, nor is there anything wrong in engaging in commercial competition with another, even if one knows that this will drive the competitor out of business.[37] What is wrong and impermissible is doing these things in order to bring about the unwelcome effects upon another.[38]

Not surprisingly, this is exactly the type of reasoning that led Cour de Cassation in the celebrated case of Clément Bayard[39] to find abuse of rights. Clément Bayard concerned a claim made against a landowner who had erected a sixteen metre high fence with metal spikes around his property line. The fence was of no use for managing the land, but was erected to prevent hot-air balloons from a nearby airfield from flying over the property. Occasionally, the balloons would fly over the fence and get punctured. The French Court of Cassation ruled in favour of the balloonists: because the fence was erected solely for the purpose of harming the landowner's neighbours its construction was an abuse of the right of ownership. This emphasis on purpose is also reflected in English contract law dealing with cases on blackmail and acts akin to blackmail such as *Thorne* v *Motor Trade Association*[40] and *Crofter Handwoven Harris Tweed Co. Ltd*. v *Veitch*.[41] What has to be justified is not the threat but the demand which at the time had to be made 'with reasonable or probable cause'. A threat to do something lawful will therefore be most likely treated as illegitimate and amounting to duress if it accompanies a demand made, not in furtherance of the duressor's legitimate interests, but for the purpose of injuring the duressee.[42]

The second category deals with threats not to contract. The general position seems to be as follows. A threat not to contract, at least with a commercial party, will perhaps never be illegitimate, especially if the accompanying demand seeks to increase profit rather than simply

36 N. Tamblyn, Contracting under lawful act duress, (2010) SJLS 400-416, 401; It should also be noted that the courts did not, on the facts, find lawful act duress.

37 G. Lamond, Coercion, Threats and Blackmail, [in:] A. Smith and A. Simester (eds.) Harm and Culpability (OUP 1996), 231.

38 Ibid. 231.

39 Case *Coquerel v Clément-Bayard* (n 11).

40 [1937] A.C. 797.

41 [1942] A.C. 435.

42 Tamblyn (n 36) 404.

injure the other party. In a capitalist society the pursuit of profit cannot be treated as illegitimate.[43] There is no separate element of bad faith or unconscionability in this test because such issues are internalised and already resolved in favour of the duressor: if the duressor simply pursues his commercial interests that is a legitimate enterprise in itself. The desirability of this particular interpretation of what exactly constitutes legitimate pressure is beyond the scope of this analysis. However it is instructive to observe that despite the restrictive approaches taken both in *CTN Cash Carry Ltd*. v *Gallagher*[44] and *Alf Vaughan & Co. Ltd* v *Royscot Trust plc*,[45] it still remains open to the court to find lawful act duress if a threat not to contract was made exclusively for the purpose of injuring the other party. As Tamblyn points out, this proposition finds further support in the dicta of Viscount Cave L.C. in *Sorrell v. Smith,*[46] where his Lordship said that if it is lawful to withdraw custom, then a threat to withdraw custom is also lawful, 'subject always to the condition that the purpose of the threat is to forward [one's] trade interests and not wilfully … injure the trade of another'.[47] Even though there is no decided case in which a threat not to contract with the sole purpose of harming another was made, it seems to follow logically from the courts' decisions that if such a threat were made, especially when there had been prior contractual dealing between the parties as in *CTN Cash Carry*, it would constitute lawful act duress. It is submitted that, taking into account the context of the pre-existing relationship between the parties, such threat could then also be seen as an instance of abuse of rights; in this particular case, a right not to contract.

The following summary is warranted at this stage. Both the rules governing secret trusts and lawful act duress can be explained as based on the prohibition of abuse of rights. While the case law on which both of these areas of law are based do not explicitly mention the doctrine of abuse of rights, it is nonetheless striking how easily they can be fitted within the continental framework of abuse of rights that is supposed to be so foreign to English law ('the common law should not be a court of conscience').[48] This finding prompts the following conclusions. First, we should bear in mind the way in which the doctrine developed in France and Germany. It was first read into provisions not explicitly addressing the issue of abuse and only from there gradually applied across different areas. Second, a growing number of areas of English law, of which just two are discussed here, can be interpreted as instances of abuse of rights, undermining the claim that English judges will allow illegitimate activity as long as it is lawful. That is what the judges in cases on secret trusts and lawful acts duress did in practice, even if they did not use the language of abuse of rights in the process. In effect, there is no reason in principle to deny the possibility that the doctrine of abuse might in the future be recognised as a general principle of the English legal system by means of a 'bottom-up' development. This conclusion is further reinforced by two observations. First, the doctrine of abuse of EU law is already part of the legal order in the United Kingdom. Second, the introduction of a full-blooded general doctrine of abuse of law is planned to address tax avoidance. The last part of this article will briefly deal with this potential development and will argue that, should such a provision be introduced, it would strengthen the thesis presented here even further.

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43 M. Chen-Wishart, Contract Law (3rd ed. OUP 2009) 359.
44 [1994] 4 All ER 714, (C.A.).
45 [1999] 1 All ER (Comm.) 856 (Ch. D.).
46 [1925] A.C. 700 (H.L.).
47 Tamblyn (n 36) 405.
48 T. Weir, Economic Torts (Clarendon Press 1997), 74, quoted in: Taggart (n 9) 165.

Doctrine of abuse of rights in the field of taxation

The doctrine of abuse of rights features prominently in many jurisdictions as an efficient means of dealing with tax avoidance.[49] There is no universally accepted definition of tax avoidance, but the following statement arguably captures the defining features of the phenomenon. Tax avoidance can be defined as an activity consisting of arranging one's affairs in such a way as to obtain a tax advantage, where this arrangement is generally characterised by a high degree of artificiality and runs contrary to the legislative purpose. The reference to legislative purpose is crucial here because it provides the link that allows the doctrine of abuse of rights to deal with tax avoidance, usually by means of a general anti-avoidance rule. Such a rule is a general legislative provision intended to apply certain principles, presumptions or overriding tests to the interpretation of specific tax legislation.[50] This feature of anti-avoidance measures is borne out by not only the fact that they are often said to be designed to deal with abusive examples of tax planning[51] but by also legislative provisions of some legal systems that make explicit reference to abuse in this context. For example, Paragraph 42 of the German Code of Tax Procedure[52] explicitly prohibits the circumvention of tax law by means of abusive structuring of legal arrangements (*Missbrauch von Gestaltungsmöglichkeiten des Rechts*). This necessarily brief overview of the connection between abuse of rights and countering tax avoidance is pertinent because of the increasing likelihood that a general anti-avoidance rule will be introduced to English law.

After a long consultation period a study group chaired by Graham Aaronson QC in November 2011 published a report on the desirability of introducing such a rule. The purpose of the study was to consider whether the introduction of some type of general anti-avoidance rule would be beneficial for the UK tax system.[53] The Report concludes by recommending the enactment of such a rule. It remains to be seen if the Report's conclusions will ripen into legislative provisions and whether the shape of the final legislation will resemble that proposed by the Study Group. However, it is instructive to observe that the notion of abuse is a defining feature of the GAAR model proposed in the Report. It introduces a notion of an 'abusive tax result' which is then used to define the abnormal arrangements that are supposed to be countered by the anti-avoidance provision.[54] The relevance of such development for the present analysis should now be apparent. If the GAAR is accepted in the form proposed by the Study Group, it will subject a substantive area of English law to the operation of a general principle premised on the notion of abuse of law. Consequently, this change will undermine the claim that English law does not recognise, and is generally hostile to, principles premised on abuse of rights. It will also bring English law closer to the continental systems that already operate such general anti-avoidance provisions.

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49 For example, in Canada it is the statutory GAAR contained in s. 245 of the Federal Income Tax Act 1985 and in Australia a similar provision is contained in Part IVA of the Income Tax Assessment Act 1936.

50 J. Freedman, Interpreting tax statutes: tax avoidance and the intention of Parliament, (2007) L.Q.R. 53, 73.

51 A. Zalasinski, Some Basic Aspects of the Concept of Abuse in the Tax Case Law of the European Court of Justice, Intertax, Volume 36, Issue 4 (Kluwer Law International 2008) 159.

52 Abgabenordnung 2002 (BGBl. I S. 3866).

53 GAAR Study Report by Graham Aaronson QC, 1.2 (http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf).

54 Appendix I – Illustrative Draft GAAR, ss. 3(1) and 3(2).

Conclusion

This article sought to demonstrate that English law recognises the doctrine of abuse of rights in a way not too dissimilar to that of civilian legal systems. More differences exist between the traditional English approach and that taken by the CJEU. This, however, is of little relevance since the rules developed by the Court are nonetheless part of the English national law by virtue of the doctrine of supremacy of EU law. This intermeshing of legal orders also goes to show that it is no longer possible to draw a clear dividing line between the civilian and common law approaches. Moreover, as the elucidation of the nature of national civilian doctrines has shown, they are in fact not very coherent themselves and are in many ways similar to the fragmented approach taken by the English law in the areas of secret trusts and lawful act duress. Finally, with the likely adoption of the GAAR yet another important area of law will be governed by a rule prohibiting the abuse of rights.

Life After *Bankovic* and *Al-Skeini v UK:* Extraterritorial Jurisdiction Under the European Convention on Human Rights

Natasha Holcroft-Emmess[1]

Introduction

The decision in *Bankovic*[2] centred upon the meaning of 'jurisdiction' in Article 1 of the European Convention on Human Rights ('ECHR') in the context of extraterritorial application of the Convention. It addressed the question of when a Contracting Party to the ECHR is under an obligation to secure for persons falling within its jurisdiction the rights and freedoms guaranteed by the Convention. *Bankovic* thereby laid down the conditions under which a case will be declared admissible, so that a Contracting Party (or Parties) may be held liable for a breach of the obligation in Article 1 flowing from a human rights violation which is committed under its extraterritorial jurisdiction. The scope and meaning of extraterritorial jurisdiction under Article 1 of the ECHR is therefore of fundamental importance and immense interest, not only to governments and international human rights lawyers, but to anyone who values the universal and effective protection of human rights.

This article will analyse the case law of the European Court of Human Rights ('the Strasbourg Court') pre- and post-*Bankovic* to outline the Court's development of the test of jurisdiction. It will be shown how, and to what extent, prior and subsequent case law materially differs from the holding in *Bankovic*. The implications of this for the coherence of the Court's case law will be evaluated. It will be argued that the meaning of 'jurisdiction' has been the subject of a casuistic interpretation by the Strasbourg Court. As a result, it has been increasingly difficult to extract from the Court's jurisprudence consistent principles with which to reconcile a wide range of factually differing cases concerning the extraterritorial application of the Convention. The casuistic approach has thus generated a body of case law doctrines 'which are, at best, barely compatible and at worst blatantly contradictory'.[3]

Although *Bankovic* affirms the principle of extraterritoriality found in prior case law, it represents a shift in emphasis and actually modifies the substance of the test for extraterritorial jurisdiction, specifically grounding it in *'spatial'* terms, and introducing a requirement that the impugned state exercise 'public powers' in the state in question. It can therefore be said to be inconsistent with previous case law both substantively and as a matter of emphasis.

Even greater doctrinal inconsistency is evident in later cases, in which jurisdiction is based rather on the exercise of physical power in isolated *'personal'* incidents than under the more rigid territorial limit in *Bankovic*. Subsequent cases are to this extent inconsistent with *Bankovic*. However, it cannot be said that *Bankovic* has been departed from by the Court so as to

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1 Keble College. I am grateful for comments from Miles Jackson, University College, Laura Hilly, Magdalen College; and reviewers from the Oxford University Undergraduate Law Journal Editorial Board.

2 *Bankovic and others v Belgium and others* [2007] 44 EHRR SE5.

3 *Al-Skeini v UK* [2011] 53 EHRR 18 [O-II20] (Bonello J).

render the decision no longer authoritative. In *Al-Skeini v UK*[4] the Grand Chamber of the Strasbourg Court attempted to bring some principled consistency to the body of case law spanning widely differing scenarios. The ruling in *Bankovic* was 'significantly altered'[5] by moving as far away as possible from the 'spatial' limit on extraterritorial jurisdiction found in that case, before falling short of actually departing from it and holding to the central tenet of *Bankovic*: the *exceptional* application of extraterritorial jurisdiction.

The result is a body of virtually irreconcilable jurisprudence, which purports to be able to explain these doctrinal differences, but which relies upon arbitrary distinctions in an unprincipled way. It is argued in this article that a principled approach to the notion of 'jurisdiction' in Article 1 of the ECHR, such as that advocated by the concurring opinion in *Al-Skeini v UK*, would bring desirable clarity to the law, and would ensure, fundamentally, that States' obligations under Article 1 are 'measured against the essential yardstick of the supremacy and universality of human rights anytime, anywhere'.[6]

Early case law and *Bankovic*

Article 1 of the ECHR provides that the Contracting Parties[7] shall secure to everyone 'within their jurisdiction' the rights and freedoms defined in the Convention. Early case law emphasises that the term 'jurisdiction' is 'not restricted to the national territory of the High Contracting Parties'.[8] This was of relevance in the Northern Cyprus conflict of 1974, in which the European Commission on Human Rights held that Turkey had jurisdiction for the purposes of Article 1 and was in breach of the obligation contained therein when human rights violations were committed during its military occupation of Cyprus.

The crucial judgment of the Strasbourg Court in confirming the extraterritorial reach of Article 1 is *Loizidou v Turkey (Preliminary Objections).*[9] In *Loizidou* the claimant was denied access to her land in Cyprus as a result of the aforementioned Turkish occupation, generating claims under Article 8[10] and Article 1 of Protocol 1 ECHR.[11] The Court propounded that, 'bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory'.[12] The test for extraterritorial jurisdiction was therefore stated as follows: when a state exercises *effective control* of an area outside its national territory, it is under an obligation to secure in such an area the rights set out in the Convention. Using this spatial conception of jurisdiction, the Court found it unnecessary to decide whether Turkey actually exercised detailed control over administrative actions and policies in the occupied part of Northern Cyprus. It was held sufficiently obvious from the number of active Turkish troops engaged in Northern Cyprus that Turkey's army exercised effective control over the relevant part of the island. This entailed control over, and

4 *Al-Skeini* (n 3).
5 M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' [forthcoming] EJIL <http://ssrn.com/abstract=1917395>.
6 *Al-Skeini* (n 3).
7 Referred to as 'High Contracting Parties' in the Convention.
8 *Cyprus v Turkey* [1997] 23 EHRR 244 [14].
9 [1995] 20 EHRR 99.
10 Article 8 ECHR – Right to respect for private and family life.
11 Article 1 Protocol 1 ECHR – Right to peaceful enjoyment of possessions.
12 *Loizidou* (n 9) [62].

responsibility for, policies and administrative actions; in particular, the Court emphasised that the Northern Cyprus authorities constituted in effect a 'puppet government', insufficiently independent to justify withdrawing from Turkey jurisdiction under the ECHR. The Court in *Bankovic* expressly reaffirmed the *Loizidou* principle of extraterritorial application of the Convention.[13] In this respect, the *Bankovic* decision is consistent with prior jurisprudence.

There were several differences between previous case law and the ruling in *Bankovic*. *Bankovic* provided a novel fact-scenario for the Court to address. The claim was lodged by relatives of people killed during the NATO aerial bombing of a television and radio station in the Former Republic of Yugoslavia. The attack was launched as an attempt to prevent the promulgation of propaganda during the Kosovo war. The factual difference between *Loizidou* and *Bankovic*-type situations is that while the former is characterised by 'boots on the ground' military occupation, the extraterritorial act in the latter consisted of a missile launched from a NATO-controlled aircraft. It could not be said that the individual NATO states[14] had 'effective overall control' of the part of Yugoslavia bombed, nor the whole of Yugoslavia. The Court in *Bankovic* responded to this new situation by reiterating the test for jurisdiction.[15] The corollary of the Court's re-rationalisation of the applicable test was that the NATO states were held not to have exercised jurisdiction over the deceased at the time of the bombing. The test was changed in three material ways.

Firstly, in contrast with its early approach in the Northern Cyprus cases, the Court shifted emphasis in *Bankovic* onto the '*exceptional*'[16] character of an exercise of extraterritorial jurisdiction. It held that 'jurisdiction', in line with its general meaning in public international law, was 'essentially territorial'.[17] Secondly, jurisdiction was exceptionally to be found where states, 'through the effective control of the relevant territory and its inhabitants abroad … exercised all or some of the public powers normally exercised by Government'.[18] The requirement of 'exercise of public powers' was not mentioned in *Loizidou*, however. Thirdly, and most importantly, the application of extraterritorial jurisdiction in *Bankovic* was limited in spatial, territorial terms: the Convention was held to operate in the 'legal space' (*espace juridique*)[19] of contracting parties. This spatial concept of jurisdiction is not found explicitly in *Loizidou* (though perhaps implicitly in the notion of the 'effective overall control' of an area requirement) and it precluded the admissibility of the case for lack of jurisdiction since Yugoslavia was not within the 'legal space' of the Contracting Parties. Therefore, the judgment in *Bankovic* on the test for extraterritorial jurisdiction can be said to be inconsistent with earlier cases in terms of its emphasis on the exceptional nature of such jurisdiction, the substantive requirements of the test ('exercise of public powers'), and the explicit spatial foundation of the application of such jurisdiction for the purpose of engaging the obligation contained in Article 1 of the ECHR.

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13 *Bankovic* (n 2) [68].
14 Or any international organisation involved in the conflict.
15 *Bankovic* (n 2) [69].
16 *Bankovic* (n 2) [65], emphasis added.
17 *Bankovic* (n 2) [59].
18 *Bankovic* (n 2) [69].
19 Ibid. [78].

Subsequent case law

The decision in *Bankovic* was unanimous and the interpretation of 'jurisdiction' therein has since been repeated by the Strasbourg Court,[20] most notably in *Al-Skeini.*[21] In the United Kingdom, the House of Lords pronounced that *Bankovic* was the leading Strasbourg case on the meaning of jurisdiction in Article 1, describing it as 'a watershed authority in the light of which the Strasbourg jurisprudence as a whole has to be re-evaluated'.[22] However, subsequent case law of the European Court of Human Rights shows that the spatial limits of *Bankovic* are not consistently borne out in all later cases. This represents a move towards a concept of jurisdiction based on a '*personal*' and contextual view, and away from the territorially and spatially limited one found in *Bankovic*.

In many cases, what has been decisive since *Bankovic* is the 'exercise of *physical power and control over* the *person* in question'.[23] Four cases which demonstrate the substantive shift in the Strasbourg Court's approach will now be outlined. In its judgment of the merits in *Öcalan,*[24] the Court accepted that physical force over a person, during the arrest and detention of the applicant, a leading member of the Kurdistan Workers' Party by Turkish forces in Nairobi airport, constituted effective control for the purposes of Article 1 so that the applicant came within Turkey's jurisdiction 'directly after being handed over to the Turkish officials by the Kenyan officials',[25] even though Turkey exercised its authority outside its territory. In *Medvedyev*[26] the Court held that the applicants were within French jurisdiction because of the exercise of exclusive control over a ship and crew[27] in international waters by French agents for the purpose of Article 1. In *Ilascu,*[28] the Court controversially held that alleged Convention violations were within Russia's jurisdiction through military presence and political and economic support to a separatist movement, the Moldovan Republic of Transdniestria. In *Issa v Turkey*[29] although it could not be proved on the facts that the act of killing was attributable to the contracting state, the Court held that, had that been established, the deceased would have been within Turkey's jurisdiction by virtue of the soldiers' 'authority and control'[30] over them, even though they did not exercise 'public powers' in Iraq. On the facts of *Al-Skeini* too, the 'physical power over a person' reasoning enabled the applicants to come within the UK's jurisdiction for the purpose of Article 1 of the ECHR. These cases, as Judge Bonello points out in *Al-Skeini*, therefore 'fly in the face'[31] of the territorial limit on the application of extra-territorial jurisdiction in *Bankovic*.

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20 *Al-Skeini* (n 3).
21 *Al-Skeini* (n 3) [131].
22 *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 [109] (Lord Brown). See also *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.
23 *Al-Skeini* (n 3) [136], emphasis added.
24 *Öcalan v Turkey* [2005] 41 EHRR 45.
25 Ibid. [91], emphasis added.
26 *Medvedyev v France* [2010] 51 EHRR 39.
27 Although some might seek to explain *Medvedyev* on the basis of spatial control over the ship, it is argued that a better (and more realistic) interpretation concerns the physical control of the detainees.
28 *Ilascu v Moldova and Russia* [2005] 40 EHRR 46.
29 [2005] 41 EHRR 27.
30 Ibid. [71].
31 *Al-Skeini* (n 3) [O-II5] (Bonello J).

