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Lijie Song and Jiufeng Chang
Southampton Student Law Review, Editors-in-Chief
May 2018

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Foreword

I am very happy to be able to offer a few opening remarks to this latest edition of the *Southampton Student Law Review* – which continues its crucial role of providing a forum for our students and former students to share a wide range of legal scholarship. As ever, the content of this issue is of a high quality and reflects a number of the most pressing legal issues at home and abroad. On the domestic front, these include the UK's exit from the European Union on a populist wave that will see the restoration of our beloved 'sovereignty' albeit at the expense of more tangible benefits. They include also a housing crisis driven by government policies that fetishize home ownership for the wealthier middle classes at the expense of secure rental property for those unable or unwilling to buy. On the international scene, we see nation states struggling to emerge from war and internal strife and to come to terms with wrongs commitment during those times.

This volume begins then in Liberia: a country distinguished in world history by its foundation by freed African American slaves, and more recently by two bloody and disastrous civil wars driven by tribal and ethnic division. Jun Wei Quah delivers the fullest article of this volume with a thoughtful analysis of transitional justice mechanisms there, and the competing imperatives of restoration and peace on the one hand and retribution and punishment for past crimes on the other. The author offers a provocative argument that urges the finding of space for both internationalist values such as human rights and the rule of law and at the same time also for traditional restorative and reconciliatory mechanisms that prioritise peace over fault-finding. Jun Wei Quah's argument promotes social justice for those most vulnerable and most marginalised in Liberian society: the horrifically high numbers of victims of sexual violence in the two civil wars and the reintegration of brutalised former child soldiers.

Next, Irinna Vavaletskou in a short essay considers the relationship between the concept of national sovereignty and the supremacy of the European Court of Justice. Vavaletskou charts the acceptance in a number of European Union states of the Court's supremacy on the eve of the UK's exit from the EU. She suggests that, contrary to the expressions of resentment by little Britons such as Michael Gove about the existence of a layer of legal authority higher than Parliament and not removable by the British voting public, the history of the EU is in fact one in which satisfactory compromise between national and supra-national authority has largely been reached.

Thereafter follow three incisive and timely case notes. The first of these, by Markos Phillips, considers the Supreme Court's eminently sensible decision that Rangers Football Club should pay income tax on their players' earnings even though these wages were paid first into a trust (a device, as everyone knows, exists primarily to avoid paying tax). Phillips is not convinced by the Court's 'purposive' approach to identifying Parliamentary intention in their ruling, nor by the Court's straying into the realm of morals when they named Rangers' scheme pejoratively as 'tax avoidance'. For Phillips, the case 'is not about fairness or harms, [but rather] about

whether payments to an EBT are considered earnings for the purposes of ICTA/ITEPA.' One might suggest in reply that perhaps the issue at the heart of the case is necessarily both a legal and a moral one, but that is a debate for another time.

Second, Tantuvardhn Sabharinathan analyses a ruling by the Court of Chancery that the format of a TV show may be the subject of copyright, albeit not in the instant case. As a reluctant co-viewer of the BBC's The Great British Bake Off and its move over to Channel 4 (my wife being its primary watcher in our house) with its unique and defining features (a tent in the grounds of a country estate, bad puns and a set of contestants contractually obliged at all times to be nice to each other), I find myself in agreement with the judge's view that even trivial game shows are entitled to copyright protection in the UK *if* they can distinguish themselves as suitably unique.

Finally, Paul Musa offers some reflections on the Supreme Court's ruling that Article 8 of the ECHR cannot be relied upon by a tenant on an Assured Shorthold Tenancy (AST – the standard form of tenancy in the private sector in England and Wales) who seeks to challenge the proportionality of a Landlord's exercise of his legal right to repossess his property. Musa takes a balanced approach to reading this ruling, which is for many people represents something of a missed opportunity to soften some of the hardest and cruellest edges of Tory housing policy. Musa concludes ultimately that since Parliament's intention was that repossession under s.21(4) of the Housing Act 1988 would exclude considerations of proportionality, the Supreme Court were right not to favour the tenant's Article 8 submission.

In sum then, this is a fine collection of essays that provides a good example of some of the legal research and writing being carried out by some of our current and former students. The contributors' conclusions may be debated, but I have been impressed by the quality of scholarship on display here. It only remains for me to pay tribute to the hard work and dedication of the journal's editors Lijie Song and Jiufeng Chang in bringing these papers together, and I hope others enjoy them as much as I have.

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May 2018

Peace in our time? Averting Transitional Justice's Mid-life Crisis in Liberia

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Abstract

Transitional justice's goal, broadly construed, is to ensure accountability and redress for victims in post-conflict societies devastated and divided at its core by systemic human rights violations.

Yet, the noble aims of transitional justice and its attendant mechanisms are almost always hamstrung by context-insensitivity, disenchantment with the transitional process, and the propensity of transitional mechanisms to be manipulated for political ends. Left unaddressed, these issues subvert the transitional process and eventually defeat transitional justice mechanisms, relegating transitional justice to a mere cosmetic rather than substantial, process post-conflict.

This article comparatively analyses the application of transitional justice mechanisms in, *inter alia*, Liberia and South Africa, highlights where and why transitional processes often wane, cautions against the boilerplate application of transitional justice mechanisms, and proposes a practical framework to avoid transitional justice's disposition to a mid-life crisis from which it has great difficulty bouncing back from.

Introduction

This article begins by exploring the causes of societal turmoil and instability in post-conflict Liberia and highlights tensions left unaddressed by national and international institutions post-conflict.

A comparative analysis of the application of transitional justice mechanisms in similar post-conflict societies is then carried out to ascertain whether and how those experiences can inform a more nuanced and efficacious approach to the transitional process.

This is followed by an analysis of Liberian transitional justice mechanisms and concludes with proposing a practical framework which seeks to safeguard transitional justice's effectiveness and relevancy in post-conflict societies going forward. This assessment is crucial in ensuring that transitional justice retains its role as a substantive and crucial mechanism employed to steer nations emerging from cataclysmic conflicts to a more optimistic future.

1. *Terra de Liberia*

Founded by emancipated African-Americans ("Americo-Liberians") in 1822, Liberia is Africa's first republic and a founding member of the UN.[1] Despite its distinguished

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[1] Melville Mackenzie, 'Liberia and the League of Nations' (1934) 33 Journal of the Royal African Society 372, 374 – 377; Robin Doak, *Liberia (Countries Around the World)* (Heinemann-Raintree 2012) 22 –

history, Liberia remains plagued by sectarian violence flowing from societal dissension.[2] Section 1 explores the brief history of Liberia, its two civil wars and posits three tensions contributing to societal instability post-conflict. Section 1 will then examine local and international legal responses to the said tensions and identify key challenges which remain unaddressed.

1.1. Historic Tension

Prior to 1822, Liberia was not 'unified' under a central government; each ethnic group was self-governing.[3] Despite the occasional skirmishes, inter-ethnic relations were stable.[4] Yet Liberia was not an egalitarian utopia pre-1822; powerful tribes established brutal top-down tribal hierarchies.[5] However, post-1822, the Americo-Liberian's divide-and-conquer tactics were game changing in the sense that they polarized ethnic groups on an unprecedented scale[6] and triggered the civil wars. The Americo-Liberians behaved as their erstwhile American masters did and hoarded wealth and political power while treating the native Liberians as subhuman and inferior.[7] Unsurprisingly, native Liberians became impoverished and politically excluded in this 'new' Liberia.

A flashpoint was finally reached in 1979,[8] when native Liberian Samuel Doe seized power from the Americo-Liberian political dynasty in a coup d'état.[9] Doe's regime was characterised by wanton killings;[10] dissenters, regardless of ethnicity, were incarcerated, tortured and killed.[11] Doe favoured his tribe, the Krahns, who became the most politically and economically dominant ethnic group.[12] While contemporary scholars are quick to point out Doe's divisive nepotism as being counterproductive to nation building, the gentrified Krahns controvert that Doe's reign was far from the dystopian narrative championed by Ballah et al, with Nmoma asserting Liberian society entered a 'golden age'.[13]

Charles Taylor, of the Gola ethnicity, sparked the first civil war which toppled Doe, cumulating with Doe's brutal public execution. Taylor, much like Doe, favoured his own while persecuting other tribes.[14] Yet Taylor's bloodthirsty regime was welcomed

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26. See also Constitution of Liberia 1847, art 11.

[2] Mary Moran, *Liberia: The Violence of Democracy* (University of Pennsylvania Press 2006) 101 – 123.

[3] Heneryatta Ballah and Clemente Abrokwaa, 'Ethnicity, Politics and Social Conflict: The Quest for Peace in Liberia' (2003) 10 Penn State McNair Journal 52, 56.

[4] Ibid.

[5] Earl Conteh-Morgan and Shireen Kadivar, 'Ethnopolitical Violence in the Liberian Civil War' (1995) 15 Journal of Conflict Studies 30, 31.

[6] Michael Brown, *Nationalism and Ethnic Conflict* (Massachusetts Institute of Technology Press 2001) 269 – 271.

[7] Horatio Bridge, *Journal of an African Cruisier* (Wiley and Putnam 1845) 107.

[8] Ballah and Abrokwaa, 'Ethnicity, Politics and Social Conflict' (n 3) 61.

[9] Abiodun Alao, *The Burden of Collective Goodwill* (Ashgate 1998) 10.

[10] Emmanuel Dolo, *Democracy Versus Dictatorship: The Quest for Freedom and Justice in Africa's Oldest Republic – Liberia* (University Press of America 1996) 56.

[11] Ballah and Abrokwaa, 'Ethnicity, Politics and Social Conflict' (n 3) 62; Ibaad Naas, *A Study in Internal Conflicts: The Liberian Crisis & the West African Peace Initiative* (Fourth Dimension Publishing 2001) 10 – 12.

[12] Alao, *The Burden of Collective Goodwill* (n 9) 15 – 21.

[13] Veronica Nmoma, 'The Civil War and the Refugee Crisis in Liberia' (1997) 17 Journal of Conflict Studies 57, 62.

[14] Emmanuel Aning, 'Gender and Civil War: the Cases of Liberia and Sierra Leone' (1998) 1 Civil Wars 1, 2 – 5.

by some native Liberians who believed that it reduced ethnic conflicts.[15] Peace was brittle and the indignant Krahns forced Taylor into exile following the second civil war, resulting in his incarceration in 2012.[16]

The two ethnically polarising civil wars may be characterised as post-Clausewitzean 'new wars' which focused less on political ideology and more on socio-ethnic tensions.[17] Pursing accountability for human rights abuses *postbellum* raises the first tension between justice and reconciliation. As will be explored, masculine tensions are but part of the wider framework of tensions operating in post-conflict Liberia; the marginalisation of women and children contributed to the second and third tensions.

1.2. Universality of Truth

Liberian women were subject to sexual brutality during and post-conflict;[18] over 80% of women were sexually assaulted.[19] Having been 'tainted' by the enemy, survivors of sexual violence were cast from their tribes and society.[20]

However, this article cautions against painting women as hapless damsels; female conscripts participated as combatants and contributed to sectarian violence during the civil wars.[21] On the other hand, as social actors, Leymah Gbowee and her posse were a steadying influence who eventually secured an undertaking from Taylor to attend peace talks.[22] Nonetheless, the historic and systematic exploitation of women gave impetus to truth-seeking campaigns post-conflict.[23] Bradley contends that establishing the truth via truth commissions for example, cannot replace the value of punishment as a political and societal reaction to rebalance a harmed society.[24] This is the second tension post-conflict.

1.3. Lost generation

Thousands of Liberian children are veterans of the civil wars;[25] most were coerced into combat.[26] Alternatively, there were volunteers seeking to avenge the brutal rapes or murders of their family; some of these children returned to their own villages to pillage

[15] Iryna Marchuk, 'Confronting Blood Diamonds in Sierra Leone: The Trial of Charles Taylor' (2009) 4 Yale Journal of International Affairs 87, 89 – 92.
[16] *Prosecutor v Charles Ghankay Taylor*, Special Court for Sierra Leone, SCSL-03-01-T, Judgment, 18 May 2012.
[17] Donald Snow, *Uncivil Wars: International Security and New Internal Conflicts* (Lynne Rienner 1996) 1 – 3.
[18] Lenart Skof, *Breathing with Luce Irigaray* (Bloomsbury Academic 2013) 192; Julie Ouellet, 'Women and Religion in Liberia's Peace and Reconciliation' (2013) 1 Critical Intersections in Education 12, 13.
[19] Berkley Centre for Religion, Peace, and World Affairs, *Ending Liberia's second civil war: Religious women as peacemakers* (BCRP 2010) 7.
[20] Allison Reid-Cunningham, 'Rape as a Weapon of Genocide' (2008) 3 Genocide Studies and Prevention 279, 281.
[21] Aning, 'Gender and civil war' (n 14) 7 – 9.
[22] Leymah Gbowee, *Mighty be Our Powers* (Beast Books 2013) 192; Theodora-Ismene Gizelis, 'A Country of their Own: Women and Peacebuilding' (2011) 28 Conflict Management and Peace Science 522, 527 – 529.
[23] Peace Medie, 'Fighting Gender-Based Violence: The Women's Movement and the Enforcement of Rape Law in Liberia' (2013) 112 African Affairs 377, 385.
[24] Gerard Bradley, 'Retribution: The Central Aim of Punishment' (2003) 27 Harvard Journal of Law & Public Policy 19, 24 – 27.
[25] Human Rights Watch, *How to Fight, How to Kill: Child Soldiers in Liberia* (HRW 2004) 8.
[26] Ibid, 11.

and kill.[27] By eviscerating the relationships defining them, children are both perpetrators and victims of sectarian violence post-conflict.[28] Having become part of a burgeoning 'lost generation', these children experience deep psychological trauma and lack the opportunities for societal reintegration and education. In such a scenario, is punishment more practical than reintegration in post-conflict societies short on time and resources?

The 'lost generation' dilemma characterises the third tension between profound and pragmatic objectives post-conflict. Do the profound objectives of reconciliation and reintegration constitute the bulk of transitional justice's day-to-day vocabulary? It may be argued that pragmatic objectives, by seeking to re-establish the rule of law and facilitate economic recovery, is the more practical approach a post-conflict nation should elect to take.[29] The question of prioritisation forms the third tension.

What can be gleaned from this timeline is that the displacement of Americo-Liberian hegemony opened the political arena to competing ethnicities. The recurring themes of justice, reconciliation and stability are attended by the inherent tensions between retributive and restorative justice, and truth and reconciliation. Could Liberia's justice system satisfactorily address these three tensions?

