

*Can human rights be universal and have respect for cultural  
relativism?*

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Abstract

The underlying principle behind the notion of human rights is that they are accorded to every individual, all the time. However, 'human rights' have been criticised as being a Western ideal without proper consideration of cultural sensitivities. This article debates the question by looking at where the universality of human rights appears at one with cultural relativism and where the two diverge.

Introduction

Human rights are based on the principle that every individual is of equal worth and of inherent dignity. Donnelly defines human rights as 'inalienable entitlements of individuals held against the state and society' simply because they are human beings.<sup>1</sup> Jonathan Cooper OBE interprets human rights as the 'fundamental moral rights of all people that are necessary for a life with human dignity'.<sup>2</sup> It appears that human rights must be universal because they apply to every single individual on this earth.

This discussion aims to illustrate that in many respects, the universality of human rights does share common ground with the customs and traditions of cultures. However, just as there is common ground, there is also conflict between universal human rights and culturally-rooted practices. The author focuses on one in particular: the freedom of religion and the treatment of apostasy in Muslim countries. Is there a way for human rights standards to respect this example of cultural relativism?

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<sup>1</sup> Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly, 400-18, 406.

<sup>2</sup> Presentation by Jonathan Cooper OBE at René Cassin International Human Rights Law Training Day 2009, 'Guaranteeing Security, Countering Terrorism, Protecting Human Rights' (London 22 November 2009).

### Human rights and cultural relativism: an interdependent relationship

At first glance, the notion of cultural relativism appears to conflict with human rights. An-Na'im refers to the term culture as the 'totality of values, institutions and forms of behaviour transmitted within a society [...].'<sup>3</sup> Donnelly, when contrasting cultural relativism to the universality of human rights, asserts that strong cultural relativism 'holds that culture is the principal source of the validity of moral right or rule'.<sup>4</sup> Whereas the source of human rights undoubtedly originates in being human, cultural relativism contends that the individual plays little or no part at all in the establishment and realisation of rights. The interests of society override that of the individual.

More profound analysis demonstrates that human rights and cultural relativism in fact share characteristics. First, there is at least some cross-cultural consensus when it comes to moral values, such as the rights to life and liberty and the prohibition of torture, irrespective of the source of these rights.<sup>5</sup> Secondly, cultural relativism acknowledges the differences in customs, cultivates tolerance and fosters mutual respect.<sup>6</sup> The Universal Declaration of Human Rights (UDHR) echoes this as it aims to promote respect amongst peoples. Thirdly, inherent dignity of the individual can still be protected without conforming to human rights standards because traditional societies have their own mechanisms of protecting dignity.<sup>7</sup> Finally, human rights adjudication depends on balancing the individual freedoms with the interests of society. Since society is shaped by culture, it ensues that culture must influence these freedoms. In conclusion, it cannot hold that that human rights and cultural relativism are mutually exclusive.

This interdependent relationship is demonstrated in reality. For example, the language of many constitutions resonates with that of the UDHR.<sup>8</sup> Many Muslim countries have

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<sup>3</sup> Abdullahi Ahmed An-Na'im, 'Problems of Universal Cultural Legitimacy for Human Rights', in *Human Rights in Africa: Cross-Cultural Perspectives*, A.A. An-Na'im and F.M Deng (eds) (Washington DC: Brooking Institute, 1990) pp. 331-67, 332.

<sup>4</sup> Donnelly (n 1) 401.

<sup>5</sup> See Donnelly (n 1) and Abdullahi Ahmed An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9 *Human Rights Quarterly*, 1-18.

<sup>6</sup> *An-Na'im* Ibid 340.

<sup>7</sup> Donnelly (n 1) 410.

<sup>8</sup> For example, the Malaysian Constitution protects the right to freedom of religion, freedom of speech, the right to peaceful assembly.

ratified both the Covenant on Economic, Social and Cultural Rights and that of Civil and Political Rights (ICCPR).<sup>9</sup> The UDHR has been invoked in the judgments of national courts.<sup>10</sup>

Freedom of religion: where human rights and cultural relativism diverge

Although it appears that human rights can be universal and respect cultural relativism, further analysis shows that the two cannot be completely reconciled. The freedom which is one of the most problematic is the freedom of thought, conscience and religion;<sup>11</sup> in particular, the freedom to leave one's religion.

In Malaysia, where religious freedom is enshrined in its constitution,<sup>12</sup> apostasy is a criminal offence of up to three years.<sup>13</sup> Moreover, an apostate may face punitive civil consequences: the *Shari'ah* court can make civil orders against property or custody of children.<sup>14</sup> A number of Muslim countries such as Saudi Arabia, Iran and Afghanistan prescribe more serious punishment: the death penalty.<sup>15</sup> Taking into account the penalties of apostasy, it is possible to reconcile the freedom of religion with apostasy?

First, it is necessary to understand the reasoning behind such harsh sanctions. Apostasy is forbidden in Islam. An-Na'im explains that Islamic law finds its basis in the Qur'an and Sunnah, the latter being the traditions of Prophet Muhammed. An-Na'im claims that although several verses in the Qur'an condemn apostasy, they do not propose any kind of criminal sanction for the apostate. It is the Sunnah which calls for the death penalty.<sup>16</sup>

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<sup>9</sup> For example, Pakistan, Afghanistan, Egypt, Iran and Indonesia. Turkey, a majority Muslim country, is party to the European Convention of Human Rights.

<sup>10</sup> Andrew Clapham, *Human Rights: A Very Short Introduction* (OUP, Oxford 2007), 42.

<sup>11</sup> Art. 18 of both the UDHR and the ICCPR.

<sup>12</sup> Art. 3(1) provides that: 'Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation'. This is further strengthened by Art. 11(1) which states: 'Every person has the right to profess and practice his religion...and to propagate it'.

<sup>13</sup> Michael Kirby, 'Fundamental Human Rights and Religious Apostasy: The Malaysian Case of Lina Joy' (2008) 17 Griffith Law Review, 151-82, 159.

<sup>14</sup> *Idem*.

<sup>15</sup> P Marshall, 'Apostates from Islam: The case of Afghan convert is not unique' *Weekly standard* (USA April 10, 2006, Vol. 11, No. 28).

<http://www.weeklystandard.com/Content/Public/Articles/000/000/012/059fpgm.asp>

<sup>16</sup> Abdullahi Ahmed An-Na'im, 'The Islamic Law of Apostasy and Its Modern Applicability: A Case from Sudan' (1986) 16 Religion, 197-223, 211.

Apostasy is condemned because it is perceived as an affront to the 'Umma', the Islamic community. As Abdul Aziz Mohamed JCA commented in the Court of Appeal in the *Lina Joy*:<sup>17</sup>

'Being a Muslim is not an individual act. It is part of being the wider community, is being part of the Ummah. And the responsibility of the State is to take care of the Ummah. And therefore [...] no individual can make a unilateral declaration without bringing the authorities to say that he or she is no longer a Muslim [...]

Where it was argued above that universal human rights and cultural relativism share common ground irrespective of their source; their differences in origin now cause an apparent irreconcilable conflict. Human rights appear to value a human being as an individual. Islam appears to value a human being as part of the 'Umma'. Human rights principles hold that inherent dignity comes from entitlements of being a human being, whereas Islam holds that such dignity arises out of one's duty to God.<sup>18</sup>

It is suggested that this conflict regarding freedom of religion could at least have been given more consideration at the drafting stage of the UDHR. An-Na'im analyses the cultural legitimacy of the UDHR's formulation and observes the following. First, by the UDHR's drafters precluding texts from the Middle Ages, 'they effectively excluded much of the civilisations of the African and Asian peoples'.<sup>19</sup> Moreover, the drafting committee had only one representative from the Middle East and one from Asia. Since these representatives were educated in the West, they were more inclined to Western ideals than those of their own cultures. Another concern related to the economic development of Asian and African countries, which was not on par with the West at the time. As a result of differences in progress, An-Na'im suggests that Asian and African countries may not have fully appreciated the needs of their indigenous cultures.<sup>20</sup>

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<sup>17</sup> Quoted from *Kirby* (n 15) 163. This case concerned a female Muslim in Malaysia who wished to have her religion changed on her identity card as she had converted to Christianity.

<sup>18</sup> Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non Western Conceptions of Human Rights' (1982) 76 *American Political Science Review*, 303-16, 305.

<sup>19</sup> *An-Na'im* (n 5) 346.

<sup>20</sup> *Ibid* 350. Most African and Asian countries joined at the last stages of adoption in 1966 when they had gained independence.

Therefore, if there had been a larger contribution from Muslim countries, at least Article 18 could have been culturally rooted to some degree.

Nevertheless, it ought to be considered whether such discrimination in religion is actually based on legitimate cultural practices or whether it is simply a tool for oppression. There are Muslim countries which do not enforce criminal sanctions against apostates<sup>21</sup> and, as highlighted above, there are those that seem committed to religious freedom in their Constitutions.<sup>22</sup> Donnelly therefore argues that the application of practices inconsistent with human rights standards have very little to do with its cultural basis and are much more to do with despotism.<sup>23</sup> Even if there is a cultural basis, An-Na'im affirms that these practices cannot continue.<sup>24</sup>

#### Room for reconciliation

In An-Na'im's view, the universal application of human rights is only successful if such rights are rooted in culture. As a possible solution to reconciling the conflict between the offence of apostasy and Article 18, An-Na'im supports the approach of the Islamic reformer Mahmoud Taha. Taha proposed a re-interpretation of the Qur'an by referring to the chapters which account the Prophet Muhammed's life in Mecca rather than in Medina. This is where 'the fundamental and universal message of the Qur'an and the Sunnah texts' lie, which he believes is consistent with current human rights standards.<sup>25</sup> For example, Chapter 2 Verse 256 of the Qur'an states that, 'There is no compulsion in religion'. This, as An-Naim argues, is consistent with Article 18.

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<sup>21</sup> For example Indonesia, which has the largest Muslim population in the world, approximately 86.1% of its 240 million are Muslim: <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>

<sup>22</sup> For example, Algeria, Somalia, Kuwait, Indonesia. Unfortunately, such discrimination does exist in reality. In Somalia, Islamists have been executing extra-judicially those that appear to be apostates: 'Somali executed for apostasy' *BBC news website* (16 Jan 2009). <http://news.bbc.co.uk/1/hi/7833621.stm>.

<sup>23</sup> See *Donnelly* (n 1) for further discussion. In 1985 in Sudan, the Islamic reformer Mahmoud Taha (who was seen as a political threat) was executed for apostasy. However, this offence was not even on the statute book at the time.

<sup>24</sup> Abdullahi Ahmed An-Na'im, 'Religious Minorities under Islamic Law and the Limits of Cultural Relativism' (1987) 9 *Human Rights Quarterly*, 1-18, 14. He is particularly referring to Iran, which according to Islamic law, legitimises the deprivation of life of the Bahá'í people since they are deemed 'unbelievers': *Ibid* 13.

<sup>25</sup> The texts from Mecca are regarded as supporting complete freedom of choice and prohibiting coercion of non-Muslims. Prophet Muhammed's call for death for apostasy was during his time in Medina, which was considered a tumultuous time for the survival of Islam. See *An-Na'im* (n 17 and n 26).

In conclusion, although human rights and cultural relativism differ in principle, this article highlights their common ground, yet also focuses on the human right in which the two appear to be irreconcilable: the freedom of religion. The treatment of apostasy in certain Muslim countries cannot presently be seen to be consistent with current human rights standards.<sup>26</sup> Muslim reformers have suggested a possible solution to reconcile this conflict, and that of human rights and cultural relativism in general: that human rights must be culturally-rooted and not simply seen as a Western ideal. Then, the author contends, and only then, can such rights be truly universal.

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<sup>26</sup> However, as highlighted above, different Muslim countries treat this freedom differently. This fact leads to further discussion whether apostasy in Islam is itself culturally relative.

## *International Investment Agreements: A Threat to Democracy?*

ADAM JACOBS

### Abstract

Although the proliferation of International Investment Agreements (IIAs) has hugely accelerated in the past twenty years, this article analyses whether this trend has proved beneficial to democratic organs in developing states who have used IIAs as a vehicle to attract lucrative foreign investment. Traditionally, foreign investors have insisted upon additive 'expropriation' and 'fair and equitable treatment' treaty provisions if they are to commit resources to potentially 'unstable regimes'. Nonetheless, this author will argue that these (frequently) punitive clauses have wrongly hindered the ability of developing countries to make crucial decisions in their national interests. Although the author recognises that globalisation can only fulfill a useful function if property rights are respected and upheld, it will be submitted that the frustration of democratic governance in order to ensure these aims is not the correct approach. Rather, better alternative methods enabling and encouraging local democratic institutions in developing countries are proposed.

### List of Abbreviations

AJIL- American Journal of International Law

Ala L Rev- Alabama Law Review

Am U J Int'l L & Pol'y- American University Journal of International Law and Policy

BIT- Bilateral Investment Treaty

BYU L Rev- Brigham Young University Law Review

Colo J Int'l Env'l L- Colorado Journal of International and Environmental Law

Colum J Transnat'l L- Columbia Journal of Transnational Law

Currents: Int'l Trade LJ- Currents International Trade Law Journal

FTC- Free Trade Commission

IIA- International Investment Agreement

IISD- International Institute for Sustainable Development

ICSID- International Centre for Settlement of Investment Disputes

MIT- Massachusetts Institute of Technology

MTBE- Methyl Tertiary Butyl Ether

NAFTA- North American Free Trade Agreement

OECD- Organisation for Economic Co-Operation and Development  
OUP- Oxford University Press  
PCB- Polychlorinated Biphenyl  
Temp. Int'l & Comp LJ- Temple International and Comparative Law Journal  
U Ill L Rev- University of Illinois Law Review  
UNCTAD- United Nations Conference on Trade and Development  
UNCITRAL- United Nations Commission on International Trade Law  
UN- United Nations  
US- United States of America  
Vand J Transnat'l- Vanderbilt Journal of Transnational Law

### Introduction

It is trite in international law that nations can regulate issues of public concern at will.<sup>1</sup> This tenet, however, has been threatened by the fact that increased foreign investment has been accompanied by additive IIA<sup>2</sup> protections against expropriation and regulatory uncertainty.<sup>3</sup> These, foreign investors argue, are necessary because they are subject to host-state regulations yet cannot directly participate in political processes dictating them.<sup>4</sup> Nonetheless, undemocratic outcomes can arise where foreign investors invoke these protections to defeat perceived injurious public-interest provisions. This article shall argue that IIAs have often balanced these competing interests unsatisfactorily by disproportionately favouring foreign investor protection over host-states' democratic rights. This will be achieved by first defining democracy, contextualising IIA use and explaining the importance of the promotion of democracy within IIAs. Second, the undemocratic aspects of IIAs will be analysed. In particular, it will be demonstrated that expropriation and 'fair and equitable treatment' clauses have 'negatively affected policy flexibility',<sup>5</sup> though it will also be postulated that 'fair and equitable treatment' provisions are, if used properly, ideal mechanisms for supporting

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<sup>1</sup> Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" (2008) 41 Vand J Transnat'l, 777

<sup>2</sup> This will be used to refer to either BITs or regional multilateral treaties.