Has the Court then on this basis departed from *Bankovic*? The answer is no. The closest the Court has come to explicitly doing so was in *Al-Skeini*. The applicants in *Bankovic* argued that the obligation under Article 1 of the ECHR could be 'divided and tailored' in accordance with the particular circumstances of the extraterritorial act in question; in other words, that jurisdiction could be applied to isolated instances of control over persons, even without control over the whole territory. The Court in *Bankovic* rejected this argument. In *Al-Skeini*, however, the Court compared this rejection in *Bankovic* with its current jurisprudence which – absolutely antithetically – endorses that approach.[32] The Court also rejected the concept of 'legal space', stating that the 'importance of establishing the occupying State's jurisdiction [in *Loizidou* and *Bankovic*] does not imply, *a contrario*, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States'.[33] Despite these promising moves away from *Bankovic* (and therefore from doctrinal inconsistency) in *Al-Skeini*, the Court reasserted the main holding in *Bankovic*: although it applied a personal model of jurisdiction to the killing of the applicants, it did so only *exceptionally* because the UK exercised *public powers* in Iraq.[34] Had the state not exercised public powers, (as was the case in *Bankovic*), the personal model of jurisdiction would not apply, and the result in *Bankovic* would be the same under this test. Therefore, on its facts, *Bankovic* is still considered by the Strasbourg Court to be correct and has not been departed from. This holding can be contrasted with Judge Bonello's opinion, imploring that the Court 'return to the drawing board'[35] on extraterritorial jurisdiction to establish applicable principles rather than trying, as it has been doing, to fashion doctrines which fit the facts of the case at hand, but which may be irreconcilable with the different fact-scenarios presented in subsequent cases. This constituted a separate opinion from the majority reasoning of the Court, however, which therefore compels the conclusion that *Bankovic* survives, albeit in an altered form.

Jurisdictional Theory

The underlying tension in this area pertains to the broader debate over using 'jurisdiction' as a threshold for establishing state responsibility. This threshold notion of jurisdiction is consistent with *Bankovic*, as confirmed in *Al-Skeini*. Many academics have evaluated the desirability of such an approach. McGoldrick[36] and O'Boyle[37] are in favour of the threshold approach to jurisdiction. They argue that such use of a threshold concept is consistent with the framework of jurisdictional analysis in public international law methodology. To take a context-based approach to determining jurisdiction would, in their view, impermissibly equate 'jurisdiction' with 'state responsibility' (as understood by the International Law Commission Articles on Responsibility of States) by removing the function of jurisdiction as an admissibility requirement. They argue that under the Convention system, which includes in Article 1 a jurisdiction clause, the concepts of jurisdiction and state responsibility are not interchangeable (though the former is necessarily the pathway to establishing the latter).

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32 Compare *Bankovic* (n 2) [73] with *Al-Skeini* (n 3) [137], also noted by Milanovic (n 5).

33 *Al-Skeini* (n 3) [142], emphasis in original.

34 Ibid. [149].

35 Ibid. [O-II8] (Bonello J).

36 D McGoldrick,'Extraterritorial Application of Human Rights Treaties' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

37 M O'Boyle,'The European Convention on Human Rights and Extraterritorial Application: A Comment on "Life After Bankovic"' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

Thus the Court's methodology in *Bankovic* could not be faulted on their view, and provides a coherent picture of cases using jurisdiction as a threshold for state responsibility.

This approach of the Court has been the subject of critique by Sheinin[38] and Lawson.[39] They suggest that the Court made a 'methodological mistake' in *Bankovic* in confining the notion of jurisdiction as a threshold principle. Sheinin argues in favour of an approach whereby 'facticity determines normativity', ie there should be a contextual assessment of a state's factual role regarding the events which allegedly constitute a violation of human rights. Failure to adhere to this view led to the methodological mistake of relying on the erroneous idea that 'jurisdiction' in international human rights law must be the same as the limited conception in public international law. Thus in *Bankovic*, the Court's discussion of jurisdiction was constrained by reference to the narrow, primarily territorial, international law meaning of jurisdiction, with the corollary that extraterritorial jurisdiction was considered exceptional and requiring special justification. Sheinin argues that the international law conception of jurisdiction was in fact irrelevant in *Bankovic*, as this confuses the question of the legal consequences of an exercise of authority abroad with the permissibility of a state exercising jurisdiction beyond its own territory. Therefore, Sheinin argues, assessment of jurisdiction ought necessarily to entail a simultaneous interpretation of what constitutes a human rights violation. Lawson similarly propounds the view that 'control entails responsibility': if there is a direct and immediate link between the extraterritorial conduct of a state and the alleged human rights violation, the individual must be assumed to be within that state's jurisdiction. The obligation on states under Article 1 is consequently commensurate with the extent of state control. Sheinin and Lawson's views of jurisdiction therefore align most naturally with the context-based, 'personal' basis of jurisdiction in *Al-Skeini*. It is submitted that their analysis is consistent with the most recent leading authority of the Strasbourg Court, and is therefore desirable in principle to provide a clear conceptual basis upon which to ground the test for jurisdiction. As such, it is unfortunate that the Court insisted on keeping this the exception rather than recognising it as the rule to determine extraterritorial application of jurisdiction.

The Court's reasoning in *Al-Skeini* attempted to reconcile its finding of jurisdiction with the enduring exceptionality of such a finding (from *Bankovic*) using post-*Bankovic* case law's 'personal' approach based on 'exercise of public powers'. It relied on the latter criterion as an arbitrary distinction, grasped in an attempt to reconcile a body of factually differing cases.[40] Thus, when *Bankovic* and *Al-Skeini* are taken together, we are confronted with the proposition, as Milanovic[41] notes, that while the power to kill is 'authority and control' over the individual if the state exercises public powers, killing is not authority and control if the state has not arrested the individual beforehand, or is merely firing missiles from an aircraft. Milanovic argues that it is completely arbitrary to limit the personal conception of jurisdiction found in *Al-Skeini* to whether the person affected is subject to the exercise of public

38 M Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

39 R Lawson – 'Life After Bankovic: on the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).

40 Al-*Skeini* (n 3) [O-II29] (Bonello J: 'This Court has, so far, had several occasions to determine complaints which raised issues of extra-territorial jurisdiction, but all of a markedly different nature.').

41 Milanovic (n 5).

powers by the contracting state, ie to whether or not they had been arrested prior to the rights violation. Such a distinction is not grounded in any principled basis, and the approach advocated by the concurring opinion in *Al-Skeini* would remedy the arbitrariness which currently afflicts the law in this area.

In his opinion in *Al-Skeini*, Judge Bonello suggested that the Strasbourg Court's development of the test of jurisdiction in Article 1 has been plagued by arbitrary and unprincipled extensions of that concept to suit the facts of novel cases. He stated that the case law of the Strasbourg Court had 'spawned a number of 'leading' judgments based on a need-to-decide basis, [a] patchwork case law at best'.[42] Although Judge Bonello concurred with the result of that case, in effect his opinion on the Court's elaboration of the test of jurisdiction was a dissenting one. Though *Al-Skeini* 'placed the doctrines of extra-territorial jurisdiction on a sounder footing than ever before', Judge Bonello still did 'not consider wholly satisfactory the re-elaboration of the traditional tests to which the Court has resorted'.[43] Judge Bonello would have applied a different test of jurisdiction in order to determine cases using 'immutable principles which underlie the fundamental functions of the Convention'.[44] He advocated a 'functional' test. By virtue of having contracted into the Convention, every state assumed five basic minimum functions to ensure the observance of human rights:[45] (i) to not violate human rights; (ii) to have in place systems which prevent breaches of human rights; (iii) to investigate complaints of human rights abuses; (iv) to scourge those of their agents who infringe human rights; and (v) to compensate the victims of breaches of human rights. Judge Bonello's preferred test is therefore that '*a state has jurisdiction for the purposes of Article 1 whenever the observance or the breach of any of these functions is within its authority and control*.'[46] Thus the obligation on states to respect human rights is not made 'casual and approximate depending on geographical co-ordinates'.[47] This reasoning fits naturally with the argument expounded by Lawson and Sheinin and provides a bright line rule which measures jurisdiction 'against the essential yardstick of universality of human rights anytime, anywhere'[48] rather than an unsatisfactory case-by-case approach. Although the approach advocated by Judge Bonello is found only exceptionally under the *Bankovic* threshold, it ought instead to be the general rule on extraterritorial jurisdiction.

The opinion of Judge Bonello delivers a forceful and eloquent critique of the casuistic development of the Strasbourg Court's case law on jurisdiction. In particular, it charges the Court with arbitrarily stretching the concept of jurisdiction to reconcile very dissimilar factual situations, resulting in the lack of adherence to any coherent principle on which to base a finding of jurisdiction. Judge Bonello's criticism of the Court's approach to jurisdiction leading up to, and including, the majority ruling in *Al-Skeini* is accompanied by a compelling discourse on the effect which the taking of such an approach has had on the adequacy of human rights protection under the Convention, as guaranteed by the Strasbourg Court. Judge Bonello posited that the 'inept distinctions' which exist as a result of the approach of the current law on jurisdiction are 'designed to promote a culture of law that perverts, rather than fosters,

42 Ibid. [O-II5] (Bonello J).
43 Ibid. [O-II3] (Bonello J).
44 Ibid. [O-II8] (Bonello J).
45 Ibid. [O-II10] (Bonello J).
46 Ibid. [O-II11] (Bonello J), emphasis in original.
47 Ibid. [O-II18] (Bonello J).
48 Ibid. [O-II20] (Bonello J).

the cause of human-rights justice'.[49] Judge Bonello further stated that he was 'unwilling to endorse à la carte respect for human rights'.[50] These powerful condemnations of the effect of inconsistencies in the Court's case law are entirely appropriate, particularly given what is at stake in such cases, namely the achievement of the purpose for which the Convention was created. The crucial significance of Article 1 ECHR is that it imposes an obligation to secure the substantive rights protected therein. The aim of achieving the 'supremacy of the rule of human-rights law'[51] is only viable if the jurisprudence of the Court is sufficiently open to finding Article 1 engaged.

Conclusion

In conclusion, to the extent that it affirms the extraterritoriality of Article 1 ECHR, *Bankovic* is consistent with its preceding case law. However, *Bankovic* represents a change in substance and emphasis in the test for extraterritorial jurisdiction. Subsequent case law, including *Öcalan*; *Medvedyev*, *Ilascu*, *Issa v Turkey*; and, in particular, *Al-Skeini*, is inconsistent with *Bankovic* to the extent that it removes the spatial limitation on jurisdiction in this context and focuses instead on the exercise of control over persons rather than territory, subject to the requirement of exercise of public powers. Nonetheless, it cannot be said that *Bankovic* has been departed from; the Court for the most part has been unwilling to say that extraterritorial jurisdiction is other than exceptional. It has even gone to the extent of incorporating arbitrary distinctions into the test for jurisdiction in an attempt to stretch the case law into a coherent body of doctrine. Such an approach ought not to be taken any further. Going forward, a test which provides a bright line rule for the application of jurisdiction, such as that advocated by the concurring opinion in *Al-Skeini*, is preferable in order to provide for the principled development of the Strasbourg Court's doctrine relating to extraterritorial application of the Convention.

49 *Al-Skeini* (n 3) [O-II15] (Bonello J).
50 Ibid. [O-II18] (Bonello J).
51 Ibid. [O-II19] (Bonello J).

Shifting the Scales of Social Justice in the Cohabitation Context: The Juridical Basis for the Varying of Interests in Residential Property

Matthew McGhee[1]

Cohabitation and equity – an introduction

Cohabitation has been a problematic issue for property lawyers for some time. The law is yet to settle how to deal with residential property when unmarried couples separate. The tumult in this area of the law is evinced in the reports of the Law Commission[2] and the recent cases of *Stack v Dowden*[3] and *Jones v Kernott*[4] in the House of Lords and the Supreme Court respectively.

In the most recent of these cases – *Jones* – Lord Walker and Baroness Hale in their joint speech cite with approval[5] the dicta of Waite LJ in *Midland Bank v Cooke,*[6] where his Lordship stated that 'Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time'.[7]

It is the social impact of the law on cohabitation that makes this such an important area to focus on. The law is required to balance the relative interests of those with an entitlement to cohabited property, which is often something that the parties have considered before their separation. Equity's role is a difficult one; it must mitigate the harshness of a purely legal view, but cannot divorce the legal rights of the parties from a firm doctrinal basis in favour of a purely discretionary approach. The notions of social justice as propagated in the courts will here be explored, seeking to identify a trend and to plot the future trajectory that the law will take. It shall be seen that the courts have traditionally taken a strict legal view on such matters, but this view has been softened to a more relaxed position that allows the court's perceptions of the deserving nature of the parties, as regards their contributions to the property and to family life, to be taken into consideration. It will be shown that the current course of the courts is tending too far away from the strict legal basis for the division of interests and should seek to curtail this deviation from causing further mischief by ensuring that certainty is maintained when dealing with separated cohabitees.

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1 Magdalen College.

2 Law Commission, Cohabitation: The Financial Consequences of Relationship Breakdown (Law Com No 307, 2007).

3 [2007] UKHL 17, [2007] 2 AC 432.

4 [2011] UKSC 53, [2011] 3 WLR 1121.

5 Ibid. [20] (Lord Walker and Baroness Hale).

6 [1995] 4 All ER 562 (CA).

7 Ibid. 575.

The nature of social justice

Recent judicial engagement with the beneficial interests of cohabitees, particularly through cases such as *Stack* and *Jones*, has demonstrated a changing attitude towards the common intention constructive trust and the courts' use of that device. It has been commented previously that the law on cohabitation 'recognises the cost of everything in cash terms but recognises the value of little else'.[8] This is a criticism which Baroness Hale's holistic factors from *Stack*[9] seek to rebut. As such, the contemporary position is very different; the courts being increasingly ready to mitigate what might seem to be the harsh rule of the common law in instances where they would not previously have been so inclined.

One might suggest that, in light of the changing attitude that the courts are taking to cohabitation and the finding of interests in the residential property involved in such instances, the constructive trust as understood in contemporary law has evolved from a creature of strict equity into an instrument of broader social justice. Miller delineates between three distinct veins of social justice, namely theories based respectively on rights, deserts, and needs.[10]

An analysis of the modern law of cohabitation under the auspices of the needs-based theory can be swiftly disposed of. The basis of English property law does not allow for the distribution of value of any kind simply to ameliorate imbalances in the initial placement of that value, as between different people. Specifically, the courts do not concern themselves with the needs of the parties when determining where the beneficial interest in a given property should lie. Any appearance that the courts may in fact be doing so is explicable as an application of either the rights- or deserts-based conceptions of social justice. For example, in *Baker v Baker,*[11] the Court of Appeal ordered that an annuity be acquired to meet the claimant's need for sheltered accommodation. However, the order was made on the basis of a proprietary estoppel arising from a financial contribution to the defendant's house on the understanding that the claimant would have a permanent right to reside. An award for the contribution that the claimant made towards the house would be inappropriate, since it failed to recompense the claimant for that which he had given up (a secure tenancy at another property) and did not represent what was promised to him (a permanent right of residence). The award was not made on the basis that the claimant was in need and that the courts should rule so as to meet that need.

The rights-based view of social justice is best observed *Lloyds Bank plc v Rosset,*[12] in which Lord Bridge established the requirements of a constructive trust of a family home: the claimant would be awarded a beneficial interest provided both parties actually intended (as evidenced by express discussions) such a division of assets with the further requirement of detriment reliance by the claimant by way of a direct contribution to the purchase price. The rule in *Rosset* has not been uncontroversial, being widely criticised as being overly strict on the circumstances giving rise to a common intention.

8 A. Hudson, 'The Cost of Everything and the Value of Nothing: Rights in the Family Home' (Homesharers and the Law, Canterbury, June 2003).
9 *Stack* (n 3) [69] (Baroness Hale).
10 D. Miller, Social Justice (Oxford University Press: Clarendon Press 1976) 28.
11 [1993] 25 HLR 408 (CA).
12 [1991] 1 AC 107 (HL).

This strict statement by Lord Bridge is the foundation of the modern law. It provides that an interest in property can only be awarded on the basis of a constructive trust where there is a pre-existing entitlement to that interest, primarily arising from a direct contribution to the purchase price of the property in question or through express agreement between the parties. This is a very contractarian basis and does not make provisions for extraneous factors, such as rearing children, to be taken into account and 'is ostensibly value-neutral except to the extent that it supports commercial morality by requiring that a contract once made is inviolate'.[13]

The final potential juridical basis for the law on cohabitation is that of deserts. Such a basis stems from a notion that one should, on principle, acquire some form of a right in that which one has substantially contributed towards. This view reflects the idea that one is entitled to the fruits of one's labour, whether such labour manifests itself financially as a contribution to the initial purchase price or more socially as a non-pecuniary contribution to the life at or to the value of the property.

Waite LJ appears a prominent supporter of such an approach, albeit without explicitly saying so. In *Cooke*, Waite LJ held that Ms Cooke was entitled to a 50% share in the family home on separation on the basis of a 7% contribution by way of a wedding gift and a 25 year period of married life. Thompson has written that it would be ridiculous for the same share to not be awarded in identical circumstances save the absence of that very small contribution, which is unable to justify the substantial beneficial interest awarded on its own.[14] It seems that the extended period of married life entitles Ms Cooke to the share awarded on the facts. Waite J (as he was then) made a similar ruling in the earlier case of *Hammond v Mitchell,*[15] considering the question of finding a common intention to be 'detailed, time-consuming and laborious'.[16] Therefore, in the light of all the facts, Waite J found the non-legal owner's share of the house to be one half on the basis that the couple's relationship leads to the inferred intention that they were to share everything equally.

The dicta of Waite LJ in both *Cooke* and *Hammond* (as Waite J) are extraordinary, being suggestive of the fact that a 'family assets doctrine'[17] does exist and a far cry from the rights-centric approach in *Rosset*. This flies very close to the concept of family property suggested by Lord Diplock in his dissent in *Pettitt v Pettitt,*[18] before being firmly rejected by the majority of the House of Lords in *Gissing v Gissing.*[19] Moreover, the House of Lords in *Gissing* held that the requisite common intention must be genuine and judged objectively, not being invented by the courts on the parties' behalf. It would therefore be odd if Waite LJ sought to reintroduce the idea and, indeed, Waite LJ seeks to use language that accords with the doctrine of the common intention constructive trust. Waite LJ asserts that he looks for an implied agreement.[20] However, such an implication is based on an entirely fictitious understanding, requiring the parties on buying the house to have anticipated the breakdown of the marriage

13 Hudson (n 8).
14 M. Thompson, 'An Holistic Approach to Home Ownership' [2002] Conv 273, 281.
15 [1991] 1 WLR 1127.
16 Ibid. 1130 (Waite J).
17 A. Hudson, Equity & Trusts (3rd edn, Cavendish 2003) 447.
18 [1970] AC 777 (HL).
19 [1971] AC 886 (HL).
20 *Cooke* (n 6) 573 (Waite LJ).

but not to have set their respective shares, and thereby grants the court carte blanche when deciding the parties' shares. This is highly unsatisfactory, though is a reflection of Dewar's view that chaos is not so much a feature of the law as it is of the circumstances on which the court is asked to rule.[21] Whilst legally unsatisfactory, it might be deemed the practical approach to the problem. However, that a firm doctrinal basis is required when interfering with property rights.

Cooke should be contrasted with *Drake v Whipp*,[22] where the claimant contributed a far greater proportion of the property's purchase price than in *Cooke* and had undertaken significant renovation work. The period of cohabitation was shorter, but still totalled six years. Peter Gibson LJ awarded only a one third share of the property as a beneficial interest. This is more in line with the rights-based conception of social justice, though it does not hold rigidly to financial contributions. Instead, Peter Gibson LJ struck a delicate balance by taking into account the non-pecuniary nature of the cohabitation, namely the joint finances in a shared bank account and the collaboration in renovation work, as well as contributions to the purchase price. This seems a less radical form of the deserts-based conception of social justice and is similar to an expanded rights-based theory.

The scales of social justice

The question that surfaces through the consideration of different forms of social justice is whether it is in fact possible to differentiate the constructive trust as a creature of equity from its role to play in effectuating social justice? It is submitted that this is a false distinction and that equity is better portrayed simply as a tool of social justice. This description of '*social* justice' seems particularly pposite for two reasons. First, equity has never been a purely individualised doctrine and has tracked the changing values of society, reflecting what society deemed to be just. Second, given the cohabitation context, 'social' issues are in play such that the courts inevitably must make socio-political choices.