1.4. A Vacated Bench

Liberia's judiciary is based on Western legal tradition which entails litigation and a fault-finding process. Western justice, however perfectly conceived, is imperfectly realised in practice. Minow observes that addressing atrocities post-conflict requires avoiding selectivity in prosecution as it invites allegations of victor's justice.[30] Indeed, Schabas argues that trials conducted in lands unaccustomed to Western laws creates connotations of unfairness, brevity and inaptitude.[31]

Justice Breyer of the United States Supreme Court controverts that trials create credible permanent records, engage in a secular method of memorialisation and condemnation of atrocities 'relatable to all'.[32] This article submits that trials risk failure if its capacity for healing is purchased through context-insensitivity or violations of the rule of law.[33] Thus in post-conflict Liberia, trials risk doing *more* damage as the Liberain state holds little to no legitimacy in the eyes of Liberians, who regard themselves as members of a pre-state entity.[34]

Western justice can be argued to evolve from customary laws required to promulgate the machinery of a Westphalian state;[35] from this perspective, imposing customary

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[27] Ibid, 12.
[28] Sam Doe, 'Former Child Soldiers in Liberia' (1998) 12 Relief and Rehabilitation Network 1, 2.
[29] Phil Clark and Zachary Kaufman, *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond* (CUP 2009) 413 – 415.
[30] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press 2000) 30.
[31] William Schabas, 'Genocide Trials and *Gacaca* Courts' (2005) 3 Journal of International Criminal Justice 1, 6 – 9.
[32] Stephen Breyer, 'Crimes against Humanity Nuremburg, 1946' (1996) 71 New York University Law Review 1161, 1162 – 1164.
[33] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers 1997) 195 – 226.
[34] Dolo, *Democracy Versus Dictatorship* (n 10) ch 4; Max Weber, *The Vocation Lectures: 'Science as a Vocation'; 'Politics as a Vocation'* (David Owen and Tracy Strong eds, Hackett Publishing 2004) 180 – 182.
[35] Leo Gross, 'The Peace of Westphalia, 1648 – 1948' (1948) 42 American Journal of International Law

laws of one society onto another predictably broaches legitimacy and confidence issues in the recipient state's society. 'Traditional' societies, however defined, in contrast to 'modern' societies, have their own agendas that should not be reductively linked to modern political aims.[36]

Beyond being culturally abstruse, the Liberian judiciary do not enjoy the people's confidence for four reasons. First, the justice system is shunned because it fails to foster reconciliation, which goes against the traditional Liberian approach towards conflict resolution.[37] Second, the judiciary has a reputation of incompetence and corruptibility;[38] a 2008 Gallup Poll found the judiciary to be the least trusted and least accessible state institution.[39] Third, trials are a drain on time and money, both being scarce commodities in post-conflict Liberia.[40] Fourth, there is a fear of retaliation for taking a case to a public trial as it is seen as a rejection of tradition.[41]

With all due respect, while trials do establish some measure of accountability, Justice Breyer's broad conception of justice falls short of the 'Liberian ideal' and is further hampered the Liberian judiciary's corruptibility, inaccessibility, incomprehensibility and context-insensitivity to the Liberian layman.

Could the International Criminal Court ("ICC") fill this void? After all, crimes against humanity, war crimes and possibly genocide were committed during the Liberian civil wars.[42] Legally, this is impracticable as ICC *post-hoc* jurisdiction only allows the prosecution of crimes committed *after* the enactment of the Rome Statute in July 2002, long after civil wars ended.[43] Policy-wise, although its distance from the location of the crimes can be argued to guarantee security for litigants, being far-removed prevents ICC judgments from contributing substantively and legitimately to post-conflict reconciliation in Liberia.[44] If the Liberian courts are already struggling to fit within Liberia's societal fabric, it is challenging to conceive Hague-dispensed justice as the Liberians' forum of choice.[45]

20, 35 – 39. See also Treaty of Westphalia 1648, art lxiv.

[36] Volker Boege, *Traditional Approaches to Conflict Transformation — Potentials and Limits* (Berghof Research Center for Constructive Conflict Management 2006) 3.

[37] Aaron Weah, 'Hopes and Uncertainties: Liberia's Journey to End Impunity' (2012) 6 International Journal of Transitional Justice 331, 337 – 340.

[38] Medie, 'Fighting Gender-Based Violence' (n 23) 385.

[39] Magali Rheault, *Liberians Give High Marks to Their Government* (Gallup 2008) 1; International Crisis Group, *Liberia: Resurrecting the Justice System* (Africa Report 2006) 2.

[40] Lawyers Committee for Human Rights, *First Steps: Rebuilding the Justice System in Liberia* (LCHR 1991) 14 – 20.

[41] Deborah Isser and others, 'Looking for justice: Liberian experiences with and perceptions of local justice options' (US Institute of Peace 2009) 3 – 5.

[42] Rome Statute of the International Criminal Court 1998, arts 6 – 8. Duty to investigate and prosecute see *Prosecutor v Tadic* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995, para 62. See also *Bautista de Arellana v Colombia* (Communication No 563/1993, UN Human Rights Committee) para 8.6; *Barrios v Peru,* Concurring Opinion of Judge Trindade, (Inter-American Court of Human Rights, Judgment of March 14, 2001) para 3.

[43] Charles Jalloh and Alhagi Marong, 'Ending Impunity The Case for War Crimes Trials in Liberia' (2005) 1 African Journal of Legal Studies 53, 73. See also United Nations Security Council, *Report of the Secretary-General on the situation in Liberia Un Doc* (S/2003/582).

[44] Catherine Gegout, 'The International Criminal Court: limits, potential and conditions for the promotion of justice and peace' (2013) 34 Third World Quarterly 800, 810 – 816. See also *Horvath v Secretary of State for The Home Department* [2001] 1 AC 489 (HL), 495 – 497 (Hope LJ).

[45] Lydia Nkansah, 'Justice within the Arrangement of the Special Court for Sierra Leone versus Local Perception of Justice: A Contradiction or Harmonious?' (2014) 22 African Journal of International and

This article ventures that the preference for reconciliation post-conflict is not based on archaic traditions and is rationally grounded in the socioeconomic context. Liberia's agrarian society depends heavily on social and economic interdependence; [46] adversarial trials only sows further discord and is counterproductive to social *and* economic reconstruction post-conflict. A Liberian interviewee aptly observed that 'traditional laws settle disputes easily; disputants leave with smiles on their faces. Statutory law brings separation among our people.'[47]

However, it does not follow that Liberians condone forgetting past atrocities through forced forgiveness; rather, instead of forging peace through a singular retributive approach, perhaps an effort to assimilate the 'people's choice' in a field saturated by Western approaches may be apposite.

The tensions highlighted between justice, truth, reintegration and reconstruction encapsulates the profound versus pragmatic objectives minefield transitional justice is meant to transcend; efficacy is heavily dependent on approaches tailored to the societal context.[48] Contrary to Justice Breyer's thesis, because Liberia's incumbent Western-based justice system has necessarily limited capacities of resonance,[49] it predictably fails to furnish a holistic approach capable of sustaining peace in a dissimilar society post-conflict. Indeed, this is a recurring theme in South Africa, Mozambique, Uganda and Liberia.[50]

2. Perfection in an Imperfect World?

Having spotlighted three unaddressed tensions in post-conflict Liberia, Section 2 examines whether comparative transitional justice mechanisms applied in similar post-conflict societies can, in theory and in practice, offer solutions to these tensions.

2.1. Justice v Peace/Stability

The tension between justice and peace is encapsulated by the divide between retributive and restorative justice. While both variants ensure that transgressions are dealt with, they theoretically diverge on the *type* of justice required. Retributive justice punishes perpetrators in a manner reflecting societal disapproval of the crimes.[51] This 'Just Deserts' principle is argued to right wrongs in the moral order.[52] Minow states that retributive justice, as promulgated in Western legal systems, removes personal animus and harnesses public anger into public punishment. [53] Notwithstanding

Comparative Law 103, 106 – 110; Obiora Okafor and Uchechukwe Ngwaba, 'The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections' (2015) 9 International Journal of Transitional Justice 90, 104 – 107.

[46] Isser and others, 'Looking for justice' (n 41) 4.

[47] Ibid, 5.

[48] Klaus Schlichte, *The Dynamics of States: The Formation and Crises of State Domination* (Ashgate Publishing) 277 – 296.

[49] Emilios Christodoulidis, 'The Inertia of Institutional Imagination: A Reply to Roberto Unger' (1996) 49 Modern Law Review 373, 380 – 386.

[50] Lydia Nkansah, 'International Criminal Court in the Trenches of Africa' (2014) 1 African Journal of International Criminal Justice 8, 33 – 35.

[51] Bradley, 'Retribution' (n 24) 25; David Starkweather, 'The Retributive Theory of Just Deserts' (1992) 67 Indiana Law Journal 853, 855.

[52] Ibid, 856.

[53] Minow, *Between Vengeance and Forgiveness* (n 30) 12.

allegations of victor's justice, key examples of retributive justice is vividly illustrated by the Nuremburg and Tokyo trials.[54]

However has this approach become so overwhelmingly predominant that it risks appearing as the *universal* model? Who decides what justice is? Can reconciliation be an end in itself? In contrast to retributive justice, restorative justice prioritises reconciling victims and perpetrators through a *context-specific* approach.[55] Restorative justice's context and cultural specificity has the advantage of encouraging intra-community dialogue and inclusiveness,[56] making peace settlements more legitimate and binding. Do restorative justice mechanisms offer a viable alternative to formal justice in practice?

Liberia's customary laws focuses on social reconciliation.[57] The emphasis on reaching a compromise in *Palava* is observed to effectively repair communal relationships.[58] The sharing of kola nuts between feuding parties is another traditional approach focussing on acknowledging responsibility, showing remorse and promoting reconciliation within a communal setting.[59] The nature of these methods, where decisions are made after community-wide consultation, strengthens its legitimacy and practicality.[60] Indeed a survey by McDonald et al found that only 2%-3% of civil and criminal cases were settled in the Liberian courts.[61]

Yet it would be remiss to presuppose that customary laws *always* offer practical alternatives. The bitter pill of interethnic violence flowing from the traditional 'violent self-help' forced the Acholi of Uganda to prioritise peace. Nonetheles, Afako highlights that *Mato oput* and *Cula kwor* were adopted post-conflict as they healed in a manner 'formal' justice could not by promoting family-centred reconciliation, procuring acknowledgements of wrongdoing, and reintegrating ex-combatants back into the community.[62]

In the aftermath of the brutal Mozambican Civil War, Mozambicans chose *Timhamba* over 'formal' justice to fix psychological traumas and bridge societal polarity post-conflict.[63] Purification by *Timhamba* is believed to venerate the spirits of the dead and allow post-conflict reconciliation through moral renewal to begin life anew.[64] *Timhamba*'s quality of honouring the past and renewing the present is context-specific and thus binding.

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[54] Janine Clark, 'The Limits of Retributive Justice' (2009) 7 Journal of International Criminal Justice 463, 465 – 468.
[55] Luc Huyse and Mark Salter, *Traditional Justice and Reconciliation after Violent Conflict* (Trydells Tryckeri AB 2008) 112.
[56] Ibid, 113 – 116.
[57] Isser and others, 'Looking for justice' (n 41) 4 – 6.
[58] William Zartman (ed.), *Traditional Cures for Modern Conflicts: African Conflict "Medicine"* (Lynne Rienner 2000) 163.
[59] Christian Chereji and Charles King, 'A Comparative Study of Traditional Conflict Resolution Methods in Liberia and Ghana' (2013) 5 Conflict Studies Quarterly 3, 9.
[60] Tobias von Gienanth and Thomas Jaye, *Post-Conflict Peacebuilding in Liberia* (Centre for International Peace Operations 2007) 60.
[61] Glenn McDonald and others, *Small Arms Survey 2014: Women and Guns* (CUP 2014) 18.
[62] Barney Afako, 'Reconciliation and Justice: Mato Oput and the Amnesty Act' (2002) 11 Accord 64, 67.
[63] Alcinda Honwana, 'Sealing the Past, Facing the Future: Trauma Healing in Rural Mozambique' (1998) 3 Accord 75, 76 – 79.
[64] Ibid, 77.

Although these comparative approaches to soothing ruffled feathers post-conflict have withstood the test of time, have *Mato oput*, *Cula kwor* and *Timhamba* kept up with the contemporary challenges of transitional justice? Perpetuation of gender inequality and sexual violence post-conflict may be inherent in customary legal processes;[65] women are often commoditised in traditional conflict resolution negotiations.[66] Adherence to the old ways entrenches gender-based violence and trivialises women's aspirations to move beyond the domestic sphere.[67] Indeed, traditional attitudes on rape involves victim-blaming, where women are blamed for rape by simply being alone in the same room as men.[68] From this perspective, traditional approaches centres power in the patriarchy and perpetuates intimidation and repression.[69] Rape remains prevalent across sub-Saharan Africa, with traditional thinking grasping at straws to comprehend why gender inequality or rape is a problem that requires addressing.[70]

Crucially, the light-touch approach of customary law may foster impunity and denial towards commission of atrocities.[71] Further, its efficacy in reconciliation drastically drops when disputants are from different tribes or when communities are ethnically diverse.[72] Customary legal approaches may even escalate intergenerational conflict as it condones 'violent self-help' or 'honour killings', which delegitimises conflict management built around traditional strategies.[73]

These are weighty considerations as transitional justice's effectiveness hinges on its ability to operate *beyond* the cultural or tribal context. For example, if *Timbamba* respects cultural traditions but is biased, or commoditises women to promote peace post-conflict, or condones vigilante justice, it will fail to terminate violence in the long term.

Although spiritual rituals of guilt cleansing may fly in the face of certain conceptions of justice, it is submitted that as restorative justice in the form of customary laws reflects Liberian society's collective morality, as laws normally should, it can offer a practical and nuanced alternative to retributive state laws administered by a distant judiciary post-conflict.[74] Striving towards a balance between justice and peace remains an ideal post-conflict; but it is an ideal that we move closer to by embracing the advantages of customary law.