<sup>3</sup> Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance", (2005) 25 International Review of Law and Economics, 107

<sup>4</sup> Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to be Embraced or a Sword to be Feared?* (2002) *Byu L Rev* 527, 531

<sup>5</sup> Mayeda, "Investing in Development: The Role of Democracy and Accountability in International Investment Law" (2009) 46 *Alberta Law Review* 6, 1009; Choudhury (n.1), 775



democracy. Additionally, it will be suggested that the threat of huge compensation awards deters states from acting in the public's best interest. Third, possible improvements to the current situation will be suggested.

## Chapter 1- Contextualising Democracy and IIAs

### *(i.) Democracy: A Working Definition*

Democratic forms are multifarious,<sup>6</sup> but unanimously they require a government by and for the people.<sup>7</sup> Thus, Franck proposes that democracy is indicated by the presence of three institutions: self-determination, electoral participation and free political expression.<sup>8</sup> Nevertheless, although superficially attractive, Mayeda convincingly dismisses this thesis as overly-simplistic and culturally inflexible.<sup>9</sup> Rather, he argues democracy's critical element is full public participation in political processes. Practically, this entails public access to knowledge affecting their interests and institutions implementing policy changes.<sup>10</sup> Whilst Franck's criteria often facilitate this, Mayeda maintains they can be manipulated to ensure undemocratic outcomes.<sup>11</sup> Additionally, unconventional democratic models may not conform to Franck's exact institutional framework.<sup>12</sup> Consequently, an alternative 'normative' definition is proffered, whereby democracy is achieved when 'everyone affected by a decision has access to a discourse intended to solve or address a particular problem.'<sup>13</sup> Given that international investment law inherently legislates across cultural boundaries, this 'broad-brush' approach is preferable. Simultaneously, in contrast to the 'institutional model', the 'normative position' pragmatically reflects when institutions are actually, rather than nominally, democratic. Thus, this definition is adopted throughout this essay.

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<sup>6</sup> Emerson, *Defining Democracy: Decisions, Elections and Good Governance* (Belfast, De Borda Institute, 2002)

<sup>7</sup> Kittrie, "Democracy: An Institution Whose Time has Come-From Classical Greece to the Modern Pluralistic Society" (1993) 8 *Am U J Int'l L & Pol'y* 375, 379

<sup>8</sup> The so-called "institutional model"; Franck, "The Emerging Right to Democratic Governance" (1992) 86 *AJIL* 46

<sup>9</sup> Mayeda (n.5), 1015

<sup>10</sup> Choudhury (n.1), 783

<sup>11</sup> For a detailed analysis see Carothers, "The End of the Transition Paradigm", (2002) 13:1 *Journal of Democracy* 5, 18

<sup>12</sup> e.g. countries without democratically elected Parliaments, Mayeda (n.5), 1017

<sup>13</sup> Mayeda (n.5), 1017-18 quoting Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by Rehg (Cambridge, MIT Press, 1996) 298

(ii.) *The Development of IIAs*

IIAs largely arose because of developing countries' growing discontent with the perceived bias of customary international investment law towards capital-exporting countries. Thus their proliferation constituted an attempt to equalise this sensitive area.<sup>14</sup> Despite this, IIA terms are usually dictated by and advantageous to developed nations.<sup>15</sup> For instance, most BITs adopt 'anti-expropriation' provisions<sup>16</sup> which are overly burdensome for developing countries wishing to employ 'takings' as useful regulatory tools.<sup>17</sup> Additionally, IIAs usually contain clauses requiring host-states to treat foreign investors 'fairly and equitably'. These can be problematic for developing nations if interpreted broadly.<sup>18</sup>

Nonetheless, it is frequently assumed that strict IIA terms are offset by the benefit of increased foreign investment.<sup>19</sup> However, 'the best available evidence suggests that BITs have either no [...] or a minimal positive effect on investment flows'.<sup>20</sup> Contrastingly, capital-exporting nations nearly always gain desired 'reciprocal' investment protection.<sup>21</sup> Thus, in actuality, IIAs enshrine the dominance of capital-exporting nations in international investment law but provide little economic benefit to host-states whilst constraining their democratic decision-making abilities.

(iii.) *The Promotion of Democracy in IIAs is Mutually Beneficial*

The promotion of democracy is important in IIAs because it facilitates sustainable development in host-countries by providing economic capital.<sup>22</sup> Democratic systems generally guarantee stable governance and respect for property rights, both of which are attractive to lucrative foreign investment. Thus, the resultant revenue generated by this significantly aids

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<sup>14</sup> Elkins, Guzman and Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000", (2008) 265 U Ill L Rev, 267-279

<sup>15</sup> *Ibid.*, 268-272

<sup>16</sup> Shapren, "Nafta Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?" (2003) 17 Temp. Int'l & Comp LJ, 327

<sup>17</sup> Mayeda (n.5) 1024

<sup>18</sup> See below pp.19-20

<sup>19</sup> Guzman, (1998) *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va J Int'l L, 639, 654

<sup>20</sup> UNCTAD, *Bilateral Investment Treaties In the Mid-1990s*, annex I at 159-217, UN Doc. UNCTAD/ITE/IIT/7, UN Sales No. E98.II.D.8 (1998)

<sup>21</sup> Fridh and Jensen, "Multilateral or Bilateral Negotiations: Where Can Developing Countries Make Themselves Heard?" (CUTS International, Briefing Paper No. 9, 2002), available at <http://cuts-international.org/9-2002.pdf>, 2

<sup>22</sup> Sen, *Development as Freedom*, (New York, Knopf, 1999) 38-40, 160-68

the development of a host state's economy. Conversely, undemocratic states are unappealing to foreign investors due to their perceived disdain of property rights.<sup>23</sup> Given this, it is submitted that IIAs must support democracy if developing countries are to fully benefit economically from them.

Moreover, perhaps counter-intuitively, it is suggested that the promotion of democracy in IIAs is also beneficial to capital-exporting states. The promulgation of democratic values in developing countries, it is argued, would eventually facilitate secure investment conditions without the need to artificially impose higher standards of investment protection. Such a development would be better for an investor's long-term economic interests. Further, even where IIAs are used in disputes between developed countries, it is suggested that undemocratic outcomes should be avoided because of potential damage to the democratic systems already in existence.

## Chapter 2- Undemocratic Clauses in IIAs

### *(i.) Expropriation Clauses*

#### *(a) The Distinction between Expropriation and Regulatory Measures*

Expropriation is 'the deprivation by states of foreign rights to property or its enjoyment'<sup>24</sup> and can be direct or indirect.<sup>25</sup> The right to lawfully expropriate is recognised by most IIAs, provided it is non-discriminatory, enacted with due process, for valid public purposes and accompanied by full, prompt and adequate compensation.<sup>26</sup> 'Full, prompt and adequate compensation' is quantified by assessing the full market value of investments confiscated.<sup>27</sup> Conversely, expropriations not conforming to these requirements are 'unlawful' and entitle investors to extensive damages.<sup>28</sup> Either way, the financial consequences of expropriating are potentially severe.

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<sup>23</sup> Elkins, Guzman and Simmons (n.14), 289

<sup>24</sup> Qureshi and Ziegler, *International Economic Law* (2<sup>nd</sup> Edn., London, Sweet and Maxwell, 2007) 403

<sup>25</sup> Actions that do "not involve overt taking, but that effectively neutralise the enjoyment of property" (*Lauder v. Czech Republic* (2001), 14:3 WTAM 35, 200)

<sup>26</sup> See e.g. *AMCO v. Indonesia (Merits)*(1984) 89 ILR, 405, 466

<sup>27</sup> Kriebaum, "Regulatory Takings, Balancing the Interests of the Investor and the State" (2007) 17 The Journal of World Investment and Trade 717, 720

<sup>28</sup> Assessed under the "Chorzow" formula, see *Case Concerning Factory at Chorzow* (Indemnity) Judgment No. 13, 1928, PCIJ, Series A No. 17, Order, 13 Sept 1928, p.47

In contrast, general regulatory ‘takings’ are not traditionally considered expropriatory and produce no obligation to compensate.<sup>29</sup> However, capital-exporting states, whose nationals are usually affected by this exception, have sought to counter it.<sup>30</sup> Thus, broadly-drafted expropriation definitions in IIAs, allowing compensation for actions ‘having the effect of’<sup>31</sup> or ‘tantamount to’<sup>32</sup> expropriation, have enabled tribunals to interpret customary ‘general regulatory measures’ as expropriatory actions.

*(b) The Impact of Overly-Broad Interpretations of “Expropriation”*

It is submitted that the ‘general regulatory takings’ exception is sensible. Though fulfillment of commercial expectations is morally and economically important,<sup>33</sup> customary international law rightfully recognises that states cannot be held to the same standards as private actors in contractual disputes. Democratic nations exist to promote their citizen’s welfare and should be allowed to act accordingly, even where individual property rights are occasionally threatened. Moreover, the promotion of democratic governance is always worthy *in itself*.<sup>34</sup> Thus, marginalising the ‘general regulatory takings’ exception is problematic because it allows foreign investors to frustrate democratic governance.

This is well demonstrated by *Metalclad Corporation v. Mexico*,<sup>35</sup> where various levels of the Mexican government reneged on agreements with Metalclad to build a landfill site. Though clearly a breach of Metalclad’s legitimate expectations, the decision was *bona fide* because Mexican officials felt the deal would have adverse environmental effects.<sup>36</sup> Nevertheless, completely ignoring customary law,<sup>37</sup> the tribunal found Mexico should fully compensate Metalclad because their interference ‘in [...] the use of reasonably to-be expected economic

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<sup>29</sup> e.g. *Feldman v. Mexico*, Award, 16 December 2002, 18 ISCID Review-FILJ (2003) 488

<sup>30</sup> Shapren (n.21) 327

<sup>31</sup> e.g. Article 5(2) of the French Model BIT (2006)

<sup>32</sup> e.g. Article 4(2) of the German Model BIT (2008); Chapter 11, Article 1110(1) of NAFTA

<sup>33</sup> Vandevelde, *Investment Liberalisation and Economic Development: The Role of Bilateral Investment Treaties* (1998) 36 Colum J Transnat’l L 501, 502-503

<sup>34</sup> See above p.9-10

<sup>35</sup> *Metalclad Corporation v. Mexico*, Final Award (Aug. 25, 2000) (hereafter *Metalclad*)

<sup>36</sup> Shapren (n.16), 335

<sup>37</sup> Mayeda observes this of e.g. *Compania de Aguas del Aconquija SA and Vivendi Universa SA v. Argentina* (2007) Case No. ARB/97/3 (ICSID) (hereafter *Vivendi*) but the same observation is applicable here, Mayeda (n.5) 1023

benefit' was expropriatory.<sup>38</sup> The decision has rightly been criticised for obstructing Mexico's democratic decision to regulate the environment.<sup>39</sup>

However, it is suggested that this damaging approach was unnecessarily adopted. Rather, the tribunal could have limited the breach of Metalclad's legitimate expectations to the alternative inquiry into whether Mexico had acted fairly and equitably. This would have permitted the tribunal to assess Mexico's damages in a less draconian manner,<sup>40</sup> therefore balancing both Mexico's democratic rights and Metalclad's legitimate expectations. Instead, the tribunal, in an obdurately commercial decision, skewed their decision wholly in favour of Metalclad's interests.

Similar reasoning has hindered democracy in other instances. For instance, in *Vivendi*, following a privatisation movement in Argentina, CAA, the French company Vivendi's Argentine subsidiary, lost reasonably-to-be-expected profits after refusing to renegotiate a concession agreement to supply water to the province of Tucuman. Moreover, *inter alia*, the Tucuman legislature had passed legislation preventing CAA from collecting water bills until they agreed to unilaterally amended terms. The tribunal considered this expropriatory despite events being triggered by CAA's extortionate prices, unfounded but understandable due to public health concerns over water turbidity and opposition to privatisation.

Additionally, they held that the measures taken against CAA were 'illegitimate sovereign acts'<sup>41</sup> because the Tucuman officials were motivated by personal opposition to privatisation rather than popular opposition to the concession. Nonetheless, Mayeda appositely observes that these conclusions were imputed.<sup>42</sup> The tribunal failed to either embark on a comprehensive assessment of the democratic credentials of the regulation invoked or to consider that the newly-proposed concession was reviewed by the elected provincial legislature. As such, he correctly concludes that the tribunal's conclusions were actually far

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<sup>38</sup> *Metalclad*, 33

<sup>39</sup> Alvarez "Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?" (2008) 60 *Ala L Rev* 943, 964

<sup>40</sup> See below pp.20-21

<sup>41</sup> *Vivendi*, 7.5.20

<sup>42</sup> Mayeda (n.5) 1029

from obvious.<sup>43</sup> Thus, *Vivendi* is arguably even more undemocratic than *Metalclad* because not only did the tribunal prevent Argentina from regulating freely but it also effectively substituted Argentina's explanation of the situation for its own. This, it is submitted, is concerning.