The better approach is to identify the form of social justice that is propagated in the courts and to consider whether equity has changed in its alignment with the forms of social justice. In practice there can be no clear delineation between the forms identified by Miller – this has already been seen when seeking to categorise *Drake*. Setting aside the needs-based view for the reasons set out previously, the best visualisation is of a balancing scale between the rights-based and deserts-based theories. The question is then how far equity has departed from its traditional requirement that a claimant demonstrate a particular equitable right 'founded in history and in the precedents of the court administering equity jurisdiction. It is not sufficient that because we may think that the justice of the present case requires it, we should invent such a jurisdiction for the first time'.[23]

The starting point when considering the existence or otherwise of constructive trusts is highly determinative of the nature of social justice that the law is pursuing. The position after *Rosset* is that the intentions of the parties and their pre-existing rights in the property form the starting point; a contractarian view that accords with a rights-based approach to justice. However, recent authorities have intimated that fairness would be the preferable starting

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21 J. Dewar, 'The Normal Chaos of Family Law' (1998) 61(4) MLR 467.

22 [1996] 2 FCR 296 (CA).

23 *Re Diplock* [1948] Ch 465 (CA) 481 (Lord Greene MR).

point, rather than fairness. Notably, Baroness Hale has criticised *Rosset* in both *Stack*[24]and *Abbott v Abbott*[25] as having 'set [the] hurdle rather too high',[26] whilst tending towards a position more focussed on fairness.

This leaves the ruling in *Rosset* in an unclear position; *Rosset* contains little discussion of authorities, but is clear authority in itself, thus one is uncertain exactly how to regard it. Whilst recent criticisms have been levelled at *Rosset*, these have been made obiter and made alongside explicit expressions of intention not to depart from its doctrine. *Rosset* is unlikely to be overturned unless the Supreme Court finds it to result in manifest unfairness, an outcome which is not foreseeable and was not considered in *Jones*, where the Supreme Court seemed to give the judgment in *Rosset* an implicit degree of respect.

The greater danger for the doctrine in *Rosset* is that it may be sidelined as an authority. For example, in *Jones*, only Lord Collins made reference to *Rosset*, despite its strong authority, and even then it was mentioned only as a side-note.[27] However, the explanation for the treatment of *Rosset* in *Jones* could well be that there was no concern as to the existence of a common intention, only whether that common intention had changed since its inception. Although predating *Jones*, in *Thomson v Humphrey*[28] Warren J required an analysis of the facts under the lens of *Rosset*. Whilst Warren J accepted that the law had likely progressed from the restrictive rule in *Rosset,*[29] he concluded that evidence was still required of conduct that establishes an interest in the property on *Rosset*-type lines and that the absence of such evidence on the facts led to the conclusion that there was neither a common intention nor variation of beneficial interests.[30] This view is reflected in the speech of Lord Walker and Baroness Hale in *Jones*, where their Lordships identified that in the pre-*Stack* case law there was a trend (which their Lordships did not identify as being incorrect) that, 'once an intention to share ownership had been established, the courts had tended to adopt a more flexible and 'holistic' approach to the quantification of the parties' shares in cases of sole legal ownership'.[31] This recognition that a question of establishment needed answering before one could consider quantification on any grounds must be seen against the backdrop of Lord Bridge's dicta in *Rosset* and is indicative of the continued relevance of *Rosset* and its impact on the scales of social justice.

Gardner, however, does believe that *Rosset* has been supplanted by the holistic approach of Baroness Hale in *Abbott*,[32] citing *Stack*, and gives as an example of this the case of *Laskar v Laskar.*[33] However, there has been no reported case that determines the existence or otherwise of a beneficial interest on the basis of *Abbott* rather than *Rosset*, thus this supplantation seems to be exceptionally unlikely. Moreover, the Court of Appeal's decision in *Laskar* does not support Gardner's interpretation; the reasoning of the Court was that the primary motivation of the arrangement was for financial gain, not cohabitation, thus the resultant trust

24 *Stack* (n 3) [63] (Baroness Hale).
25 [2007] UKPC 53, [2008] 1 FLR 1451 [19] (Baroness Hale).
26 *Stack* (n 3) [63] (Baroness Hale).
27 *Jones* (n 4) [59] (Lord Collins).
28 [2009] EWHC 3576 (Ch), [2010] 2 FLR 107.
29 Ibid. [29] (Warren J).
30 Ibid. [94] (Warren J).
31 *Jones* (n 4) [8] (Lord Walker and Baroness Hale).
32 S. Gardner, 'Family Property Today' (2008) 124 LQR 422, 425-27.
33 [2008] EWCA Civ 347, [2008] 1 WLR 2695.

analysis was more appropriate.[34] The difference between the commercial and family home spheres has been recently recognised in *Crossco No.4 Unlimited v Jolan Limited*[35] by the Court of Appeal.[36] The commercially-orientated case law, including *Laskar*, gives a limited representation of the law regarding cohabitation.

The continued relevance of *Rosset* can be seen in the post-*Stack* cases, such as *Crown Prosecution Service v Piper,*[37] where Holman J followed similar reasoning[38] to Warren J in *Thompson* regarding the moderation of the *Rosset* approach,[39] yet recognising the need for an objectively deduced common intention from conduct within the expanded rights-based view. This most judicial explanation of the common intention constructive trust clearly stresses the need to establish a common intention constructive trust on orthodox grounds, but that, once established, the ambulatory nature of the trust grants substantial freedoms to the first instance judge to determine the parties' respective shares. This leads on to the most significant change following *Jones*, namely imputation.

Tipping the scale? Imputing a common intention

The more prevalent debate in the modern cases has been over the acceptability of imputing intentions to parties, and the increased openness on the part of the courts to admit that they are doing just that. The court in both *Stack* and *Jones* demonstrated a readiness to address issues of fairness and imputing without seeking to do so covertly.

Imputing is not directly permitted in *Stack*, though Lord Walker suggested that the processes of imputing and inferring are in actual fact much the same.[40] Such an attitude is, however, backwards looking in that it fails to describe what scope there is for imputing. That analysis, therefore, is unhelpful due to a lack of guidance for future cases, without which *Stack* is rendered incoherent on this point.

The main passage in *Stack* that prompted commentators to examine the question of imputing is found in the speech of Baroness Hale, where her Ladyship states that the task of the courts is 'to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it'.[41] Baroness Hale's apparent assertion that the courts should ascertain imputed intentions seems clear in its endorsement of imputing. However, this was her Ladyship's only reference to the term and in *Jones*, Lord Collins criticised the treatment of Baroness Hale's speech by commentators 'as if it were a statute, and ambiguities in it have been exploited or exaggerated, [such that] she has been taken as having treated inferred intention and imputed intention as interchangeable'.[42]

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34 Ibid. [17], [21] (Lord Neuberger MR).
35 [2011] EWCA Civ 1619, 14 ITELR 615.
36 Ibid. [121], [129] (McFarlane LJ), [85] (Etherton LJ).
37 [2011] EWHC 3570 (Admin).
38 Ibid. [7(2)-(3)] (Holman J).
39 Text to n 27 – n 29.
40 *Stack* (n 3) [20]-[23] (Lord Walker).
41 Ibid. [60] (Baroness Hale).
42 *Jones* (n 4) [59] (Lord Collins).

HHJ Dedman giving the first instance judgment in *Jones*, an unreported decision upheld in the High Court,[43] identified a further problem with suggesting that Baroness Hale endorsed imputing in *Stack*: In *Stack*, her Ladyship asserted that the task of the courts is not to concern themselves with fairness.[44] Logically, this must preclude the imputing of an intention, since there seems no other basis on which the courts would otherwise seek to impute an intention. HHJ Dedman accepted the possibility of imputing intentions, but rhetorically questioned what he could impute. The problem with imputing on grounds of fairness, as the deputy judge correctly recognised, is that imputing could encompass anything that could not be proved to be unfair – a position that HHJ Dedman found to be unsatisfactory.

The approach of developing a test of fairness was the preferred approach of the minority in *Jones*. Lord Kerr and Lord Wilson recognised that 'imputing intention has entered the lexicon of this area of law and it is probably impossible to discard it now',[45] but that there does need to be a clear dividing line between inference and imputation with the latter involving a rather different exercise. Lord Wilson expressly disagrees with Baroness Hale's statement in *Stack* where her Ladyship denies that fairness is necessarily involved when imputing, and echoes the analysis of HHJ Dedman.[46] The minority of the Supreme Court imputed an intention based on fairness, believing that to be a more justifiable basis than the majority's 'slender foundation'[47] for a strained inference.

Gardner and Davidson have recently described this as 'the more realistic appreciation',[48] and go on to suggest that 'the majority too must see a greater role for imputation than they declare. And wider thought indicates correctly so: that this area of the law depends heavily on imputation.'[49] It seems unavoidable that the courts pursue fairness in such cases, and it therefore seems prudent to accept this and to develop a standard of fairness against which cases can be measured, although Lord Kerr and Lord Wilson did not address this second stage. Until such a standard is developed, with necessary safeguards attached to ensure consistent application, the courts should respect to the rules that they have placed to limit their discretion in this area.

To accept the imputing of an intention in the manner proposed by the minority would be to blur the boundary between the qualification and quantification stages of determining interests in property. This would cause a paradigm shift in the balance of the scales of social justice towards the deserts-based conception, since a division of cohabitees' interests in a manner deemed by the courts to be fair would be synonymous with a division based on what each cohabitee 'deserves'. Whether such a shift would be desirable is a question of perspective, and perhaps the preferred approach of the majority – to find an inference – is explicable as being, in part, a manifestation of the reluctance of the courts to directly address that question.

The position of the majority in *Jones*, and, therefore, the position of the current law on imputing intentions, is that 'the difference between inference and imputation will hardly ever

43 [2009] EWHC 1713 (Ch), [2010] 1 All ER 947.
44 *Stack* (n 3) [61] (Baroness Hale).
45 *Jones* (n 4) [74] (Lord Kerr).
46 Ibid. [87] (Lord Wilson).
47 Ibid. [76] (Lord Kerr).
48 S Gardner and K Davidson, 'The Supreme Court on Family Homes' (2012) 128 LQR 178, 179.
49 Ibid. 180.

matter... and that what is one person's inference will be another person's imputation'.[50] Lord Walker and Baroness Hale accept that there is an elision of the two processes and that both are used to quantify beneficial interests. Lord Walker and Baroness Hale also approve the comments made by Piska on the process of imputing, who observes that:

> Subjective intentions can never be accessed directly, so the court must always direct itself to a consideration of the parties' objective intentions through a careful consideration of the relevant facts. The point is that the imputation/inference distinction may well be a distinction without a difference with regard to the process of determining parties' intentions. It is not that the parties' subjective intentions are irrelevant but rather that a finding as to subjective intention can only be made on an objective basis.[51]

In insisting that 'while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great',[52] the majority of the Supreme Court have sought to end the debate as to whether or not one can impute a common intention to parties, whilst preserving the dicta in *Rosset* and the conceptual distinction between qualification and quantification. However, the price that the Supreme Court has paid for sustaining the status quo is a lack of clarity as to what and when the courts can impute an intention. The consequence of this and the Supreme Court's unquestioning acceptance of the trial judge's findings[53] is, in effect, to pass substantial responsibility and power to the first instance judges, who are given the power to essentially determine their own jurisdiction should they choose to impute a common intention to the parties. This is despite the finding by the Court of Appeal that there was no evidential basis for HHJ Dedman's finding.[54]

This difficulty in objectively determining the relative sizes of the parties' shares following the ambulation of the constructive trust is evinced in *Jones* itself. The Supreme Court upheld HHJ Dedman's finding that intentions had changed 'over the years', the implication clearly being that such a change occurred gradually, but it is unclear exactly how that conclusion was reached. For example, was there a period of time immediately following the departure of Mr Kernott during which there was no change in the interests? Equally, can the gradual ambulation of the interests eventually result in one party's share being extinguished? On this latter point, the Court of Appeal assumed that such was the case,[55] but there is no other support for such a proposition beyond the operation of logic.

The other hypothetical variation on the facts of *Jones* is what would have happened had Mr Kernott died before the original action had been served? Presumably Ms Jones would have sought to claim that there was a normal joint tenancy and thus she had the full rights of survivorship; would the executor of Mr Kernott have been able to launch the same litigation that Ms Jones has over the ambulatory interests? And if the executor had, would the court have reached the same result? A rights-based conception of the law would require that they would,

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50 *Jones* (n 4) [65] (Lord Collins).

51 N.Piska, 'Intention, Fairness and the Presumption of Resulting Trust after Stack v Dowden' (2008) 71 MLR 120, 127-128.

52 *Jones* (n 4) [34] (Lord Walker and Baroness Hale).

53 Ibid. [48] (Lord Walker and Baroness Hale), [84] (Lord Wilson).

54 *Jones v Kernott* [2010] EWCA Civ 578, [2010] 1 WLR 2401 [81]-[83] (Rimer LJ).

55 Ibid. [57] (Waller LJ).

but in light of the overtones of fairness and deserts in recent law, this is far from certain. The Supreme Court seized on the crystallisation argument relating to the cashing in on the life insurance policy,[56] but it is far from clear that this would have the effect of denying Ms Jones the right of survivorship – in this sense, the principle from *Jones* seems to be biased in Ms Jones' favour. The issue of survivorship is perhaps evidence of a misguided approach in the court in finding joint tenancies in the first instance, which is convincingly criticised by Briggs, who argues[57] that this stems from inaccurate observations in *Stack*[58] that cohabitees are presumed to be equitable joint tenants. Briggs instead argues that 'Everything in *Jones*... would make perfect sense... if the point of departure for a conveyance into joint names, silent as to equitable ownership, were that the co-owners were equitable tenants in common in equal shares'.[59]

Briggs' position is that a tenancy in common is required for the variation of the beneficial interests, and that it is more fitting in equity, and more elegant jurisprudentially, to have tenancies in common subsisting from the first instance rather than relying on a severance which, in the absence of any reference to 'severance' in their Lordships' judgments, seems to result 'from beneficial joint tenants just drifting apart'.[60]

The final possible analysis of the apportionment of shares in Jones is hinted at by Gardner and Davidson, where they suggest that 'the taking of a matrimonial-style approach, requiring division of the parties' overall asset pool – not simply the house under litigation – 50:50'[61] adequately explains the result. If one considers the combined value of the properties lived in by each of Mr Kernott and Ms Jones, an equal division would leave Mr Kernott with the property in which he resided and approximately 10% of the value of the property that Ms Jones resided in. This is the same approach that is taken with regards married couples getting divorced, thereby seemingly implementing a form of the Law Commission proposals[62] or the Matrimonial Causes Act 1973 by the back-door and supporting Gardner's 'materially communal relationship' theory.[63] Where there is a sufficient element of 'trust and collaboration' so as to show 'communality' in the relationship (presumed in marriage, to be proved in others), Gardner suggests that common ownership in equity is the solution, making restitutionary remedies available, with parties' shares 'corresponding to the value of any contributions he has made, directly or indirectly, to [the home's] acquisition. This reproduces the position in unjust enrichment'.[64] Such an approach certainly leads down the deserts-affiliated path of social justice and replicates the position in Canada.[65]

However, whilst this could be a partial answer to Briggs' criticism (there is a joint tenancy in relation to the two properties together and thus the value is still held in equal undivided shares), this analysis is not expressed in Jones and thus, if it is a correct analysis of the Su-

56 *Jones* (n 4) [48] (Lord Walker and Baroness Hale), [76] (Lord Kerr).
57 Adrian Briggs 'Co-ownership and an equitable non sequitur' (2012) 128 LQR 183.
58 *Stack* (n 3) [14] (Lord Walker), [54] (Baroness Hale), [109] (Lord Neuberger MR).
59 Briggs (n 57) 183.
60 Ibid.
61 Gardner and Davidson (n 48) 181.
62 Law Commission (n 2) paras 4.43-4.51.
63 Simon Gardner, 'Rethinking Family Property' (1993) 109 LQR 263.
64 Gardner 'Family Property Today' (n 32) 441.
65 *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214, 227h (McLachlin J).

preme Court's underlying thinking, it is hidden and provides no overt assistance to first instance judges who are considering how to impute a common intention.

The true effect of *Jones* and imputing will be unlikely to be realised for some years, since it will be the role of the Court of Appeal to describe the limits of *Jones*. It is submitted that the Court of Appeal is likely to try and limit the impact of *Jones* and to emphasise the more conservative attitudes of the judgments of the minority on the basis that the Court of Appeal, particularly Rimer LJ, has previously expressed doubts about the ruling in *Stack* and this is unlikely to have changed following the Supreme Court's decision in *Jones*. The Court of Appeal may well seek to impose requirements of reasonableness on the operation of imputation, but this is speculative and would not be a satisfactory position in the long term.

The problem that the Court of Appeal is likely to encounter, however, is that its ability to control the exercise of imputation will be highly limited, given that the court will be unable to reconsider the findings of fact of the first instance judge. The power to develop the law in the short- to medium-term will, therefore, lie with the lower courts, given the absence of guidance as to when imputation may occur. Gardner has suggested that the holistic factors of Baroness Hale in *Stack,*[66] generally understood to provide an evidentiary role for the implication of common intentions, may in fact provide a normative function and could form guidance here. It is Gardner's belief that the holistic factors are a set of circumstances that require the law to invent a common intention as to the parties' interests.This is unlikely to have been intentional on her Ladyship's part, but the holistic factors may provide a framework of inquiry. If they find as a fact that there is a common intention (by imputation if necessary) then that finding is binding and cannot be challenged in the appellate courts. In isolation, therefore, this renders a highly deserts-centric gloss to the law, given that the trial judge has the ability to decide (essentially unchallenged) on fairness grounds what the shares due to each party are. Fortunately, from a legal certainty and rights-based perspective, the judges have so far not seemed inclined to make broad findings of fact in relation to common intention,[67] but it is too early to identify a trend.

Ultimately, the enduring question is what are the limits on the doctrine of the common intention constructive trust? In *Jones*, a potential weakening of the doctrine may be seen, based on the stretching of the very concept of an 'intention' – indeed, there is a fictional one on the view of some of their Lordships. Whilst the language of the Court still fits with the common intention constructive trust, one must ask whether the increasingly forceful push towards a more deserts-based conception is fundamentally changing the nature of the mechanism by which the courts seek to balance the delicate scales of social justice.

The scales are teetering?

One might suggest that the judiciary is already beginning to consider the establishment question based on all of the pertinent circumstances (which would be a purely deserts-based view), but that they assert a fixed rule since they are naturally unwilling to admit an element of arbitrariness. However, the more conservative and realistic view is that the more open-textured consideration of qualification does not yet pervade the judicial conscience, but may

66 *Stack* (n 3) [69] (Baroness Hale).

67 *Thomson v Hurst* (CA, 30 March 2012); *Geary v Rankine* (CA, 29 March 2012).

occur openly in the future when 'the holistic approach advocated for infringing the parties' common interest as to the size of the shares will spill over into finding that there is a common intention to share beneficial ownership in the first place'.[68] The approach currently taken by the courts when considering the quantification question is one based on fairness under *Oxley v Hiscock*.[69] Whilst one might be tempted to suggest that *Jones* changes this, a careful reading of the case demonstrates such a suggestion to be a falsity – *Jones* deals only with establishing the existence of an agreement to share through an imputed common intention and does not overrule *Oxley*, instead drawing on the language of Chadwick LJ in that case, who made specific reference to imputing into the parties an intention that would be 'fair having regard to the whole course of dealing between them in relation to the property'.[70]

However, in *Jones*, Lord Walker and Baroness Hale sought to bring this part of Chadwick LJ's judgment within the rule in *Jones* and averred that it 'should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions'.[71] This seems to represent a gentle elision of *Stack* and *Oxley* (despite Baroness Hale's approval of *Oxley* in the 'single-names' cases in *Stack*, recognising that the joint-name and single-name situations are different)[72] being subtly orchestrated by their Lordships in *Jones* and, it is submitted, it is such an elision which poses a greater risk to the doctrine in *Oxley* than the decision in *Abbott* does. By bringing *Oxley*-considerations into the process of establishing a constructive trust in the first instance, the court risks blurring any discernible or sensible separation between the two stages of analysis.