2.2. Truth as the basis of Morality

How have other societies dealt with the second tension between truth, justice and reconciliation? The responsibility of establishing the 'truth' post-conflict is often left to

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[65] Honwana, 'Sealing the Past, Facing the Future' (n 63) 80.
[66] Susanne Buckley-Zistel and Ruth Stanley, *Gender in Transitional Justice* (Palgrave Macmillan 2011) 176 – 178.
[67] Caroline Mosner and Fiona Clark, 'Gender, Conflict, and Building Sustainable Peace' (2001) 9 Gender and Development 29, 33 – 37.
[68] Medie, 'Fighting Gender-Based Violence' (n 23) 386.
[69] Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 Journal of Women in Culture and Society 635, 645 – 647.
[70] Kathryn Birdwell Wester, 'Violated: Women's Human Rights in Sub-Saharan Africa' (2013) 5 Human Rights & Human Welfare Journal 3, 6.
[71] Boege, *Traditional Approaches to Conflict Transformation* (n 36) 15.
[72] Ibid, 14.
[73] Eghosa Osaghae, 'Applying Traditional Methods to Modern Conflict: Possibilities and Limits' in Zartman (n 58) 215.
[74] Gerry Johnstone and Daniel Van Ness, *Handbook of Restorative Justice* (Willian Publishing 2007) 55.

truth commissions; its appeal lies its official recognition of wrongdoing, especially when truth was supressed *postbellum*.[75] In the aftermath of the Argentine Dirty War and the forced disappearances of thousands, the Argentine Commission on the Disappeared reported on human rights violations by Perón's regime, adduced evidence proving that there were mass graves, and acted as an official voice to families who lost their husbands and sons.[76] By providing an accurate and impartial historical record, the report condemns past atrocities while educating future generations.[77]

The tension arises when truth-seeking unseats those pursuing retributive justice. This, of course, is dependent on cultural context and whether priority is placed on truth or retribution. If it is the latter, truth commissions pales vastly in comparison to prosecution. A case in point would be Cambodia, where retribution is integral in society; the Khmer Rouge 'Brothers', then in their eighties and nineties, were dragged to trial to answer for their crimes.[78] However, if priority is placed on truth-seeking, then trials can only be socially divisive and emotionally devastating.[79]

An analysis of truth commissions and its tensions with formal justice would be deficient without examining South Africa's Truth and Reconciliation Commission ("SATRC"). The SATRC was a quasi-judicial truth finding committee which had the power to grant amnesty to cooperative offenders.[80] Corliss argued that this was controversial as it removed the possibility for prosecution.[81] However, General van der Merwe's testimony which implicated two Ministers would not have been rendered but for the offer of amnesty to informants.[82] Can the therapeutic effects of establishing what happened, listening to victims, and 'naming and shaming' perpetrators be weightier than punitive justice?

Ultimately it is a question of context. Meredith acknowledges that the South African amnesty-for-truth bargain was flawed but it placed the vast majority of victims, who would otherwise be excluded from airing their grievances at trial, at the centre of public attention.[83] This provided personal catharsis and moral reconstruction,[84] facilitated official acknowledgement of human rights violations, and even laid the foundations for institutional reform.[85] These are intangibles that Corliss' thesis failed to account for; constructing a nationally accepted narrative of past atrocities helped the South African society regain a sense of purpose and find closure to a painful episode in their history.[86] Indeed, shrewd politicians aware of formal justice's limits may prefer truth

[75] Aryah Neier, *What should be done about the guilty* (The New York Book of Reviews 1990) 32 – 34.
[76] Argentine National Commission on the Disappearance of Persons, *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (New York: Strauss & Giroux, 1986) 37.
[77] Eduardo Gonzalez and Howard Varney, *Truth Seeking, Elements of Creating an Effective Truth Commission* (International Centre for Transitional Justice 2013) 23.
[78] Katheryn Klein, 'Bringing the Khmer Rouge to Justice' (2006) 4 Northwestern Journal of International Human Rights 549, 554 – 559.
[79] Minow, *Between Vengeance and Forgiveness* (n 30) 74 – 77.
[80] Ibid, 59.
[81] Cody Corliss, 'Truth Commissions and the Limits of Restorative Justice: Lessons Learned in South Africa's Cradock Four Case' (2013) 21 Michigan State International Law Review 273, 280.
[82] Minow, *Between Vengeance and Forgiveness* (n 30) 60 – 62.
[83] Martin Meredith, *Coming to Terms: South Africa's Search for Truth* (Public Affairs 1999) 325.
[84] Yael Tamir, *Truth Commissions: A Comparative Assessment* (Harvard Law School 1996) 75 – 77.
[85] Minow, *Between Vengeance and Forgiveness* (n 30) 66 – 71; Argentine National Commission on the Disappearance of Persons for reform suggestions, *Nunca Mas* (n 76) 55 – 70.
[86] Judith Herman, *Trauma and Recovery: The Aftermath of Violence--From Domestic Abuse to Political Terror* (Basic Books 2015) 133 – 154.

commissions to underscore a break with the past and bolster the incumbent government's political legitimacy.[87] This raises issues of politicisation of the truth.

Can a tree really be unchopped? Truth risks being merely cosmetic if it fails to build a bridge to a collective future. As with all political agendas, the risk of governmental manipulation to deflect blame and defend institutional policies exists.[88] President de Klerk accused the SATRC for failing to be impartial as he was denied an audience while Winnie Mandela was permitted a public hearing to absolve herself.[89] Whether the South African conscience is forgiving or forgetful is a question for another day. However, many South Africans assert that the SATRC is a *conscious* nonviolent response to violence which prioritisesaleads the way by proving that truth-seeking can still be pellucid without naming-and-shaming.[90]

Although prosecuting crimes committed during periods of conflict is crucial to re-establishing the rule of law post-conflict, it is reasoned that formal justice is a limited *post-hoc* intervention that struggles to promote tolerance, cooperation and integration as effectively as truth commissions.[91] Combatting impunity, memorializing the truth and bridging intergenerational relations post-conflict should not be confined to one institution or one approach.[92] As such, the tension between truth and justice, in relation to transitional justice, is less of a dichotomy and more of a continuum. The above analysis proves that comparative truth commissions furnish a practical, if less than perfect, response to the second tension.

2.3. Profound v Pragmatic Objectives

Finally, there is the tension between profound and pragmatic objectives inherent in transitional justice initiatives. From the reintegration of child soldiers into society to mending torn communities post-conflict, profound objectives are concerned with holism.[93] Pragmatic objectives, in contrast to grand goals, takes account of limited resources and prioritises approaches based on its effectiveness in building a lasting peace.

Practically, resources and the competence of state institutions post-conflict are limiting factors in what objectives can be pursued. Schabas highlighted that the overburdened justice system necessitated resurrecting the customary *Gacaca* in Rwanda.[94] Indeed, *Gacaca* offers a theoretical 'needs must' answer to the tension between profound and pragmatic objectives. Conversely, Bolocan intimates that *Gacaca* forces forgiveness and falsifies reconciliation which undermines profound goals of transitional justice such as mending intergenerational relations.[95] In post-conflict Rwanda, should

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[87] Priscilla Hayner, 'Commissioning the truth: further research questions' (1996) 17 Third World Quarterly 19, 19.
[88] Ibid, 22.
[89] Tamir, *Truth Commissions* (n 84) 83.
[90] Chilean National Commission on Truth and Reconciliation, *Report of the Chilean National Commission on Truth and Reconciliation* (USIP 2002) 180.
[91] Laurel Fletcher and Harvey Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 585.
[92] Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 Journal of International Affairs 647, 667.
[93] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda* (CUP 2010) 26 – 28.
[94] William Schabas, 'Genocide Trials and *Gacaca* Courts' (2005) 3 Journal of International Criminal Justice 879, 881-3.
[95] Maya Bolocan, 'Rwandan Gacaca: An Experiment in Transitional Justice' (2004) 2 Journal of Dispute Resolution 1, 45.

reconciliation be prioritised over providing medical care to survivors and reconstructing public infrastructure? Can both be achieved? Are the endgames, on occasions, mutually exclusive? The tension between idealism and reality are countervailing forces that governments must balance between when applying transitional justice strategies to avoid artificiality.

There is no 'one stop' solution in building a sustainable peace and terminating intergenerational conflict. However, customary laws and truth commissions can, notwithstanding improvements to be made regarding gender inequality and politicisation, offer practical alternatives to the ineffectual modern approach analysed in Section 1.

3. Towards a Sustainable Peace

Based on Section 2's comparative analysis, Section 3 evaluates Liberia's transitional justice mechanisms. The evaluation will be conducted within a sustainable peace framework ("SPF") focussing on societal reconciliation, reintegration, redressing harms caused, and re-establishing the rule of law. Although equally important, Section 3 precludes an analysis of the mechanisms' effect on stimulating economic recovery, rebuilding public infrastructure and normalising international relations.

3.1. Hidden Costs of *Palava*

Can *Palava* walk the tightrope with regards to the tension between justice and peace examined in Section 1?

Palava entails a prolonged discussion presided over by an elder where disputants remain in the hut until the issue is resolved.[96] The perpetrator is required to publicly apologise, make reparations and, in violent disputes, is banished from the community for three to seven years.[97] Resolutions are sealed through a communal meal to mark a step towards reconciliation.[98]

Palava is popular with Liberians because it is decentralised, affordable, familiar and accessible by urban and rural dwellers.[99] Further legitimacy flows from the presiding elders who form part of the social milieu.[100] What is distinctive about *Palava* is its marginalisation of fault-finding, which expedites admission of responsibility and allows resolution and reconciliation to take centre stage.[101] This is contrasted with the adversarial system, where the accused traditionally denies wrongdoing and parties are mired in establishing guilt.[102] Menkel-Meadow questions whether the adversarial

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[96] Chereji and King, 'A Comparative Study of Traditional Conflict Resolution Methods in Liberia and Ghana' (n 59) 9.
[97] Ibid, 10. Republic of Liberia Truth and Reconciliation Commission, *Consolidated Final Report, Vol II* (TRC 2009) 273.
[98] Chereji and King, 'A Comparative Study of Traditional Conflict Resolution Methods in Liberia and Ghana' (n 59) 11.
[99] Kwaku Danso, *Mending Broken Relations after Civil War: The 'Palava Hut' and the Prospects for Lasting Peace in Liberia* (Kofi Annan International Peacekeeping Training Centre, Policy Brief 2016) 4.
[100] Ezekiel Pajibo, *Traditional Justice Mechanisms: The Liberian Case* (International Institute for Democracy and Electoral Assistance 2008) 22.
[101] Chereji and King, 'A Comparative Study of Traditional Conflict Resolution Methods in Liberia and Ghana' (n 59) 11.
[102] Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural

system can truly promulgate an immutable and universal dispute resolution process, and whether truth can be represented accurately in such a system.[103] This theoretical shortcoming, exacerbated by the Liberian judiciary's proclivity for corruption, leads this article's reasoning that Liberia's fragile peace requires dispute resolution processes recognised as legitimate by the populace, not outlandish statutes enforced by a distrusted judiciary.[104] Indeed Liberians widely acknowledge that accountability goes *beyond* prosecution; that rebuilding broken relationships takes priority.[105] From this perspective, *Palava*'s *vox populi vox dei* quality can heal intergenerational conflict and provide binding redress for harms suffered.

However, *Palava*'s ostensible omnipotence is undermined by the state's selection of presiding elders.[106] Thus, peace is brokered by elders imposes a biased and patriarchal 'gerontocratic' rule that marginalises parties to the dispute.[107] Additionally, records of resolutions are not kept, causing decisions to be wildly inconsistent.[108] This is incompatible with building a post-conflict society under the rule of law.[109]

Additionally, contrary to Chereji and King's thesis, are *Palava*-rendered apologies adequate if, in an impoverished post-conflict society, reparations are inadequate? Minow argues that apologies are 'inevitably' inadequate and cannot compel forgiveness.[110] If reparations are inadequate, apologies are offered at the risk of appearing meaningless. Nonetheless, this article adopts a less parochial perspective; sincere apologies *can* go beyond material value and are solemn declarations that one has 'no excuse, defence or justification for the act'.[111] So even if *Palava* fails to guarantee material reparation, victims may secure a position of strength, respect and closure from sincere apologies.[112]

Next, there are doubts over *Palava*'s ability to include marginalised groups. Although there is a growing trend towards awareness of gender-based violence in Liberia,[113] the subjugation of women in male-dominated *Palava* procedures remain obstacles to encouraging their participation in peacebuilding.[114] Going beyond gender equality and reconciliation, incorporating women's perspectives into peacebuilding policies

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World' (1996) 38 William & Mary Law Review 5, 12 – 16. See also Niki Kuckes, 'Civil Due Process, Criminal Due Process' (2006) 25 Yale Law & Policy Review 1, 18 – 20.

[103] Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (n 103) 41 – 43.

[104] Gienanth and Jaye, *Post-Conflict Peacebuilding in Liberia* (n 60) 11.

[105] Rosalind Raddatz, 'Tempering great expectations: Peacebuilding and transitional justice in Liberia' (6th General European Consortium for Political Research Conference, Reykjavík, 25 – 27 August 2011 < https://ecpr.eu/Filestore/PaperProposal/dcad542f-cdaa-4566-b2d1-74cbdd2af273.pdf> accessed 5 March 2018.

[106] Pajibo, *Traditional Justice Mechanisms* (n 101) 23.

[107] Boege, *Traditional Approaches to Conflict Transformation* (n 36) 15; Danso, *Mending Broken Relations after Civil War* (n 100) 4.

[108] Pajibo, *Traditional Justice Mechanisms* (n 101) 23.

[109] Amanda Rawls, *Policy Proposals for Justice Reform in Liberia* (International Development Law Organization 2011) 17 – 22.

[110] Minow, *Between Vengeance and Forgiveness* (n 30) 116.

[111] Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press 1993) ch 2. See also Richard Bilder, The Role of Apology in International Law and Diplomacy (2006) 46 Virginia Journal of International Law 433, 473.

[112] Rhoda Howard-Hassmann, 'Official Apologies' (2012) 1 Transitional Justice Review 31, 53.

[113] Tavuchis, *Mea Culpan* (n 112) 388.

[114] Danso, *Mending Broken Relations after Civil War* (n 100) 4; Julia Boyle, 'Women of Liberia – Find your Voices' (Master's Thesis, University of Lund 2012) 8 – 10.

strengthens the democratisation of a state post-conflict and adds credence to this pursuit.[115]

The lack of trust in formal justice combined with widespread belief in *Palava* evinces its potential to provide socially accepted redress and lay the foundations for a sustainable peace.[116] Notwithstanding its biases, *Palava* avails itself as a complementary alternative to formal criminal proceedings in the interim while national courts rebuild their capacity and credibility post-conflict.[117] This will also enable the resource-stretched International Criminal Court to concentrate on the most severe international situations that leaves national entities unable or unwilling to act.[118]

If *Palava* can guarantee peace post-conflict, when do national and international courts step in? Should they step in? If the objective is to ensure sustainable peace, then logically, reconciliation brought about by the people's conception of justice holds more legitimacy.[119] This is not to say that *Palava* can replace the rule of law, prevent mob justice and promote gender-neutral participation in peacebuilding. However, *until and unless* the Liberian judiciary builds up its capacity to respond to the demands made of it,[120] it is submitted that *Palava* remains crucial to providing redress and promoting reconciliation post-conflict.