(c) *Alternative Approaches- Respect for Democracy in IIA Expropriation Provisions*

1. *Arbitral Decisions*

(A) *The Proportionality Approach*

Despite decisions such as *Vivendi* and *Metalclad*, it is suggested that other tribunals have had greater respect for democratic values. Thus the 'proportionality approach'<sup>44</sup> has occasionally been adopted, whereby expropriations are found if the significance of the regulatory measures outweighs the public interest being protected.<sup>45</sup> This is welcome because it recognises host-states' democratic rights, albeit only where reasonable. Moreover, it encourages tribunals to consider the regulations' context, thus avoiding 'interpretation in a vacuum'. Nonetheless, despite these advantages, it is submitted that the acceptance of unelected and unaccountable<sup>46</sup> tribunals evaluating the 'reasonableness' of states' actions is democratically unsatisfactory. Moreover, like *Vivendi* and *Metalclad*, it ensures 'all or nothing' conclusions, whereby if expropriation is found then the host-state will be exposed to the full financial consequences, whereas if it is not, the foreign investor receives nothing.<sup>47</sup>

That said, Kriebaum advocates a better version of this approach. Heavily influenced by the European Court of Human Rights' approach to 'right to property cases', she proposes that proportionality assessments are used to gauge if expropriations are *justified* rather than whether they *occurred*. As such, where states' actions were expropriatory but understandable, compensation would be proportionately lowered, thus allowing democratic governance whilst acknowledging foreign investor rights.<sup>48</sup> This nuanced approach is certainly persuasive. Nevertheless, it is submitted that it still constitutes an overly-intrusive examination into the

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<sup>43</sup> *Ibid.* 1029-30

<sup>44</sup> e.g. *Tecmed v. Mexico*, Award (May 29, 2003) and *Azurix v. Argentina*, Award (14 July 2006) (hereafter *Azurix*)

<sup>45</sup> Choudhury (n.1) 795

<sup>46</sup> *Ibid.* 808-821 for an explanation of this.

<sup>47</sup> Kriebaum (n.27) 729

<sup>48</sup> *Ibid.* 731-44

democratic decisions of countries. Thus, despite its strengths, Kriebaum's view also should be rejected.

*(B) Methanex- A Reassertion of the Right to Regulate*

Given the problems with the 'proportionality approach', it is submitted that the stance taken in *Methanex v. US*<sup>49</sup> is preferable. Here the Canadian company Methanex, a leading supplier of methanol, was detrimentally affected by a Californian ban on MTBE imposed by Grey Davis, the Governor of California, after scientific evidence suggested MTBE, of which methanol is a constituent part, was potentially dangerous to health. Methanex alleged, *inter alia*, that their substantial losses emanating from this constituted unlawful expropriation. Despite the tribunal initially denying they had jurisdiction to hear the case,<sup>50</sup> the case's merits were eventually heard when Methanex alleged that Governor Davis had banned MTBE because of 'backdoor dealing between himself and ethanol-based additive producer Archer Daniel Midland'.<sup>51</sup>

In particular, it is submitted that two elements of the decision are laudable. First, the tribunal indicated an expropriation had not occurred because 'no specific commitments' were made to Methanex by the US indicating it would refrain from regulating against MTBE.<sup>52</sup> Thus, unlike *Metalclad*, the tribunal largely accepted the legitimacy of the 'regulatory measures exception' and thus deferred to the judgment of the democratically-elected official. Second, in contrast to *Vivendi*, the tribunal thoroughly examined the accusations against Grey Davis before rejecting any impropriety.<sup>53</sup> As such, the democratic integrity of the regulatory measure was properly considered.

However, despite this, *Methanex* is subject to a caveat. Although the logic of the 'specific assurances' exception is understandable, the tribunal should have considered that states may be compelled to renege on specific assurances due to adverse changes of circumstances.<sup>54</sup>

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<sup>49</sup> *Methanex Corporation v. US*, Final Award (2005) 44 ILM 1345 (hereafter *Methanex*)

<sup>50</sup> *Methanex Corporation v. US*, Award on Jurisdiction 83 (Aug 7, 2002), 74

<sup>51</sup> Shapren (n.16), 340

<sup>52</sup> *Methanex*, Part IV, Chapter D, p.4, 7

<sup>53</sup> Mann, "The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles" (2005) IISD, 5 available at [http://www.iisd.org/pdf/2005/commentary\\_methanex.pdf](http://www.iisd.org/pdf/2005/commentary_methanex.pdf)

<sup>54</sup> e.g. *CMS Gas Transmission v. Argentina* (2005) 44 ILM 1205 (ISCID) (hereafter *CMS*), though extraordinarily the tribunal disagreed.

Although it is accepted that investors may require compensation if this occurs, this should not be achieved by holding the state's behaviour to be expropriatory. Rather, as in *Metalclad*, any question of legitimate expectations should have been confined to an assessment of the 'fair and equitable treatment' provision.<sup>55</sup>

## 2. State Practice

States have been 'sufficiently alarmed'<sup>56</sup> by cases such as *Metalclad* and *Methanex* to start legislating against the potentially undemocratic outcomes that they produce. For instance, the US Model Treaty 2004 now specifically prevents 'non-discriminatory regulatory actions' from constituting expropriations.<sup>57</sup> Nonetheless, it remains to be seen whether these provisions will have long-term repercussions. For instance, it is still unclear whether the US's example will be extensively followed. Additionally, even if these measures become standard aspects of new IIAs, this will not 'address more than 2,500 (IIAs) that do not contain these carve-outs.'<sup>58</sup> Thus it is submitted that while these terms are welcome, they must be greeted with cautious optimism.

### (ii.) Fair and Equitable Standard

#### (a) Scope

'Fair and equitable treatment' is a nebulous concept, unclear in its exact content<sup>59</sup> and, as such, this essay will offer no expansive definition. However, a minimum customary international law standard extending a 'high measure of deference...to the right of domestic authorities to regulate matters within their own borders'<sup>60</sup> certainly exists. Given this, it is submitted that such an interpretation is well-placed to ensure respect for democratic governance.

However, problems have ensued where IIA provisions offering 'fair and equitable treatment' are not construed as conforming to the minimum standard. Indeed, a recent UNCTAD survey

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<sup>55</sup> See above p.13

<sup>56</sup> Alvarez (n.39) 966

<sup>57</sup> Annex B, Article 4 of the 2004 US Model BIT (2004)

<sup>58</sup> Choudhury (n.1) 822

<sup>59</sup> Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6(3) *The Journal of World Investment & Trade* 357-386

<sup>60</sup> *S.D. Myers, Inc. v. Canada*, (November 13, 2000), Partial Award, ILM 408.



identified seven different 'fair and equitable treatment' standards.<sup>61</sup> These can instead 'result in expansive obligations imposing a high threshold of protection in favour of investors'<sup>62</sup> and thus potentially obstruct democratic governance.

*(b) The Negative Impact on Democracy of Overly-Broad Interpretations of the 'Fair and Equitable Treatment' Clauses*

Where the minimum standard is not used, it is submitted that tribunals have found breaches of the 'fair and equitable treatment' requirement all too easily.<sup>63</sup> Such cases are characterised by the second-guessing of democratic actions, an overly-intrusive and potentially damaging process.<sup>64</sup>

*CMS* provides arguably the most extreme example of this. Here, after Argentina entered severe financial crisis prompting extreme civil unrest, the country enacted emergency fiscal regulations which involved, *inter alia*, disavowing guarantees made to US-owned public-utilities companies. This inevitably prompted an action alleging breaches of the US-Argentina BIT. Rodriguez correctly observes that one might have thought Argentina's actions would be allowed under an exception provided in the treaty permitting parties to take measures protecting their 'essential security interests.'<sup>65</sup> Nonetheless, the tribunal rejected this and instead found that Argentina's actions were not the 'only way' the crisis could have been resolved. On this basis a breach of 'fair and equitable treatment' was found.<sup>66</sup>

This outcome, it is submitted, unacceptably hindered necessary democratic reforms.<sup>67</sup> Moreover, regrettably, the tribunal completely refused to accept that arguably foreign investors should bear some responsibility for exposing themselves to the risks of alien

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<sup>61</sup> UNCTAD, "Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking" (2007) available from [www.unctad.org/en/docs/iteiia20065\\_en.pdf](http://www.unctad.org/en/docs/iteiia20065_en.pdf).

<sup>62</sup> Malik, "The Fair and Equitable Treatment Standard" (Sept. 2009), IISD available at [http://www.iisd.org/pdf/2009/best\\_practices\\_bulletin\\_3.pdf](http://www.iisd.org/pdf/2009/best_practices_bulletin_3.pdf)

<sup>63</sup> Mayeda (n.5) 1026

<sup>64</sup> Rodriguez (n.39) 965-67

<sup>65</sup> See Article XI, US-Argentina BIT (1994) available at [http://www.bilaterals.org/article.php3?id\\_article=435](http://www.bilaterals.org/article.php3?id_article=435)

<sup>66</sup> Alvarez and Khamsi, "The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime" in Sauvant, *Yearbook on International Investment Law and Policy* (Oxford, OUP, 2009), 398-402

<sup>67</sup> Mayeda (n.5) 1027

conditions. Thus, although Argentina had induced foreign investment by offering certain guarantees, the fact that transnational-corporations should have been aware of the country's well-publicised history of economic difficulties<sup>68</sup> was not considered. Furthermore, frustratingly the undemocratic result could have been averted entirely had the high threshold of the minimum-standard been used.

*(c) Measure and Quantification of Damages*

Even where the minimum standard is used to assess breaches of 'fair and equitable treatment', tribunals have imposed heavy compensation when contraventions actually occur. This can detrimentally affect democracy where regulations are unlawful despite being *bona fide* and pursuing legitimate aims. For instance, in *S.D. Myers v. Canada*<sup>69</sup> it was found that Canada had breached Article 1105 of NAFTA because it should have used government contracts and subsidies rather than an export ban to pursue the valid goal of protecting the Canadian PCB market.<sup>70</sup> Despite Canada's motivations, full recovery of the investor's loss of profits was allowed. This is unpalatable because whilst *S.D. Myers* had undoubtedly been discriminated against, it is submitted that the award overly-impeded Canada's democratic right to regulate their economy.

However, the tribunal could have taken a different approach. Most IIAs (including NAFTA) fail to provide a measure of damages for breaches of 'fair and equitable treatment'. Indeed, in *S.D. Myers* it was actually noted that this was in order that tribunals could award compensation 'appropriate to the specific circumstances of the case'.<sup>71</sup> Moreover, the tribunal explicitly held that it was not setting a precedent for future proceedings.<sup>72</sup> Thus, it is suggested that arbitral panels could consider host-states' rights to democratically regulate by awarding damages for breaches, but reducing them case-by-case depending on the severity of the breach.

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<sup>68</sup> Olorunda, "[To Peg or Not to Peg: The Pros and Cons of Pegging the Argentine Peso to the U.S. Dollar and Balancing FDI Incentives](#)" (2004) 2 *Regent Journal of International Law*, 57-80

<sup>69</sup> Award on Liability, 13 Nov. 2000, 40 ILM (2001) 1408 (hereafter *S.D. Myers*)

<sup>70</sup> *Ibid.*, 64

<sup>71</sup> *Ibid.*, 94

<sup>72</sup> *Ibid.*, 99

(d) *Limitations on the 'Fair and Equitable Treatment Clause' and its Positive Impact on Democracy*

1. *Administrative Decisions*

The scope of 'fair and equitable treatment' was arguably most dramatically curbed by the British Columbia Supreme Court's review of *Metalclad*.<sup>73</sup> It was originally found that Mexico had breached Article 1105 NAFTA because of a lack of transparency in the host-states' administrative practices.<sup>74</sup> Nonetheless, although somewhat understandable, the decision demonstrated a worrying failure to consider the host-states' democratic culture. In reality, the Mexican authorities were effectively penalised for failing to be a 'well-run administrative state' and the tribunal was intolerant of the fact that decision-making involving several levels of federal government would cause excusable difficulties with providing full transparency.<sup>75</sup> Thus, despite rightly concluding that Mexico had breached the 'fair and equitable treatment' duty, the tribunal exceeded its jurisdiction by casting aspersions on the democratic practices of a host-state. Rather, the unfair and inequitable behaviour in *Metalclad* was actually Mexico's creation of legitimate expectations by Metalclad which were then detrimentally relied upon. Whilst lack of transparency in administrative procedure may have contributed to this, it was not the cause in itself.

Given these considerations, the British Columbia Supreme Court struck down this aspect of the tribunal's judgment.<sup>76</sup> This is praiseworthy, it is suggested, because it necessarily dictates that future tribunals focus on investment disputes' merits rather than states' democratic credentials. An assessment of states' actions of democratic legitimacy, it is submitted, is only appropriate where allegations of corruption or malfeasance are made.<sup>77</sup> However, whilst these findings were helpful, they only apply to 'customary rather than conventional' international law.<sup>78</sup> As such, more must be done to ensure that the minimum customary standard becomes the dominant interpretation.

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<sup>73</sup> *Mexico v. Metalclad Corp.* (2001) BCSC 664

<sup>74</sup> *Metalclad*, 29

<sup>75</sup> Alvarez (n.39) 964

<sup>76</sup> Kirkman, "Fair and equitable treatment: Methanex v. United States and the narrowing scope of NAFTA Article 1105" (2002) 34 *Law and Policy in International Business*, 38

<sup>77</sup> e.g. *Methanex*

<sup>78</sup> OECD, "Fair and Equitable Treatment Standard in International Investment Law" Working Paper on International Investment No. 2004/3 (September, 2004), 21-22 available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf>

## 2. *The Increasing Acceptance of the 'Minimum Standard'*

In view of decisions such as *Metalclad* and *CMS*, Mayeda observes that 'the safest course of action for a developing country [...] is to adopt the international minimum standard in any IIA it negotiates.'<sup>79</sup> Happily, a trend to this effect is emerging. For instance, the FTC has ruled that Article 1105 NAFTA accords with the minimum standard.<sup>80</sup> Admittedly *Mondev International LTD v. United States of America*<sup>81</sup> held this to invoke wider obligations than before the proliferation of BITs. However this still ensures greater deference towards democratic decisions of host-states, as demonstrated by the recent difficulty foreign investors have had in proving breaches of 'fair and equitable treatment' under NAFTA.<sup>82</sup> Additionally, both Canada and US Model BITs now ensure "'fair and equitable treatment" is understood as the minimum standard'.<sup>83</sup> One can only hope that wider practice reflects this in future years.