Were the question of qualification to become confused with this question of quantification then there would no longer be two discrete tests and the law would lurch in the direction of a deserts-based analysis. This would be undesirable because the courts would be far too able to counteract the common intention of the parties in arranging their affairs and could easily upset the predictability of the law in this area. The balance in the law as it stands is that the courts are, rightly, wary of disturbing the legal balance of interests, but that if the legal interests are varied in the circumstances then the courts have a broad discretion. To introduce that discretion at the qualification stage would be to undermine both legal certainty and the strength of legal property rights. Nevertheless, an example of just such a spilling over as Smith envisages[73] (which is closely analogous to the author's allegory of a set of balancing scales moving from a rights-based to a deserts-based conception) can be seen in the case of *Cooke*, where Waite LJ inferred a common intent based on 'general equitable principles'[74] and the simple relationship between parties – such a situation is entirely indistinguishable as inferring as opposed to imputing.

Until such time as imputing intentions on the basis of fairness becomes widespread, however, a more rights-influenced view prevails under the authority of *Rosset*. Such a conclusion is reinforced by considering the general attitude of the courts to give greater weight to a financial contribution (to the initial purchase price or mortgage repayments) than to non-

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68 Roger Smith, Property Law (6th edn, Pearson Longman 2009) 195.
69 [2004] EWCA Civ 546, [2005] Fam 211.
70 Ibid. [69] (Chadwick LJ).
71 *Jones* (n 4) [51] (Lord Walker and Baroness Hale).
72 *Stack* (n 3) [61], [64]-[65] (Baroness Hale).
73 Smith (n 68) 195.
74 *Cooke* (n 6) 575 (Waite LJ).

financial contributions (such as undertaking renovations, or bringing up children). In *Jones*, Lord Walker and Baroness Hale stress the importance of financial contributions as part of a joint venture, giving tacit respect to the decision in *Rosset* and ruling that it is implicit in the nature of the joint enterprise that:

> If a couple in an intimate relationship... decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise.[75]

This echoes the House of Lords in *Stack*, where it was suggested that the larger contribution to purchase price and mortgage repayments by the respondent, coupled with the separation of finances, was highly significant. Lord Hope, agreeing with the heavy emphasis on financial outlays, stated that it was not possible 'to ignore the fact that the contributions which they made to the purchase of that property were not equal'.[76]

A separate point is exactly how unusual those 'very unusual'[77] cases in which the court will re-open the joint ownership issue actually are. This is clearly crucial in determining the extent of the doctrine in *Stack* and *Jones*. Gardner has queried whether the arrangements of the couple in *Stack*, namely the keeping of separate finances, were in fact 'unusual', finding it hardly exceptional for a young, unmarried couple to keep separate finances.[78] Gardner's suggestion on this point is that the incidence of such situations that Baroness Hale has classed as 'very unusual'[79] are not as uncommon as she purports them to be. Rimer LJ, giving judgment in the Court of Appeal in *Jones*, was likewise sceptical as to how 'exceptional' the facts of *Stack* actually were.[80] This seems correct, given that in both *Stack* and *Jones*, the House of Lords and the Supreme Court have opted to re-apportion the interests in the respective family homes. Therefore, in retrospect, it may have been wrong to initially regard such cases as empirically rare. Such a conclusion is in tension with the previous suggestion that the deserts-based view is being currently restrained by the more rights-centric approach taken in the case law. Certainly, the incipience of Smith's spilling over of the holistic inquiry[81] is evinced in the courts' evident preparedness to be generous in their decisions to vary the strict rights-based position. The seemingly frequent departure from the joint tenancy arrangement is also further evidence that Briggs' approach[82] is correct, and that the equitable tenancy in common in equal shares is the more principled starting point.

Unfortunately, it is too early to state with certainty the course that the courts will take following *Jones*. However, it is unlikely that the shift to a purely deserts-based view is particularly imminent given the strong dissent of Lord Neuberger MR in *Stack*, the hostility in the Court of Appeal to ideas of imputation (such as Rimer LJ in *Jones*) and the bare majority and variety of approaches in the Supreme Court in *Jones*. The position is best summarised as being

75 *Jones* (n 4) [19] (Lord Walker and Baroness Hale).
76 *Stack* (n 3) [11] (Lord Hope).
77 Ibid. [68] (Baroness Hale).
78 Gardner 'Family Property Today' (n 32) 424.
79 *Stack* (n 3) [68] (Baroness Hale).
80 *Jones* (n 54) [75] (Rimer LJ).
81 Text to n 72.
82 Text to n 56 – n59.

in a state of flux, with the courts clinging to the common intention constructive trust and, consequently, the classic rights-focussed basis for this, but at the same time numbing the impact of the rights-based approach by recognising that requirements of fairness (a term not yet limited by authority) compel the relaxation of that approach where the contextual impression of the first instance judge demands it. It will be interesting to see the strength of the courts' grip on *Rosset* as the law develops.

The future of cohabitation

The current operation of equity seems more aligned with the deserts-based approach than the rights-based approach. The law is at a crossroads, and the following years will see whether the courts choose to tread the same course that has characterised the past decade by stressing the Supreme Court's express reluctance to depart from authorities such as *Rosset* and *Oxley*; or whether the dicta of the House of Lords in *Stack*, as relating to holistic considerations of fairness, and of the Supreme Court in *Jones*, as relating to imputing intentions, are capitalised on so as to lead the law in a new direction. It is likely that the general drift towards a deserts-based conception of social justice will continue, leading to the latter approach, with the more rights-centric cases being overruled or rendered irrelevant. However, the courts must take care so as not to undermine the central tenet of the rule of law – certainty. It would be a highly undesirable state of affairs if cohabitants had to enter a lengthy process of litigation with uncertain results whenever they wished to determine their respective shares. Whilst doctrinal robustness is important, it should not be achieved at the expense of cohabitees' certainties and securities.

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The Jurisdictional Immunities Case: Between Immunity and Impunity

Jurisdictional Immunities of the State (*Germany v Italy*: Greece intervening)

Judgment of 3 February 2012, International Court of Justice

Elton Tan Xue Yang[1]

Introduction

The judgment of the International Court of Justice (ICJ) in the Jurisdictional Immunities case is significant in several ways. It represents the Court's lengthiest deliberation to date on the nature of peremptory norms and the effect of a breach of these norms on State immunity. It is unique in the extent to which the Court's judgment was concerned with a wide-ranging but detailed survey of State practice and the decisions of various municipal and international courts on an issue of international law. Yet it was not the watershed decision that human rights advocates, or the welter of claimants seeking legal redress for atrocities suffered during the Second World War,[2] had been hoping for. The Court's positivist approach to its examination of the effect of *jus cogens* violations on the assertion of State immunity rendered a decision that was little more than a return to orthodoxy.

Factual and procedural background

On 23 December 2008, the Federal Republic of Germany instituted proceedings against the Italian Republic, alleging that Italy had violated international law by wrongfully breaching Germany's jurisdictional immunity. The facts of the case centred on the decisions of the Italian courts to exercise jurisdiction in three civil cases[3] brought before it, each concerning the violations of international humanitarian law committed by the Third German Reich during the Second World War. For instance, in *Ferrini v Federal Republic of Germany*, the Italian Court of Cassation had previously held that it had jurisdiction over Germany's subjection of Mr. Luigi Ferrini to forced labour, on the grounds that immunity does not apply in circumstances where the relevant act constitutes a crime against humanity and a breach of a peremptory norm of general international law.

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1 Exeter College.

2 *Greek Citizens v Federal Republic of Germany* (2003), Bundesgerichtshof, Case No. III ZR 245/98, 42 ILM 1030; *Ryuichi Shimoda et al. v The State*, Tokyo District Court, 7 December 1963, Hanrei Jiho, Vol.355 p.17; *Kalogeropoulou and others v Greece and Germany*, Application No. 59021/00, ECHR Reports 2002-X, p.417; *Margellos v Federal Republic of Germany*, Greek Special Supreme Court, Case No. 6/2002, 129 ILR 525.

3 *Ferrini v Federal Republic of Germany*, Decision No. 5044/2004, 128 ILR 658 [Ferrini]; *Federal Republic of Germany v Giovanni Mantelli and others*, Order No. 14201, 103 AJIL 122; *Max Joseph Milde*, Decision No. 1072/2009, 92 Rivista di Diritto Internazionale 618

The illegality of the acts of the German Reich in question, which included the deportation of civilians to forced labour camps and the large-scale killing of civilians in occupied territory as part of a policy of reprisals, was not contested by Germany in the proceedings. Germany's contention was that by exercising jurisdiction in these cases brought before the Italian courts, Italy had breached its obligation under customary international law to accord immunity to Germany. On 3 February 2012, the Court found by a majority of twelve to three that Germany's immunity had been wrongfully breached by the Italian courts. The majority opinion was rendered by President Owada, with dissenting judgments written by Judges Trindade, Yusuf, and Judge *ad hoc* Gaja. The Court further held by a majority of fourteen to one that the measures of constraint taken by Italy against Villa Vigoni, a property located on Italian soil and owned by Germany, similarly constituted a breach of Germany's immunity.

The judgment of the Court

The current state of the law on jurisdictional immunity

The Court's examination of the subsisting law on jurisdictional immunity, while affirming the traditional application of the doctrine, contains several observations which will be of significance in future disputes concerning the operation of State immunity. It began by noting the parties' agreement that immunity is an issue governed by international law rather than a mere matter of comity, and confirmed the view of the International Law Commission (ILC) that it is a general rule of customary international law 'solidly rooted in the current practice of States'. [4] The doctrinal basis of the rule is the principle of the sovereign equality of States, and thus it accords with the Charter of the United Nations[5] which identifies this principle as fundamental to the international legal order.

In an observation essential to its discussion of the merits of the claim later in the judgment, the Court affirmed its finding in *Arrest Warrant (Democratic Republic of Congo v Belgium)*[6] that the law of immunity is procedural in nature, and thus it would apply the law of immunity as it existed at the time of the proceedings in the Italian courts, rather than that which existed in the time of the Second World War. This essentially precluded any argument based on the evolution of the doctrine of immunity between 1945 and the present day. Further, the Court had little hesitation in identifying the acts of the German military during the Second World War as *acta jure imperii* (acts in exercise of the public or sovereign powers of a State) [7] rather than *acta jure gestionis* (acts performed as a private person or trader),[8] on the basis that they were clear expressions of sovereign power. This distinction, as an issue which has to be examined in order to determine if jurisdiction can be exercised, precedes any examination of the legality or illegality of the act in question. The Court's unequivocal language in this regard appears to establish that the application of immunity is an entirely separate inquiry from that of whether the act is an international illegality, or the question of the gravity of the offences committed; the former does not hinge on the latter. Notably, this stance is contrary to a well-established line of judicial opinion, reflected in the *dicta* of several well-known cases

4 Yearbook of the International Law Commission, 1980, Vol. II(2), p.147, para.26.
5 Article 2, para.1, Charter of the United Nations.
6 *Arrest Warrant (Democratic Republic of Congo v Belgium)*, ICJ Reports 2002, p.25, para.60.
7 H. Fox CMG QC, *The Law of State Immunity*, 2nd ed. (Oxford: Oxford University Press, 2008) [Fox] p.35.
8 Ibid. 35.

in municipal courts,[9] that acts which constitute grave breaches of human rights are an abuse of State sovereignty and cannot fall within the category of the functions of a State and State officials. The characterisation of Germany's acts as *jure imperii*, rather than as anti-juridical acts negating the protection accorded by immunity, was the subject of a forceful dissent by Judge Trindade.

The territorial tort principle

The first argument raised by Italy in its defence was that under customary international law, a State is not entitled to immunity for acts involving death, personal injury, or damage to property which occur on the territory of the forum State. The Court declined to consider whether there existed under custom the broad doctrine of the 'tort exception', preferring to limit its examination of the issue to the narrower scenario of acts committed by armed forces of a foreign State on the territory of the forum State, in the course of conducting an armed conflict. The issue turns largely on the applicability of the 'tort exception' to actions taken by States in the theatre of armed conflict. The ICJ found that Article 12 of the UN Convention on Jurisdictional Immunities of States and their Property (UN Convention)[10] provided no support for Italy's argument because it was not intended to apply to situations involving war operations, and in any event is not yet in force.

A brief survey of State practice supports this construction of the 'tort exception',[11] and the persuasiveness of this approach is buttressed by the impracticability of allowing States to be inundated by claims for torts committed on the territory of other States during war. It is unlikely that the 'tort exception' was ever envisaged to include situations of armed conflict, and its consequence in terms of the potential liability of States involved in such conflict renders any broadening of the doctrine in this direction a distinctively unattractive and unrealistic proposition. This practical consideration makes the Court's ruling on this matter a well-justified one.

The effect of breaches of peremptory norms of general international law on jurisdictional immunity

The ICJ proceeded to consider Italy's further arguments based on the gravity of Germany's violations of international humanitarian law. Italy contended that serious violations of the law of armed conflict amounting to crimes under international law operate to deprive a State of an entitlement to immunity, and that this is *a fortiori* the case with respect to breaches of peremptory norms of international law, or *jus cogens*. Italy's argument following upon this

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9 *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3)* (1999) 1 AC 147, p.263; *Regina v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 1)* (2000) 1 AC 61, pp.109 and 115; *Hugo Princz v Federal Republic of Germany*, 26 F.3d 1166, 307 U.S.App.D.C. 102, 1 July 1994, p.118

10 UN Convention on Jurisdictional Immunities of States and their Property, 2 December 2004, A/RES/59/38.

11 *Margellos v Federal Republic of Germany*, Greek Special Supreme Court, Case No. 6/2002, 129 ILR 525; *Natoniewski v Federal Republic of Germany*, Supreme Court of Poland, Polish Yearbook of International Law, Vol. XXX, 2010, p.299; *Littrell v United States of America (No. 2)*, United Kingdom Court of Appeal, (1995) 1 WLR 82; *Holland v Lampen-Wolfe*, United Kingdom House of Lords (2000) 1 WLR 1573; *McElhinney v Ireland*, Supreme Court of Ireland, (1995) 3 Irish Reports 382.

was that forced labour, deportation and the massacres carried out by the German army were clear breaches of *jus cogens*.

The Court took a positivist approach to the matter, basing its decision largely on an examination of State and international practice pertaining to the relationship between immunity and *jus cogens*. It noted that the ILC had contemplated the insertion of a *jus cogens* exception into the UN Convention, but decided against this on the basis that the rule was not yet 'ripe enough' for codification, and pointed out the observations of the European Court of Human Rights to the same effect. [12] The Court emphasised the lack of success achieved by such an argument before various municipal courts, [13] and derived from this the conclusion that customary international law does not yet treat a State's entitlement to immunity as dependent upon the gravity of the act or peremptory nature of the rule which it is alleged to have violated. It then went further by ruling that no conflict exists between the rules of State immunity, which are procedural in character, and the substantive prohibitions contained within norms of *jus cogens* nature. The issues of immunity and state responsibility are two distinct matters. As such, the ICJ did not deem it necessary to pronounce on whether forced labour and deportation are indeed offences amounting to breaches of *jus cogens*.

The Court's position is well-supported by publicists and judicial opinion,[14] and it flows from the logical intuition that the assertion of immunity is a procedural defence and is analytically distinct from a defence asserting no breach of a substantive legal obligation. Fox, for instance, has argued that immunity 'does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different mode of settlement'.[15] However, it is difficult to see how the situation of the Italian military internees is one where immunity does not amount to impunity, given the lack of an alternative means of redress available to them. Fox's argument proves unpersuasive in this scenario because no diversion to different avenues of compensation is evident. The Court, while acknowledging the unpalatable nature of the scenario of impunity and its effects on the military internees' rights to reparation, nevertheless did not hesitate in finding that a State's entitlement to immunity does not depend upon the ability of individuals to secure redress elsewhere.

It is possible that the Court's strict demarcation between procedural and substantive rules in international law may well be too severe. It has been argued that there does not exist in international law established criteria to categorise international norms as distinctly procedural or substantive in nature.[16] The substantive nature of *jus cogens* prohibitions against grave violations of human rights should not be overemphasised, since their 'principal rationale is to impact on the legal consequences of the breach of the relevant substantive peremptory

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12 *Al-Adsani v United Kingdom*, Application No. 35763/97, ECHR Reports 2001-IX [*Al-Adsani v UK*], p.101, para.61; *Kalogeropoulou and Others v Greece and Germany*, Application No. 59021/00, ECHR Reports 2002-X, p.417.

13 *Bouzari v Islamic Republic of Iran*, Court of Appeal of Ontario (2004) DLR 4th Series, Vol. 243, p.406; *Jones v Saudi Arabia*, United Kingdom House of Lords (2007) 1 AC 270 [*Jones v Saudi Arabia*]; *Bucheron* case, Court of Appeal of Paris, 9 September 2002, and *Cour de cassation*, No. 02-45961, 16 December 2003, *Bull. civ.*, 2003, I, No.258, p.206.

14 *Jones v Saudi Arabia*, (n 13), paras.44-45; A. Zimmermann, 'Sovereign Immunity and Violation of International *Jus Cogens*: Some Critical Remarks', 16 Mich. JIL (1995) 433, p.438

15 Fox (n 7) 1st ed., 525.

16 A. Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', EJIL 18 (2007) 955

norm'.[17] The *Ferrini* decision suggests, in a similar direction, that norms at international law interact with each other, and too much primacy should not be given to any strict procedural/ substantive divide.

The discussion of peremptory norms in *Germany v Italy* represents the ICJ's longest examination of the operation of *jus cogens* to date. Once again the Court affirmed *jus cogens* rules as norms from which 'absolutely no derogation is permitted',[18] but it is perhaps regrettable that it did not deal explicitly with what appears to be the logical consequence of the non-derogable nature of *jus cogens*. In a powerful dissenting judgment in the *Al-Adsani* case before the European Court of Human Rights, in which the votes were split nine to eight, Judges Rozakis and Caflisch had previously argued that because *jus cogens* are located at the apex of the hierarchy of norms in international law, other non-peremptory norms should not be capable of producing legal effects which are in contradiction with the content of the peremptory norm.[19]By allowing the procedural bar of immunity to prevent the well-established substantive prohibitions on forced labour, deportation and murder from being enforced in cases where there is no alternative means of redress, it is clear that their deterrent effect is greatly diminished since States can plausibly breach such norms with impunity, and this surely contradicts the purpose and *ratio* of these prohibitions in international law. For international law to explicitly hold such prohibitions as being non-derogable in nature, but simultaneously grant immunity to those who breach these rules in circumstances where it is clear that immunity amounts to impunity, amounts perhaps to a juridical absurdity; at the very least it surely renders the position of the law incoherent.

Conclusion

The ICJ's decision in the Jurisdictional Immunities case lends clarity to an area of the law that has seen a series of developments riding on the back of the increasing emphasis on the preservation of human rights in the international community. The judgment lays out with welcome lucidity several features of the doctrine of State immunity that have been ambiguous for some time. Yet the positivist and conservative approach of the Court in this decision represents a return to orthodoxy, and casts a shadow over the ability of the international legal system to enforce *jus cogens* norms, to secure fundamental rights to a remedy and access to justice, and protect the individual from State atrocities. The concept of *jus cogens*, no longer new in international law, cannot for long remain nascent and tentative in application if individuals are to obtain justice for wrongs suffered under State-sanctioned violence.

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17 Ibid. 968.

18 Article 50, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

19 *Al-Adsani (*n 12) Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, paras.1-4.

Mexfield v Berrisford: A Word of Caution

Ketan Ahuja[1]

Mexfield Housing Cooperative Ltd ('Mexfield') bought Ms Berrisford's house and leased it back to her as part of a mortgage rescue scheme. Clause five of her housing agreement provided that Ms Berrisford could bring the agreement to an end by giving a month's notice, and clause six provided that Mexfield could only bring the agreement to an end subject to a number of conditions, none of which imposed a finite limit on the term of Ms Berrisford's lease.

In 2008, Mexfield served a notice to quit on Ms Berrisford without alleging any of the conditions under clause six had come to pass. Mexfield could have attempted to terminate the lease under clause 6(a), because Ms Berrisford was in arrears, but it did not take this route because she would have been granted relief from forfeiture. Additionally, Mexfield did not actually want to evict Ms Berrisford, and claimed she would be given a new lease if it won: Mexfield brought this case because it wished to test the enforceability of their standard contracts. Instead Mexfield argued that because the lease was of uncertain term, it could not be enforced on its terms, and must instead be construed as a periodic tenancy which Mexfield could then terminate by giving notice within the required period.