3.2. Deficient Truth

Having analysed wider tensions between truth and justice, did Liberia's Truth and Reconciliation Commission ("TRC") manage to redress harms suffered while improving the participation of marginalised groups? The TRC was mandated to provide a platform for victims and perpetrators to create a clear picture of the past, recommend institutional reform policies, and offer amnesty to complaisant perpetrators.[121]

This raises two questions. First, was the TRC biting off more than it could chew? Second, was the amnesty provision drafted in line with society's expectations? Regarding the first question, the TRC recommended strengthening the judiciary and enforcing separation of powers to establish the rule of law.[122] While these are foundational elements of statecraft, the report failed to capture the extent of violence against women, make recommendations regarding reintegration of child combatants, and develop a viable state-sponsored reparations policy.[123] Linking this to the tension between profound and pragmatic objectives, the TRC may have erred on the side of

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[115] Boyle, 'Women of Liberia – Find your Voices' ((n 115) 11. See also Bina Agarwal, Jane Humphries and Ingrid Robeyns, *Amartya Sen's Work and Ideas: A Gender Perspective* (Routledge 2005) 255.
[116] Huyse and Salter, *Traditional Justice and Reconciliation after Violent Conflict* (n 55) 16; Rawls, *Policy Proposals for Justice Reform in Liberia* (n 110) 17.
[117] Ruti Teitel, *Transitional Justice* (OUP 2000) 3.
[118] Rome Statute of the International Criminal Court 1998, art 17; Matiangai Sirleaf, 'Regional Approach to Transitional Justice? (2009) 21 Florida Journal of International Law 209, 275.
[119] Teitel, *Transitional Justice* (n 118) 3.
[120] Gienanth and Jaye, *Post-Conflict Peacebuilding in Liberia* (n 60) 56; Rawls, *Policy Proposals for Justice Reform in Liberia* (n 110) 12.
[121] Accra Comprehensive Peace Agreement 2003, Art XIII.
[122] Republic of Liberia Truth and Reconciliation Commission, *Preliminary Findings and Determinations Vol I* (TRC 2009) 6 – 11.
[123] Paul James-Allen and others, *Beyond the Truth and Reconciliation Commission: Transitional Justice Options in Liberia* (International Centre for Transitional Justice 2010) 14.

idealism. Leymah Gbowee's involvement in the TRC failed to encourage the participation of women and children and caused a loss of credibility in the public's eyes.[124] Within the gender dynamics praxis, Stanley and Buckley-Zistel criticised the sexist nature of the report as it reinforced the portrayal of women as passive objects who lack agency.[125]

Secondly, the amnesty provision was sharply divisive. A segment of society sought to focus on national reconciliation.[126] Another segment controverted that amnesty legalises impunity and fosters forgetfulness.[127] Beyond superficiality, there were political accents in play; because the TRC sanctioned soon-to-be President Sirleaf and several Ministers, those holding political and social clout standing against impunity were now for it.[128] As a result, the recommendation on barring Sirleaf from running for president due to her complicity in Doe's regime was ignored by the government.[129] This enraged the community, who believed that Sirleaf's presidency marked a move away from punishing those who suffered and died during the wars.[130]

Although the TRC's report seminally and comprehensively mapped human rights violations and furnished important information regarding the history and context of the wars,[131] its haphazard policy recommendations, inadequate engagement with marginalised groups and inapt management of the truth and justice camps leaves much to be desired.[132]

3.3. Averting Transitional Justice's mid-life crisis

As explored throughout this article, successful transitional justice mechanisms can contribute to the long-term goal of cultivating political and societal values based on international human rights and the rule of law.[133] This coincides with de Greiff's holistic conceptualisation of transitional justice which rejects cherry-picking approaches.[134]

Transitional justice's goal, so conceived, must mediate between pragmatism and idealism. Because the Liberian mechanisms operate in an imperfect world,[135] *Palava* and the TRC only represents a singular approach to transitional work. However, as the end goal is to establish an *inclusive* society under the rule of law, more than abstract notions of justice are required. Paradoxically, de Greiff's holistic approach inevitably

[124] Ibid, 8; Theo Sowa, 'Children and the Liberian Truth and Reconciliation Commission' in Sharanjeet Parmar and others, *Children in Transitional Justice* (HUP 2010) 221 – 223.
[125] Buckley-Zistel and Stanley, *Gender in Transitional Justice* (n 66) 11.
[126] Kwesi Aning and Thomas Jaye, *Liberia: A Briefing Paper on the TRC Report* (KAIPTC 2011) 11.
[127] Othello Garblah, 'TRC Report: Civil Society Predicts Woes Without Justice' (2009) 16 New Democrat 1, 12.
[128] Ibid, 8 – 11.
[129] Aning, *Liberia: A Briefing Paper on the TRC Report* (n 127) 12 – 17.
[130] Evelyne Schmid, 'Liberia's Truth Commission Report: Economic, Social, and Cultural Rights in Transitional Justice' (2009) 24 Fletcher Journal of Human Security 5, 7 – 9.
[131] James-Allen and others, *Beyond the Truth and Reconciliation Commission* (n 124) 13.
[132] Ibid, 14; Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women' (2007) 1 International Journal of Transitional Justice 338, 343 – 348.
[133] Bronwyn Leebaw, 'The Irreconcilable Goals of Transitional Justice' (2008) 30 Human Rights Quarterly 95, 117.
[134] Pablo de Greiff, 'Theorizing Transitional Justice' (2012) 51 Transitional Justice 31, 33 – 36.
[135] David Dyzenhaus, 'Leviathan as a Theory of Transitional Justice' (2012) 51 Nomos 180, 183 – 186.

leads to expansionism and imprecision, which can dilute the strength of transitional justice's nuanced quality, leading to a 'mid-life crisis'.[136]

Moving forward, this article makes three prudent recommendations to achieve the SPF, bolster the shortcomings of existing mechanisms, while avoiding the trapdoor of expansionism. The shortcomings of *Palava* and the TRC can be bolstered by (1) state efforts at memorialisation, (2) reparations, and (3) more rigorous assessment of the needs of marginalised groups.

While the *value* of memorialisation post-conflict is universal, the questions of *who* and *what* should be memorialised can give rise to tensions.[137] One may be viewed both as a liberator and an oppressor depending on perspective; further, Jelin questions whether memorialisation can truly represent a common consensus.[138] But these challenges cannot negate the ability of memorialisation to heal and promote a sustainable peace.[139] As such, the state should support ongoing community initiatives on remembering the past, create linkages between memorialisation, community reconstruction and reintegration, involve the participation of women and children in the process, and allow space for the creation of multiple narratives.[140] It is reasoned that individual conceptions of truth, tempered by a central and accurate memorialisation of *the truth*, provides the psychological redress the TRC lacked by honouring the past and symbolising closure. There is much truth in the adage, *in medio tutissimus ibis*.[141]

The absence of reparation policies is worrying because conscientiously structured reparation programs, by establishing a mutual commitment to right past wrongs, can foster trust between citizens and the state.[142] Conversely, Arriaza asserts that reparations can trivialise harms suffered by creating an impression that spilt blood can be 'made up for' through material payments.[143] From the victim's perspective, reparation programmes are rarely, if ever, satisfactory.[144] I contend that these critiques cannot justify jettisoning reparation programmes altogether; instead, it signals that such programmes must be carefully planned. To be clear, this article seeks to propose 'what works' instead of 'what's optimal'. Reparations can satisfy the 'need to feel repaired' and contributes to a pluralistic but focused approach to facilitate transitional work as opposed to Arriaza's perhaps fruitless search for perfection in an imperfect world.

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[136] Susanne Buckley-Zistel, *Transitional Justice Theories* (Routledge 2014) 111.

[137] Sebastian Brett and others, *Memorialization and Democracy: State Policy and Civic Action* (International Centre for Transitional Justice 2007) 8 – 10.

[138] Elizabeth Jelin, 'Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America' (2009) 1 International Journal of Transitional Justice 138, 144.

[139] Impunity Watch, *Policy Brief: Guiding Principles of Memorialization* (Oak Foundation 2013) 11 – 14.

[140] Brett and others, *Memorialization and Democracy: State Policy and Civic Action* (n 138) 25; Jelin, 'Public Memorialization in Perspective' (n 139) 156.

[141] Publius Ovidius Naso, *Metamorfosi: Vol II* (first published 8AD; Einaudi 2015) 137

[142] United Nations High Commissioner for Human Rights, *Rule Of Law Tools for Post-Conflict States* (UN HR/PUB/08/1) 30.

[143] Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 Hastings International and Comparative Law Review 157, 161 – 167.

[144] Carlton Waterhouse, 'The Good, the Bad and the Ugly: Moral Agency and the Role of Victims in Reparations Program' (2009) 31 University of Pennsylvania Journal of International Law 257, 258.

Thus, reparation policies must identify funding sources and the criteria for selecting and verifying beneficiaries. This criterion must not be so wide as to render it impractical; at the same time, it must be exact in determining the compensation required in relation to the magnitude of the offense.[145] Crucially, reparations policies must respond to the nuanced needs of women and children.[146]

With regards to improving the participation of marginalised victims in *Palava*, procuring information from marginalised groups allows the holistic articulation of views which can then inform the structure of reparation and memorialisation policies.[147] Particular attention must be paid to Liberia's 'lost generation', who grew up around violence and are thus most susceptible to perpetuating cyclical intergenerational conflict. Left unchecked, this is a recipe for crime in the short-term and societal and political instability in the long-term.[148]

Ideally, outreach approaches should be interesting, relevant and age-appropriate to provide women and children with a safe *and* receptive environment to voice their opinions.[149] This participatory focus furthers the idea that transitional justice is an *actualisation* of the process of doing justice; this entails mending relational harms and giving the marginalised a *say* in the process transition.[150] Achieving this will unlock the immeasurable potential of Liberian women and children to serve as catalysts for reconciliation and peacebuilding within their own tribes and for Liberian society *in toto*.[151]

Conclusion

These proposals, taken together with existing mechanisms, will open the door to marginalised groups, provide a wider scope to redress harms, and encourage *ownership* of peacebuilding from the grassroots level, reinforcing its impact on mending society during and post transition.

The caveat is that these proposals must resist the temptation to give in to populist claims for expansionism which can create confusion and vagueness.[152] This vagueness may unfortunately result in transitional justice being constructed to mean 'all things to all people', which is the very result transitional justice is meant to transcend.[153] The

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[145] Matthew Pauley, 'The Jurisprudence of Crime and Punishment from Plato to Hegel' (1994) 39 American Journal of Jurisprudence 97, 98.

[146] James-Allen and others, *Beyond the Truth and Reconciliation Commission* (n 124) 23.

[147] Clara Ramirez-Barat, *Making an impact: Guidelines on designing and implementing outreach programs for transitional justice* (International Center for Transitional Justice 2011) 30.

[148] Gienanth and Jaye, *Post-Conflict Peacebuilding in Liberia* (n 60) 44. See also Cecile Aptel and Virginie Ladisch, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (International Centre for Transitional Justice 2011) 6.

[149] Gienanth and Jaye, *Post-Conflict Peacebuilding in Liberia* (n 60) 37. See also Karen Campbell-Nelson, *Liberia is Not Just a Man Thing: Transitional Justice Lessons for Women, Peace and Security* (Initiative for Peacebuilding 2008) 13 – 19.

[150] Frank Hill, 'Restorative Justice: Sketching a New Legal Discourse' (2008) 1 Contemporary Readings in Law and Social Justice 115, 116. See also Jeannette Lekskes, 'Appraisal of psychosocial interventions in Liberia' (2007) 5 Intervention 18, 20 – 22.

[151] Aptel and Ladisch, *Through a New Lens* (n 149) 7.

[152] Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2009) 3 International Journal of Transitional Justice 5, 13.

[153] Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Buckley-Zistel, *Transitional Justice Theories* (n 137) 117 – 120. See also *Bowman v United Kingdom* (1998) 26 EHRR 1 [12].

very word 'transition' implies a journey; a journey that, this article concludes, begins with an exclusive moment in time post-conflict and ends when the objectives within the SPF are achieved. Having debated transitional justice's best practices and limitations in comparative and local contexts, it is based on this what is *needed*, not what is *wanted* theory that this article constructs the proposals around current and immediately proximate transitional operations.

Finally, this article does not romanticise customary laws as they can be highly problematic; nonetheless, it provides a complementary forum for reconciliation and redress to national and international bodies. Although building strong communities may be antithetical to establishing centralised state institutions, this state-building dilemma must be left to 'their' ideals, not 'ours'. Indeed, Waldron famously contested the rule of law's role in maintaining societal stability.[154]

Of course, nothing should detract from the fact there are some rights so basic that they should be available to everyone everywhere.[155] However, as the application of transitional justice mechanisms takes place in post-conflict societies, it is unrealistic to expect transitional tools to abide by and promote liberal democratic values that are well-established in old democracies;[156] achieving stability, security and self-sufficiency are, by necessity, more pressing needs. Only after these needs are satisfied can communities begin to *shape* the transition and *open* democratic space. So the universality of human rights argument must recognise the limits flowing from transitional relativism. Liberia's rickety path to peace is more assured by understanding and mediating with customary institutions.

[154] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept?' (2002) 21 Law and Philosophy 137, 154 – 157.
[155] *R v Reyes* [2002] UKPC 11, [26] (Lord Bingham). See also United Nations Universal Declaration of Human Rights 1948, arts 1 – 3.
[156] Mark Drumbl, 'Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide' (2002) 5 Contemporary Justice Reviews 5, 12 – 14. See also *Guincho v Portugal* (1985) 7 EHRR 223, [35] – [41].

The Principle of Supremacy and the Response of Member States' Constitutional Courts

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Abstract

One of the main concerns that was highlighted, by the referendum requesting Britain to leave the European Union, was the principle of supremacy as developed by the European Court of Justice. This article will examine the principle of supremacy, the response by national courts, the true nature and extent of the principle, whilst discussing the statement by Michael Gove MP on who should be the political decision-makers. The facts and opinions expressed in case law and journals, will be used to add to this discussion and will be connected to the original statement by Michael Gove MP throughout. It is concluded that despite the original opposition, acceptance is the more commonplace as Member States realize that they can allow supremacy, without losing their own sovereignty.

Introduction

The concern mentioned in the abstract arose due to the widespread belief that the supremacy of EU law interfered with basic political ideals of the United Kingdom, such as parliamentary sovereignty.[1] As expressed by Michael Gove MP, the legal and political decisions of the nation should be determined by bodies which are elected and that 'the public must have the right to change laws and Government at election time'.[2] This statement is in harmony with views adopted by respected members of the legal community, such as Lord Denning who has expressed that '[The UK's] sovereignty has been taken away by the European Court of Justice…[European law] is now like a tidal wave bringing down our sea wall and flowing inland over our fields and house'.[3] This article will examine the principle of supremacy, the response of national courts in Germany, France, Italy and the UK, the true nature and extent of the principle, whilst returning to the aforementioned statement by Michel Gove.