### (iii.) *Fear of Compensation Pre-Emptively Hindering State Actions*

Regulatory measures are hampered more subtly when the fear of paying sizeable compensation acts as a disincentive for states to regulate in the public interest.<sup>84</sup> *Ethyl Corporation v. Canada*<sup>85</sup> proves an instructive example of this. Here, an American company (Ethyl Corporation) alleged that Canadian environmental provisions were expropriatory. After it was found the claim could be heard, Canada quickly repealed the measures and settled the case.<sup>86</sup> This, it is submitted, is unhealthy in societies prioritising the welfare of its citizens. Indeed, the situation particularly affects the 'Precautionary Principle', which states that where possible but unproven risks to the public exist, states can err on the side of caution.<sup>87</sup>

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<sup>79</sup> Mayeda (n.5) 1028

<sup>80</sup> FTC Note of Interpretation of 31 July 2001

<sup>81</sup> ICSID Case No. ARB(AF)/99/2 (Award) (11 October, 2002)

<sup>82</sup> Pinto-Leon, "[Fair and Equitable Treatment under International Law: Analyzing the Interpretation of the NAFTA Article 1105.1 by NAFTA Chapter 11 Tribunals](#)" (2006) *15 Currents: Int'l Trade LJ* 3, 11

<sup>83</sup> e.g. Article 2, US-Uruguay BIT (2005)

<sup>84</sup> Mayeda (n.5) 1027

<sup>85</sup> NAFTA Chapter II Arbitral Tribunal (Award on Jurisdiction), UNCITRAL, 38 ILM 708 (hereafter *Ethyl*)

<sup>86</sup> Shapren (n.16), 332

<sup>87</sup> Public Citizen's Global Trade Watch, Washington D.C., "NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy (2001), 10 available at <http://www.citizen.org/trade/ftaa/index.cfm>

### Chapter 3- Possible Improvements

This chapter will explore how IIAs can be made more democratic. In particular, two suggestions will be made. First, either a general multilateral treaty or greater cooperation between developing states is required. Second, municipal courts should have greater involvement in international investment disputes.

#### *(a) The Choice Between an Unlikely Multilateral Treaty or Greater Cooperation Between Developing States*

Given that IIAs simultaneously disrupt the democratic processes of host-states whilst providing few economic benefits, their proliferation has puzzled academics.<sup>88</sup> The most convincing explanation is arguably postulated by Guzman, who suggests that the clamour for lucrative foreign investment amongst developing countries has meant that they have accepted disadvantageous terms.<sup>89</sup> The obvious solution to this, it is submitted, would be a multilateral treaty emphasising respect for democratic governance. Any such agreement should include provisions exempting legitimate regulatory measures. Additionally, the content of these measures could be specified in order to avoid confusion between legal expropriation for public purposes and regulatory measures.<sup>90</sup> Moreover, the multilateral treaty would need to globally standardise the 'fair and equitable treatment' minimum standard and precisely explain the obligations this entails.<sup>91</sup> This would be advantageous for two reasons. First it would ensure greater certainty. Second, the imposition of the 'minimum standard' would minimise the possibility of wide-ranging and intrusive interferences with democratic decisions.

Nonetheless, the difficulties with achieving a multilateral investment treaty have been well-documented.<sup>92</sup> As such, it is alternatively suggested that rather than competing individualistically for foreign investment, developing countries should mutually cooperate to strengthen each other's bargaining positions. Given the fact that developing countries

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<sup>88</sup> e.g. Ginsburg (n.3), 115

<sup>89</sup> Guzman (n.19), 654

<sup>90</sup> Higgins, "The Taking of Property by the State: Recent Developments in International Law (1982) 176 *Recueil des Cours* 259, 331 has noted the difficulty with justifying the distinction.

<sup>91</sup> *Ibid.*, 1028

<sup>92</sup> e.g. Baumgartner, "Demise of the Multilateral Agreement on Investment" (1998) 10 *Colo J Int'l Env'l L & Pol'y*, 40

represent good investment opportunities for foreign investors,<sup>93</sup> a uniform approach insistent upon democratic IIA provisions could force a more democratic approach. UNCITRAL, it is submitted, appears ready-made for this purpose.

(b) *The Re-Assertion of Domestic Remedies in International Investment Law*

Mayeda has highlighted that democratic governance of host-states is damaged by the failure of IIAs to uniformly ensure that domestic remedies are exhausted before recourse to arbitration is made.<sup>94</sup> Though this observation is true for a number of reasons,<sup>95</sup> municipal judicial contribution would arguably be most valuable where expropriation and 'fair and equitable treatment' claims are considered. Domestic courts, unlike international tribunals are engaged in the domestic democratic forum.<sup>96</sup> As such, it is suggested that they are likely to have greater insight into the factors dictating the implementation of regulatory public-interest measures. Thus, if municipal courts considered disputes first, this would provide tribunals with vital context and prevent tribunals from reaching their conclusions in a vacuum. Given decisions such as *Metalclad*, *Vivendi* and *CMS*, it is submitted that such prophylactic measures are clearly required.

That said, due concern must also be shown towards foreign investors. As states' full judicial processes are frequently lengthy and could potentially be used to contribute to rather than alleviate expropriatory measures, a compromise should be struck. This, it is suggested could involve the dispute being heard at first-instance in a domestic court, with an international tribunal functioning as the single appellate body. This would preserve the efficacy of international commercial relations whilst filling the democratic lacuna currently caused by the lack of municipal judicial contribution.

### Conclusion

*Methanex* appears to be indicative of a general realisation by tribunals that IIAs are potentially undemocratic. Nonetheless, due to the fact that international law 'is devoid of' a system of

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<sup>93</sup> Elkins, Guzman and Simmons (n.14) 266-67

<sup>94</sup> Mayeda (n.5), 1033

<sup>95</sup> *Ibid.* for a fuller explanation of the "constitutional impacts" of the failure to exhaust domestic remedies

<sup>96</sup> *Ibid.*

precedent,<sup>97</sup> this fails to detract from concerning previous cases such as *Metalclad*, *Vivendi* and *CMS*. Thus, it is clear that efforts by the states themselves are required if IIAs are to definitely produce democratic outcomes. Impetus for these changes has, perhaps surprisingly, already been generated by capital-exporting nations such as Canada and the US.<sup>98</sup> Nonetheless, developing countries must also participate in this process by cooperating with each other and using the resultant political clout generated to ensure fairer IIAs are agreed. Until this is done, despite the best efforts of any tribunal, IIAs will remain democratically deficient.

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<sup>97</sup> Choudhury (n.1) 797

<sup>98</sup> See above pp.17-18, 23

*The Intricacies of Regulation 5(1) Social Security (ICA) Regulations  
1976/409 and the Social Security Contribution and Benefits Act 1992 S.70  
and areas for reform*

ALEX ROBINSON

Abstract

This essay attempts to address the complex nature of entitlement to the Carer's Allowance, relating to individuals pursuing further or higher education. The author is compelled into doing so, after first-hand experience of the complicated and antiquated terms contained in the relevant legislation, and would relish the opportunity to demonstrate that, due to changes in the lifestyle and manner of studying, these rules are no longer relevant to our Social Security System.

Introduction

The point of our Social Security System is to provide practical assistance and financial support if a person is unemployed and looking for work. It also provides people with additional income if their earnings are low, if a person is bringing up children, if they are retired, if they care for someone or if they have a disability.<sup>1</sup>

This assertion makes the system appear translucent and straightforward. However, in reality there are many ambiguous regulations that can impair a claimant's application for financial help. Any person at any time throughout their lives can become a carer; they can be any age, either gender, from any race, they can be disabled themselves, they can come from any social class, any political affiliation or sexual orientation and disturbingly, people often do not realise they are carers. Becoming a carer can be entirely unexpected, such as from the result of a bad accident, or the birth of a child with an illness like Cystic Fibrosis. It can also be anticipated, especially if one is starting a relationship with a disabled person, or it can arise as an exacerbation of an existing illness like Cancer or Alzheimer's disease. Regardless of how an individual becomes a carer, they are treated equally in terms of claiming financial help. However, the entitlement rules fluctuate

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[http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/BeginnersGuideToBenefits/DG\\_10021385](http://www.direct.gov.uk/en/MoneyTaxAndBenefits/BenefitsTaxCreditsAndOtherSupport/BeginnersGuideToBenefits/DG_10021385)



depending on their current lifestyle, such as undertaking paid employment, attending education, or if they are in receipt of a pension. Many carers themselves feel that the three categories of people listed above are treated differently unjustifiably, and that the law should be changed to allow these people to claim Carer's Allowance.

There is no statutory definition of a carer; the English dictionary defines a carer as:

'a family member or paid helper who regularly looks after a sick, elderly or disabled person.'<sup>2</sup>

Another definition of a carer is of someone who spends at least thirty-five hours or more caring for someone who is ill or disabled.<sup>3</sup> This latter definition originates from three sources relevant to carers and the fact that spending thirty-five hours is a prerequisite to be considered for entitlement to Carer's Allowance.

The 2001 census endeavoured to determine the actual number of carers by asking:

'Do you look after or give any help or support to family members, friends or neighbours or others because of: long-term physical or mental ill-health or disability or problems related to old age?'<sup>4</sup>

The results indicated that there are almost six million people that classify themselves as carers. The 2001 census also demonstrated that 58 per cent of carers are female and 42 per cent are male. Buckner and Yeadle (2007) estimated that this saves the taxpayer £87 billion per annum.<sup>5</sup> It is worth noting that the cost that carers save the taxpayer is more than the yearly cost of all aspects of the National Health System (NHS) which stands at £81.678 billion.<sup>6</sup> However, considering the number of carers in Great Britain it is surprising that there are only 496,140 claiming the full Carer's Allowance of £53.90 per

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<sup>2</sup> Oxford English Dictionary 11<sup>th</sup> Edition, 2009 OUP

<sup>3</sup> [http://www.direct.gov.uk/en/CaringForSomeone/MoneyMatters/CarersAllowance/DG\\_10012525](http://www.direct.gov.uk/en/CaringForSomeone/MoneyMatters/CarersAllowance/DG_10012525), <http://www.carers.org/who-is-a-carer,118,GP.html> and <http://www.carersuk.org/Aboutus/Whoarecarers>

<sup>4</sup> Census 2001, Office for National Statistics

<sup>5</sup> Valuing Carers – calculating the value of unpaid care; Dr Lisa Buckner & Professor Sue Yeadle, University of Leeds, published by Carers UK.

<sup>6</sup> Department of Health: Departmental Report 2007, The Stationary Office, May 2007

week.<sup>7</sup> There were a further 419,240 people in Great Britain who were entitled to the Carer's Allowance, but not receiving any payment as they were receiving another benefit, such as the Incapacity Benefit or a State Pension. Taking into account both those who are receiving Carer's Allowance and those with entitlement to it, 915,380 people in Great Britain have made a successful claim for Carer's Allowance. As of August 2008, 50,381 people in Northern Ireland were entitled to Carer's Allowance, of whom 31,307 received the Allowance. Consequently, there would appear to be approximately five million people who classify themselves as carers but do not receive Carer's Allowance, Incapacity Benefit or a Pension.

### Carers in education

Carers in education are those who are in full or part time courses at further or higher education establishments. As carers under the age of 16 are studying at compulsory education establishments they are not entitled to any state support for their caring role, In the United Kingdom there are 4.3 million students participating in further education<sup>8</sup> and there are 2.3 million students engaging in higher education.<sup>9</sup> Therefore the amount of post-compulsory students in the United Kingdom is 6.6 million, from the 2001 census it was ascertained that there were 58.7 million people living in the United Kingdom<sup>10</sup> and a recent estimate for 2008 UK population was 61.4 million.<sup>11</sup> From the total number of students in further and higher education and the population of the UK it means that potentially one in ten students in the UK are carers.<sup>12</sup>

### The Current Law

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<sup>7</sup> Carer's Allowance Statistics - August 2008 – Published by Carers UK. 477,660 are Carers in Great Britain this was collected in February 2008 and 30,745 Carers are located in North Ireland this was collated in November 2007.

<sup>8</sup> Post-16 Education & Skills: Learner participation, outcomes and Level of Highest Qualification Held Page 22 [http://www.thedataservice.org.uk/NR/rdonlyres/82B63DA1-7024-4F74-A0CE-FC61C085D649/0/nat\\_SFR\\_Post16\\_Education\\_and\\_Skills\\_July09.pdf](http://www.thedataservice.org.uk/NR/rdonlyres/82B63DA1-7024-4F74-A0CE-FC61C085D649/0/nat_SFR_Post16_Education_and_Skills_July09.pdf) (as seen 12.03.2010)

<sup>9</sup> Higher Education Statistics Agency 2007/2008

<sup>10</sup> Ethnicity of the UK's population - <http://www.statistics.gov.uk/CCI/nugget.asp?ID=273>

<sup>11</sup> UK population estimates for 2008 - <http://www.statistics.gov.uk/cci/nugget.asp?ID=6>

<sup>12</sup> This is worked out on the assumption that if approximately one in ten of the population are carers then in the absence of contrary evidence one might assume that one in ten of those in post-compulsory education are carers.

If a student became a carer and they apply for Carer's Allowance, numerous factors are taken into consideration before they receive their decision of entitlement. The law regarding a carer's eligibility to Carer's Allowance is in S.70 Social Security Contribution and Benefits Act 1992, which provides *inter alia*:

(1) A person shall be entitled to [carer's allowance] for any day on which he is engaged in caring for a severely disabled person if:

(a) he is regularly and substantially engaged in caring for that person;

...

(c) the severely disabled person is either such relative of his as may be prescribed or a person of any such other description as may be prescribed.

(2) In this section, 'severely disabled person' means a person in respect of whom there is payable either an attendance allowance or a disability living allowance by virtue of entitlement to the care component at the highest or middle rate or such other payment out of public funds on account of his need for attendance as may be prescribed.<sup>13</sup>

It appears that these provisions are straightforward and that carers in education will be entitled to Carer's Allowance. However, these subsections cover the main and initial requirements for one's entitlement to Carer's Allowance. Even if the carer satisfies these requirements, there are still circumstances that affect their entitlement to the benefit.

One of these exceptions of concern regards the education of the carer:

(3) A person shall not be entitled to an allowance under this section if he is under the age of 16 or receiving full-time education.

...

(8) Regulations may prescribe the circumstances in which a person is or is not to be treated for the purposes of this section as engaged, or regularly and substantially engaged, in caring for a severely disabled person, as gainfully employed or as receiving full-time education.

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<sup>13</sup> S.70 Social Security Contribution and Benefits Act 1992

S.70(3) provides the rules regarding carers in full time education, however the definitions that govern whether the carer is in full time education for the purposes of the act are contained in regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976/409, which provides:

‘1) For the purposes of [section 70(3) of the Contributions and Benefits Act], a person shall be treated as receiving full-time education for any period during which he attends a course of education at a university, college, school or other educational establishment for twenty-one hours or more a week.