Counsel for Ms Berrisford made two novel arguments in support of her claim that the lease should not be treated as a periodic tenancy in spite of its uncertain term:

I. Contractual analysis: the agreement amounted to a binding personal contract between Mexfield and Ms Berrisford. Ms Berrisford could enforce this contract against Mexfield, and could obtain specific performance because Mexfield remained owner of the property. This argument differed slightly depending on whether the court held there was a periodic tenancy:

a. If the agreement did not create a lease, then it created a contractual license which Ms Berrisford could enforce using specific performance.

b. If the agreement created a periodic tenancy without the uncertain fetters in clause six on Mexfield's right to terminate the tenancy, then Ms Berrisford was entitled to have the fetters enforced as personal contracts.

II. Lease for ninety years analysis: Counsel for Ms Berrisford drew attention to authority pre-dating the Law of Property Act 1925 in which uncertain leases to individuals had been automatically converted into a tenancy for life. Following section 149(6) of the Law of Property Act 1925, tenancies for life are automatically transformed into ninety-year leases. So Ms Berrisford's lease should be read as a lease for ninety years, where Mexfield had a power to terminate the lease should any of the conditions under clause 6 of the lease agreement materialise.

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Decision of the Court of Appeal

The Court of Appeal accepted that it could not enforce the lease on its terms because it was bound by *Prudential Assurance v London Residuary Body*,[2] which affirmed that leases must be of certain term. This meant that Ms Berrisford's housing agreement could not create a lease as set out by the terms of the agreement because the conditions under which Mexfield could bring the lease to a certain end under clause 6 of the lease were not of certain term. It also meant that any periodic tenancy created by the agreement could not only be terminated in accordance with clause 6, because the conditions under clause 6 would have placed a fetter of uncertain term on Mexfield's right to terminate the periodic tenancy.

However, the Court of Appeal was divided regarding the contractual argument set out above. The majority rejected the Ib version of the contractual argument because 'it seems improbable… that there are in existence one lease from month to month between A and B and… a contract for a lease for some uncertain period which can be specifically enforced as between the two contracting parties.' Ultimately, the majority also rejected the Ia version of the contractual argument because the parties did not intend such an arrangement.[3] In addition, Mummery LJ argued that if a lease fails for a certain reason, the contract which purports to grant that lease must fail for the same reason. In sum, the majority decided that Ms Berrisford occupied the property under a periodic tenancy which took effect without the clause 6 fetter on Mexfield's right to terminate the periodic tenancy.

In the minority, Wilson LJ accepted the 1b version of the contractual argument, stating that he saw no problems with it.[4] As such, the agreement took effect as a bare periodic tenancy, where Ms Berrisford had no *proprietary* right to prevent the owner of the property from ending the tenancy with one month's notice. However, because of her contract with Mexfield, Ms Berrisford had a *personal* right to prevent Mexfield from evicting her unless she broke one of the terms specified in clause 6 of the agreement.

Decision of the Supreme Court

Lord Neuberger, giving the judgement of the court, summarised the law regarding uncertainty of term of leases as follows:

1. An agreement cannot give rise to a lease if the maximum term of the lease was uncertain at the inception of the agreement;

2. A fetter of uncertain term on a person's right to terminate a periodic tenancy would be invalid, but a fetter of certain term could be valid.

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2 *Prudential Assurance Co. Ltd v London Residuary Bod*y [1992] 2 AC 386 (HL).

3 *Mexfield Co-operative Housing Ltd. v. Berrisford* [2010] EWCA Civ 811, [2011] Ch 244 [56].

4 Ibid.

He recognised that the rule requiring leases to be of certain term is very unpopular, and lawyers have long found it difficult to justify. However, he refused to overrule the requirement because:

1. For centuries, it has been seen as fundamental to the concept of a lease that the term of the lease was certain from the date the lease was created;

2. Echoing Lord Browne-Wilkinson in *Prudential Assurance v London Residuary Body,* to change the law might upset long established titles;[5]

3. The certainty of term requirement was confirmed recently in *Prudential Assurance*;

4. Since he found in favour of the lease for ninety years argument, there was no need to change the requirement for certainty of term.[6]

However, the judicial restraint of the Supreme Court in failing to overturn the rule requiring certainty of term is offset by the acceptance of the lease for ninety years analysis: it interpreted the agreement as creating a lease for ninety years, where Mexfield had a power to terminate the lease if any of the conditions in clause 6 arose. Lord Neuberger made it clear that this argument will also apply to periodic tenancies with uncertain fetters on the right of one party to terminate the tenancy, so periodic tenancies with uncertain fetters are now to be treated as ninety year leases with powers to terminate in accordance with the terms of the fetter. Lord Neuberger acknowledged that this argument conflicted with the rule requiring certainty of term which the court had just re-affirmed, but said that the conflict could be reconciled because the lease for ninety years argument had not been raised in previous authority.[7]

Lastly, all the Justices commented favourably on the 1a version of the contractual argument. In contrast with the Court of Appeal, the Supreme Court considered it irrelevant that the parties intended to create a lease and not a license, because, following *Street v Mountford*, the legal characterisation of the relationship between the parties is a matter of law, and not of the intentions of the parties.[8] Lord Neuberger also noted that parties to a lease which fails rarely intend their relationship be governed by a periodic tenancy, and yet the courts often impose periodic tenancies in such circumstances. The court did not address the 1b version of the contractual argument.[9]

Analysis

The Lease for Ninety Years Analysis

The Supreme Court's adoption of the lease for ninety years argument is welcome, for it means that the practical consequences of the unpopular rule requiring leases be of a certain

5 Although Lord Neuberger expressed doubts about the strength of this argument, and did not put much weight on it.

6 *Mexfield Co-operative Housing Ltd v Berrisford* (n 3) [35]-[37].

7 Ibid. [52]-[53].

8 Ibid. [62]-[63].

9 Ibid. [69].

term have been greatly reduced. However, it is notable that the arguments in favour of the decision in *Mexfield v Berrisford* were arguments of legal history rather than arguments of principle: the justification for the common law rule transforming uncertain leases into leases for life was not considered. As a result, the decision is open to a number of principled objections, which future reform should attempt to accommodate. Firstly, the decision only applies the lease for ninety years argument to leases to individuals: leases of uncertain term to corporations are void. Secondly, *Mexfield v Berrisford* conflicts fundamentally with the *Prudential Assurance* line of authority. Finally, and most importantly, *Mexfield v Berrisford* treats uncertain leases intended for the short term in the same way as uncertain leases intended for the long term, with undesirable consequences. These consequences could be avoided by distinguishing between long and short term leases, or by treating all uncertain leases as short term leases. It is unlikely that all of these reforms could be accomplished by the courts, owing to the restrictions involved in interpretation of statutes and precedent, and given that the courts have been extremely reluctant to change the law regarding uncertainty of term.

The lease for ninety years argument only applies to leases to individuals: before the Law of Property Act 1925, only uncertain leases to individuals were converted into tenancies for life. Uncertain leases to corporations were simply invalidated out of concerns that such leases could endure for a potentially unlimited amount of time and the absurdity of granting a lease for 'life' to a corporation. In the modern law there is no basis in principle for this distinction, because tenancies for life are automatically converted into leases for ninety years under section 149(6) of the Law of Property Act 1925. If the courts are willing to interpret uncertain leases to individuals as leases for ninety years, they should do the same to uncertain leases to corporations. Lord Dyson noted this distinction with regret,[10] but decided that it should be left to Parliament to remove the distinction between corporations and individuals. However, it is possible as a matter of authority for the courts to make this change. The pre-1925 rule that the courts interpret uncertain leases to individuals as leases for life is a common law rule. Therefore the courts can extend this rule, such that they also interpret leases to corporations as leases for life, which are then transformed into leases for ninety years by the Law of Property Act. Whether the courts are willing to make this change is another matter.

In addition, *Mexfield v Berrisford* cannot stand comfortably with *Prudential Assurance*.[11] *Prudential Assurance* treats all attempts to make uncertain leases as nullities, leaving the court to conclude that there was a periodic tenancy or contractual licence from the fact that one party occupied another's property at a rent. In contrast, *Mexfield v Berrisford* treats most uncertain leases as leases for ninety years. However, the court in *Mexfield v Berrisford* asserted that the two cases could coexist: it confirmed the rule in *Prudential Assurance*, and then went on to find in favour of the tenancy for ninety years argument. This infringes the coherence and clarity of the law: the law is not coherent if the courts give support to two incompatible principles. As such, the courts will have to either overturn the decision in *Mexfield v Berrisford*, or recognise that *Prudential Assurance* should cease to have practical consequences. There are two reasons why the courts should keep *Mexfield v Berrisford*, and recognise that *Prudential Assurance* should cease to have practical consequences. Firstly, Lord Neuberger noted that it was fundamental to the conception of a lease that it was of certain term. *Mexfield v Berrisford* allows uncertain

10 Ibid. [119].

11 The rule in *Mexfield v Berrisford* (n 3) conflicts with the rule in *Prudential Assurance* (n 2), even though it would not have made a difference to the outcome of *Prudential Assurance*, for the lease in *Prudential Assurance* was to a commercial party.

leases to be enforced, while respecting this principle. Secondly, with minor modifications, *Mexfield v Berrisford* can enforce uncertain leases while preventing the allocation of contractual risk from being distorted by the effects of time, as explained below.

Most importantly, the decision in *Mexfield v Berrisford* can be criticised because it fails to distinguish between leases which were only intended as short term arrangements, and leases which were intended as long term arrangements. This distinction is important because leases which operate over the long term have different formality requirements and legal consequences than leases which only operate over the short term. Regarding formality requirements, an oral lease can be created so long as it is of a term of three years or under.[12] So if a landlord orally attempts to create a lease allowing the purported tenant to stay in his property until the bluebells flower next spring, this lease would be invalidated because, following *Mexfield*, the lease will be interpreted as a ninety year lease which cannot be made orally.[13] Additionally, a number of statutory provisions give different legal consequences to long term leases than to short term leases. Section 1 of the Landlord and Tenant Act 1954 gives the protection of the Rent Acts to long leases at low rents. Section 129 of the Housing Act 1988 provides assistance to local housing authority tenants on short term leases who wish to find alternative accommodation. Section 12 of the Housing Benefit Regulations provides for the payment of a rent allowance to those who need such assistance, but is not available for people on long term leases. These provisions consistently define a long term lease as a lease for 'a term of years certain, exceeding 21 years'.[14]

It is also important that we distinguish between leases which were intended to run only for the short term, and leases which were intended to run for the long term because time unfairly distorts the value of rights and obligations under a contract. Susan Bright notes that a reasonable agreement at one point in time may be a very unreasonable agreement thirty years later unless some provision is made to counteract the effects of time distorting the obligations under the agreement.[15] *Prudential Assurance* provides a perfect illustration: In 1930, the claimant rented a strip of land from the council at its commercial rate of £30 a year. Since the agreement was only intended to last for the short term, the parties did not agree to adjust the rent according to inflation. In 1992, the claimant was still paying a rent of only £30 per year, even though the market rate was around £10 000 per year. Fortunately, by confirming the rule requiring that leases be of certain term, the court could invalidate the lease, and allow the landlord to create a new lease and charge market rent for the property. However, a modern court, following *Mexfield v Berrisford,* would be bound to interpret the agreement as amounting to a ninety year lease, thereby giving the plaintiff another twenty years use of the land at a negligible rent. Susan Bright's suggestion that we introduce into the law of contract a doctrine allowing people to renegotiate contracts where they have become substantively unfair has been met with much criticism. Arguments in favour of such a doctrine have been rejected in the context of frustration of contracts. For example, in *The Eugenia*, the court confirmed that a contract will not be held to be frustrated simply because it has become more onerous or expensive to perform; it will only be frustrated where changing circumstances have made it a

12 Law of Property Act 1925, s 54(2).

13 This argument succeeded in excluding the lease for 90 years argument in *Hardy v Haselden* [2011] EWCA Civ 1387.

14 Landlord and Tenant Act 1954, s 2(4); Leasehold Reform Act 1967, s 3(1); Housing Act 1985 s 115(1)(a).

15 S. Bright, 'Uncertainty in leases - Is it a vice?' (1993) 13 LS 38.

fundamentally different bargain to the one which was entered into.[16] The court's rejection of such a doctrine has stemmed from its desire to hold parties to their agreed allocation of risk, and from the uncertainty inherent in deciding whether a contract has become substantively unfair. In addition, it is possible to create a more targeted rule which addresses problem created by very long periods of time altering the value of proprietary rights, without resorting to a wide doctrine allowing people to renegotiate contracts in the case of substantive unfairness. The problem of very long periods of time gradually distorting the value of rights and obligations arises almost exclusively regarding property rights over land, because such rights are transmitted to the successors in title of to the land and therefore last much longer than other contractual rights. This differs from the paradigm claim for a frustrated contract, where the value of rights and obligations under the contract is drastically altered in a short space of time, owing to a sudden event, such as a war or a crash in the market. So it is understandably heavy-handed to introduce into the law of contract such an uncertain doctrine which allows people to renegotiate contracts in the case of substantive unfairness, when the problem this doctrine is designed to address arises almost exclusively in contracts relating to land. As such, the court in *Mexfield v Berrisford* can be criticised for gutting the rule requiring that leases be of certain term without searching for a solution to problems which relate to the distortion of contractual obligations by time.

One could object that since the law categorises legal relationships according to the facts rather than what the parties intended,[17] a court should not look at whether the parties intended a long or short lease in deciding the exact nature of the legal relationship. However, this objection is misplaced. It is true that the courts must decide the nature of the legal relationship between the parties according to the facts of the relationship rather than according to what the parties call their relationship. Otherwise a landlord could attempt to escape the obligations he owes to a tenant, simply by calling the agreement a license rather than a lease, as happened in *Street v Mountford*. But this concern does not apply where the court merely looks to see if the parties intended to be bound for the long or short term. Instead, whether the parties intend to be bound for the short or long term is a fact which the court must take into account when deciding the legal nature of their relationship. This is clear because the courts take into account whether the parties intend to be bound for the short or long term in other contexts in land law. For example, a right will not crystallise into an easement where the owner of a servient tenement only intends to allow the owner of a dominant tenement to use the right temporarily.[18]

So how can the rule in *Mexfield v Berrisford* be adapted to distinguish leases which are intended to run for the short term from leases which are intended to run for the long term? One possibility would be to allow the courts to look at all the circumstances of the case, and read the agreement as applying for the most appropriate number of years, rather than simply reading all uncertain leases as leases for ninety years. Relevant circumstances would include the formalities used to create the lease, whether the rent is adjusted for inflation, the period for which the parties roughly expected the lease would run, and whether the parties intended to make use of certain statutory benefits. In some cases, this approach might be reasonably

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16 [1964] 2 QB 226.

17 *Street v Mountford* [1985] AC 809 (HL).

18 *Wright v Macadam* [1949] 2 KB 744: the court stated that a right which was enjoyed by the inhabitant of the property will not become an easement when the inhabitant was granted a lease under Law of Property Act 1925, s 62, where the parties intended the right to be exercised only temporarily.

effective: although the leases in question are strictly for an uncertain term, the parties to such leases would likely have a clear idea of roughly how long the arrangement would last. For example, if a lease of an uncertain term was granted to a student studying for a DPhil, it would be reasonable for the court to assume that the parties contemplated a lease of around three years. But in cases where the parties have no clear idea of roughly how long their lease is to last, this approach is inadequate. In such cases, the courts would have to face arguments about whether they should only infer the intent of the parties, or whether they can impute intention. Similar arguments have vexed the courts in family homes cases.[19] More importantly, this approach would create great uncertainty, for nobody under a lease of uncertain term would be able to determine the precise legal consequences of the lease unless they apply to the court, because they would not know how long their lease would last. If our DPhil student entered into his lease orally, he would not be able to say for certain whether it was in force: if the courts read it as a lease for more than three years, then the lease would be void following section 54(2) of the Law of Property Act 1925. Similarly, whether a tenant under an uncertain lease can take advantage of the social security provisions set out above would depend on whether the court decides to read his lease as a lease for more than 21 years or for 21 years or less. This uncertainty does not just affect the tenant: it also affects the state, which would have to apply to the court to decide exactly how to treat a tenant under a lease of uncertain term. So it seems that in distinguishing between leases intended for the short term, and leases intended for the long term, the perils of uncertainty mean the court may prefer a bright line rule over attempting to distinguish between long and short term leases.

However, even if a bright line rule is ultimately better than attempting to distinguish between long and short term leases, the courts can still improve the rule in *Mexfield v Berrisford*. *Mexfield v Berrisford* reads all leases of uncertain term as leases for ninety years. However, there is nothing in principle which demands that such leases be read as ninety-year leases, rather than leases for a shorter period. The reason the court chose ninety years over a shorter period is simply because of the historical fact that before the Law of Property Act 1925, the courts interpreted uncertain leases as tenancies for life, and section 149(6) of the Law of Property Act 1925 converted tenancies for life into leases for ninety years. In principle, it would be preferable for leases of uncertain term to be read as short leases rather than long leases for three reasons. Firstly, under a short lease, there is lower risk of the value of contractual obligations being distorted by the effects of time. Secondly, many of statutory provisions which distinguish between short and long term leases are social welfare provisions which are designed to benefit tenants under leases for less than 21 years. In cases of uncertainty, it would be preferable to read leases as giving tenants the benefits of these provisions, rather than as restricting tenants from accessing these benefits. Thirdly, it does little harm to interpret a lease intended for the long term as a short term lease: although a tenant under such a lease will not be able to avail the protection given by section 1 of the Landlord and Tenant Act 1954 (above), this is a relatively minor injustice compared to the problems that arise when short term leases are interpreted as long term leases. It is submitted that the ideal length of time for the law to impose on a lease of uncertain term is three years: if such leases were to be read as lasting longer than three years, oral leases of uncertain term would be void under section 54(2) of the Law of Property Act 1925. In principle, it is theoretically possible for the courts to make this modification without assistance from parliament. As noted above, the pre-1925 rule that uncertain leases to individuals should be interpreted as leases for life is a common

19 See the line of cases culminating in *Jones v Kernott* [2011] UKSC 53.

law rule. Therefore it is open to the Supreme Court to modify this rule by overturning and reinterpreting its precedents. As such, the courts could modify the pre-1925 authorities such that they treat uncertain leases as leases for three years rather than leases for life. However, it would be highly invasive for the courts to make such a modification, particularly because some might argue that it is an attempt by the courts to circumvent section 149(6) of the Law of Property Act. Given that the courts have been so reluctant to reform this area of law, it is unlikely they will be willing to make this change, instead leaving reform to Parliament.

Contractual analysis

As Lord Hope recognised,[20] practical application of both versions of the contractual argument presents a number of difficulties. Firstly, the contractual argument can only apply between the original contracting parties to the uncertain lease in question. Secondly, it does not vest any proprietary rights in the tenant, so a tenant who wishes to use the contractual argument to prevent herself from getting evicted would have to hope that the court will use its discretion to grant specific performance to remedy the breach of contract. In light of these difficulties, the contractual argument is clearly less preferable to tenants than having the lease enforced on its terms. Additionally, given the fact that the court in *Mexfield v Berrisford* adopted the lease for ninety years argument (and therefore all uncertain leases to individuals are read as leases for ninety years), the contractual argument would only be argued in cases of uncertain leases to corporations. As such, if the courts accept that the distinction between leases to individuals and leases to corporations should be removed, the contractual argument can safely be consigned to history.

Conclusion

The decision of the Supreme Court in *Mexfield v Berrisford* is welcome as it renders the rule requiring leases be of certain term irrelevant for practical purposes, at least in cases of leases given to individuals. However, the law is not yet in a satisfactory state. First, the decision in *Mexfield* makes an unprincipled distinction between leases granted to individuals, and leases granted to corporations. This distinction is indefensible, and should be removed, with the effect that uncertain leases to individuals and leases to corporations should be treated in the same way. Secondly, to promote the clarity of the law, the courts should overturn the *Prudential Assurance* line of authority. Its conflict with the decision in *Mexfield v Berrisford* should not be brushed under a rug with the simple acknowledgement that the lease for ninety years argument was not put before the court in *Prudential Assurance*. Finally, the courts ought to recognise the distinction between long and short-term leases. If requirements of certainty prevent them from making such a distinction, then they would still do better to interpret all uncertain leases as short term leases lasting for a maximum period of three years, rather than long term leases lasting for a period of ninety years.

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20 *Mexfield Co-operative Housing Ltd v Berrisford* (n 3) [80].