The Development of the Principle of Supremacy

The principle of supremacy was mainly developed through case law. However, Article 4(3) of the Treaty of the European Union states 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.[4] Furthermore, Article 18 of the Treaty on the Functioning of the European Union grants the discretion to the European Parliament and the Council to introduce new legislation to protect against

[1] Mark Elliott, 'Brexit| Vote Leave, Take Control? Sovereignty and the Brexit Debate' <https://publiclawforeveryone.com/2016/06/23/vote-leave-take-control-sovereignty-and-the-brexit-debate/> accessed 4 February 2017. "Parliamentary Sovereignty" will be referred to as 'PS'.
[2] Michael Gove MP, 'Vote Leave' 20th Feb 2016.
[3] Lord Denning, Introduction to *'The European Court of Justice: Judges or Policy Makers?'*
[4] The Treaty of the European Union, Article 4.

discrimination.[5] Although this does not explicitly establish supremacy, it speaks to the power held by the EU and the cooperation required by its members. Finally, Article 288 states the direct effect of regulations and directives, allowing some discretion to the Members as to the methods in which the goals can be achieved.[6]

One of the first steps taken by judicial bodies to establish the supremacy of EU law was *Van Gend en Loos*.[7] The EU was characterised as a "new legal order", where Member States sacrificed part of their power to generate benefits.[8] The Court stated that obligations placed upon the Members by relevant treaties should apply automatically, without time-costly processes required to create national legislation.[9] This statement is in direct correlation with the fact that incompatible domestic law results in interference with the achievement of the objectives set forth in the Treaty of Lisbon. Returning to the statement by Michael Gove, whilst power has been removed from Member States, in *Van Gend en Loos* an explanation is provided, indicating that it was not an impetuous action, but a well thought plan by the EU. Another landmark case for supremacy was *Costa v ENEL*, where the newfound nature of the European Union system was highlighted.[10] In this case, the court expanded on its reasoning for the importance of supremacy in the efficient functioning of the EU. One of the key elucidations on the matter regarded the enforcement of Community law against States and individuals and, in parallel with the conclusions of *Van Gend en Loos*, when legislative acts can be questioned they become dependent, as opposed to unconditional. Consequently, when Community laws are questioned, the Community itself comes into question.[11]

GERMANY

The response of the German Constitutional Court as to the supremacy of EU law came in *Solange I and II*.[12] In *Solange I*, the Court expressed that limits exist on supremacy, defined by the German Constitution which is in place to ensure the protection of fundamental rights. In their view, the German Constitution is supreme to the relevant EU law.[13] *Solange II* was a case which complemented the disparities left by its homonymous predecessor. The Court characterised the demand for supremacy to infiltrate the German Constitution as an "intrusion into the fundamental architecture, the constituting structures of the Constitution'.[14] However, the Court concluded that EU law supremacy will be allowed over the German Constitution, if it provides adequate protection to fundamental rights, protection equal to that previously

[5] Treaty on the Functioning of the European Union, Article 18.
[6] Treaty on the Functioning of the European Union, Article 288
[7] Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1
[8] ibid para. 3
[9] William Phelan, 'The Troika: The Interlocking Roles of Commission v. Luxembourg and Belgium,Van Gend En LoosandCosta v. ENEL in the Creation of the European Legal Order' European Law Journal 21.1 (2014): 116-35.
[10] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
[11] ibid p. 599
[12] *Internationale Handelsgesellschaft mbH v Einfur-und Vorratsstelle fur Getreid und Futtermittel* [1974] 2 CMLR 540; *Re Wunsche Handelsgesellschaft* [1987] 3 CMLR 225
[13] J.H.H. Weiler, 'The European Constitution and the Courts-Adjudicating European Constitutional Law in A Multilevel System' (2003) Max Planck Institute for Comparatice Public Law and International Law 9/03 p. 24
[14] Bogdandy, Armin Von, and Jurgen Bast, 'Principles of European Constitutional Law' (Munchen: Beck, C H, 2011) p. 411

provided by the Constitution.[15] This fruitful dialogue between Germany and the supranational institution reflects that the statement made by Michael Gove may be inaccurate, since EU supremacy is not a result of EU lawmakers acting on their own accord; there is extensive cooperation between Member States and the EU in order to achieve the most desirable outcome for all parties involved.

FRANCE

Similarly, the acceptance of supremacy in France was a gradual process.[16] In *Semoules* it was concluded that supremacy would not be granted to EU law, following the standpoint formerly expressed by the *Conseil d'Etat*.[17,18] Supremacy was officially accepted in the case of *Administration des Douanes v Societe 'Café Jacques Vabre'*.[19] However, the milestone case for the holistic incorporation of supremacy occurred in *Raoul Georges Nicolo* where the true conformity of the French constitution was examined.[20] The decision of *Semoules* was overturned and primacy was acknowledged but the court justified its decision using Article 55 of the French Constitution, rather than prior decisions of the ECJ.[21] Furthermore, they have not accepted EU supremacy within their constitution and the *Conseil Constitutionnel* argues that the powers of EU law within the French legal system are defined by the French Constitution.[22] This is highlighted in the wording used by the *Conseil Constitutionnel* in *Mastricht I* and later, by the insertion of a new article in the Constitution, relating the potentiality of a referendum with regard to implementing new treaties in the domestic legal system.[23] In parallel with the German approach, the approach of the French Constitutional Court shows the potential erroneousness of Michael Gove's belief, where the bodies elected by the people still hold the power and are responsible for changing the law and representing the interests of their people. Once again, it can be observed that the supremacy of the EU results from the acceptance communicated from the domestic legal system.

ITALY

In Italy, the original, prominent view was that Community legislation held the same power as other international treaties,[24] as seen in *Costa v Enel*. However, recently this view has changed and supremacy has been acknowledged, particularly via the *Frontini*

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[15] *Re Wunsche Handelsgesellschaft* (n14) para. 387

[16] Paul P Craig and Grainne De Burca, *EU Law: Text, Cases, and Materials* (6th ed. Oxford: Oxford UP, 2015) p. 292

[17] ibid.

[18] *Syndicat General de Fabriqcants de Semoules de France* [1970] CMLR 395

[19] *Administration des Douanes v Societe 'Café Jacques Vabre' et SARL Weigel et Cie* [1975] 2 CMLR 336

[20] Juscelino F. Colares, 'The Reality of EU Conformity Review in France' (2012) College of Law Faculty Scholarship. Paper 66 p. 6

[21] 'The Influence of the General Principles of Community Law on Rules of Procedure and Rules of Substance in Ireland' (*Cour de Cassation*, 2000) https://www.courdecassation.fr/venements_23/colloques_4/2000_2038/of_the_9468.html; French Constitution of 4 October 1958, Article 55; *Raoul Georges Nicolo* [1990] 1 CMLR 173, [178].

[22] Richards Claudina, 'EU Law Before the French Courts: The Curious Incident of the Question Prioritaire De Constitutionnalité' (2011) University of East Anglia School of Law p. 9

[23] Maastricht I Conseil Constitutionnel, decision 9 April 1992, 92–308 DC; French Constitution of 4 October 1958, Article 88.5.

[24] Conforti Benedetto and Francesco Francioni, *Enforcing International Human Rights in Domestic Courts* (The Hague: Kluwer Law International 2002) p. 22.

case, where a similar approach to *Solange* was taken.[25] More specifically, the court stated that if the interpretation of Community law gave 'an unacceptable power to violate the fundamental principles of the Italian Constitution [...] the Italian Constitution Court reserves the right to control the continuing compatibility of the Treaty as a whole with such fundamental principle'.[26] Later, the *Granital* case established pure supremacy for EU law, while the Court acknowledged the on-going struggle to incorporate EU law supremacy into the Italian Constitution and legal system.[27] The court also made reference to *Frontini* and the importance of respect towards pre-existing institutions of the Italian Constitution.[28] The aforementioned cases prove that despite the acceptance of supremacy, Member States still have control over the changing of laws, contrary to the view expressed by Michael Gove.

UNITED KINGDOM

The UK's acceptance of supremacy has been one of the most complex to date, due to its unwritten constitution, a founding block of which is Parliamentary Sovereignty. Dicey most accurately defines Parliamentary Sovereignty as 'that Parliament [...] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[29] One of the primary limitations as imposed by E.U. legislation is Section 2(4) of the European Communities Act 1972 where Parliament cannot take any action which would contradict EU law, challenging Parliamentary Sovereignty and decreasing the Parliament's power.[30] The pivotal case for acceptance is *Factortame (No. 2)* where the House of Lords accepted that when delivering its judgment, any relevant national law will be disregarded if it contradicts the law of the EU.[31] The case of *Thoburn* also reflected acceptance, and albeit limitation to Parliamentary Sovereignty was observed, Laws LJ stated that it was "consistent with constitutional principles."[32] However, similarly to the patterns established by the German and Italian Constitutional Courts, Section 18 of the European Union Act 2011 recognises that, in technical terms, the sovereignty of Parliament remains unchanged as it is Parliament that gives effect to all EU legislation within the U.K.[33] Finally, due its uncodified nature, the U.K. Constitution cannot be challenged, further proving that PS has been unaffected, as it can adapt based on the status quo, even if the status quo is heavily influenced by supranational institutions.[34]

[25] Michael Rosenfeld, 'Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court' (2006) 4 International J Con Law 681, p. 634.
[26] *Frontini v Ministero dellle Finanze Giurisprudenza Constituiozanele* 1974 CMLR 371, [10].
[27] *Spa Granital v Amministrazione delle Finanze dello Stato Constitutional Court* (Italy) Decision No. 170 of 8 June 1984.
[28] De Santa Cruz Oliveira and Maria Angela, *International Trade Agreements Before Domestic Courts: Lessons from the EU and Brazilian Experiences* (Switzerland: Springer International, 2015) p. 170.
[29] AlbertV. Dicey *The Law of the Constitution* (Indianapolis: Liberty Classics1885) p. 3-4
[30] European Communities Act 1972, Section 2(4).
[31] *Factortame Ltd v Secretary of State for Transport* [1991] 1 AC 603 p. 658 .
[32] *Thoburn v Sunderland Council* [2003] QB para. 59 (although not heard at a Constitutional Court, it is an inseparable part of the U.K.'s answer towards E.U. law supremacy).
[33] European Union Act 2011, Section 18.
[34] Miles G. Kellerman, *UK Membership in the European Union: Undermining Parliamentary Sovereignty?* (Inquiries Journal, 2011).

Conclusion

A pattern which becomes apparent between the aforementioned Constitutional Courts is that the establishment of European law supremacy was originally met with great opposition. It is arguable one of the reasons why this opposition emerged was because it was unheard of that a supranational institution could infiltrate courts and parliaments alike. Acceptance started to become more commonplace as Member States realized that they could allow supremacy, without losing their own sovereignty, through the implementation of articles, such as Article 88.5 in the French Constitution or Section 18 of the European Union Act in the U.K. To the author's view this was, in part, a false sense of power allowed on behalf of the EU; however, there was also a true assertion of dominance on behalf of the Member States, as reflected in *Solange II* and *Thoburn*. The assertion is a result of the conditional acceptance of EU supremacy by Member States, dependent upon their own domestic laws and constitutions. Taking into consideration the arguably false sense of power permitted by the EU, Michael Gove's statement rings true; however, what truly matters is that a compromise was reached and national elected bodies are still able to determine the legal and political futures of their nationals. On a final note, other treaties have impacted the socio-political climate of EU countries, making it almost impossible to characterise any Parliament as truly sovereign.[35]

[35] ibid: Consider membership in the North Atlantic Treaty Organization (NATO), General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO).

Comment on the decision in *RFC 2012 Plc (in liquidation) v Advocate General for Scotland* [2017] UKSC 45

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Abstract

In the *Rangers*[1] case, the Supreme Court heard an appeal concerning whether a charge to income tax was applicable to payments made by an employer into a trust, on behalf of an employee. It considers the meaning of 'earnings' in relation to the income tax statutes and reaches the conclusion that the payments made by the Rangers were 'earnings'. In this article, the reasoning of the Court will be discussed. The only judgement given in the case, by Lord Hodge, reads seamlessly and reaches the only justifiable conclusion, but perhaps for the wrong reasons. The decision also demonstrates how the courts have been grappling to counteract aggressive tax avoidance schemes.

The Facts

In 2001, the Murray Group, a holding company for the Rangers Football Club (the "Rangers"), set up a Principal Trust to benefit its employees. Whenever it sought to benefit an employee, it would make a payment to the Principal Trust along with a recommendation that the trustee resettle the sum on a sub-trust with the designated employee as the protector. A protector of a trust is the grantee of various powers to enforce the trust mechanism, such as the power to appoint or delete beneficiaries.[2] While the Principal Trust trustee had discretion over whether or not to apply the funds to the sub-trusts, on virtually all occasions, the trustee accepted the recommendations of the Murray Group.

The arrangement benefitted all the parties involved. Employee earnings or 'emoluments' are normally liable to a charge to income tax. Section 19 of the Income and Corporation Tax Act (the "ICTA")[3] imposes a charge to tax 'in respect of any office or employment on emoluments therefrom'. However, the Rangers argued that the 'payments' to the Principal Trust were not 'emoluments' and therefore not liable to a charge to income tax. At the same time, the Rangers claimed that payments to the Principal Trust were deductible from the Ranger's taxable profits. Section 74(1)(a) of ICTA[4] allows a company to deduct expenses that are 'wholly and exclusively for the purposes of the trade' from their calculation of taxable profits. By classifying the payments as expenses for the purposes of their trade, the Rangers were able to reduce their taxable profits and subsequent Corporate tax liability. In achieving efficiency on both ends of the transaction, the Rangers were able to offer players a much higher net salary.

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[1] *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 (hereinafter '*RFC v AGS*').

[2] Donovan Waters, 'The Protector: New Wine On Old Bottles?' *Trends in Contemporary Trust Law* (OUP 1997) 63.

[3] Income and Corporations Tax Act 1988 (hereinafter 'ICTA 1988'), s 19(1). This provision has since been superseded by the Income Tax (Earnings and Pensions) Act 2003 (hereinafter 'ITEPA 2003'), s 9, where the term "emoluments" is replaced by "earnings", defined in s 7. Since the Act is a rewrite of the 1988 legislation, the substance remains the same.

[4] This provision has since been superseded (for corporate bodies) by the Corporation Tax Act 2009, s 54. Again, this Act comprises rewritten legislation, with no alteration to substance.