(2) In calculating the hours of attendance under paragraph (1) of this regulation:

(a) there shall be included the time spent receiving instruction or tuition, under-taking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision is made in the curriculum of the course; and

(b) there shall be excluded any time occupied by meal breaks or spent on unsupervised study, whether undertaken on or off the premises of the educational establishment.

(3) In determining the duration of a period of full-time education under paragraph (1) of this regulation, a person who has started on a course of education shall be treated as attending it for the usual number of hours per week throughout any vacation or any temporary interruption of his attendance until the end of the course or such earlier date as he abandons it or is dismissed from it.’<sup>14</sup>

#### Issues with the law

The first perturbing inconsistency with S.70 and regulation 5(1) is that S.70(8) allows regulations to prescribe circumstance in which a person is or is not to be treated as receiving full-time education for the purpose of section 70(3). However, Regulation 5(1) only prescribes circumstances in which a person is treated as receiving full-time

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<sup>14</sup> Reg.5 Social Security (Invalid Care Allowance) Regulations 1976/409

education, not the circumstances in which a person is not to be so treated. Consequently, a person will still be found to be receiving full-time education although they are not attending a course for 21 hours or more. This one-size-fits-all hypothesis is a lackadaisical method of applying the law, as potentially many people are being denied Carers Allowance even though the wording of the regulation suggests they should be entitled to it.

The Regulation 5(3) Social Security (Invalid Care Allowance) Regulations 1976/409 appears to be quite peculiar. A summer vacation for a 'full-time' undergraduate degree student can be up to and potentially over four months, if the examination period finishes at the end of May and the next semester starts at the beginning of October. The regulation states that, even if there is no studying related to their course during this period, irrespective of any considerations the 'student' will still be classed as receiving full-time education, thus disentitling their claim to Carer's Allowance.

The first point of concern about Regulation 5 stands out in Section 1. This section provides that the hourly threshold classed as receiving full-time education is twenty-one hours per week; this is perplexing because an individual in employment is classed as a part-time employee if they are working under thirty-seven hours per week over five days. The word 'attends' appears in section 1 and this is one of the first issues with the regulation. The Oxford English Dictionary provides a definition of 'attend' as: 'be present at, or go regularly to go regularly to (a school, church or clinic)'.<sup>15</sup>

As there is no definition of 'attend' in the act, the ruling in *R v Fulling*<sup>16</sup> needs to be applied. In this case it was held that when using dictionary definitions in the legal context, the definitions need to be given their natural and ordinary meaning. Applying the *Fulling* ruling one needs to assess the connotations from the definition which offers that the student has to be physically present at the educational establishment before being affected by the regulation.

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<sup>15</sup> Oxford English Dictionary, 11<sup>th</sup> edition (revised 2009)

<sup>16</sup> *R v Fulling* [1987] Q.B. 426

### What constitutes as Full-Time Education?

The current regulations for carers in full-time education are austere to say the least. It has already been explained that Regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976/409 provides that if a student is in supervised study for at least twenty-one hours per week they are in full-time education and are not entitled to Carer's Allowance.

The definition of full-time student and full-time employee are surprisingly complex and therefore puzzling; and they appear to have been set in line with the Government's intended policy of excluding students from benefits.

### Supervised Study

The next aspect of concern is in the terminology of regulation 2(a) of regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976/409, which provides for the calculating of the hours determining what constitutes 'supervised study'. This is one of the main problems with challenging the law, as the case law provides an anomalous rule. In *Bronwyn Wright-Turner v Department for Social Development*<sup>17</sup> the appellant claimed for Carer's Allowance in May 1996 whilst she was studying an arts degree. On her claim form she stated that her arts course required nine hours of study. However, the Dean of the Faculty stated that she was expected to undertake approximately 36 hours per week, encompassing a mixture of lecture, tutorials and independent study time. Her application was rejected on the grounds she was receiving full-time education, she successfully appealed to a tribunal which found that that the lecture and tutorials only took up 13 hours per week. Independent study was to be regarded as unsupervised study. Nonetheless, the adjudication officer appealed to the Social Security Commissioner, and the Chief Commissioner held that the appeal tribunal had failed to apply the correct test in ascertaining whether independent study should be classed as supervised study or unsupervised study.

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<sup>17</sup> *Bronwyn Wright-Turner v Department for Social Development* (Northern Ireland case, unreported)

The Commissioner found that if the work was set by the course tutor and done privately in the student's own time then it would be supervised study. One appreciates the distinction because the work set by supervisors is often recommended to assist with participation in seminars, some tutors might be aggrieved if students have not fully completed preparation for seminars and the work set by supervisors will further the student's knowledge of the topic which can help for examinations and coursework. In *Wright Turner*, Carswell LCJ provided some guidance to appeal tribunals and Commissioners, the proposals *inter alia*:

- '2. the words "attends" and "supervised" are ordinary English words, which take their meaning from the context [...]
4. attending a course of education at a university means engaging in the academic activities required of those who are enrolled'

However, the problem arises at point seven to point eight:

- '7. Ascertainment of the hours of attendance at a course of education is a question of fact, to be determined by the adjudicating officer or tribunal. In doing so they will have to regard the university's requirements of attendance at the formal contacts specified in Regulation 5(2)(a), any estimate furnished by the university authorities of the supervised study time required to complete the course, the claimant's own testimony any other source of material evidence.
8. The tribunal of fact should ordinarily focus primarily on the standard amount of time which the university authorities expect students to devote to contact hours and supervised study in order to complete the course'.

These last two points make it very difficult for tribunals and commissioners to correctly apply the law because every educational course and every student is completely different. An undergraduate law degree at Aberystwyth University may have different participation requirements than an undergraduate law degree at the University of Central Lancashire. Likewise an Aberystwyth Law student could have a different studying style from their co-students yet they achieve the same grades. Thus, it brings a difficult predicament for

those applying the law: do they now follow the logic that all courses have exactly the same participation requirements and that all students have exactly the same learning style? Imagine applying this blanket-style rationale in the Criminal Courts when sentencing, this would mean should an individual found or pleading guilty will receive a set sentence where no mitigation, no Pre-Sentence Reports, no bad character references have been considered. This would culminate in an awful sense of injustice. The very thought of that would send shudders down the spines of most criminal lawyers, so clearly there is an argument for applying a different logic when deliberating on Carers Allowance applications.

Consequently, a tribunal panel may automatically<sup>18</sup> have a view that a 'full-time' student will be in supervised study for over 21 hours per week and apart from providing a timetable or a letter from a member of staff at the university it is difficult for the appellant to prove otherwise. In *Flemming v Secretary of State for Work and Pensions 2002*,<sup>19</sup> Pill, Chadwick and Longmore LJ all agreed that, when ascertaining what amounts to supervised study, any work connected with studying the subject should be considered as supervised study even if the work is carried out at home.

However, this still further complicates the law, because how can one prove how long they are spending studying at home. As the tribunals' process is an adversarial process, the onus is on the claimant to prove how long they spend studying. In *Wright-Turner* the appellant's appeal was dismissed as the tribunal found that she spent 24 hours per week in supervised study, she appealed against this decision but the Social Security Commissioner found that the tribunal had followed the correct procedure in classifying supervised study.

The appellant then appealed to the Northern Ireland Court of Appeal, the Lord Chief Justice, Lord Carswell gave the judgment on this case, he found in favour of the criticism of the word 'attends' and established that it was wholly conceivable that a student can carry out private study absent from university premises. However, Lord Carswell's

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<sup>18</sup> It would be difficult to say for certain as one cannot know what goes on inside the heads of tribunal panels

<sup>19</sup> [2002] EWCA Civ 641, Reported as R(G) 2/02



reservation was over whether the law should allow students on a full-time course who have a small amount of supervised study to claim the benefit? Furthermore, if they disentitled students on full-time courses who have a large quantity of supervised study then it could create an awkward precedent, because there would be many students disentitled to Carer's Allowance as they could be on a course requiring more hours of supervised study. Most university tutors will be able to ascertain how much time the average student has dedicated to their work and they will recognise how much time they think is reasonable for the average student to just pass the course. However it might be difficult for tutors to ascertain the reasonable amount for an individual student, which is exactly what was recommended in *Wright-Turner*. Nonetheless the tribunals and commissioners continue to use evidence from university tutors as expert evidence and not to rely on the students' own opinions when deciding how many hours they will dedicate to pass the course. However, this approach will not be of assistance to all students as there are inevitably some that will fail the test.

#### Regulation 5(2)(a)

Regulation 5(2)(a) explains the activities which contribute to totalling the hours of full-time education. These terms and definitions sit uncomfortably with this author. From *Wright-Turner* the word 'attends' means engaging in the academic activities required of the course; however, this is perplexing, because *Wright-Turner* also states that the words should be used for their normal and ordinary meaning. This author accuses the above application of the term 'attends' as a policy decision attempting to scupper challenges to the law because for many degree courses the time of physical presence on the premises will be less than the hours taken up by engaging in the academic requirements of the course. For the purposes of the article we shall use a student studying an undergraduate Law degree.

For example, with regards to 'receiving instruction or tuition', the dictionary definition for 'tuition' is: 'teaching or instruction, especially of individuals or small groups'.<sup>20</sup> In an ordinary context this would be attending timetabled lectures, seminars or small group sessions.

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<sup>20</sup> Oxford English Dictionary 11<sup>th</sup> Edition, 2009 OUP

As explained in the case of *Wright-Turner* above, there is no definition offered for 'supervised study'. The dictionary provides an array of definitions, such as: 'Observe and direct the execution of (a task or activity) or the work of (a person).'<sup>21</sup> These definitions suggest physical or close presence to the student, thus for this the student ought to be on the premises of the educational establishment to be in receipt of supervised study.

Furthermore, the definition of 'examination' is as follows: 'A formal test of knowledge or proficiency in a subject or skill.'<sup>22</sup> Most 'examinations' are held intermittently and often only form a small part of the hourly requirements for an undergraduate degree. For example, this author's last examination structure was as follows: an Equity and Trusts exam of three hours, a Land Law exam lasting two hours, a Penology exam over three hours, and a Criminal Justice exam lasting three hours. The examinations were spread out over May and June, culminating in eleven hours of 'examination'. Notwithstanding the significance of the examinations, they only occupied a small proportion of the academic year.

An additional area of concern is the definition of 'practical', provided as: 'an examination or lesson involving the practical application of theories and procedures.'<sup>23</sup> For the purposes of a law degree, this could be an activity similar to a mock trial or something similar, which requires hands-on participation from the student. Moreover, the term 'exercise' is very vague, being defined in the dictionary as: 'a task set to practice or test a skill.'<sup>24</sup> This is very indistinct and impractical, as it could form any activity of an undergraduate degree programme apart from any assessed work.

The noun 'experiment', although perhaps not entirely applicable to a law degree, is relatively clear: 'A scientific procedure undertaken to make a discovery, test a hypothesis, or demonstrate a known fact; a course of action tentatively adopted without being sure of the outcome'.<sup>25</sup> The definition of 'project' is: 'a piece of research work by a

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

school or college student,<sup>26</sup> for which 'provision is made in the curriculum of the course'. With an explanation such as this, this activity would almost certainly be associated with assessed coursework or preparation for discussion in seminars or tutorials.

Using these dictionary definitions, the regulation suggests that to be classed as receiving full-time education the student must be physically present on the educational premises. Furthermore, the activities in 2 (a) are vague at best, and it seems that the requirements may only be carried out when the student is physically on the premises. The only activity which is not often associated with the student being on the premises is the last activity.

#### **Challenging the decision in *Flemming and Wright-Turner***

A recent decision from the Upper Tribunal Administrative Appeal Chamber confronted the meaning of Regulation 5(1) and criticised the process to decide the outcome of the claim. In *CG/449/2008*,<sup>27</sup> the claimant, Ms Deane, had been entitled to Carer's Allowance since 1990 as she was not gainfully employed and was regularly and substantially engaged in caring for her daughter who was severely disabled. Ms Deane decided to undertake further education and on 25<sup>th</sup> September 2006 she enrolled on and started a BA combined honours degree in English Language and English Literature at the Liverpool Hope University. In December 2006 she notified the CA unit by telephone that she had started what she apparently described as a full-time course at the university, involving her in twelve and a half hours of supervised study per week. The Carer's Allowance unit contacted the university to enquire on the number of hours that the student was expected to undertake for the curriculum, the university advised the Carer's Allowance unit that was 1,080 hours per annum which averages out at 27.69 hours a week over the 39 weeks of the academic year. Consequently, Ms Deane's claim for Carer's Allowance was suspended.

Judge Mesher was very critical of the regulation, as in paragraph two:

'It is highly unsatisfactory that there has been no clarifying amendment to regulation 5 since the strong criticism of drafting in

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<sup>26</sup> *Ibid.*

<sup>27</sup> [2009] UKUT 46 (AAC)

those decisions. In my view regulation 5 is entirely unfit for purpose as a means of deciding when study on an undergraduate degree course is fairly compatible with continuing entitlement to CA. I hope there will be a complete reconsideration as part of the review of carers' benefits that I understand is going on'.<sup>28</sup>

In this Upper Tribunal case, Mesher J tried his hardest to challenge the one-size-fits-all approach from *Flemming* and *Wright-Turner*, which was commented on in the subsequent appeal case *C1/2009/1425 Secretary of State for Work and Pensions v Amanda Deane*,<sup>29</sup> as per paragraph forty-four:

'The consequence of Judge Mesher's approach is that entitlement to CA is dependent upon whether the student is hard working or lazy, brilliant or less able, ambitious or complacent, over-confident or over-cautious and there seems to be no reason of policy or fairness for drawing such distinctions.'

It was held that Mesher's approach was incorrect, Ward LJ, as per para 51, provided the following:

'In my judgment therefore, concentration on the hours actually spent is the wrong approach. To construe Regulation 5 consistently with section 70(3) of the Act, the fundamental question is whether the applicant for CA "is receiving full-time education". A student will "receive" that which is provided. If in ordinary circumstances the course upon which the student is enrolled is one offered as a full-time university course, as opposed to a part-time university course, then there must be, as Pill L.J. put it, "some presumption" that the recipient is in full-time education.'