Primus inter pares – Re-rationalising EU Legal Supremacy as Co-operative Dualism

Joshua Folkard[1]

Introduction

This article will argue that the Court of Justice of the European Union (CJEU) is best seen not as top of a monist hierarchy, but as a *primus inter pares*. Since *Costa v ENEL*[2] in 1966, when the CJEU unilaterally asserted the supremacy of EU law over national law, the tension between the competing supremacy claims of national courts and the CJEU has been a puzzling one. Can both the EU and Member States be 'in charge'? If so, how? This article will show that these competing claims of supremacy, rather than leaving the two legal systems at loggerheads with one another, have facilitated a co-operative relationship between national courts and the CJEU. It will be further argued that the best theoretical basis for this co-operation is not the pluralism which has proved so popular in recent times to explain the relationship between Member State systems and the EU legal order, but a deferential dualism of the kind championed by Eleftheriadis.[3]

Given its sensitivity, of course, a great deal of academic ink has been spilt on the question of the supremacy of EU law. It is also significant because this co-operative approach might be indicative of a wider trend in EU law. This is exemplified by the introduction of the yellow/orange card procedure by the Lisbon Treaty,[4] which offers the possibility of co-operation between national Parliaments and EU legislative institutions in the making of EU legislation. This article will first consider the issue of supremacy from the point of view of the CJEU before turning to developments as seen from the courts, both high and low(er), of the Member States.

The supremacy of EU law from the point of view of the Court of Justice of the European Union (CJEU)

The development of EU constitutionalism

The above-mentioned assertion of the supremacy of EU law in *Costa v ENEL*[5] was a remarkably bold move by the CJEU. It followed soon after the famous assertion in *Van Gend en Loos*[6] that 'the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the sub-

1 University College. I would like to thank Angus Johnston for his helpful comments on earlier versions of this article.
2 Case 6/64 *Costa v ENEL* [1964] ECR 585.
3 P Eleftheriadis, 'Pluralism and Integrity' (2010) 23(3) Ratio Juris 365.
4 Article 12 of the Treaty of the European Union and Article 3 of Title I of the Protocol on the Role of National Parliaments in the European Union.
5 Case 6/64 *Costa v ENEL* [1964] ECR 585.
6 Case 26/62 *Van Gend en Loos* [1963] ECR 1.

jects of which comprise not only the Member States but also their nationals' In *Costa v ENEL*, the CJEU enunciated a simple conception of bare supremacy (which this essay will term 'simple supremacy'). It stated that

> by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[7]

This notion of 'simple supremacy' was an assertion by the CJEU of its place at the top of a monist hierarchy. The Court of Justice viewed itself at the apex of a single constitutional order, in many ways similar to the supreme court of single national system. This conception is evident from the reasons adduced by the Court of Justice in *Costa v ENEL*. The reasoning which led to this conclusion involved three major elements. The first argument was functional: the aims of the Treaty (as agreed by the Member States) would be imperilled if supremacy were not accorded to EU law. The second was what Craig and de Búrca have labelled 'contractarian':[8] '[an] obligation arising under the Treaty', argued the CJEU, 'carries with it a permanent limitation of [Member States'] sovereign rights'.[9] The third was rooted in what is now Article 288 TFEU. The CJEU was of the opinion that 'the precedence of Community law is confirmed by Article [288 TFEU] whereby a regulation 'shall be binding' and 'directly applicable in all Member States'… This provision, which is subject to no reservation, would be quite meaningless if a State could nullify its effects by means of a legislative measure which could prevail over Community law'.[10] This third argument, in particular, marks a key departure from the theoretical starting point of classic dualism. The UK doctrine of implied repeal, for example, was a logical consequence of such dualism. According to this doctrine, supremacy would be accorded even to subsequent national legislation which did not expressly make clear its intention to depart from the EU provision with which it was incompatible.

Development of simple supremacy

In Internationale Handelsgesellschaft,[11] the CJEU confirmed that, from its point of view, all EU law was supreme over all national law, even when the former was a regulation dealing with the technicalities of a deposit system, and the latter constituted fundamental rights enshrined in the constitution. The now-familiar efficacy argument was again adduced: 'the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.[12] The procedural conclusion of this line of thought was drawn in both

7 Case 6/64 *Costa v ENEL* [1964] ECR 585, 593.

8 P Craig and G de Búrca, EU Law: Text, Cases and Materials (5th edn, Oxford University Press), 258.

9 Case 6/64 *Costa v ENEL* [1964] ECR 585, 594.

10 Ibid. 594.

11 Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

12 Ibid. [3].

Simmenthal[13] and IN.CO.GE,[14] in which the CJEU emphasised that even the lowest Member State court, national rules of precedent notwithstanding, is obliged to disapply the decisions of higher courts in situations where the decisions of those courts conflict with EU law. Both cases also confirmed that this obligation arises even when the national legislation in question is adopted subsequent to the piece of EU law. Finally, IN.CO.GE emphasised that the result of the incompatibility of national law with EU law is not invalidity, but 'disapplication'. 'It cannot … be inferred from the judgment in Simmenthal that the incompatibility with Community law of a subsequently adopted rule of national law has the effect of rendering that rule of national law non-existent. Faced with such a situation, the national court is, however, obliged to disapply that rule'.[15]

Thus, the view of CJEU on the interaction of EU and Member State law is straightforward and hierarchical: EU law is considered to have 'simple supremacy' over national law. The national courts of some Member States have, however, rejected this assertion of the Court of Justice. The 'simple supremacy' view, however, fails in two respects. First, it has not gained acceptance in the courts of a number of Member States, notably France, Germany and the United Kingdom. It therefore succeeds as an explanatory tool, if at all, only to explain supremacy from one end of the relationship. It might tell one how the CJEU views the interrelationship between the two systems, but fails to explain how it is viewed at the point of acceptance, namely in the courts of all the Member States. Second, although it has been repeated in numerous cases by the CJEU, the analysis of the cases below suggests that this is not, *in fact*, what the Court of Justice is doing, nor how it perceives its role. These are significant drawbacks which raise the question of whether there is a better way to assess the interaction between national and EU legal systems.

Competing supremacy claims as a co-operative method

It is not the purpose of this article to evaluate the individual national claims which take its place, nor to compare among them. But it is the claim of this article that what has resulted is not a legal logjam with both sides claiming simple supremacy. Rather, these competing supremacy claims have provided an arena for, and facilitated, a relationship of co-operation between national courts and the CJEU. In developing this argument further, an important distinction needs to be drawn between two senses of 'co-operation'. The first is co-operation in a narrower sense: this is co-operation in terms of lack of conflict. The second is a broader sense, which is co-operation in the form of a dialogue, or discussion, between national courts and the Court of Justice. In order to illustrate this, this article will draw on developments from Member States' courts.

EU supremacy from the point of view of Member States

Co-operation in a narrow sense

Unsurprisingly, there is a good deal of evidence of co-operation in a narrow sense between national courts and the CJEU. Two good examples can be drawn from German constitutional law, in which the *Bundesverfassungsgericht* (Germany's Federal Constitutional Court)

13 Case 106/77 *Simmenthal* [1978] ECR 629.

14 Case C-10-22/97 *Ministero delle Finanze v. IN.CO.GE* [1998] ECR I-6307.

15 Ibid. [21].

has repeatedly withdrawn from the brink of drawing (more or less) logical conclusions from its previous judgments, which would have brought it into direct conflict with the Court of Justice.

The Banana Market *case*

First there was the *Bundesverfassungsgericht's* withdrawal from its approach in the *Solange I*[16] and *Maastricht*[17] judgments in the *Banana Market Case*.[18] In *Solange I*, the *Bundesverfassungsgericht* (BVerfG) stated that it would review Community acts against the standard of fundamental rights as guaranteed in the German Constitution as long as ('*solange*') EU law did not contain a catalogue of fundamental rights essentially equivalent to those in the German constitution. In *Solange II*[19] the BVerfG mellowed its position, emphasising that, so long as the fundamental rights were guaranteed in the EU to the same degree as in the German Constitution, the BVerfG would not review individual EU acts. Gone, therefore, was the requirement of a codified catalogue of human rights, as was the need for EU legislation to protect the rights enshrined in the German constitution in every single case. This was doubtless, as Kokott[20] has convincingly argued, a response to the growing EU human rights jurisprudence, but it represented a more permissive attitude to the CJEU, notwithstanding that the BVerfG reserved the final say for itself. However, this development was put at risk in the *Maastricht Judgment*. The BVerfG reasserted its jurisdiction to review individual CJEU decisions in individual cases. It moved from an intention not to review to a role in which it was more actively to scrutinise the protection of fundamental rights in the EU. This development has rightly been characterised by Elbers and Urban[21] as a reversion to pre-*Solange II* jurisprudence, and by Kokott[22] as a *Solange III*, in which the BVerfG reacted in the same way as in *Solange I*, in this case to the dynamic activism of the Luxembourg Court.

In the Banana Market Case, however, the BVerfG held that challenges to EU secondary legislation before the court were 'inadmissible from the outset if their grounds do not state that the European evolution of law … has resulted in a decline below the required standard of fundamental rights after the Solange II decision'.[23] Any other reading of the Maastricht Judgment, the BVerfG held, was based on a 'misunderstanding'.[24] This withdrawal has led Elbers and Urban cogently to argue that 'the Maastricht Judgment must be understood as qualified – if not partially [overruled] – by Bananas Market' and that the decision was a 'defusi[ng] of an acute threat to the entire process of European integration'.[25] It therefore provides one example of the BVerfG changing tack in order to avoid a conflict with the Court of Justice, and hence embracing co-operation in a narrow sense as outlined earlier in this article.

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16 BVerfGE 37, 271; (1974) 2 CMLR 540.
17 Cases 2 BvR 2134/92; 2159/92 (1994) 31 CMLR 57.
18 BVerfGE 102, 147.
19 BVerfGE 73, 339; (1987) 3 CMLR 225.
20 J Kokott, 'Report on Germany' in Slaughter, Sweet and Weiler (eds), The European Courts and the National Courts (Hart Publishing, 1997).
21 U Elbers and N Urban 'The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System' (2001) 7 European Public Law 21.
22 Kokott, (n 20), 110.
23 BVerfGE 102, 147.
24 Ibid.
25 Elbers and Urban, (n 21) 32.

Honeywell

The second example is drawn from the decision of the BVerfG in *Honeywell*.[26] In that case the BVerfG stepped back from its position on the *ultra vires* review jurisdiction it had conferred on itself in its *Maastricht Judgment*, substantiated in its *Lisbon Judgment*.[27] In *Maastricht*, the BVerfG asserted a jurisdiction to review whether EU legislative provisions were outside the EU's competence. The BVerfG therefore accorded itself what German scholars have called *Kompetenz-Kompetenz*, the power conclusively to decide the EU's competences. This explicitly confirmed what had been implicit in earlier decisions such as *Solange I*, namely that *Kompetenz-Kompetenz* did not lie with the CJEU. This was based on the view that the only real democracy could be a national one, and on the characterisation of the EU as a league of states (a '*Staatenverbund*')[28] as opposed to anything akin to a federation ('*Bundesstaat*').[29] In its *Lisbon Judgment*, the BVerfG fleshed-out this approach but also softened it slightly. The BVerfG insisted that the transgression of EU law would have to be sufficiently serious for it to exercise this *ultra vires* review. The BVerfG also emphasised that this *ultra vires* jurisdiction was to be conducted in the spirit of '*Europafreundlichkeit*' ('friendliness towards Europe') and explicitly recognised the exceptional character of *ultra vires* review.

In *Honeywell*, however, the BVerfG refused to find the decision of the Court of Justice in *Mangold*[30] *ultra vires* the competences of the EU. This is significant because it is submitted that the reasoning in *Mangold* itself was very weak. In that case, the Court of Justice relied on the '*constitutional traditions common to the Member States*'[31] and '*international instruments*'[32] to conclude that there was a general principle against age discrimination in EU law. In fact, only the constitutions of Finland and Portugal protected against age discrimination, and there were no international treaties with such specific provisions. If there was a case in which the BVerfG could have chosen to wield its *Mangold-Lisbon ultra vires* doctrine, it is suggested that this was it. This supports the reasoning of Payandeh to the effect that this decision '*significantly mitigates*' the danger that the BVerfG would *ever* declare EU acts to be *ultra vires* and represents a '*remarkably restrictive*' approach to *ultra vires* review.[33] It is hard to escape Payandeh's conclusion that 'Honeywell *had a pacifying and de-escalating function for ultra vires review*'.[34]

These German examples show that, for obvious political reasons, an atmosphere of minimal co-operation has been created between national courts and the Court of Justice. As noted above, however, this is the co-operation of ceasefire, and the '*incentive[s] to strive to respect the traditions of the other*' are the incentives of the Cold War and the logic of Mutually Assured Destruction.[35] As Weiler has cogently argued, this co-operation comes about because any

26 BVerfG 2 BvR 2661/06.

27 BVerfG 2 BvE 2/08.

28 2 BvR L 134/92 (1994) 1 CMLR 57, 89.

29 2 BvR l 134/92 (1994) 1 CMLR 57, 89.

30 Case C-144/04 Mangold [2005] ECR I-9981.

31 Ibid. [74].

32 Ibid.

33 M Payandeh, 'Constitutional Review of EU Law after Honeywell: contextualising the relationship between the German constitutional court and the EU Court of Justice' (2011) 48 CMLRev 9, 10.

34 Ibid. 27.

35 JHH Weiler, 'The Autonomy of the Community Legal Order: through the looking Glass' in Weiler (ed), The Constitution of Europe: Do the new clothes have an emperor? (Cambridge University Press, 1999), 321.

conflict would be '*extremely hazardous*'[36] for both the Member State and the EU, particularly where it creates a situation which the national government might not be able to remedy, for example where there was strong public support for the decision of the national constitutional court. The big question, and the issue on which this article hangs, is whether there can be seen to be a more full-bodied co-operation between the CJEU and Member States.

Co-operation in a broad sense

As one might expect, the germs of this more expansive form of co-operation can be seen, if at all, in the case law concerning the preliminary ruling procedure contained in Article 267 TFEU. There are a number of good examples of co-operation from the national side, which seem to suggest the national courts being receptive to EU legal norms. The first of these can be seen to have arisen in Belgium, in response to the long-running European Arrest Warrant (EAW) saga.

The European Arrest Warrant saga

The EAW litigation arose in a number of Member States in response to a Framework Decision to simplify/expedite extradition post-9/11. It diverted most of the decisions on extradition from the executive to judges, and went further than the 1996 Convention on Extradition, which gave Member States a veto. This caused litigation in a number of Member States concerning the compatibility of this decision with Member State constitutions. In the *Belgian EAW Case*,[37] the Belgian Constitutional Tribunal sought a preliminary ruling from the CJEU on the validity of the national measure implementing the Framework Decision. This willingness to seek a preliminary ruling in the context of the Third Pillar showed, as Cloots has highlighted, '*exceptional loyalty*'.[38] It was '*remarkable*',[39] not only because of the national court's readiness to refer, which was significant because the case concerned the validity of a national implementing measure, but also since '*as a general rule, the [Belgian Constitutional Tribunal] carefully followed the ECJ's conclusions*'.[40] Rather than the Belgian Constitutional Tribunal choosing to apply EU law, this is a good example of a national system, in its conclusion on national law, deferring to EU legal norms as interpreted by the CJEU. This therefore seems to be a very solid example of co-operation in an area of competence historically jealously guarded by the Member States. However, this may be the exception that proves the rule.

It seems that further evidence for such co-operation in the EAW context can be gleaned from the judgment of the Polish Constitutional Court in its handling of the EAW Framework Decision.[41] The Polish court was in a slightly different position from that of its European neighbours, since two seemingly clashing provisions were in play: Article 55(1) of the Polish Constitution – which stated that '*the extradition of a Polish citizen shall be forbidden*' – and Article 9 – which stipulated that Poland would respect international law binding on it. The Polish Constitutional Court resolved this dilemma by referring the issue back to the legislature.

36 Ibid. 320.
37 Cour d'Arbitrage Case No. 124/2005.
38 E Cloots, 'Germs of Pluralist Judicial Adjudication: Advocate Voor de Wereld and other references from the Belgian Constitutional Court' (2010) 47 CMLRev 645, 652.
39 Ibid.
40 Ibid. 665.
41 Trybunał Konstytucyjny Rzeczypospolitej Polskiej, Case P 1/05.

The court further afforded the legislature the maximum amount of time allowed under the Polish constitution for it to make its decision, which, pursuant to Article 190(3) of the Polish Constitution, was 18 months. As Komárek[42] and Leczykiewicz[43] have both shown, the Polish Constitutional Court rejected an interpretative solution where, albeit at a stretch, one might have been possible. That said, the defusing of the situation by remitting the issue to the legislature, coupled with the imposition of the maximum time-limit allowed, has been hailed by commentators as '*an excellent example of what constitutional courts should do in cases of truly irreconcilable conflicts between their constitutions and EU law*'.[44] However this co-operative trend was bucked by the BVerfG's *EWA Judgment*.[45]

In that litigation, the BVerfG took almost the exact opposite approach to the Belgian court, not only holding the national implementing measure to be unconstitutional but reversing the extradition decision of the original (Spanish) court. The BVerfG rejected the reasoning in the rulings of the CJEU in *Gözütok*[46] and *Brügge*,[47] which had both emphasised that there was a necessary implication that Member States had mutual trust in one another's justice systems, and that each must recognise the criminal law in force in the others, notwithstanding that the solution in national law might have been different. Further, the *Bundesverfassungsgericht* held that derogations from (in that case Article 16 of) the German Constitution had to be proportionate, which entailed the necessity of review on a case-by-case basis.

This decision has been criticised as both belligerent and unhelpful. It also seems thoroughly to reject the co-operative thesis enunciated above. As Komárek has convincingly highlighted, the BVerfG effectively '*consider[ed] … the Grundgesetz to be the standard against which all European co-operation in the field of criminal justice will be measured*'.[48] This adoption of the national constitution as the (only) yardstick against which measures like the EAW Framework Decision could be judged '*undermined the whole approach to the judicial co-operation in criminal matters within the third pillar, based on mutual trust among Member States*'.[49] The majority in the BVerfG can be strongly criticised, in particular, for not dealing adequately with the CJEU's *Pupino*[50] judgment. In that case, decided three months before the BVerfG handed down its *EAW* judgment, the Court of Justice held that the duty of consistent interpretation of EU law extended also to the Third Pillar, although it was emphasised that a *contra legem* reading was unnecessary. It is therefore difficult not to agree with Hinarejos Parga's submission that, following *Pupino*, the BVerfG ought to have endeavoured to interpret the national implementing measure as far as possible in a manner which was consistent with the wording and purpose of the Framework Decision.[51] If this was impossible, the duty of loyal co-operation ought, at least,

42 J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles' (2007) 44 CMLRev 9.

43 D Leczykiewicz, 'Trybunał Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 205, No. P1/05, on the constitutionality of the European Arrest Warrant national implementation' (2006) 43 CMLRev 1181.

44 Komárek, (n 42), 19.

45 BVerfG 2 BvR 2236/04.

46 Case C-187/01 *Gözütok* [2003] ECR I-5689.

47 Case C-385/01 *Brügge* [2003] ECR I-5689.

48 Komárek, (n 42), 25.

49 Ibid. 21.

50 Case C-105/03 *Pupino* [2005] ECR I-5285.

51 A Hinarejos Parga, 'Annotation of the decision of the German Bundesverfassungsgericht on the German EAR law' (2006) 43 CMLRev 583.

to have prompted the BVerfG to curtail the effects of its judgment, for example by declaring the national EAW law partially invalid. The *Bundesverfassungsgericht's EAW* judgment certainly does not constitute evidence in favour of the view of the relationship between the CJEU and national courts as put forward in this article, namely as one of co-operative dualism. But it should not be thought that this decision is necessarily indicative of the German judiciary's approach to supremacy. It is submitted that a focus on the practices of the lower German courts supports such a co-operative approach to the problem of EU law supremacy.

Evidence from lower German courts

One field of German law will be examined to suggest that the Belgian *EAW* ruling might be part of a wider judicial trend in Europe. Significant here is the remarkable discourse between the German Labour Court and Court of Justice over the latter's decision in *Bötel*,[52] which held that a part-time worker had to be paid for attending a Workers' Council meeting outside of his working hours. This decision was extremely unpopular in Germany, since it was considered a privilege to take a place on such a Council. The German Labour Court sent a reference to the Court of Justice explicitly asking whether Community law prohibited the institution of honorary membership on the Council. As Kokott has commented, '*this question was rightly translated by a critic as meaning: 'Do you really think the Bötel decision is correct?*''[53] Another example from the same area is the *Paletta*[54] case. Mr Paletta's family had fallen ill at the end of their holiday in their home town in Italy for several consecutive years, and Mr Paletta's German employer refused to pay his salary for these periods on the basis that he did not trust the Italian medical certificates produced. In a preliminary ruling, the CJEU held that such certificates were binding on an employer.[55] The German Labour Court then re-referred the same question to the CJEU, explaining that the Court of Justice's previous position amounted to a violation of the German principle of proportionality.