The validity of the Rangers tax scheme relied on a string of decisions brought before the Tax Tribunal in the 2000's. In *Dextra Accessories Ltd v Macdonald*,[5] a company transferred most of the salary of three of its directors into an Employee Benefit Trust (the "EBT"). Access to the funds was beyond the control of the directors. The Special Commissioners[6] concluded that since the trustee held discretion on how to apply the capital, the directors were not liable to a charge to income tax. The *ratio* was briefly stated by the Commissioners as follows: "The reason why the employees are not taxed on funds in the EBT is simply that they do not belong to the employees".[7] This reasoning was followed in 2008 where similar facts came before the Special Commissioners in the case of *Sempra Metals Ltd v Revenue and Customs Commissioners*.[8] *Sempra Metals* also involved a host of other issues on the side of corporate tax deductions; however, on the issue of an employee's liability to income tax for payments made into a trust, the consensus was to follow *Dextra Accessories*.

Dextra Accessories was appealed to the House of Lords on the issue of corporate deductions for earnings paid to employees.[9] The decision in that case restricted the tax relief to payments actually made by the trustees. Therefore, a payment sitting in the hands of a trustee will not necessarily qualify an employer for a corporate tax deduction until the time that earnings have been paid out.

The Issue

The central issue in the *Rangers* appeal was whether a payment to the Principal Trust on behalf of an employee was subject to a charge to income tax, where the employee had no prior right to receive the remuneration. To resolve this issue, it was necessary to employ the *Ramsay* principle, adopted by the courts to counteract unacceptable tax avoidance. This involves a two-step approach as elaborated by Lord Nicholls in *Barclays Mercantile v Mawson*.[10] First, the court is required to purposively construe the tax imposing statute. Next, it is required to decide whether the substance of the taxpayer's transaction falls under the purposive construction of the statute. The Rangers scheme spanned over a number of tax years and required the court to consider two separate taxing statutes: ICTA 1988, and ITEPA 2003. In both instances, the focus of the analysis was on the meaning of the term 'earnings' or 'emoluments'. Returning to the *Ramsay* principle, this required the court to answer two questions. What transactions did Parliament contemplate as earnings or emoluments at the time it enacted these statutes? Are the payments to the Principal Trust considered to be 'earnings' or 'emoluments' in substance? As a point of law, the response to these questions has great importance for remuneration in the business world.

The Rangers argued that the payments into the Principal Trust were not 'earnings'. This interpretation offers advantages that could benefit all high earners, and deprive the Revenue of millions of pounds. Consider for a moment the operation of this tax scheme. A football player who is earning a gross salary of £1,000,000/year would normally fall in the highest income tax bracket and, in 2017, would take home a net salary of £540,676. Now, if that same £1,000,000 was a payment to an employee benefit trust, which was 'beyond the control of the employee', no immediate tax liability would arise, depriving the Revenue of £459,324 in that tax year. The Rangers case was far more egregious than this. The players

[5] *Dextra Accessories Ltd v Macdonald (Inspector of Taxes)* [2002] STC (SCD) 413.
[6] The General Commissioner of Income Tax and the Special Commissioners of Income Tax were replaced by the new tax tribunal system on the 1 April 2009, comprising the First-tier Tribunal and the Upper Tribunal.
[7] *Dextra Accessories* (n 5) [17].
[8] *Sempra Metals Ltd v Revenue and Customs Comrs* [2008] STC (SCD) 1062.
[9] *MacDonald (Her Majesty's Inspector of Taxes) v Dextra Accessories Ltd. & Others* [2005] UKHL 47.
[10] *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51.

were also protectors of the trust, meaning that they could assign the beneficial entitlement of the trust to anyone and in any proportion. If they assigned beneficial interest of the trust property to themselves in smaller amounts over a number of years, they would be able to considerably reduce their tax liability. In effect, the Rangers scheme took the matter one step further, and the players would opt to take a loan from the sub-trust, avoiding the charge to income tax in its totality.

For this reason, all eyes in the tax world were on the *Rangers* case when it reached the Supreme Court. Would the principle established by the Special Commissioners in *Dextra Accessories*[11] stand or fall under scrutiny by the highest appellate court?

Judgement

Ultimately, the unanimous decision of the Supreme Court was that payments to the Principal Trust were 'earnings' pursuant to the legislation, and as such, a charge to income tax was deductible at source. In his judgement, Lord Hodge stated that 'as a general rule, the charge to income tax extends to money that the employee is entitled to have paid as his remuneration, whether or not it is paid to the employee or a third party'.[12]

In reaching this decision, Lord Hodge is essentially asking two questions:

1) Does remuneration directed at a third party amount to earnings?

Turning to the legislation, Lord Hodge first considers the operation of the tax charge. Section 9(2) of ITEPA 2003 provides that tax is charged to "earnings from an employment".[13] The concept of earnings is further defined in section 62.[14] In addition to the obvious net for salary and wages,[15] section 62(2)(c) captures "anything else that constitutes an emolument of the employment". This gives broad discretion to the court to interpret the concept of earnings.

Next, Lord Hodge considers whether remuneration needs to be directed at an employee in order to be considered 'earnings'. Section 13 of ITEPA[16] defines the taxable person as "the person to whose employment the earnings relate", yet it reveals no requirement that he ought to personally receive the remuneration for it to be considered earnings. In the words of Lord Hodge, if an employee enters into a contract with his employer that provided he would receive a salary of £X and that the employer would also pay Aunt Agatha £Y, there is no statutory purpose for taxing the former but not the latter.[17] Since both sums are agreed in relation to the employee's work, it is irrelevant that a part of the remuneration is paid to Aunt Agatha or a third party.

The general rule therefore is that the charge to tax on employment extends to money that the employee is entitled to have paid as his or her remuneration, whether or not it is directed to a third party. There are however three exceptions to this rule.

The first circumstance relates to payments to a third party for an employee's prerequisites. In the case of *Tennant v Smith*,[18] a bank manager was not liable for a charge to income tax

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[11] [2002] STC (SCD) 413.
[12] *RFC v AGS* (n 1) [41].
[13] Income Tax (Earnings and Pensions) Act 2003 (the "ITEPA"), s 9(2).
[14] ibid, s 62.
[15] ibid, s 62(2)(a).
[16] ibid, s 13.
[17] *RFC v AGS* (n 1) [39].
[18] *Tennant v Smith* [1892] AC 150.

on accommodations provided to him by the bank, which were requisite for him carrying out his work. The legal test established was whether the benefit can be converted into money or money's worth. If it cannot be converted into money, the payment will not constitute earnings. The second circumstance relates to statutory in-kind benefits, colloquially referred to as perks. Certain expenditures by an employer to benefit employees are exempted by ITEPA 2003.[19] The third circumstance concerns rights to benefit based on a contingency. In *Edwards v Roberts,*[20] the employer paid bonuses into a trust for an employee in addition to his regular salary. However, the employee was only able to access the funds once certain contingency was fulfilled (i.e. his resignation). The money placed in the trust was not considered as earnings as the Court found that the employee only had a conditional interest in the property.

Applying this construction of the legislation to the facts, Lord Hodge found that the payment of money into the Primary Trust was a component of the footballers' remuneration package.[21] Based on the intention of the parties negotiating the players' salaries, it was understood that the player would be able to access the funds whenever he so chose. While a contingency did exist in that the trustee ought to exercise his discretion, it was clear that the Rangers had sought trustees that were 'lax' and who 'would comply with their recommendations'.[22] Furthermore, the existence of a risk did not set aside the common intention of the parties in setting up the trusts; that is to reward the players for their work.

2) Has a payment been made on account of the earnings?

Counsel for the Rangers argued that the "payment of remuneration cannot be the payment of emoluments unless the employee is entitled to receive it".[23] Since *Garforth v Newsmith*,[24] the term 'payment' has been understood to take meaning from its context. In that case, a company had decided to award bonuses to two of its directors, and consequently segregated the money into a separate company account. Even though the directors did not draw from the account in that year, they were assessed a charge to income tax by the Inland Revenue. In his judgment, Walton J offered a definition for the term payment in this context: "when money is placed unreservedly at the disposal of directors by a company, that is equivalent to a payment".[25] In *obiter* comments, Walton J indicated that 'different considerations would have arisen' if access to the money was subject to another vote by the board of directors.[26] A negative formulation of the '*Garforth* principle' would therefore assert that money which is not at the disposal of an employee cannot be deemed as a payment for the purposes of income tax.

This line of reasoning had been applied by the Special Commissioners in both *Dextra Accessories* and *Sempra Metals*. In both of these cases, the company directors avoided a charge to income tax on the technicality that remuneration paid into a trust was subject to the discretion of the trustee and therefore was not 'unreservedly at the disposal of the directors'. The Rangers tax scheme drew its lifeblood from this interpretation of 'payment'. With little reasoning, Lord Hodge ruled that both cases were wrongly decided since the

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[19] ITEPA 2003, pt 3, ch 2-11.
[20] *Edwards v Roberts* (1935) 19 TC 618.
[21] *RFC v AGS* (n 1) [61].
[22] *Murray Group Holdings and Others v HMRC* [2012] UKFTT 692 (TC), [255].
[23] *RFC v AGS 2012* (n 1) [48].
[24] *Garforth v Newsmith Stainless Ltd* [1979] 1 WLR 409.
[25] ibid [414A-B].
[26] ibid [415C-E].

Commissioners had erred in their reasoning by misapplying the 'judicial gloss' from *Garforth*.[27]

In response to this issue, Lord Hodge offers up the 'redirection principle' as an explanation. Through a purposive interpretation of the tax provisions[28], he explains that any remuneration in the form of money, which the employee agrees should be paid to a third party, will constitute earnings.[29]

Applying this principle to the facts, it is clear that the football players had agreed, through a side letter to their contracts, to a part of their remuneration packages being assigned to a trust. This was no different than an employer's assignment of part of an employee's salary to the proverbial 'Aunt Agatha'.[30]

Impact

This decision is surprising for several reasons.

Firstly, the Supreme Court sidestepped the basis of the appeal and engaged itself in circular logic. The point of law submitted on appeal, by Andrew Thornhill QC, on behalf of the taxpayer was: whether payments to an Employee Benefit Trust, on behalf of an employee, constituted 'earnings' as defined by the relevant statutes.[31] Only if the payment constitutes earnings was the employer liable to deduct income tax.[32] Unfortunately, this question was not answered. Instead, the Supreme Court answered a much easier question, which was 'whether payments to a third party would constitute earnings'. As described above, this question begins with the presumption that 'earnings' exist instead of qualifying the concept on its own merits. David Goldberg QC argues that this point was 'honestly never in doubt'.[33] In jumping to the conclusion that remuneration exists, the court misses an opportunity to provide much needed clarity on the concept of payments.

Secondly, the case brings up a fundamental issue regarding prospective certainty in tax law. At para 59, Lord Hodge states:

> "No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party"[34]

The 'scope of the tax' charge is a concept that can only be discovered from an application of the *Ramsay* Principle. What Lord Hodge is actually considering is whether the transactions carried out by the Rangers were within Parliament's contemplation at the time that it legislated the tax charge. This of course rests on the debatable assumption that such a thing as the 'Parliamentary intention' can exist.[35] Even if we assume that such a thing as Parliamentary intention can exist, how can a taxpayer be reasonably expected to know Parliament's intention beyond the words of the statute? As one judge has remarked on the purposive approach in tax, it is appropriate to ask taxpayers and their advisers to read

[27] *RFC v AGS* (n 1) [57].
[28] ITEPA 2003, s 62(2)(b).
[29] *RFC v AGS* (n 1) [59].
[30] ibid [39].
[31] ITEPA 2003, s 62 and ICTA 1988, s 131.
[32] ITEPA 2003, s 9(2).
[33] David Goldberg QC and Nigel Doran, 'The Rangers FC case: payments to remuneration trust were themselves remuneration' [2017] 1(1362) Tolley's Tax Journal, p 8.
[34] *RFC v AGS* (n 1), [59].
[35] Natalie Lee, 'A Purposive Approach to the Interpretation of Tax Statutes?' (1999) 20(2) Statute Law Review 131, at p 136.

statutes, and perhaps also guidance to statutes, but "they should not have to read the parliamentary debates and the earlier reports".[36] In the Rangers case not only was the statute silent on the issue of payments to trusts, but case law such as *Sempra Metals* and *Dextra Accessories* explicitly condoned the transaction in question. For a judge to simply stretch the tax-imposing statute to include a transaction not present in the words of the statute demonstrates an extraordinary application of judicial discretion. It is arguable that this type of behaviour is not compliant with European principles, which require prospective certainty in law before an individual can be deprived of personal property.[37]

There are also practical difficulties with the purposive approach applied. Taxpayers are still left with a degree of uncertainty regarding the utility of Employee Benefit Trusts. In discussing the case of *Edwards v Roberts,*[38] Lord Hodge proposed that money paid into a trust with a contingency would not constitute earnings, at least not until that contingency was realised. However, Lord Hodge distinguished *Edwards v Roberts* on the fact that there were no contingencies in the Rangers scheme.[39] This distinction contradicts the *Garforth* principle described above, as well as basic principles of trust law. We know that beneficiaries of a trust don't have title to property unless the trustee exercises discretion. So what is it about the trustees in the Rangers case that made their role so meaningless? Perhaps it was their "lax" character, which received a substantial amount of attention in Lord Hodge's judgement.[40] However, this cannot be an adequate and practical distinction to explain why the trusteeship in the Rangers case was different from *Edwards v Roberts*. For this reason, the law could have greatly benefitted from a more detailed explanation of the concept of payments in relation to earnings.

Secondly, morality features prominently throughout the judgement. Lord Hodge opens his opinion with the following line: "This appeal concerns a tax avoidance scheme by which employers paid remuneration to their employees through an employees' remuneration trust in the hope that the scheme would avoid liability to income tax and Class 1 national insurance contributions".[41] As Stephen Daly has pointed out, it seems that the Judge had already reached his conclusion before picking up the pen.[42] This was an aggressive scheme by anyone's definition, but it is clear that the Court is condemning avoidance from its opening line. It does not stop there, though. Other clear moral sentiments find their way into the decision. Lord Hodge goes on to characterise tax avoidance as: "the prodigious intellectual effort in support of tax avoidance."[43] It is worth repeating that tax avoidance is legal. The words of Lord Tomlin in the *Duke of Westminster v IRC* cannot be repeated enough times:

> "Every man is entitled, if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."[44]

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[36] Sir Ian McKay 'Interpreting Statutes-A Judge's View' (2000) 9 OULR 743, at p 755.
[37] Cathya Djanogly, 'Retrospective Tax Legislation: A Clash Of Two Moral Imperatives' [2012] Thomson Reuters Practical Law <https://uk.practicallaw.thomsonreuters.com/0-518-8006> accessed 12 January 2018.
[38] *Edwards v Roberts* [1935] 19 TC 618.
[39] *RFC v AGS* (n 1) [48].
[40] *RFC v AGS* (n 1) [28]-[30] and [63].
[41] ibid [1].
[42] Stephen Daly, 'The Language Of Avoidance Cases' [2017] Tolley's Tax Journal <https://www.taxjournal.com/articles/language-avoidance-cases-31082017> accessed 12 January 2018.
[43] *RFC v AGS* [2012], at para 13.
[44] *IRC v Duke of Westminster* [1936] A.C. 1, 20.