Subsequently, Ms Deane's appeal was dismissed and she was disentitled to Carer's Allowance.

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<sup>28</sup> There was no reconsideration of this rule in the 2008 National Carers Strategy

<sup>29</sup> [2010] EWCA Civ 699

Ward LJ has further remarked:

‘Regulation 5 has undoubtedly raised difficult questions of construction and application. Whether the criticisms of it call for some review by the rule-making body is a matter for that body [...] Sadly for her, and notwithstanding my sympathy for her, I have to conclude that Judge Mesher erred in setting the test for the calculation of twenty-one hours to be time actually spent in the activities specified in paragraph 2 of Regulation 5. On the other hand his instincts for the right decision as set out at [10]<sup>30</sup> were absolutely correct and he would have given effect to them had he not been constrained by authority from which I feel able to depart.’

It is clear that the early precedent has hindered many opportunities to challenge the law, but this author is once again unsatisfied. Regulation 5(1) and *Flemming and Wright-Turner* are still present and they are causing many problems for tribunals and commissioners.

### Reform

The reasons for reform come from two different angles. The first angle is the legal side and the second is the social aspect. As has been highlighted previously, the law appears very straightforward from reading S.70(3) alone, but when one assesses Regulation 5(1) the law is frivolously complex. This author is unsatisfied that some terms in Regulation 5(1) are given their ordinary and general meaning while others are not,<sup>31</sup> as this brings inconsistency and elusiveness to the law. Consequently, the question remains: are those in receipt of this “justice” actually getting a fair hearing? Furthermore, the ‘one size fits all’ prescription, when considering if they are in full-time education or not, is deeply unproductive; consequently, this author feels that this has been more of a policy decision, than a meticulous application of the law.

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<sup>31</sup> The word “attending”, which means engaging in the academic activities required of those who are enrolled in the course

It is the belief of the author that there needs to be a rigorous revisit of the legal terminology, not only because of the legal complexities that arise from dissecting it, but because of the financial assistance that Carer's Allowance provides. Ward LJ addressed the issue powerfully in paragraph 52:

'If the rationale ever was that the carers embarking on full-time education would receive financial support from the education authorities to compensate for the loss of CA, those days are long gone. University students now leave university with overdrafts. How Ms Deane was expected to be able to care for her child while she was in full-time education I do not know.'

Notwithstanding that supportive comment, carers, by pursuing full-time education, are forgoing earning money for at least three years, consequently they will likely leave education with a higher amount of debt than the average student; they are more likely to suffer severe financial hardship and poverty due to their caring role.<sup>32</sup> These carers are helping to save the UK taxpayer £87 billion per annum, and should therefore receive financial recognition for their role through Carer's Allowance. Consequently, the unfit for purpose S.70(3) and Regulation 5(1) need to be abolished at the next review of carer's benefits.

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<sup>32</sup> Carers in Crisis: A Survey of Carer's finances in 2008, Carers UK

## Is our developing case law in respect of discrimination on grounds of religion or belief in danger of opening up a Pandora's box?

TIMOTHY KILLEN

### Introduction

If, in affording protection to individuals because of their religion or belief, we are in danger of opening up a Pandora's box, the question must be posed – why protect such beliefs in the first place?

At the last census 7.9% of the British population were from a “non-white” background, a figure which amounts to around 4.6 million people (a number greater than the population of the Republic of Ireland). As this evidences, we live in an increasingly multicultural Britain, a Britain where diversity is welcomed and difference is encouraged. We all, as inhabitants of this evolving society reap the benefits of this cultural and racial shift in terms of language, food, fashion, art and, arguably most importantly, outlook and belief. We become exposed to new belief systems which provide varying philosophies through which we are able to assess our lives and relationships (some incredibly liberating, others very conservative). Inevitably, however, there are those who resist and fear change and see what is unfamiliar and new as a threat, and as opposition to the way of life in which they have found comfort and security. Some of those who close their eyes and cover their ears to the benefits of diversity lash out directly at those who are different from them by using physical violence or preaching the degenerative politics of aggression. Others, meanwhile, use more subtle, less overt means of manifesting their suspicions of change by preventing access to services, employment and social opportunities for those who they perceive as different, and it is this behaviour which European and domestic law has been designed to address. In order to preserve the benefits of multiculturalism and lubricate the wheels of change the Courts and the legislature have had to afford legal protection to difference. To this end the Employment Equality (Religion or Belief) Regulations 2003<sup>1</sup> were enacted which prohibit direct and indirect discrimination on the grounds of an individual's belief.

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<sup>1</sup> Statutory Instrument 2003 No. 1660 (hereafter, the “2003 Regulations”)

The definitions of direct and indirect discrimination<sup>2</sup> are contained within s.3(1)(a) and (b) of the 2003 Regulations. The former amounts roughly to treating someone less favourably *because of* their religion, while the latter is unjustifiably applying a universal provision or practice which has the effect of putting persons of a particular belief or religion at a disadvantage in comparison to all others.

Such prohibitions from discrimination on “protected grounds<sup>3</sup>” generally are, whilst aiming to serve the most legitimate of aims, generating complex conceptual, legal and practical difficulties; and none more so than those laws which aim to prevent discrimination on grounds of religion or belief. This essay identifies and analyses three areas in which the contemporary development of such rules has caused confusion and is likely to generate further problems in the future. The first of these is the difficulty which the Courts have recently encountered in providing a stable and principled definition of a “religion” or “belief” which ought to attract protection. The second is the struggle which the Courts have had in identifying the boundary between the “holding” and the “manifestation” of a belief and the implications which arise as a result. Finally, the conflict which arises between religion and other “protected grounds” such as sex, sexual orientation, race or disability, shall be discussed.

As this essay progresses it shall be shown that, just as in the well-renowned Greek myth of Pandora’s box, great ills can be unleashed on the world as a result of the most innocent of intentions. Just as Pandora, a maiden shaped by the gods, releases the evils of mankind from a sealed container because of her curiosity, the Courts, in their developing case law on discrimination on grounds of religion or belief, may be releasing the most feared of judicial evils – the evil of uncertainty – owing to their most valiant of attempts to protect a valuable and still fragile diversity. It is thought that in some ways this uncertainty may in fact have a tendency to undermine the very tolerance which it is aiming to engender.

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<sup>2</sup> Which find their origins in legislation such as the Sex Discrimination Act 1975 (the “SDA”) and the Race Relations Act 1976 (the “RRA”)

<sup>3</sup> The phrase used by the Equality Act 2010 (which comes into force in October 2010) is “protected characteristics” and refers to Age, Disability, Gender Reassignment, Marriage and Civil Partnership, Race, Religion or Belief, Sex and Sexual Orientation.



Defining “religion” or “belief”: When is a box a jar?

*But the woman took off the great lid of the jar with her hands and scattered all these and her thought caused sorrow and mischief to men.<sup>4</sup>*

Creating words and definitions poses all manner of problems. Assigning a sound or collection of symbols to encompass the meaning or essence of an object has proven difficult for even the most talented of linguists and philosophers. When one person says or writes a word it is an important feature of language and communication that others understand the same concepts as the speaker means to identify.

An example of this difficulty is to be found in the original Greek descriptions of the legend of Pandora contained within Hesiod’s poems “Theogony” and “Works and Days”. Hesiod writes of the evils of the world being stored within a “*Pithos*”, or particular form of ancient Greek storage jar. However, when one thinks of the legend of Pandora, it is normally that of “Pandora’s Box”, rather than “Pandora’s Jar” which springs to mind. It was only later, in the sixteenth century when the work was translated into Latin that the vessel was referred to as a “*pyxis*”, which has itself come to be most commonly translated as “box”. Given this prescient example of the difficulty encountered in attempting to provide an accurate definition of a simple physical object, it is no wonder that the Courts have struggled to accurately define the complex, abstract and multifarious conception of “religion or belief” in a manner which can consistently and accurately be understood and applied.

In *Grainger Plc v Nicholson*<sup>5</sup>, a 2009 decision of Mr Justice Burton in the EAT, the tribunal was asked to consider the definition of “a philosophical belief” within the meaning of Regulation 2(1)(b) of the 2003 regulations, and particularly the question of whether an employee’s “strongly held philosophical belief[s] about climate change and the environment”<sup>6</sup> could qualify for protection against discrimination under the regulations.

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<sup>4</sup> Hesiod, *Works and Days*, lines 91-2

<sup>5</sup> (UKEAT/219/09) [2010] I.C.R. 360, hereafter “*Grainger*”

<sup>6</sup> Extract from the Claimant’s Witness Statement at [2010] I.C.R. 362

In his analysis of the matter Judge Burton drew a distinction between the test for identifying a “religious belief” and the test for identifying a “philosophical belief”. In *R (Williamson) v Secretary of State for Education and Employment*<sup>7</sup> Lord Nicholls asserted that the Court’s enquiry into “the genuineness of a person’s religious belief...[i]s a limited inquiry” and that “[t]he Court is concerned to ensure an assertion of religious belief is made in good faith...but emphatically, it is not for the Court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard...”<sup>8</sup> However, at paragraph 6 of his judgment, Burton J roundly rejects the applicability of this principle in relation to the test for identifying a philosophical belief and states that cross examination may be required in order to establish the authenticity of an individual’s philosophical beliefs. In Burton J’s considered opinion (which drew on the case law of the European Court of Human Rights in *Campbell and Cosans v United Kingdom*<sup>9</sup>) a philosophical belief must satisfy five criteria before it can be considered as a “similar philosophical belief” worthy of protection under the 2003 Regulations. These being:

1. Firstly it must be a belief which is genuinely held;
2. Secondly, it must be a belief and not an opinion or viewpoint based on the present state of information available;
3. Thirdly, it must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. Fourthly, it must attain a certain level of cogency, seriousness, cohesion and importance;
5. Finally, it must be worthy of respect in a democratic society<sup>10</sup>

With respect, it is submitted that this approach to the definition of protected “beliefs” is troubling in three ways. Firstly, for its prejudicing of the established over the emerging, secondly, for its prejudicing of the irrational over the rational, and, thirdly, for its objective uncertainty, which will necessarily require individual judges to make social-value judgements

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<sup>7</sup> [2005] 2 AC 246 para 22, hereafter “*R (Williamson)*”

<sup>8</sup> *Ibid* and at para 5 of *Gratnger*

<sup>9</sup> (1982) 4 EHRR 293

<sup>10</sup> [2010] I.C.R. 370, para 24

rather than principled legal decisions; thereby placing the judiciary in constitutionally controversial territory.

Burton J's approach provides for different tests dependent upon whether the claimant is asserting a "religious belief" (which very often tends to refer to established belief systems) or a "philosophical belief" (which are the more commonly emerging belief systems<sup>11</sup>). In doing so the EAT has ascribed greater value to established religious beliefs than it has to emerging philosophical ones. Whilst this approach can be justified from a social/group value perspective it is not an argument which succeeds when analysed from the individualistic standpoint from which the 2003 Regulations are normally perceived and justified.

If the purpose of legislation such as the 2003 Regulations is to protect multiculturalism, individualism and minority identities then it would seem unjustified to blindly accept the greater value of established belief systems over those which are emerging. J. S. Mill, when discussing the evils of the tyranny of the majority, states that "there is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism".<sup>12</sup> It is submitted that here the interference of collective opinion as to what is and is not a valid belief has encroached on the judgment of Burton J, in that established religious beliefs are subjected to less exacting scrutiny than their emerging philosophical counterparts.

The distinction would appear to stem from a fear, expressed by Lord Walker in his judgment in *R (Williamson)*<sup>13</sup>, that secular Courts ought not to be placed in a position whereby they are required to adjudicate on theological doctrine. This was so, considered Lord Walker, even when a religious belief was of a relatively extreme nature (such as a belief in mandatory corporal punishment in schools, as was under consideration in *R (Williamson)* itself).

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<sup>11</sup> For example "Humanism" which in its modern form is the view that "we can make sense of the world using reason, experience and shared human values and that we can live good lives without religious or superstitious beliefs" – <https://www.humanism.org.uk/humanism>. A further example would be secularism or, the example at hand in *Granger* itself of "Environmental Ethics".

<sup>12</sup> J. S. Mill *On Liberty and Other Writings* CUP 1989, p 9

<sup>13</sup> [2005] 2 AC 246 para 56

However, whilst it is considered that this concern may have some validity for justifying non-interference in the interpretation of religious doctrine, it is not a justification for treating non-religious beliefs differently. This concern is simply an expression of a widely applied doctrine that the Court ought not to interfere with or pass judgment on matters outside of its expertise<sup>14</sup>. Therefore, such reasoning can equally well apply to a Court examination of non-religious beliefs; just as a secular Court cannot claim authority on theological issues by virtue of a lack of knowledge, a court cannot claim authority on philosophical beliefs (or scientifically-grounded beliefs such as those at issue in *Grainger*) owing to the same deficiency.

It is noted, however, that this distinction between the tests applied for religious and non-religious belief could be accepted if, rather than seeking to protect individual identity (and prevent the tyranny of the majority), legislation such as the 2003 Regulations was in fact seeking to protect some wider social value which organised religion often brings. Many charities and community activities centre on shared religious beliefs or practices, for example, and it may be that if this is the theoretical standpoint from which the law views the value of religion then the prioritising of the established over the emerging could be justified. This “group value” conception is not, however, that which is more usually used to justify such rules and laws. Rationalisations of prohibitions on religious discrimination tend to focus more explicitly on the freedom to form individual identities (although sometimes these individual identities are formed or given value by virtue of reference to or association with larger groups<sup>15</sup>) and, in this case, Burton J’s prejudicing of the established over the emerging would seem unjustifiable.

The second problem into which it is thought Burton J’s judgment stumbles is in its prejudicing of the irrational over the rational. By articulating the requirement that the “belief must be a belief and not...an opinion or viewpoint based on the present state of information available”<sup>16</sup> Burton J would seem to explicitly exclude belief systems which are justified by

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<sup>14</sup> A matter which is well addressed in the case law surrounding clinical negligence disputes -- see e.g. *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 583 and *Bolitho v City and Hackney Health Authority* [1997] UKHL 46

<sup>15</sup> On which see Will Kymlicka, *Liberalism, Community, and Culture* (OUP 1989) pp165, 178. For the contrary view (that identity is an individual construction) see J. Waldron *Minority Cultures and the Cosmopolitan Alternative* (1991-2) 25 *University of Michigan Journal of Law Reform*

<sup>16</sup> [2010] I.C.R. 370, para 24 Citing *McClintock v Department of Constitutional Affairs* [2008] IRLR 29.

reference to rational analysis. The justifications for such a requirement are unclear and two specific difficulties are encountered.