Kokott is correct to argue that these cases are indicative of a bilateral co-operative relationship, in which the national court explains municipal law and the national consequences of a decision, and does not see itself as inferior but asserts its own rights and obligations to ensure a coherent national system.[56] Again, these cases seem to be instances of the CJEU giving weight to the norms of a national legal system, where the national court, rather than seeing itself as faced with a stark choice between either applying EU law or national law, showed itself receptive to EU norms in its application of national law.

It is submitted that both the jurisprudence from the German Labour Court and the Belgian *EAW* judgment indicate a rejection of a hierarchical view and constitutes the germ of a dialogic, co-operative approach between the courts of some Member States and the Court of Justice. Although by no means a consistent phenomenon, it is suggested that this has great potential to develop.

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52 Case C-360/90 *Bötel* [1992] ECR I-3589.
53 Kokott, (n 20), 113.
54 BAG, 11 NZA 683 (1994).
55 Case C-45/90 [1992] ECR I-3458.
56 Ibid.

Evidence from the CJEU

At this point it should be noted that any such dialogue would have to be two-sided, and that the Court of Justice has been criticised for not matching the willingness of some national courts to co-operate. First, stylistically, Cloots criticises the '*discursive*'[57] and '*oracle-ish*'[58] style adopted by the Court of Justice in answering preliminary ruling requests. Before the advent of Article 4(2) TEU in the Treaty of Lisbon, Cloots argued that the Court of Justice ought, moreover, to show more respect for national constitutional arrangements. In the *Flemish Care Insurance Scheme Case*,[59] for example, Cloots maintained the CJEU could have taken the federal structure of a Member State as a legitimate justification for free movement right infringements.

The CJEU seems to have met this criticism, however, in its jurisprudence on Article 4(2) TEU. This Article provides (inter alia) that 'the Union shall respect the … equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. It is submitted that the CJEU has given full effect to the co-operative thrust behind this article in two important cases following its introduction, namely *Sayn-Wittgenstein*[60] and *Michaniki*.[61]

Sayn-Wittgenstein concerned the free movement of persons. The Austrian authorities, pursuant to the Austrian 'Law on the Abolition of the Nobility', changed the surname of a German woman living in Austria as recorded in the Civil Registry from 'Fürstin Sayn-Wittgenstein' ('Princess of Sayn-Wittgenstein') to 'Sayn-Wittgenstein'. Although the CJEU held that there had been a *prima facie* breach of Article 21 TFEU, the Court decided that this restriction could be justified by the object and purpose pursued by the Austrian legislation, namely to ensure the formal equality of treatment of all citizens before the law. The CJEU bolstered its conclusion by citing Article 4(2) TEU, asserting that '*in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic*'.[62] What is most significant about this case is that it shows the CJEU departing from its previous tactic of dealing with sensitive conflicts between EU and national law by converting the constitutional concern of the individual Member State into an EU one, thus preserving the veneer (if nothing more) of EU legal supremacy (for example, in *Omega Spielhallen)*[63]. In *Sayn-Wittgenstein*, the Court of Justice, instead of side-stepping the issue in such a manner, explicitly recognised that it was allowing purely national constitutional concerns to permeate its balancing of factors.

An even stronger example of the CJEU enthusiastically pursuing the normative basis of Article 4(2) TEU can be seen in the *Michaniki* judgment. The CJEU accepted in principle Greece's argument that it was entitled to defend its improper implementation of a directive by relying on a provision in the Greek Constitution. In contrast to *Sayn-Wittgenstein*, this was a case in which according to EU law there was no requirement for a balancing of factors into

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57 Cloots, (n 38), 669.

58 Ibid.

59 Case C-212/06 *Flemish Care Insurance Scheme Case* [2008] ECR I-1683.

60 Case C-298/09 *Sayn-Wittgenstein*, judgment of 22nd December 2010.

61 Case C-213/07 *Michaniki* [2008] ECR I-9999.

62 Case C-298/09 *Sayn-Wittgenstein*, judgment of 22nd December 2010, [92].

63 Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

which national constitutional concerns could be poured. Nonetheless, the CJEU applied a proportionality test, although on the facts of the case it held that the exclusion of construction companies connected with media companies participating in awards for public works contracts was disproportionate. As Von Bogandy and Schill have cogently argued, this decision 'relativizes the doctrine of absolute primacy in EU law',[64] in that it 'illustrates that the ECJ is willing to recognize that domestic constitutional law is not simply overridden by secondary EU law, but has a legitimate scope of application and its own normative weight in the process of implementing a directive'.[65] This appears to be a highly significant endorsement by the CJEU of the more co-operative approach between the national and EU legal systems embodied in Article 4(2) TEU, in strong contrast to its previous reluctance to co-operate in the context of the preliminary ruling procedure.

Theoretical basis

The question remains as to what is the best theoretical foundation for this developing co-operative dynamic. This article will criticise Barber's[66] pluralistic conception of such co-operation as violating a Dworkinian notion of political integrity[67] and will hence favour Eleftheriadis'[68] dualistic approach. Eleftheriadis has put forward the view that the solution to the puzzle of competing supremacy claims is best solved neither through a monist ('simple supremacy') model nor a pluralist one, but by adopting a familiar dualist standpoint. The two systems are therefore viewed as independent but interacting, much as national legal systems incorporate the rules of other national legal systems through conflict of law provisions. On this view, what is special about the EU legal system is not that it has a unique architecture, but merely the *extent* to which the two systems are prepared to defer to one another.

Barber's theoretical foundation

Barber has argued that the European legal system is made up of two legal systems governed by two inconsistent Hartian[69] rules of recognition. Barber argues, however, that it is imperative to avoid '*over-simplification*'[70] of the relationship between national and EU law, particularly the assumption that national courts would unquestioningly follow their national constitutions regardless of their EU law obligations. Instead, since '*each side has an incentive to strive to respect the position and tradition of the other … it might be better to say that the two systems overlapped, with the duties and loyalties of those within the German system becoming increasingly ambiguous*'.[71] This approach can be distinguished from the 'simple supremacy' outlined above because it takes no general view that EU law is supreme, modifying that rule in certain cases. The essence of this approach is that it denies any such general rule. It is this ambiguity, Barber maintains, which allows national courts to avoid conflict with the CJEU through the adoption of decisions which are compatible with EU law.

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64 A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLRev 1417, 1445.
65 Ibid. 1444.
66 N Barber, 'Legal Pluralism and the European Union' (2006) 12 ELJ 306.
67 R Dworkin, Law's Empire (1st edn, Harvard University Press, 1986).
68 Eleftheriadis, (n 3).
69 HLA Hart, The Concept of Law (2nd edn, Clarendon Press, 1994).
70 Barber, *supra*, at 326.
71 Ibid.

This view is unattractive insofar as it insists on pluralism which does not respect the Dworkinian notion of integrity in a legal system.[72] The root of Dworkin's conception of integrity, as formulated in Law's Empire, was consistency in judicial decision-making, both with established decisions and the political principles of the judge's community. In Law's Empire, Dworkin stated that 'judges who accept the interpretative ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community'.[73] It will be argued that any pluralistic conception of the legal supremacy of EU law does not meet this requirement of consistency, and hence does not offer sufficient certainty to EU citizens.

The co-operative relationship described above, however, can be seen not to breach Dworkin's principle if it is interpreted as the openness of a dualist national system to EU law.[74] A similar analysis has been seen in the literature before. Eleftheriadis has criticised MacCormick's[75] Radical Pluralist interpretation of EU law on the same basis. Under MacCormick's theory of Radical Pluralism, in any given situation there are a number of legal systems to choose from, and the lawyer simply decides which to adopt in any given case. It will here be argued that the same analysis can be applied to MacCormick's view, such that Eleftheriadis's conclusion is to be preferred even to this pluralist conception.

Parallel criticism of MacCormick's view

Eleftheriadis argues that this Radical Pluralism collapses into Disjunctive Monism, in which there are two conflicting monisms with two competing hierarchies, either of which the court can endorse in a particular case. On Eleftheriadis's view 'this interpretation of radical pluralism compromises or rejects [political] integrity'.[76] The necessity to make a choice between these two conflicting monisms could mean that the result will be unpredictable for EU citizens. Such unpredictability would offend against the Rule of Law. A natural legal EU person would be unable to plan his or her life, and a commercial entity would be unable to plan its strategy. There would be confusion as to whether these plans should be drawn in line with national or EU law. Even if predictable, the result would be unprincipled, since the result would depend on the judge's subjective choice of which system to apply, without an overarching and coherent set of principles. The problem is exacerbated by the complexity of EU law. As Eleftheriadis has cogently highlighted, 'given that a single case turns on, say, three or four issues of EU law, if there is a choice over each one of them, any court or official may pick and choose and combine the various doctrines … . But then the possibilities multiply exponentially'.[77] Further, these criticisms apply with particular force to the EU legal order because, due to the adoption of a 'precarious'[78] view of European monism in Costa v ENEL,[79] 'what is needed is a legal doctrine that secures the position in the Member State jurisdiction

72 Dworkin, (n 67).
73 Dworkin, (n 67), at 255.
74 Eleftheriadis, (n 3).
75 N MacCormick, Questioning Sovereignty. Law, State and Nation in the European Commonwealth. (Oxford University Press, 1999).
76 Eleftheriadis, (n 3), 374.
77 Eleftheriadis, (n 3), 378.
78 Ibid. 379.
79 Case 6/64 Costa v ENEL [1964] ECR 585.

in the most solid way possible'.[80] This criticism concerns MacCormick's theory, but it may also be seen to extend to Barber's view quoted above.

Does the same criticism apply to Barber's approach?

It is submitted that this criticism of MacCormick's theory can also be seen to apply to Barber's view, since his approach, although claiming to tread a path between MacCormick's two stark choices, still recognises distinct systems with inconsistent rules of recognition. Barber seeks to differentiate his view from that of MacCormick, referring to the vague notion of 'overlap'[81] between legal systems, and arguing that the Rule of Law is not breached where there is no 'crisis'[82] in the form of conflict between national courts and the Court of Justice. Even if this distinction can be seen as one of substance, however, it is difficult to see how Barber's view, thus distinguished, meets the objection outlined above. Even if there is no crisis or conflict between national courts and the Court of Justice, there is no way EU citizens, in a pluralist (at least in Barber's sense) conception of the EU legal order, can plan their lives. On Barber's view there are still inconsistent rules of recognition, and there is therefore still uncertainty about which will be followed. There is no guarantee that national courts will apply the national law over EU law, or *vice versa*, when asked to consider the problem. The unpredictability is no worse in a situation in which the issue comes to a head in litigation. Barber's view, insofar as it insists on a pluralist system containing *inconsistent* rules of recognition, must fall at the same hurdle as MacCormick's.

A better approach – deferential dualism

It is thus submitted that Eleftheriadis's notion of 'softened dualism'[83] is a more attractive conceptual basis on which to ground this co-operation. On this view, the effect of EU law in the domestic system is explained through the domestic sources, but the national legal system shows a readiness to delegate to the EU legal order within the appropriate domains. This is why the dualism is 'softened' and is merely one example of deference of the national system to international legal orders. Another is, for example, the rules of English law regarding the illegality of foreign contracts.[84] It is submitted that this avoids what Barber himself characterises as 'ambiguity'.[85] The 'incentive to strive to respect the tradition of the other' should thus be understood within a framework of 'mutual compatible dualism' in which the co-operation results because 'both sides ... are so deferential … that they relate to each other very much like the way in which courts or jurisdictions relate in a single order',[86] rather than within MacCormick's theory of pluralism. The cases highlighted above, particularly the Belgian EAW judgment and the German Labour Court's dialogue with the CJEU, seem better to support the view of this co-operation as one of softened dualism.

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80 Eleftheriadis, (n 3), 379.
81 Barber, (n 66), 326.
82 Ibid. 327.
83 Eleftheriadis, (n 3).
84 Eleftheriadis, (n 3).
85 Barber, (n 66).
86 Eleftheriadis, (n 3).

Conclusion

What does this conceptual argument mean for our view of how the case law described above has developed? The Belgian court's use of the preliminary ruling procedure described above, and its willingness to follow the CJEU's conclusions, coupled with the leeway afforded to the Belgian Constitutional Tribunal by the Court of Justice, can be seen as an example of each system deferring to the other. It can also be seen as an instance of national courts avoiding the difficulties inherent in the CJEU's claim to monism by rationalising their interaction with Luxembourg on a dualist basis. A similar view, it is suggested, can be taken of the German Labour Court's dialogue with the Court of Justice over *Bötel*. This latter case in particular is a good example of a national court conceptualising itself not as a lower order in a hierarchical relationship, but having the confidence to use the Article 267 channel of communication to object to certain developments in EU jurisprudence. Eleftheriadis argues for co-operation in the context of dualism, and it has been suggested in this article that, particularly the Belgian Constitutional Tribunal's response to the EAW saga and the German Labour Court's dialogue with the CJEU. If these instances can indeed be seen as the beginning of a wider trend then this should be applauded, since this dualist halfway house has greater normative force. It seems that pluralism was, indeed, an 'unfortunate distraction'.[87]

87 Ibid. 384.

'Reverse Closed Evidence' Procedures, Deportation, and Justice

Huang Jiahui[1]

In 2006, the UK government decided it would deport Algerian and Jordanian nationals deemed to pose a threat to national security, despite the undisputedly widespread practice of torture in the prisons of these countries. In order to discharge its Article 3 obligations under the European Convention on Human Rights, the government sought and obtained diplomatic assurances from each country guaranteeing that the deportees would not be subject to torture.

In April 2007, one of seven individuals being deported by the Home Secretary to Algeria informed the Special Immigration Appeals Commission (SIAC) that he would be challenging this decision with evidence that the diplomatic assurances would not be honoured. Because the source of this evidence was anxious not to have its contents or his identity revealed for fear of reprisals, no doubt because he or his family was still in Algeria, the appellant applied for an absolute and irreversible order by SIAC to prohibit the evidence and its source ever being disclosed to anyone other than the parties to the appeal (the appellant and the Home Secretary).

Turning down the application in *W (Algeria) v Home Secretary*, SIAC explained (per Mitting J) that since the Home Secretary, having seen the evidence, might feel it necessary on the basis of 'national security and in securing the international relations of the United Kingdom'[2] to take it up with the Algerian authorities or to disclose it to a third country, SIAC had neither the power nor the legitimacy to make such an order.[3] On appeal,[4] it became common ground that SIAC did indeed have the statutory power, but the Court of Appeal agreed with counsel for the Home Secretary that such an order would nevertheless be inappropriate for the reasons previously given by SIAC.

The Supreme Court[5] took a different view of these arguments, and decided unanimously that the risk of diplomatic embarrassment was neither a compelling nor sufficient reason to deny the appellant the opportunity to protect his Article 3 rights. Even though long-standing principles of open justice would be violated, the interests of justice ultimately demanded the appeal to be allowed. In particular, their Lordships held that the Home Secretary would be able to hold up the court order as an explanation for her non-disclosure, and that she would still be able to effectively contest the admissibility or confidentiality of the closed evidence to a significant extent.

There are two pressing issues at the core of this landmark case – diplomatic assurances and closed material procedures. Their intersection here has produced the need for a novel ap-

1 Magdalen College.
2 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [19].
3 Ibid. [20].
4 Ibid.
5 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610.

proach due to the unique balancing exercise required. The result reached, however, has not been without controversy. Somewhat regrettably, their Lordships' opinions were cautiously and conservatively worded, which has perhaps detracted in part from the powerful and compelling reasons underlying them. A close analysis will show that the concerns of the Court of Appeal, the government, and some commentators are overstated. It is submitted that the decision of the Supreme Court better reflects in all the circumstances the demands of justice, and in the current climate, the procedure it has approved should be here to stay.

Assurances

In *RB (Algeria) v Home Secretary,*[6] the Supreme Court accepted that diplomatic assurances could satisfy the government's Article 3 obligations.[7] In *Saadi v Italy,*[8] the European Court of Human Rights (ECtHR) also accepted that assurances were capable of being relied upon, on a case-by-case basis.[9] It was for this reason that one appellant sought to introduce evidence targeted specifically at the effectiveness of these assurances.

Whether SIAC has satisfactorily assessed the reliability of the assurances received by the UK remains in question. On the one hand, SIAC has in its lengthy judgments undertaken to consider the terms of the assurances on their own merits without constitutional deference.[10] Indeed, when it fell to SIAC to consider the assurance obtained from Libya, it was deemed inadequate to protect against torture and therefore insufficient to allow for the deportation of Libyans.[11] This decision is, however, in reality unremarkable: the safety of Libyan deportees was to be monitored by the Gaddafi Foundation, run by one of Colonel Gaddafi's sons.[12] The failure of the Libyan assurance, therefore, cannot show that SIAC arrives at its conclusions by an adequate judgment process.

In fact, when considering the human rights records of the countries in question, it is extraordinary that SIAC accepted at face value the government's claim that the diplomatic pressure brought to bear upon these countries by giving the assurances was sufficient to guarantee the safety of the deportees. For one, the Algerian assurance consisted not of an official memorandum of understanding, but a series of letters between Tony Blair and the Algerian President[13] in which torture was hinted at only in the coyest of terms. Since Algeria has undoubtedly ignored its commitment to the UN Convention Against Torture on multiple occasions despite its explicit prohibition against torture, it is not clear how an assurance which made no clear statement on what standard of care Algeria had agreed to could be capable of holding it to better account. Such an agreement was no doubt what the ECtHR was mindful of in demanding a case-by-case scrutiny of diplomatic assurances.[14]

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6 *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2010] 2 A.C. 110.

7 *RB (Algeria)* was disapproved by the European Court of Human Rights, but on a different point.

8 *Saadi v Italy* [2008] (Application no. 37201/06).

9 J. Tooze, 'Deportation with assurances: the approach of the UK courts' [2010] PL 362, at p. 377.

10 Ibid. 378, citing *Y v Secretary of State for the Home Department*, SIAC, 24 August 2006 (unreported).

11 Ibid. 381-2, citing *DD and AS v Secretary of State for the Home Department*, SIAC, 27 April 2007 (unreported).

12 E. Metcalfe, 'The False Promises of Assurances against Torture' (2009) 6 JUSTICE Journal 63, at p. 80.

13 Ibid. 77.

14 *Saadi v Italy* [2008] (Application no. 37201/06), at [148].

Furthermore, cases like *Agiza v Sweden*[15] illustrate the shortcomings of these assurances in practice: despite having made similar provisions for monitoring in deporting a detainee to Egypt, the Swedish authorities only became aware of his torture three months after it had begun, based on reports from other organisations. However, Egypt denied those allegations, took no action, and continued to incarcerate the detainee.[16] The lack of truly effective monitoring procedures and any enforcement mechanism that rendered the Egyptian assurance nugatory are precisely the same defects that exist in the series of assurances obtained by the UK government. In particular, if any allegation of torture can be denied, and any state that regularly practises torture will not have its denials believed, then it does not matter what diplomatic pressure can be brought to bear, because a false allegation would be just as unverifiable as an untruthful denial.

The better view is not that the government has failed to provide better assurances in light of *Aziga*, which occurred in 2003, but that these problems are not realistically resoluble by any diplomatic assurance. Despite what may be the valiant efforts of the Foreign Office to deliver on the promise of the assurance scheme, the fact that the assurance obtained is neither dependable in its language nor effective in its operation must mean that the government can never be highly confident that no torture will occur. The improbability of either the Supreme Court or the ECtHR accepting this state of affairs and reversing their current position on diplomatic assurances, however, means that the compromise in *W (Algeria)* must continue to bear the burden of ensuring that detainees are not deported into torture chambers for a while to come.

Closed material procedures

Court orders guaranteeing the confidentiality of evidence are not novel in public law. SIAC, empowered by the Special Immigration Appeals Act 1997, began in 2003[17] to operate closed material procedures for the introduction of evidence deemed too sensitive to be disclosed in open court by the government. The appellant, along with his lawyer, is excluded from hearing this evidence, but has the benefit of a security-cleared special advocate who acts on his behalf (but cannot communicate with him) in the closed material procedure. The practice has come under judicial review in a long line of cases, culminating with *Tariq v Home Office*[18] and *Al Rawi v Security Service,*[19] a pair of cases resulting in seemingly contradictory judgments, handed down on the same day in July 2011.