This case is not about fairness or harms committed. It is a case about whether payments to an EBT are considered earnings for the purposes of ICTA/ITEPA. Taxpayers rely on this legislation so as to structure their commercial affairs, and the Court should not suppose that it is Parliament's intention to maximise tax revenues.

Conclusion

Ultimately, the wind is blowing against those that seek to take advantage of law, and such an aggressive tax avoidance scheme was bound to fail. However, the means used by the Supreme Court to achieve this result were inadequate for the reasons stated above. Parliament has recently introduced a General Anti-Abuse Rule (GAAR),[45] which provides HMRC with a more direct cause of action to combat aggressive tax avoidance. While the GAAR was not available at the time of the Rangers case, it provides HMRC an avenue to counteract abusive tax arrangements by making the adjustments, which are 'just and reasonable'. For future cases that are similar, it is worth considering how an application of the GAAR would have resolved this dispute. Instead of stretching the scope of legislation through purposive interpretation, the GAAR could be of valuable assistance in tax law. We need to preserve the integrity of legal rules and to do so, there must be a limit to purposive interpretation.

[45] Finance Act 2013, s 206.

Copyright protection of TV Formats in the UK: Banner Universal Motion Pictures Ltd v. Endemol Shine Group Ltd
[2017] EWHC 2600 (Ch)

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Abstract

In its decision of 19th October 2017, the High Court of Justice, Chancery Division (EWHC) held that under Copyright Designs and Patents Act 1988 ("CDPA"), a creator of a TV format is entitled to obtain copyright protection by complying with two minimum standards. The first standard being that there should be some apparently identified features which, taken together, distinguish the show in question from others of a similar type. Secondly, the distinguishing features should interlink with each other in a coherent framework which allows the creator to reproduce the show in a recognisable form repeatedly.

Legal Context

This interim application for ruling concerned the interpretation of the doctrine of originality, subject matter categorisation and requirements of copyright protection of TV formats in the UK under sections 1(1)(a) and 3(1) of the CDPA. Under the current UK copyright law, a TV program is recognised as a dramatic work and guaranteed copyright protection as a whole, which includes the TV format, the content and the final output. The claimant contest that a TV format in its individual form should be recognised as a work that can be guaranteed with copyright protection and the defendants should be held liable for infringement of claimant's copyright over the format of the game show titled 'Minute Winner'. The defendants do not contest the first issue of guaranteeing copyright protection to TV formats, but strongly challenge that the format presented by the claimants are not eligible for copyright protection and that the defendants are not liable for copyright infringement of the impugned TV format.

Facts

Endemol Shine Group Limited and Friday TV AB and NBC Universal Global Networks UK Limited were charged with infringement of copyright, breach of confidence and passing off of a TV game show format named 'Minute Winner'. The format of the show 'Minute Winner' as described by the claimant is a television program in which people are given one minute to win something.[1] The program could take place in a studio or a location like street, shopping mall and like many.[2] The winner is rewarded with prizes

[1] *Banners Universal Motion Pictures ltd v. Endemol Shine Group Ltd and Friday TV AB and NBC Universal Global Networks UK Ltd*, [2017] EWHC 2600 (Ch), [7].
[2] Ibid.

sponsored by firms/companies in an exchange with advertisements during the program.

The interim application was made by the petitioner, Banner Universal Motion Pictures (BUMP) to the High Court on the interpretation of sections 1(1)(a) and 3(1) of the CDPA, 1988.

The relevant factual issues concerned the copyright protection of TV format and copyright infringement by the defendants of the TV show named 'Minute Winner' (claimed to be created by BUMP). Snowden J was asked to consider whether only a format of a TV show can avail copyright protection under CDPA's subject matter categorisation and the doctrine of originality test.

Analysis

The court summarised the questions as, firstly, whether TV format qualified as a literary work or a dramatic work under CDPA, and secondly, whether only TV formats avail copyright protection under sections 1(1)(a) and 3(1) of the CDPA.

Firstly, to guarantee protection for a TV format as literary work or dramatic work, originality under the CDPA requires that the work must be an expression of the author's intellectual creation. This interpretation does not, however, mean that every constituent aspect of work must be original. The work must be taken as a whole and can include parts that are neither novel nor ingenious.[3] The court went on to observe that the expression 'dramatic work' is not defined in the CDPA. However, in *Norowzian v Arks Limited*,[4] the court held that a dramatic work was 'a work of action, with or without words or music, which is capable of being performed before an audience'.[5]

According to this meaning, each recorded episode of a television game show or a quiz show would be likely to qualify itself for copyright protection as a dramatic work, so that copyright would be infringed if someone else staged a re-enactment of the same episode. However, that was not the issue in the present case, since no episodes of Minute Winner were ever actually produced. The issue, in this case, was whether only the 'format' of a television game show or quiz show is separately capable of being protected by the law of copyright.

On this specific issue, Snowden J chose to overlook the decision of the Privy Council in *Green v Broadcasting Corporation of New Zealand*.[6] The Board had held that only the 'format' of a TV show could not be recognised as a dramatic work and thus could not avail copyright protection. Snowden J observed that the Privy Council's decision was wrong in not guaranteeing copyright protection for TV formats because they considered features of the show individually, rather than collectively. He concurred

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[3] Ibid.
[4] *Norowzian v Arks Limited* (No 2) [2000] EMLR 67.
[5] *Banners Universal Motion Pictures ltd v. Endemol Shine Group Ltd and Friday TV AB and NBC Universal Global Networks UK Ltd*, [2017] EWHC 2600 (Ch) [73].
[5] Ibid.
[6] *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700.

with the dissenting judgment in the Court of Appeal made by Gallen J[7] who said that a TV format in its own right could be guaranteed with copyright protection, provide that it complies with the certain basic requirement. Snowden J decided to refer to the same commentary referred by Gallen J. In *Copinger and Skone James on Copyright*,[8] where, after referring to Green, the authors commented that "A useful test to determine whether there is a protectable dramatic work is to ask whether, using the written script or another record as a basis, it is possible to present a coherent and meaningful show which is capable of being performed".[9]

Based on the authorities as mentioned above and commentaries, Snowden J decided that only the format of a television game show or quiz show could be the subject of copyright protection under the category of dramatic work.[10] However, he insisted that the copyright protection would not subsist unless the TV format satisfied the minimum requirements. The minimum requirements are that, firstly, there should be some apparently identified features which, taken together, distinguish the show in question from others of a similar type;[11] secondly, the distinguishing features should interlink with each other in a coherent framework which allows the creator to reproduce the show in a recognisable form repeatedly.[12]

However, due to the factual circumstances of the cases, the plaintiff's TV format did not qualify for copyright protection. Snowden J held that the contents of the 'Minute Winner' document presented to the court by the plaintiff as evidence was very unclear and was lacking in specifics. In his view, the contents submitted by the complainant, even when taken together, did not identify or prescribe anything resembling a coherent framework or structure which could be relied upon to reproduce a unique game show in recognisable form.[13] He concluded that features mentioned in the document presented by the complainant containing the format were, in truth, commonplace and indistinguishable from features of many other game shows.

The judge observed that the performance of a task against the clock to win a game or a prize was a common feature of most game shows, and it did not become distinctive because the time to complete the task was limited to a minute. He also observed that the UK version of 'Minute to Win It' differed from the standard US version in that it was a contest between selected teams rather than involving individual contestant.[14] Therefore, he dismissed the plaintiff's claim for copyright protection of their TV shows.

Snowden J also chose to dismiss the issue of breach of confidence raised by the complainant by pointing out that substance of the claim was the same as the one dismissed by the District Court of Sweden.[15] He Concurred with the District Court's observation that for particular information to be qualified as a trade secret, the information must be more than information of a general nature: it must have reached

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[7] Ibid.
[8] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (17th edn, Sweet & Maxwell, London 2017).
[9] Ibid [44].
[10] *Banners Universal Motion Pictures ltd v. Endemol Shine Group Ltd and Friday TV AB and NBC Universal Global Networks UK Ltd* [2017] EWHC 2600 (Ch), [43].
[11] Ibid [44].
[12] Ibid [45].
[13] Ibid [45]
[14] Ibid [54].
[15] Ibid [70]-[71].

some level of detail. Snowden J concluded that the information disclosed in the "Minute Winner" document was fundamental and general in nature, so it could not amount to a trade secret. The claim for breach of confidence was therefore dismissed.

Practical Significance

Firstly, the decision has made it clear that for availing protection under UK copyright law, the TV show's content has to be clear, specific and contain elements creating a coherent framework of being reproduced into a show with distinctive features. The judgment stressed the importance of not guaranteeing protection to ideas which lack a distinguishing feature and belong to a creative commonplace that is shared by many other game shows. In this sense, one of the significant difficulties in establishing a successful infringement claim is showing that the copied part is the expression of ideas, rather than the pure idea itself.

Secondly, the decision is a useful reminder to those devising TV formats of the importance of robust TV format bibles detailing sufficient information as to articulate the show's key features and the importance of non-disclosure agreements before disclosing the show's distinctive characteristics. The decision also acts as a warning for TV format developers that even if different examples back their commonplace game concepts, it will likely fall short of the standard for copyright protection as dramatic works.

Thirdly, the decision is not the first to address the question of guaranteeing copyright protection to TV formats. The question was answered differently in different EU Member states. While, for instance, the German Federal Court of Justice decided in the case '*Kinderquatsch mit Michael*'[16] that formats are per se, not copyright protected. The court held that the format was just an instruction book explaining how to form or to express the idea. This means that format is not the result of a creative process and therefore, even if it is original, not copyright protected. These different interpretations of copyright protection of formats which circulate on the single market result from the lack of European harmonisation. However, there is no such issue on subject matters such as databases, photographs or computer programs. This uncertainty has forced the stakeholders like producers, distributors and re-producers to resort to other legal methods for protecting their dramatic works.

The one-dimensional purpose of the individualistic copyright theories in continental Europe corresponded to the situation in the 18th Century. In the so-called digital age, copyright concerns not only single artists but whole cultural industries. This cultural development changes the perception of copyright from an instrument for the protection of artists to an instrument to balance the interests of all participants involved. In contrast to individualistic theories, Anglo-Saxon utilitarian copyright theories are more suitable to explain the balancing of these interests taking not only the artist but the society as a whole into account. Given their focus on the effects that copyright law has on the entire society, utilitarian theories allow feed backing their corresponding theoretical assumptions.

The minimum standards for copyright protection of TV formats established by the English High Court in this case have shades of the utilitarian approach. In today's

[16] *Kinderquatsch mit Michael* [2003] *Aktenzeichen* I ZR 176/01

digital age, this approach will help in striking the right balance between monopolisation of creative space and artistic freedom.

Finally, the minimum requirements proposed by Snowden J for guaranteeing copyright protection to TV formats are very similar to the originality test employed by the European Court of Justice ("ECJ") in *Infopaq International A/S*[17]and the progeny of cases like *FAPL*[18] and *BAS v. Ministerstvo kultury*.[19] The originality test is that the work examined for copyright protection should be the author's own intellectual creation. In *Infopaq*, it was held that a work could guarantee copyright protection if the work is an object of an author's intellectual labour and skill. The ECJ took a similar view in FAPL and BAS, where it was added that an author's intellectual creation signifies the personal touch of an author which can be interpreted from the distinct scheme of arrangement and use of skill to create the dramatic work. The ECJ is yet to address the issue of guaranteeing copyright protection for TV formats. However, Snowden J has addressed the issue in a manner how the formed would have addressed it. In the midst of BREXIT, the decision in *Banner Universal Motion Pictures* helps in reducing the risk arising from uncertainties, ensuring the economic efficiency of the internal markets and therefore achieving the primary objectives of copyright protection mechanism.

[17] *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465

[18] *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury*, C-393/09, EU:C:2010:816.

[19] *Joined Cases C-403/08 FAPL and others v. QC Leisure and Others C-403/08 and C-429/08 Karen Murphy v. Media Protection Services Ltd* [2011] I-09083.

Article 8 and McDonald: A Tasty Judgement for Private Landlords but A Hard One to Swallow for Residential Tenants

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Abstract

In 2016, the Supreme Court decided in *McDonald v McDonald*[1] that Article 8 of the European Convention on Human Rights cannot justify a different mandate to that of the contractual relationship between private tenants and landlords, and the mandate that Parliament decided when balancing the competing interests. This essentially means that judges are not required to assess proportionality when a Section 21 notice is granted to private tenants. Despite this case being over a year old, its ramifications are still vast as according to the 2015-16 English Housing Survey, 36% of private sector tenants are families. These are people who could one day be affected by the consequences of this case. This article through using case law, legislation and academic literature scrutinises the reasoning of the judges in this case and uncovers whether it was decided correctly.

Introduction

This essay is split into four components. The first provides a brief context of the legislation. The second focuses on the facts of *McDonald v McDonald*. The third explores the reasoning of the judges in paragraph 40, which is the current balance struck between private landlords and residential tenants.[2] The fourth component scrutinises the reasoning and provides critical commentary of it. This case comment will conclude that *Zehentner*[3] and *Pinnock*[4] do not help tenants to contend a different mandate to that of contract and statute. As well as that the judges were wrong to focus on contractual relationship, because it is illusory. Issues with the statutory provisions and how the judges applied them must be acknowledged. Despite them, unless Parliament amends them or Strasbourg decides, this reasoning will remain the current balance between private landlords and residential tenants.