Firstly, the rational justification of a belief by reference to present information is something which is common to both religious and non-religious beliefs. If one considers the ontological method of argument used by theologians and philosophers<sup>17</sup>, the very point of such intellectual endeavours was (and is) to prove the opinion that a God exists by reference to what is the commonly perceived logic of the existence of man. To exclude a "philosophical belief" for being justified in the manner in which it is human nature (often, although admittedly not always) to also justify religious beliefs would seem absurd. The rational form of religious justification is also something employed more generally, as evidenced in the work of Christian academics such as Alvin Plantinga<sup>18</sup>, and features in many other arguments for the existence of God (Christian, Muslim or otherwise) and the justification of religion. If religious beliefs are accepted with only minor interrogation it would seem illogical, even if further requirements are justified for non-religious beliefs, to exclude such a belief by reason of possessing a characteristic common to mainstream religious beliefs.

Secondly, this requirement for belief to be independent of contemporary information seems somewhat unclear in its application, for the very example which Burton J gives as a belief based on science which might qualify under the 2003 Regulations is that of Darwinism. However, it is common to very many (perhaps nearly all) believers in Darwinism that if new, reliable and empirical information were to become available which disproves the theory of evolution, they would alter their beliefs accordingly<sup>19</sup>. This is a view supported by one of the most prominent contemporary believers in evolution, Richard Dawkins, when he states that "the true scientist, however passionately he may 'believe' in evolution knows exactly what it would take to change his mind: Evidence."<sup>20</sup>

The final criticism of Burton J's judgment is perhaps simply an amplification or extension of the argument just addressed, namely that across *all* of the five criteria outlined for a "belief"

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<sup>17</sup> Both by classical theologians such as Rene Descartes (see e.g. *Meditation V: On the Essence of Material Objects and More on God's Existence*) or, more contemporary theologians such as John Milbank

<sup>18</sup> See, for example, A. Plantinga, *Advice to Christian Philosophers*, in *Faith and Philosophy: Journal of the Society of Christian Philosophers*, Vol I, 1984

<sup>19</sup> A point made by Professor Mark Hill QC and Spencer Keen in their Article *Employment: Faith, hope and clarity*, 160 NLJ 47

<sup>20</sup> *The God Delusion* R. Dawkins, Black Swan 2006, p.19 (Preface to the Paperback Edition)

to be protected, there is considerable room for personal judicial interpretation. Whilst the criteria are seemingly straight-forward and stringent on first blush, on a closer analysis there is room for significant argument at each and every stage. As rather charmingly stated by Hill and Keen “[Burton J’s Test] admits beliefs rather like the Turner Prize admits art.”<sup>21</sup>

The phrase “weighty and substantial aspect of human life and behaviour”<sup>22</sup> used in Burton J’s second requirement goes unexplained and is clearly open to many subjective interpretations. Likewise for the requirements of “cogency, seriousness, cohesion and importance”<sup>23</sup> as well as “worthy of respect in a democratic society”<sup>24</sup>. A test for “belief” formulated in such terms essentially boils down to the Court simply asking itself a single question, and that is whether it, subjectively, thinks a particular belief is worthy of protection and no more.

If this truly is the test it has clear constitutional and practical consequences. Constitutional in that it is essentially requiring the judiciary to carry out a legislative function in determining which beliefs they consider worthy of protection, rather than interpreting which beliefs parliament envisaged as worthy of protection. Practical in that such a question is likely to consume a significant amount of a Court’s time both at first instance and, as the matter is concerning the construction of a statutory provision and therefore a point of law and appealable, at EAT level or above. This has obvious costs and certainty implications but, more importantly, may have the effect of undermining the very tolerance which it attempts to uphold. If bizarre, flippant<sup>25</sup> or offensive<sup>26</sup> beliefs are afforded the substantial protection of the law or, alternatively, fundamental and sensible beliefs are left exposed to discriminatory practices at the whim of an individual judge applying the ambiguous test outlined in *Grainger*, the legal regime itself will be discredited and the aims of fostering tolerance and diversity which it pursues will be destabilised.

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<sup>21</sup> Professor Mark Hill QC and Spencer Keen op. cit. p48

<sup>22</sup> [2010] I.C.R. 370, para 24

<sup>23</sup> Ibid

<sup>24</sup> Ibid. Although, admittedly, there is significant case law under the HRA and the ECHR regarding rights and values worthy of respect in a democratic society.

<sup>25</sup> Professor Mark Hill QC and Spencer Keen op. cit. suggest that “the next time a client asks whether a belief in the Jedi Knights is covered by the Regulations you may wish to pause before sending him packing”.

<sup>26</sup> See Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart, 2007) p23 where Professor Vickers makes the assertion that it is at least arguable that adherence to a belief in white supremacy may qualify under the Regulations. – It is, however, thought that such a belief may fall foul of the requirement that it be “worthy of respect in a democratic society”.

With regards to the definition of “religion or belief” the law, as it currently stands, has clearly opened Pandora’s *Pithos*, be it a jar or a box.

Demarcating holding a belief and manifesting a belief: Pandora’s box opens further

*Of themselves diseases come upon men continually by day and by night, bringing mischief to mortals silently;*<sup>27</sup>

The Second area for analysis in the area of religion or belief is that which was addressed by the Court of Appeal in *Islington London Borough Council v Ladele*<sup>28</sup>. The *Ladele* case brings into sharp focus the dilemma which religious employees<sup>29</sup> face when a duty of their employment comes into conflict with their deeply-held religious beliefs. In *Ladele* a Christian registrar of births, marriages and deaths, employed by the local authority, was required as part of her duties to register<sup>30</sup> civil partnerships. It was Ms Ladele’s belief that it was against her religious convictions to facilitate a same-sex union (such unions being contrary to her Christian view of a marriage as being between one man and one woman) and entered into discussions with her employer in order to negotiate a solution. After receiving complaints from two homosexual registrars, who were colleagues of Ms Ladele, regarding her behaviour the local authority warned her that she would be dismissed if she did not undertake functions in relation to civil partnerships if required to do so. As a result of this warning Ms Ladele brought a claim for discrimination on religious grounds under the 2003 Regulations.

Ms Ladele’s claim succeeded in the Employment Tribunal but both the EAT and the Court of Appeal found for the Local Authority in deciding there had been no direct discrimination against Ms Ladele on the grounds of her belief and any indirect discrimination there had been was justified. This, undoubtedly, was the correct outcome. The logical route by which the decision was reached, however, raises some cause for concern, for the Court of Appeal sought to draw a distinction between discrimination suffered as a result of *belief* and discrimination suffered as a result of *conduct*. It was the Court’s opinion that Ms Ladele had

<sup>27</sup> Hesiod, *Works and Days*, Lines 103-4

<sup>28</sup> [2009] EWCA Civ 1357 hereafter “*Ladele*”.

<sup>29</sup> And potentially their employers also.

<sup>30</sup> The administrative function only, her employers having already excused her from performing the function of actually carrying out the ceremony.

been a victim of the latter and therefore could not be afforded the protection of the 2003 Regulations.

It is thought that this decision is potentially troubling because of the reliance it places on the distinction between the holding of a belief and the manifestation of a belief. This is a distinction which has been drawn under ECHR and HRA case law relating to Article 9 of the ECHR (which was referenced by the Court in *Ladele*) but as academic discussion of this series of authorities has shown, the line between the two concepts is one which is notoriously difficult to draw. If the Courts become over-eager to define certain instances as manifestations of belief rather than as the holding of a belief the protections afforded by the 2003 Regulations could be severely diminished. Further, even if the Courts and Tribunals do manage to maintain a strict and principled distinction (which, as analysis of the Article 9 case law below shows, would seem unlikely) the inherent uncertainty will again lead to practical difficulties in increased litigation (as discussed above with reference to the definition of a "belief") as well as having the more serious effect of undermining the very protections which the Regulations seek to uphold.

The ECHR case law on the holding/manifestation distinction has shown that it is most difficult to tease out the differences in situations where there is a clash between a compulsory legal regime and an individual's beliefs, which are such that they consider particular actions as an integral and mandatory part of the beliefs themselves. Examples may be the avoidance of blood products or adherence to pacifism or a particular mode of dress<sup>31</sup>. Some of these beliefs, such as an adherence to pacifism, can generally be "held" from day to day without any particular action being required, others, such as adherence to a particular dress code, will demand more frequent manifestations. The real issue, however, comes when these "requirement beliefs" are challenged by a compulsory rule of law or regime, for example when an individual is required to complete compulsory military service, or wear a certain uniform to schools where attendance is compulsory. An example of this arose in *Thlimmenos v Greece*<sup>32</sup> where the applicant, a Jehovah's Witness and believer in pacifism, was barred from becoming a chartered accountant owing to a criminal conviction arising out of his

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<sup>31</sup> These examples are those given by Aileen McColgan, *Class Wars? Religion and (in)equality in the workplace*, *Industrial Law Journal* 2009, 38(1), p.9

<sup>32</sup> (2000) ECHR Application No. 34369/97



refusal to wear military uniform<sup>33</sup>. In these situations the individual has a choice between rendering the holding of their beliefs nugatory or suffering the consequences of non-compliance with compulsory laws or regimes. In such situations the holding/manifestation distinction, whilst still logically and theoretically possible to draw, becomes practically arbitrary – if there is no alternative course of action available then the belief itself is essentially punished, not simply its incompatible manifestation.

The key concept, therefore, would seem to lie in whether a reasonably practicable alternative does or does not exist. Whether one is deemed to exist will often be the deciding factor in whether there has been an interference with an individual's religious or other beliefs. In some cases, such as in *Thlimmenos*, the answer is relatively apparent, an option of criminal sanctions in the event of non-compliance would be considered by most to be no real "choice" at all. In other situations, however, it is less obvious. The example of compulsory dress codes in schools which conflict with religious modes of dress has seen the national courts drawing different conclusions from those which would most likely be arrived at under ECHR jurisprudence<sup>34</sup>. In *R (Begum) v Denbigh High School Governors*<sup>35</sup>, for example, the House of Lords considered the fact that Shabina Begum could attend another school where the wearing of the shalwar kameeze was permitted gave her a viable "choice" so as to conclude that there had been no interference with her religious beliefs (as opposed to her manifestation of those beliefs) when she was excluded for a failure to comply with the school's dress regulations.

The decision on whether this constituted an interference, however, was reached only by a bare majority of 3-2<sup>36</sup> and whilst this logic and reasoning has also been followed subsequently by the High Court in *R (Playfoot) v Millais School Governing Body* with regards to a ban at school on the wearing of a "purity ring"<sup>37</sup> it is thought that the case would be decided differently were it to be heard by the European Court of Human Rights<sup>38</sup>. This is

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<sup>33</sup> Although, note the challenge in *Thlimmenos* was directly against the practice of compulsory service itself but rather the imposition and severity of the penalty imposed.

<sup>34</sup> For further analysis of this conclusion see R. Sandberg, *Recent controversial claims to religious liberty*, LQR (2008) at p. 214 ff.

<sup>35</sup> [2006] UKHL 15, hereafter "*Begum*"

<sup>36</sup> Lord Nicholls and Baroness Hale considered there had been an interference, Lord Hoffmann, Lord Bingham and Lord Scott considered there had been no such interference.

<sup>37</sup> [2007] EWHC Admin 1698 hereafter "*Playfoot*" – the alternative here being that it could have been "attached to a key ring or worn on a school bag"

<sup>38</sup> See R. Sandberg op. cit. at p. 214

so for in the European Court's judgments it appears that the decisive factor as to the existence of a sufficiently practicable "choice" regarding dress in order to justify a finding of no interference seems to rely heavily on the presence of voluntarily entered contracts<sup>39</sup> – something which does not exist in publicly provided educational establishments such as were in issue in *Begum* and *Playfoot*.

It is suggested therefore that to imbue the law on discrimination on grounds of belief with the inherent uncertainty encountered under the Article 9 ECHR jurisprudence, as the Court of Appeal has done in *Ladele*, is to further complicate and potentially undermine what has already been shown to be an ambiguous legal regime. Further, if the general trend in Article 9 case law is applied to discrimination at work situations, whereby any possible alternative option (presumably including finding alternative employment<sup>40</sup>) is considered sufficient to warrant a finding of no interference on religious grounds, the very objective of the 2003 Regulations will largely have failed. At any point where religious discrimination occurs the complainant will, presumably, have the option of simply leaving that particular employment. If this is in fact the case the protection offered by the 2003 Regulations will be purely illusory.

Whilst it is strongly suggested that the incorporation of Article 9 principles is undesirable, it is noted that some method of scrutiny is required with regard to when an individual has been discriminated against on the ground of their religious or other protected beliefs and when they have not. Such beliefs, as recognised under the Article 9 jurisprudence, are not an absolute right and some way of balancing them against other considerations is necessary. To this end, and to avoid the degenerative influence of importing Article 9 case law into the discrimination regime<sup>41</sup>, it is thought that a possible solution would be to treat all discrimination on religious or belief grounds in the same way that instances of indirect discrimination are currently treated and allow the "proportionate means of achieving a

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<sup>39</sup> As was the case in student-university case of *Karaduman v Turkey* (1993) 74 D.R. 93. Interestingly, this point seems to have been taken by Lord Justice Laws in his judgment dismissing an application to appeal to the Court of Appeal in *McFarlane v. Relate Avon Limited* [2009] UKEAT 0106\_09\_3011

<sup>40</sup> An option which was considered sufficient to justify a finding of "no interference" with Article 9 in *Ahmad v United Kingdom* (1981) 4 E.H.R.R. 126

<sup>41</sup> It must be noted that no assessment is made here of the compatibility of this approach with the United Kingdom's obligations under the European Convention on Human Rights. Such arguments are, perhaps, beyond the scope of this essay.

legitimate aim” defence<sup>42</sup> to be argued in every occasion. It is thought, however, that it is desirable to maintain the direct and indirect discrimination distinction in name, in order to satisfy any “labelling”<sup>43</sup> concerns which may arise. Further, it is considered important to maintain a recognition of the fact that direct discrimination is more objectionable than indirect discrimination, in that it usually involves an active prejudice being expressed, rather than simply a naïve or unthinking application of a blanket policy. To this end it could be that when the “proportionate means” defence is being considered in instances of direct discrimination the level of “proportionality” which the prima facie discriminator needs to establish is adjusted in favour of the purported victim. To put it simply, in both cases of direct and indirect discrimination reasons will be needed to justify any difference in treatment. However, in instances of indirect discrimination a “good” reason will need to be established; - whereas in instances of indirect discrimination a “very good reason, indeed” will need to be established. Therefore, in cases of direct discrimination, it is considered it will be very rare that a justification will be found which would satisfy this test and in cases of malicious direct discrimination, it is considered nearly implausible that such a justification could every be established. The practical benefit of this approach is that the court or tribunal is given a structured legal test<sup>44</sup> (and one which courts are used to applying through the influence of ECJ and ECHR case law) through which they can decide the legitimacy of any discrimination which has occurred, without having to resort to the troublesome belief/manifestation distinction.