The Supreme Court concluded that where no express Parliamentary authorisation exists, as in *Al Rawi*, the common law principles of open justice and the equality of arms prohibit the courts from establishing a closed material procedure.[20] Conversely, since provisions in the Employment Tribunals Act 1996[21] authorised the closed material procedure in *Tariq*, its per-

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15 *Agiza v Sweden*, UN Committee Against Torture, 20 May 2005.

16 E. Metcalfe, 'The False Promises of Assurances against Torture' (2009) 6 JUSTICE Journal 63, at pp. 72-3.

17 Due to the Special Immigration Appeals Commission (Procedure) Rules 2003, which implemented the authorised closed material procedures in the 1997 Act.

18 *Tariq v Home Office* [2011] UKSC 35; [2011] 3 WLR 322.

19 *Al Rawi v Security Service* [2011] UKSC 34; [2011] 3 WLR 388.

20 Ibid. [72].

21 Implemented by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004.

missibility depended only on the Article 6 right to a fair trial, which, with the exception of a strong dissent from Lord Kerr, their Lordships found had not been violated.[22]

The decision in *W (Algeria)* is different because it appears to turn the closed material procedure, intended to allow the government to protect the public interest, upon its creators. Indeed, the Court of Appeal entitled it 'the 'reverse closed evidence' issue.' To many, this may have the ring of poetic justice – so much so that the Supreme Court has taken pains to emphasise that it is not attempting to 'level the playing field' between the Home Secretary and those she wishes to deport.[23] Obviously, two wrongs do not make a right, and the solution to secretive justice is not more secretive justice. In addition, the public responsibilities of the Home Secretary put her in a position incomparable to that of the appellants.[24]

On closer analysis, it becomes clear that this concern is unwarranted because crucial differences between closed material procedures and 'reverse closed evidence' destroy their apparent symmetry. In the former, only the Home Secretary and the special advocate participate in the application to admit the closed evidence; the appellant cannot effectively contest the Home Secretary's arguments. More importantly, the closed evidence procedure itself is held without the appellant present or even capable of instructing his special advocate. In the latter, both the Home Secretary and her legal representatives have full access to the evidence at every point where it is put before the court.[25]

But what exactly is at stake? Closed material procedures fundamentally concern the equality of arms – which explains why *Tariq* has been so criticised;[26] reverse closed evidence concerns open justice. These are two distinct issues. Limitations on open justice were accepted when perpetual super-injunctions could be obtained on solely commercial grounds, often without the knowledge or oversight of the senior judiciary[27] – and much longer ago, with the profusion of closed hearings in other areas of the law. These procedures can be much more insidious than closed evidence, because they aim to conceal the very fact that a matter has been heard and ruled upon in court, not just its substantive content. Although open justice is firmly rooted in the common law, it is far less central to justice than the principle of the equality of arms, which concerns not the public or the media, but the ability of the parties in a case themselves to effectively challenge the evidence against them. Whereas the lack of open justice prevents the courts from being held to account over whether justice is done, the lack of the equality of arms makes it all too certain that justice will not be done. As Lord Kerr observed in *Al Rawi*:

> The central fallacy of the argument… lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. […] Evidence which has been insulated from

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22 Ibid. [68].

23 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610, at [22].

24 Ibid.

25 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [26].

26 See, for example, M. Chamberlain, '*Al-Rawi v Security Service* and *Home Office v Tariq*: case comment' (2011) 30 CJQ 360.

27 A. Zuckerman, 'Super injunctions - curiosity-suppressant orders undermine the rule of law' (2010) 29 CJQ 131, at pp. 136; 137.

> challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial.[28]

Indeed, special advocates themselves are unanimous in deploring the patent unfairness of the trials in which they take part.[29] Meanwhile, Article 6(1) of the ECHR explicitly permits open justice to be compromised where a compelling reason exists, but gives no grounds for compromising the equality of arms.[30] Therefore, even though *Tariq* is an unhappy decision (and may well be wrong), it is not analogous to the 'reverse closed evidence' procedure approved in *W (Algeria)*. The trenchant criticisms made of the former lose much of their force when applied to the latter, which must now be addressed on its own terms.

The ticking time bomb scenario

The ticking time bomb scenario is a thought experiment that supposes a terrorist, having planted a bomb at an undisclosed location in a major city, has now been captured and is being interrogated. If the bomb will explode in two hours, and no other leads are available, is it permissible to torture him? Is it permissible to torture his wife and children?[31] The dilemma is often used as philosophical blackmail for the justification of torture. In the immediate response to *W (Algeria)*, a modified ticking time bomb problem has been cited in criticism of the Supreme Court. Henry Oliver, for example, questions whether it can ever be justified to permit evidence to be made secret when it could potentially expose information about terrorist activity abroad: 'should we prevent the torture of one man, if that means we cannot then warn a country about the potential death and injury of hundreds?'[32] The Court of Appeal expressed a similar concern, concluding that SIAC should never be able to tie its hands regarding the confidentiality of evidence because of this possibility.[33]

Just like the ticking time bomb scenario, the question posed here is meant to draw the reader towards an inescapable moral conclusion. But just like the ticking time bomb scenario, which makes all sorts of assumptions about the way torture works and the likelihood of the circumstances, this challenge fails on account of the unwarranted assumptions it conceals. To begin with, since the secret evidence admitted is given with the view to discredit the diplomatic assurances secured by the government, it presumably involves proof that torture remains

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28 *Al Rawi v Security Service* [2011] UKSC 34; [2011] 3 WLR 388, at [93].

29 'Response to Consultation from Special Advocates', Justice and Security Green Paper, 16 December 2011, at p. 2 (accessible at http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/09_Special%20Advocates.pdf).

30 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

31 See, for example, American judge Richard Posner, who answers a firm 'yes' to the first question (http://www.powells.com/review/2002_09_05.html); and Bruce Anderson, who answers 'yes' even to the second (http://www.independent.co.uk/opinion/commentators/bruce-anderson/bruce-anderson-we-not-only-have-a-right-to-use-torture-we-have-a-duty-1899555.html).

32 H. Oliver, 'What happened to open justice? Further analysis on torture evidence secrecy decision', 1COR UK Human Rights Blog (accessible at http://ukhumanrightsblog.com/2012/03/09/what-happened-to-open-justice-further-analysis-on-torture-evidence-secrecy-decision).

33 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [24].

likely even in the face of promises not to torture. The chance that such evidence will uncover a hitherto unknown terrorist conspiracy is slim to say the least.

One of few imaginable scenarios is if the secret evidence would hint at some further terrorist plot suspected by the Algerian authorities, or the possibility that the true mastermind was still at large, and in this way explain why the Algerian authorities would choose to ignore the torture ban – a claim which the Home Secretary realises is corroborated by British intelligence. In such a case, surely the Algerians themselves can be trusted to take all action necessary, including informing other governments, if they have been trusted to honour their diplomatic assurances.

The Court of Appeal suggests, in the same vein, that material 'innocuous when seen in isolation [could] become of vital diplomatic importance once combined with material in the possession of the Secretary of State.'[34] Presumably, the scenario the court had in mind was that the secret evidence aimed to show that diplomatic assurances have been contravened in the past – which might incidentally reveal details about certain individuals, for example, that happened to fill in crucial missing elements in the government's intelligence. But these remote contingencies should not suffice to form the basis for exposing suspects to a real risk of torture.

Those who employ this modified ticking time bomb example also make a second flawed assumption that the Home Secretary's hands will be tied if she is perpetually barred from disclosing the evidence that she now possesses. It is perhaps all too easy from the use of the metonym 'the Home Secretary' in describing these proceedings to gain the false impression that the minister is alone in being saddled with the responsibility of dealing with any new information uncovered. The Home Secretary is represented and supported by a substantial team of lawyers, security experts, and civil servants when she goes to court – many of whom are sufficiently security cleared to have been responsible for producing and managing the closed evidence that the Home Secretary herself often relies upon. By virtue of the legal personality of the Home Secretary[35] the new evidence will no doubt be known to them. She will therefore have plenty of assistance to act upon the information obtained – and to craft a unilateral security response, if necessary, to obviate the threats uncovered in the above scenarios.

Furthermore, given that the secret evidence being produced will concern the likelihood of torture, any information the Home Office distils from its details regarding any planned terrorist atrocity will operate at one remove from the actual material given and the identity of the witness. It will often be possible for the intelligence services, when providing information to a third country or even to the Algerian authorities themselves, to divulge only the conclusions they have drawn from the secret evidence as opposed to the original evidence. Although this will minimise the impact of the non-disclosure order, there is conceivably a situation in which even this approach risked breaching the order. Lord Brown suggested, in such a case, that the Home Secretary could also seek a partial waiver from the witness and

34 Ibid.
35 See, for example, *In re M.* (*M v Home Office*) [1994] 1 A.C. 377, pp. 425-6.

the appellant through SIAC that would enable sufficient information to be passed on such that the national security concern is satisfied.[36]

Finally, the ticking time bomb risks belittling the strength of the Article 3 commitment. Unlike Articles 5, 6, or 10, Article 3 sets out the right not to be tortured in the most absolute terms, and contains no qualifications or conditions.[37] The Article 15 provision for governments to explicitly derogate from Convention rights also excludes derogations from Article 3. The UK government's argument that a balancing exercise needs to be conducted between the risk of torture and the danger posed by the deportee to national security has, for this reason, been resoundingly rejected by the ECtHR in *Saadi*:

> 'Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof… where the person is considered to represent a serious danger to the community.'[38]

Whether one adopts the ECtHR approach, or the more conservative statement by Lord Brown,[39] the fact of the matter is that an uncertain (but clearly credible) threat of torture is being weighed against at least an equally uncertain possibility that the secret evidence will have a drastic effect on the UK's anti-terrorism efforts. It does not appear open to a court of law, faced with a balancing exercise of this nature, to prefer deference to executive discretion over a commitment to the rule of law. It is submitted that the only institution entitled to reach such a conclusion is Parliament itself.

Diplomatic embarrassment

The Home Secretary's fear of 'diplomatic embarrassment' appears to have weighed heavily upon commentators and the Court of Appeal. The latter concluded that it might become known to a friendly state that the Home Secretary was aware of a terrorist threat within its borders and failed to inform it due to a non-disclosure order, which would have such serious repercussions upon the UK's diplomatic standing with that state, that allowing such an order to be made in the first place would be unimaginable.[40] The Supreme Court was not impressed by this argument. Somewhat unfortunately, Lord Brown chose to make in his response the riposte that the court order by SIAC would surely provide 'a substantial defence to any diplomatic complaint.'[41] Rosalind English points out that, notwithstanding the vague notion of

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36 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610, at [21]. It might be pointed out that his Lordship goes on to say that if such a waiver proves unobtainable, and this response is unreasonable in SIAC's view, that SIAC can then shut out the secret evidence or regard it with additional scepticism. With respect, this does not appear to logically follow.

37 Its complete text reads, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

38 *Saadi v Italy* [2008] (Application no. 37201/06), at [139].

39 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610, at [18].

40 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [25].

41 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610, at [14].

a 'diplomatic defence', any explanation of this kind would appear puerile if the inability to share information ever resulted in a successful large-scale terrorist attack.[42]

Once again, this challenge must be understood through the logical arguments it employs, and not simply by the emotional response it aims to provoke. The fact that a terrorist attack in another country which the Home Secretary could not warn in advance might kill dozens or hundreds is immaterial. This is because if SIAC and the government refuse to accept the limitations demanded by the witness proposing to give the secret evidence, there would presumably be no potential warning to speak of, since the Home Secretary would then never see the material which would inform her of the threat. The argument being made here, in reality, is the claim that the Home Secretary or the UK government would be in a better position not knowing anything at all, as opposed to knowing something but being inhibited from communicating it directly to the affected countries. The horrific scale of the terrorist attack is simply the rhetorical window-dressing that obfuscates the true meaning of this cynical argument. The Home Secretary, as a politician and diplomat, may be entitled to make such a judgment. But the judicial branch of government exists precisely in order to curtail the extent to which concerns of this nature are able to compromise fundamental rights.

The persuasiveness of this argument is further reduced by the fact that, as discussed above, there exists in reality a range of ways in which the Home Secretary could act upon any information she has discerned from the secret evidence – including by conveying the gist of her discoveries to the affected third country. If, happily, she is successful in doing so, then not only will the terrorist attack have been thwarted, but there will also be no diplomatic embarrassment. Even if she is not, the government will at least have had a fighting chance at preventing that attack on account of the secret evidence, and possibly also the opportunity to prevent further attacks.

Admittedly, what the courts term 'diplomatic embarrassment' may, further down the line, result in real human costs as a result of a cooling of intelligence relations. But surely one of the duties of the Home Secretary is to ensure that diplomatic embarrassment does not in fact occur. Countries inevitably keep far greater secrets than this; with an irrevocable non-disclosure order and a security classification, this secret will no doubt be given similar protection. Any mishaps which occur outside the ambit of the law can only be speculative. Regrettably, these concerns should not take precedence in a court of law over both the fundamental rights of the deportees in question *and* the possibility of being informed of an imminent terrorist attack.

It may finally be argued that judges should not aim to change the foreign policy decided by the government. Indeed they should not. But when the pursuit of that foreign policy implicates the fundamental rights of those for whose safety the government should be responsible, it falls to the judiciary to ensure that those rights remain protected. In fact, the principle – expressed more accurately, that judges should not *make* foreign policy – would implore judges to concern themselves primarily with justice and the law, and not give undue weight to the foreign policy considerations of the Home Secretary. If the demands of foreign policy prove more important, then it is the prerogative of Parliament to squarely confront what it intends

42 R. English, 'Secrecy for torture evidence – analysis', 1COR UK Human Rights Blog (accessible at http://ukhumanrightsblog.com/2012/03/08/secrecy-for-torture-evidence-analysis).

to do,[43] by changing the law and reversing the decision of the courts. This principle that the courts say what the law *is*, and Parliament says what the law *is to be*, has existed ever since (and even before) the infamous case of *Burmah Oil v Lord-Advocate*[44] and the subsequent War Damage Act 1965.

A novel approach?

In sum, it is clear that throughout much of the debate on the 'reverse closed evidence' issue, the wrong questions have been asked because an inappropriate contrast was being drawn. The right comparison should be between the scenario in which the 'reverse closed evidence' proceedings are not permitted, and the one in which they are; not between the case where the Home Secretary is able to disclose the evidence she receives and the one in which she is not. Quite simply, that question of disclosure is not a relevant distinction in this analysis since, absent the ability of SIAC to order evidence to be kept confidential, there would be no information to speak of, let alone disclose.

The real debate, then, is not one between the risk of torture and the risk of suffering terrorist atrocities, but between the risk of torture and the possibility of embarrassment and diplomatic repercussions for the Home Secretary. The latter national security consideration is not devoid of merit, but is clearly much less pressing than the former. It is disappointing to see that even the Court of Appeal, presented with this analysis by counsel, chose to dismiss it out of hand.[45] The Supreme Court's response may appear somewhat lacklustre, but ultimately sets the law in the right direction with the right sentiment.

W (Algeria) is notable for the interesting precedent it establishes for the use of 'reverse closed evidence', but also perhaps for the beginning of a new line of cases. Neither the Court of Appeal nor the Supreme Court cited any cases in their decisions,[46] and it is clear that, unlike in an ordinary case of judicial review, in which the governing principles are largely cut and dried, no obvious test is available. The balancing exercise thus tends to be – and has been – vague and imprecise, with the very factors to be balanced and the balance to be struck being means by which a discretionary judgment can be imposed before the exercise has even begun.

By the time the issue reached the Court of Appeal it had been confined to whether it was appropriate for SIAC to make such an order, and not whether it had the power to do so,[47] but it is not clear what was understood by this question. Revealingly, Sir David Keene, giving the sole judgment of the Court of Appeal, concluded that such an order 'falls outside the scope of SIAC's powers to give directions, broad though those powers are.'[48] This *ultra vires* conception is, as Lord Brown suggests,[49] not greatly helpful in these particular circumstances in light of the distinction drawn by the court itself and, with respect, is best forgotten.

43 The exhortation of Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33.

44 *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75.

45 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [25].

46 *W (Algeria) v Secretary of State for the Home Department* [2012] 2 WLR 610, at p. 611; see also A. Macdonald, 'Case Comment: Fairness versus diplomacy: protecting witnesses in national security cases, *W (Algeria) v SSHD* [2012] UKSC 8', Olswang and Matrix UKSC Blog.

47 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [20].

48 *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898, at [27].

49 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610, at [9].

The Supreme Court, meanwhile, in asking itself whether other considerations could 'outweigh' the chance of arriving at the right decision in relation to article 3, may be criticised for not being more precise in explaining exactly how the article 3 right, complicated as it were by the introduction of the element of risk, should be considered. In light of *Saadi v Italy*, it is not clear whether the ECtHR will be entirely satisfied with this approach.

However, it would also be a mistake to conclude that the influence of *W (Algeria)* is immediately far-reaching. For one, in concluding his opinion, Lord Dyson specifically addressed the nature of the claim as being to an absolute Convention right – if the right concerned were not under Articles 2 or 3, the 'countervailing considerations relied on by the Secretary of State' would prevail.[50] Although, as demonstrated above, these countervailing considerations were somewhat feeble, it is indeed unlikely that any case involving an alleged Article 8 or 10 violation would require such sensitive treatment. But it is submitted that the more salient reason comes from the balancing exercise that needs to be undertaken between open justice and the deportee's rights, independent of any foreign policy stake. The crucial difference may lie in the conception of torture as being inherently inimical to the interests of justice[51] – unlike open justice, which is a much more malleable concept, and one whose absence tends to be, but is not inevitably, counter-productive to justice being served.

Lord Dyson and Lord Brown have also taken care in their opinions to set out criteria for the deployment of these practices. In exercising its power to order 'reverse closed evidence' procedures, SIAC should be satisfied to a high degree with the apparent reliability and relevance of the secret witness's evidence, and have no doubt that the witness reasonably fears reprisals.[52] Before making the order, SIAC should also confidentially review the proposed evidence and how the appellant came to know of it, and explore the possibility of giving the evidence in the normal way, anonymously in chambers but without an irrevocable non-disclosure order.[53] There is no doubt that the 'reverse closed evidence' procedures are meant to be granted only in the most compelling of circumstances, and do not constitute a new norm for the conduct of deportation proceedings.

The way forward

As the Supreme Court is well aware,[54] secret justice is rarely justified. It can only ever become legitimate as the inevitable means of avoiding a greater injustice. This is an argument that must be made with utmost vigilance, because an argument based on the lesser of two evils may well be presenting a false dichotomy – as exemplified by the modified ticking time bomb earlier. This makes it extremely important that even in a case where such a procedure has been initiated, the judgment of the court must to the greatest extent possible state the reasons for which the decision was made. It may in fact be appropriate, under these circumstances, to appoint independent assessors to monitor the extent to which each 'reverse closed evidence' procedure serves the interests of justice (possibly drawn from the existing security-

50 *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8; [2012] 2 WLR 610, at [38].

51 See, for example, *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 A.C. 221, Lord Bingham at [11].

52 Ibid. [34].

53 Ibid. [20].

54 Ibid. [35].

cleared list of special advocates)[55] – akin to the independent reviewer appointed to assess the effectiveness of closed material procedures.[56]

National security, closed material procedures, and diplomatic assurances are areas of the law dominated by compromises and second-best solutions. That their intersection in *W (Algeria)* has resulted in a complicated and conflicted balancing exercise is hardly surprising. In a way, as Alison Macdonald points out,[57] the Home Secretary's quandary is one of her own making, in her decision to deport detainees to countries where she knows torture is commonplace. Given the demonstrably dubious reliability of diplomatic assurances, it is not difficult to understand why the Supreme Court feels the need to permit the introduction of the 'reverse closed evidence' procedure. So long as the courts and Parliament fail to scrutinise the questionable practices and disingenuous arguments invoked in the name of national security, it will be here to stay. In the context of diplomatic assurances, the principles of justice demand nothing less.

55 It has been noted (see *fn* 56) that the majority of the current 69 security-cleared special advocates lack experience because they have appeared in only one closed material procedure or none at all. Perhaps appointing some of them as one of two independent assessors in these cases would help give them the requisite exposure to closed procedures in general.

56 D. Anderson, 'Supplementary Memorandum for the Joint Committee', Parliamentary Joint Committee on Human Rights Justice and Security Green Paper Cm 8194 (accessible at http://terrorismlegislationreviewer.independent.gov.uk/publications/suppl-memo-jchr?view=Binary).

57 A. Macdonald, 'Case Comment: Fairness versus diplomacy: protecting witnesses in national security cases, *W (Algeria) v SSHD* [2012] UKSC 8', Olswang and Matrix UKSC Blog.