Context

The Housing Act 1988 (HA 1988) strikes a balance between the competing interests of private landlords and residential tenants. The interest of private landlords is that of Article 1 Protocol 1 (A1P1) of the European Convention of Human Rights 1950 (ECHR 1950), which states every natural or legal person is entitled to the peaceful enjoyment of his possessions. While the interest of tenants is that of Article 8 of the ECHR 1950, which states that everyone has the right to respect for his home. The Rent Act 1977 did not help because tenants had a strong security of tenure. This made it difficult for landlords to evict them and therefore they could not enjoy their A1P1 rights. The HA 1988 solves this by creating Assured Shorthold Tenancies (AST)

[1] [2016] UKSC 28, [2016] 3 WLR 45
[2] ibid para 40
[3] *Zehentner* (n 3)
[4] *Pinnock* (n 4)

which grant a weaker security of tenure. S21(4) allows the courts to grant a possession order if tenants have been living in the property for at least 6 months and the landlord gives a two months notice to quit. This is complemented by s89(1) of the Housing Act 1980 (HA 1980) which grants a power to postpone that order for up to six weeks, where there is exceptional hardship. These legislative provisions form a significant part of the reason the court rejected the claimant's article 8 proportionality defence.

Facts

The relevant facts of *McDonald* are that Mr and Mrs McDonald bought a property using a mortgage.[5] They granted an AST to their daughter Fiona (the claimant), who had a mental disorder and paid her rent using her housing benefit. Mr and Mrs McDonald fell into arrears and the loan company appointed receivers, who sought possession in the name of the landlords. The receivers used their powers under the mortgage to serve a notice to quit in their own names on the claimant under s21(4) of the HA 1988. The claimant raised an article 8 proportionality defence. This defence was both unsuccessful at first instance and in the Court of Appeal.[6]

Judgment

On appeal to the Supreme Court they sought to answer three questions.[7] The three questions were does article 8 require a court entertaining a claim for possession by a private landlord against a residential occupier to consider proportionality? If yes, could s21(4) of the HA 1988 be read so as to comply with that conclusion? If yes, would the trial judge have been entitled to dismiss the claim for possession? The last two questions were only discussed as *obiter* because the judges unanimously decided that no assessment of proportionality is required:

> "… although it may well be that article 8 is engaged when a judge makes an order for possession of a tenant's home at the suit of a private sector landlord, it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants."[8]

In other words, the judges decided to not apply article 8 because of contract and statute.
The court also explored Strasbourg jurisprudence to see if there was authority for a private tenant raising a proportionality defence.

To Andrew Dymond the "most significant part of the analysis of the Strasbourg case law is the court's consideration of *Zehentner*".[9] Here Ms Zehentner left her flat to receive treatment before she could pay for repairs.[10] Her flat was sold when the strict

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[5] *McDonald* (n 1)
[6] [2014] EWCA Civ 1049, [2015] Ch 357
[7] *McDonald* (n 1)
[8] *McDonald* (n 2)
[9] Andrew Dymond, 'McDonald - private landlords and article 8' (2016) 19(5) JHL 93, 94
[10] *Zehentner* (n 3)

time limits for the payment had expired. Because of her illness, Ms Zehentner was unaware of the enforcement of proceedings and the sale of her flat. When she recovered, she successfully claimed that her A1P1 and Article 8 rights had been violated. However, the court distinguished the case from *McDonald*.[11] To the judges the furthest this decision goes in assisting the tenant is to "support the notion that article 8 is engaged whenever a court determines a tenancy of residential property and makes an order for possession".[12]

Comment

Strasbourg jurisprudence

The Supreme Court's decision to distinguish *Zehentner* from *McDonald* is questionable. If the judges were incorrect in doing so then, there would be strong grounds to have a proportionality assessment. This is because s2(1)(a) of the Human Rights Act (HRA 1998) states that the courts must take into account the decisions of the European Court of Human Rights, and in *Zehentner* proportionality was assessed. *Zehentner* was rightfully distinguished because it was decided the way it was because of a lack of procedural safeguards.[13] This is not the case with *McDonald*, as a statutory regime exists.

However, Lees is right to stress the lack of clarity when the judges state that *Zehentner* shows that article 8 is engaged but does not allow tenants to invoke an article 8 defence.[14] This makes the reasoning[15] prone to criticism from Lees because an engagement of article 8 "requires a proportionality assessment".[16] What the court meant to say and should have said is that article 8 is to be appreciated, but contract and statute has decided the balance between private parties.

Dymond rightly reasons that "the question remains whether [Strasbourg] will agree with the reasoning".[17] Therefore, in the future s2(1)(a) of the HRA 1998 may allow tenants to use article 8 to contend a different mandate to that of contract and statute. However, the current balance between private parties correctly rejects tenants using Strasbourg jurisprudence, to use article 8 to contend a different mandate to that of contract and statute.

Public Authority Horizontality

Secondly, the reasoning can be critiqued because it fails to sufficiently engage with public authority horizontality. S6(1) of the HRA 1998 states that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". This demonstrates that article 8 and an assessment of proportionality applies to public landlords and residential tenants. The case of *Pinnock* helps us in this area.[18] In *Pinnock*, the local housing authority served a demotion notice on Pinnock because of a number anti-social behaviour incidents caused by members of his family. The Supreme Court held that "where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess

[11] *McDonald* (n 1) para 51
[12] ibid
[13] ibid
[14] Emma Lees 'Article 8, proportionality and horizontal effect' (2017) 133 LQR 31, 34
[15] *McDonald* (n 2)
[16] Lees (n 14)
[17] Dymond (n 9) page 96
[18] *Pinnock* (n 4)

the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact”.[19]
This leads us to the question whether *Pinnock* and s6(1) of the HRA could be used to suggest that proportionality should apply to private landlords and residential tenants? Through looking at Lord Neuberger’s reasoning in *Pinnock* the answer is no. He reasons that “nothing in this judgment is intended to bear on cases where the person seeking the order for possession is a private landowner”.[20] He also goes on to say that it is preferable for this court “to express no view on the issue until it arises and has to be determined”.[21] The issue arises in *McDonald* and in his joint judgment he reinforces the idea that proportionality only applies to public authorities and private tenants. This is because “s6(1) of the 1998 Act only applied to “a public authority”.[22] This is unsurprising because the Convention is “intended to protect individual rights against infringement by the state or its emanations”.[23] In my opinion Lord Neuberger and Lady Hale are right to give effect to the purpose of the HRA which is what they express above. Therefore, the current balance between private parties correctly rejects an application of *Pinnock* and tenants cannot use *Pinnock* and s6(1) to contend a different mandate to that of contract and statute.

However, Sarah Nield argues that the court failed to engage with the different types of horizontal effect and in this instance “remedial horizontality”.[24] S6(3)(a) of the HRA shows that the court is a public body. This means that the courts must act in a manner that is compliant with human rights and when deciding cases, they must observe the rights enshrined in the convention. Then why did the court reject the claimant’s argument? The court took the view of Lord Millett in *Harrow London Borough Council v Qazi*[25] which is that the court is “merely the forum for the determination of the civil right in dispute between the parties” and “once it concludes that the landlord is entitled to an order for possession, there is nothing further to investigate”.[26] Lord Neuberger and Lady Hale denounce critics like Alice Richardson who see the reasoning as “problematic”[27] by saying that by “more of the mere forum” they mean tortious or quasi-tortious relationships.[28] In these relationships, “the legislature has expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise”.[29]In other words, s6(3)(a) will only apply if there is no contractual relationship and statutory provisions provided.

Therefore, if it can be proved that the two do not exist or issues exist with them, then s6(3)(a) ought to apply to private landlords and private tenants and proportionality ought to be assessed.

Contract

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[19] ibid para 49
[20] ibid para 50
[21] ibid
[22] *McDonald* (n 1) para 37
[23] ibid
[24] Sarah Nield, ‘Shutting the door on horizontal effect: McDonald v McDonald’ (2017) 1 Conv 61,65-66
[25] [2003] UKHL 43, [2004] 1 AC 983
[26] ibid para 108
[27] Alice Richardson ‘Proportionality and Private Landlords’ (2016) 160(36) SJ 24
[28] *McDonald* (n 1) para 46
[29] ibid

One of the biggest criticisms of the reasoning is that the contractual relationship is illusory. Sarah Nield is a proponent of that argument.[30] She does note that the reasons that she gives are policy issues, but to her they are issues which are integral to respect for the home and should justify considering proportionality in private landlord and private tenant cases. Nield reasons that if all that is on offer for private tenants is an AST, then the "very weak security of tenure" afforded to AST tenants, may work for those that have "the few ties to cope with the frequent changes of home that may result".[31] This system may not work for those like families who want to maintain close schooling or vulnerable adults like the claimant, who may "justify the need for greater security of tenure".[32] Therefore, the idea that these contracts are freely entered is illusory, because tenants lack choice as ASTs form majority of private rented contracts.

On the other hand, Mark Routley disagrees and does not see the contractual relationship as illusory. Routley believes that had the case succeeded it could have seen "the role of the court significantly extended so as to alter the basic principle of freedom of contract".[33] However, Nield's argument is stronger because she proves that if private tenants are limited to ASTs, which in reality is the case, then freedom of contract does not exist.[34]

Emma Lees does not explicitly say that the contractual relationship is illusory. However, she reasons that either the justification for not considering the proportionality of the order lies with the fact that the rights and obligations are "freely and privately negotiated in the form of contract", or because Parliament has decided the balance.[35] For Lees, it is "problematic" to argue both.[36] This is because "if statute governs the relationship, then it is one produced by the state, and if a court order is sought, it is enforced by the state".[37] It is no longer a purely private relationship. Lees' argument is more convincing that Routley[38] and the judges'.[39] This is because she gives a logical explanation of why it is problematic to argue in favour of the contractual relationship. Routley and the judges merely mention it, but fail to stress why interfering with it is problematic.

Andrew Wade fails to draw reference to the contractual relationship being part of the reason why proportionality is not assessed. Wade instead argues that the court clearly made a "public policy decision, reviewing the history of legislation affecting private property and the purposes of the 1988 Act".[40] Therefore, to Wade proportionality is not assessed because of statute and the purpose of the HA 1988. His argument should be taken further to say that Lord Neuberger and Lady Hale should have focused on this instead of contract and statute.[41]

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[30] Nield (n 24) 66
[31] ibid
[32] ibid
[33] Mark Routley 'Human rights law and repossession' (2016) 146(1805) MFG 24
[34] Nield (n 24)
[35] Lees (n 14) page 32
[36] ibid
[37] ibid
[38] Routley (n 33)
[39] *McDonald* (n 2)
[40] Andrew Wade 'English Property Law' (2016) 145 Prop LB 4
[41] *McDonald* (n 2)

Wade's failure to reference the contractual relationship highlights its insignificance in the balance struck between private landlords and residential tenants. This added with Nield seeing the contractual relationship as illusory and Lees stressing how it ends when statute governs it, demonstrates that the judges were incorrect to say that tenants could not use article 8, to justify a different order to the contractual relationship, because the relationship does not exist.

Statute

Evidently, only half of the problem has been solved. A consideration of any issues that exist with the statutory provisions, or issues with how the judges in *McDonald* used these provisions in relation to the HRA 1998 is now required.

The first issue concerns direct statutory horizontality. Lees reasons that the HA 1988 "must, on any view, include the impact of the HRA 1998 since this is precisely what the interpretation obligation in [s3 of the] HRA is intended to achieve".[42] To Lees the "courts ought not to assume that Parliament intends the balance to be governed by the HA 1988 alone", but possibly by human rights protection.[43] This shows that the courts do have a role to interfere even where Parliament has provided legislation to balance the competing interests.

However, when exploring this judges in *McDonald* held that the "essential principles disclosed by [HA 1988] are that private landlords letting property under an AST should have a high degree of certainty that, if they follow the correct procedures and comply with their own obligations, they will be able to regain possession of the property".[44] Reading in "an obligation to assess the proportionality of doing so in the light of the personal circumstances of the individual tenant" would contradict the act.[45] Therefore, the only option would be to apply s4(2) of the HRA 1998 and make a declaration of incompatibility.[46] Lees' argument should be rejected because there is nothing in s21(4) of the HA 1988 that gives rise to a reading down and Parliament clearly intended for this provision to be automatic.

Secondly Lees argues that when Parliament produced the HA 1988 it "interfer[ed] with the private rights" of private landlords and tenants.[47] The aim was to provide certainty for landlords. To Lees if the HA 1988 "genuinely interfere[s] with an individual's human rights by rendering them homeless in a disproportionate way", then this should not be dismissed just because Parliament intended for the HA 1988 to produce certainty.[48] Having a proportionality test will balance these two considerations. She states that "the court's concerns about the proper judicial role and the balance struck" should be filtered into this test under the margin of appreciation.[49] This argument of fairness is the strongest justification to why tenants should be allowed to contend a different mandate to that of statute. However, it is still not convincing, because Parliament have already thought about these considerations, and even if the court assessed proportionality, the most that the tenant could get would be what s89 of the HA 1980 provides.[50]

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[42] Lees (n 35)
[43] ibid
[44] *McDonald* (n 1) para 69
[45] ibid
[46] ibid para 70
[47] Lees (n 14) page 33
[48] ibid
[49] Lees (n 14)
[50] *McDonald* (n 2) para 75

Lastly, Sarah Nield argues that the reference by Lord Neuberger and Lady Hale to legislation leaves the door "slightly ajar to pleading a proportionality defence where the legislation is older".[51] This argument ties in with her reference to Housing market moving on from how it was in 1988.[52] The only criticism of it, is that she does not provide us with an indication of how old the legislation needs to be.

How far does the reasoning stretch?

Before concluding it is noteworthy to know whether the reasoning in *McDonald* that concerned a s21(4) possession order also applies to possession orders in private renting that do not concern s21(4)?[53] To Nield the reasoning would apply to Ground 8 rent arrears under an AST.[54] She is right because, similarly there are statutory provisions in place which Parliament has decided balances the competing interests.[55] When dealing with possession orders in private renting whenever such provisions exist the reasoning in *McDonald* ought to apply.[56]

Conclusion

In conclusion, the judges are right in rejecting *Zehentner* as the Strasbourg authority for proportionality applying to private landlords, because it can be distinguished from *McDonald* on the facts. They are also correct in stressing that *Pinnock* and its use of proportionality should not apply to private cases because it would contradict s6(1) of the HRA 1998 and the purpose of the Convention. To the judges in *McDonald* s6(3)(a) of the HRA 1998 cannot apply because there is a contractual relationship and to Routley that relationship is paramount. Through applying the more convincing arguments of Nield, Lees and Wade the contractual relationship is clearly illusory. Therefore, the judges were wrong to use it as part of their justification for not allowing tenants to contend a different mandate to contract and statute. Although problems do exist with the HA 1988 as Lees and Nield point out, they are not strong enough to override the fact that Parliament intended for s21(4) to be automatic. Therefore, unless Parliament amends it or Strasbourg decides, tenants should not be allowed to use article 8 to contend a different mandate to that which Parliament intended.

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[51] Nield (n 24) 69
[52] ibid
[53] *McDonald* (n 2)
[54] Nield (n 24) 69
[55] Housing Act 1988, sch 2
[56] *McDonald* (n 2)