In fact, in the case of *Ladele* itself, there was a finding of indirect discrimination in the EAT and the Court of Appeal (the Employment Tribunal’s finding of direct discrimination being held as wrong in law) and the “proportionate means” defence was considered to have been satisfied. The discussion as to whether Ms Ladele had been discriminated against on grounds of her belief or her manifestation of her beliefs was therefore, it is suggested, unnecessary<sup>45</sup> and unhelpful. Likewise, the finding of direct discrimination in the First Instance decision

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<sup>42</sup> A defence which is not presently available if there has been a finding of direct discrimination – see s.3(1)(b)(iii) of the 2003 Regulations.

<sup>43</sup> The theory that it is important for Court findings to be properly labelled so that the correct stigma attaches to different findings. A commonly used example is the difference between being charged with “murder” or “manslaughter” – it would be wrong to bring manslaughter within “murder” because of the connotations with which “murder” is associated.

<sup>44</sup> As opposed to the ambiguous legal test used to define a “protected belief” as discussed in section I.

<sup>45</sup> From the point of view of domestic discrimination legislation at least, for the relevance/necessity of the ECHR in this situation see FN 41 above.

was, as stated by Elias J in the EAT “quite unsustainable”<sup>46</sup>, in that it appeared to confuse the concepts of indirect and direct discrimination. In some cases of conflicts involving the belief/manifestation distinction the problem may, therefore, simply be solved by a more accurate application of the direct/indirect discrimination principles.

An instance, however, where there perhaps could have been a finding of direct discrimination, and therefore the aforementioned modifications would be necessary, was the EAT case of *Azmi v Kirklees Metropolitan Borough Council*<sup>47</sup>. Here Ms Azmi claimed discrimination under the 2003 Regulations because her employers, a primary school, would not let her wear a niqab (a veil obscuring the face entirely) whilst teaching as a classroom assistant or, further, isolate or “protect” her from her male colleagues. Such actions on the part of the school were found to be indirectly discriminatory but justified on the facts. Again, it is suggested that this is clearly the correct overall outcome; however, the means by which the Tribunal arrived at such a result could be questioned on the current law.

The EAT, using a non-religious classroom assistant who wore a balaclava helmet as a comparator, found that the school would have acted identically in this comparator situation and thus classified the discrimination as indirect. This use of such a comparator has been described as “clumsy” and “rather embarrassing”<sup>48</sup>, in that it could (and, under the current legal regime, perhaps should<sup>49</sup>) have been considered an incidence of direct discrimination for the rule in issue did, in fact, only apply to Ms Azmi herself and was, in reality, only applied to her because of her status as a Muslim. However, the classification of Ms Azmi’s treatment as indirect discrimination allowed the EAT the flexibility to objectively justify the school’s decisions, an approach which would be legitimately available to them under the modified regime outlined above, but which was perhaps dubiously employed under the current rules. Further, it is thought that the requirement for such embarrassing comparators could be avoided if the idea mooted above were to be followed and the “proportionate means” defence were simply made available in cases of both direct and indirect discrimination.

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<sup>46</sup> [2009] ICR 387, para 52 – a finding which was confirmed by Lord Neuberger in the Court of Appeal at Para 29.

<sup>47</sup> [2007] IRLR 484, hereafter “*Azmi*”

<sup>48</sup> B. Fitzpatrick, *sexual orientation and religion or belief cases*, a report prepared for the TUC it is Fitzpatrick’s view that this was in fact an instance of direct discrimination.

<sup>49</sup> The Employment Tribunal in Ms Azmi’s case used a much broader concept of direct discrimination than that which was applied on appeal.

It is recognised that relying too heavily on the “proportionate means” defence as the deciding factor in whether there has been discrimination also entertains its own dangers, in that it too necessitates value judgments being drawn between the “worth” of religion and of other aims (e.g. business aims). This may in some sense “de-value” the claimant’s rights to religious freedom<sup>50</sup>, however, such a test based on a criteria of “proportionate means” is a strictly legal test which, as stated above, the courts can apply (and are used to and skilled in applying) with consistency and accuracy. Most importantly, however, it avoids the evils of the degenerative belief/manifestation distinction identified above being utilised. Any “de-valuation” which the claimant may suffer by allowing the employer to justify their interference with the claimant’s beliefs is counter-balanced by the fact that the regime would not run the risk of being totally undermined, as is the danger if the Article 9 case law is followed. Unlike Pandora’s mythical box, where once opened it is impossible to re-capture the evils released, there is hope here, found in cases such as *Azmi*, that some of the dangers released by *Lavele*, if not returned, may at least be ameliorated or tamed if the suggestions above are followed.

The conflict between religion and other protected characteristics: Playing with Prometheus’ fire

*‘Son of Iapetus, surpassing all in cunning, you are glad that you have outwitted me and stolen fire -- a great plague to you yourself and to men that shall be.’<sup>51</sup>*

In the myth of Pandora, the vessel containing all of the evils of mankind was created by Zeus in retaliation for the humans having been cunning and stolen the knowledge of fire from Prometheus. The area of analysis to which this essay next turns is whether the Courts have similarly unleashed the plagues of uncertainty on the discrimination regime by being too cunning. Have they, in fact, outwitted themselves and, in seeking to protect religious discrimination, created a creature which directly conflicts, not only with itself, as outlined above, but also with other “protected characteristics” from the wider discrimination regime?

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<sup>50</sup> For commentary expounding this view see Fitzpatrick. Ibid.

<sup>51</sup> Hesiod, *Works and Days*, Lines 91-3

Examples of this already encountered would be that of a seemingly unsolvable clash between protection from discrimination on grounds of religion and on grounds of sex or sexual orientation as seen in both *Azmi* and *Ladele*. As noted by Aileen McColgan<sup>52</sup>, the local education authority in *Azmi*, if they had acceded to Miss Azmi's claim to be isolated from all male members of staff whilst teaching, would have directly discriminated against their male members of staff on the grounds of their sex. Similarly, in *Ladele*, if the Local Authority had failed to discipline Ms Ladele for her refusal to facilitate same-sex unions, then they would have been at risk<sup>53</sup> of claims made by other members of staff who took Ms Ladele's views and actions (or non-actions) to be demonstrative of an attitude of homophobia which was tolerated by the employer. Employers, in this sense, are faced with an "intractable conflict"<sup>54</sup> of being forced to encroach on one or other of the protected grounds. Guidance on how this problem is to be approached appears to be unclear and based solely on a regime of carving out statutory exceptions in specific instances, rather than providing an all-encompassing set of principles which may be utilised in every instance.

These examples given above are not isolated instances of this clash either, as Frances Raday notes, conflicts between religion and other equality rights "arise in the context of almost all religions and traditional cultures, since they rely on norms and social practices formulated or interpreted in a patriarchal context at a time when individual human rights, in general, and women's right to equality, in particular, had not yet become a global imperative."<sup>55</sup> A further example, outside of the scope of conflicts with the protected characteristics of sex and sexual orientation, could be the concepts of karma and reincarnation. These concepts teach that the good and bad deeds of the eternal soul in one form of life are rewarded and punished in future lives, with the aim of the believer being to achieve ultimate liberation by living consistently "good" lives. These are widespread beliefs across established mainstream religions, being "concepts [which are] common to Hinduism, Buddhism, Sikhism, Jainism and other Vedic belief systems"<sup>56</sup>. Such beliefs would, however, appear to come into conflict with disability

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<sup>52</sup> McColgan, op. cit. at p 6

<sup>53</sup> A very real risk in this case as such complaints had been made by two other, homosexual, members of staff

<sup>54</sup> McColgan, op. cit. at p6

<sup>55</sup> F. Raday, *Culture, Religion, and Gender* (2002) 4 International Journal of Constitutional Law 663, 664-5 (noted here in McColgan, op. cit.)

<sup>56</sup> Also noted by McColgan, op. cit. at p4

discrimination legislation as it would certainly not be “difficult to (mis)read this to the effect that the disabled are being punished for their past misdeeds.”<sup>57</sup>

The problem, therefore, would seem to stem from the fact that religious norms and ideals contained within the established religions appear to be slower to succumb to social changes in attitude than those social norms or attitudes themselves. Or, to put it another way, it logically takes time for religious teachings to be reinterpreted in line with modern social beliefs<sup>58</sup>, given that those beliefs first need to be established and then slowly accepted and subsumed within the mainstream teachings of any religion. The conflicts which arise between religious protections and other protected grounds would seem, therefore, at first glance to be inherent and intractable.

There are, however, possible solutions, but what is suggested here is that the solution favoured by the current legal regime is undesirable and can be improved upon. The current approach is to allow, in certain circumstances, “exceptions” or “opt-outs” on religious grounds to be written into legislation regarding other protected characteristics. Examples of this are the Sex Discrimination Act 1975, s.19 which allows ministers of religion to be of a particular sex if this is a required “to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers”<sup>59</sup> and a similar provision, *mutatis mutandis*, appears in regulation 7 of the Employment Equality (Sexual Orientation) Regulations 2003<sup>60</sup>.

The problem which such an approach encounters, however, is that unless something is specifically written into legislation the intractable conflict remains. Further, such an approach would appear to prejudice the mainstream Western religions over all others. We are used to mainstream Western religious teachings conflicting with issues of sex<sup>61</sup> and sexual orientation<sup>62</sup>, but we are unused to such teachings conflicting with issues of disability<sup>63</sup> or

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<sup>57</sup> *ibid*

<sup>58</sup> And there will always remain a “purist” or “orthodox” section of any belief who resist the re-interpretation of religious texts in line with modern values.

<sup>59</sup> SDA s.19(2).

<sup>60</sup> SI 2003 No. 1661

<sup>61</sup> E.g. the issue of women in the priesthood

<sup>62</sup> Contained within conservative Christian teaching

<sup>63</sup> In, e.g. the case of karma noted above

race<sup>64</sup>. Because such teachings are not widely recognised, opt-outs are unlikely to be created covering such situations. One of the great values of the common law system of precedent is that it provides universally applicable rules which can adapt to specific factual situations. Having an “opt-out” regime such as that currently favoured would appear to evade such benefits. Further, as Brian Barry notes, the “rule-and-exemption” approach requires the “invidiousness of having different rules for different people in the same society”<sup>65</sup>. Such an approach, therefore, requires inequality in its quest for equality.

Barry’s solution to this problem is well summarised by McColgan as follows; “(1) that no rules should exist as to, e.g., clothing and appearance or safety requirements unless they are justifiable in the general public interest, in which case (2) exceptions should generally not be made to such rules.”<sup>66</sup> This approach essentially means that if we, as a society, have decided that sexual equality is desirable (for both moral reasons and practical reasons, such as improved economic productivity in the employment sphere owing to the wider pool of available workers) then exemptions to this rule ought not to be made. Therefore, it would seem, no exemption ought to be made<sup>67</sup> for e.g. ministers of religion.

Using the example of humane slaughter which Barry addresses in his book<sup>68</sup>, much as the Jewish religious authorities in Norway, Sweden and Switzerland have decreed that traditional precepts need not be followed regarding kosher slaughter, in order to allow Jewish followers to eat meat in countries where humane slaughter provisions do not have an opt-out, it may be that teachings would change in accordance with social attitudes regarding the sex of religious ministers, and thus the conflict between protected grounds would be eliminated. In Barry’s view, therefore, by not allowing opt-outs on areas where rules have been made in the public interest the alteration of mainstream social teachings in line with contemporary social values becomes accelerated or, alternatively, religious followers may simply choose not to engage in that activity which provides the conflict (e.g. by choosing not to eat meat at all). However, whilst this solution may seem initially attractive there is a flaw in its application and that is

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<sup>64</sup> As was an issue in Mormon teaching until recently

<sup>65</sup> B. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, (Harvard University Press, 2002) p 39

<sup>66</sup> McColgan, op. cit. p12

<sup>67</sup> Unless, this would have, perhaps, been considered by Barry to be a “pragmatic reason” for making an exemption, a caveat he maintained under his theory. It is, however, thought unlikely that Barry would have in fact considered this caveat to extend to this particular situation.

<sup>68</sup> Barry, op. cit. at pp40-41



that such an approach ascribes only a very low value to an individual's right to hold beliefs. Whilst it values society's judgements in allowing them to make decisions on matters of "safety" and "general public interests" in given situations, it does not appear to create any opportunity for the "general public interest judgement" made with regard to the decision to protect individuals on religious grounds to be taken into consideration.

In this regard it is suggested that an application of the rules outlined above as a solution to the conflict that arises in the employment sphere of religious beliefs as against business efficiency (addressed in the context of the provision of good educational services in *Azmi*) could be used to address the conflict which arises between religion and other protected characteristics. A simple proportionality balancing exercise which takes into account the importance of each protected ground within the particular factual scenario in each instance could enable the Tribunals or Courts to come to reasoned and principled conclusions in cases of such conflicts. For example, in the case of a sex discrimination claim with regard to employment as a religious minister, the fact that such an appointment may offend a significant number of the followers of that religion or breach doctrinal teaching can be taken into consideration. In such a situation it is thought that the decision reached would be the same as under the current regime, however, it can be done without the need to revert to the rule-and-exemption approach currently employed and convincingly critiqued by Barry.

#### Conclusions: All that remains is hope

*Only Hope remained there in an unbreakable home within, under the rim of the great jar, and did not fly out at the door;*<sup>69</sup>

In the myth of Pandora, once the jar had been opened and the evils of mankind had been allowed to escape, one "gift from the Gods" remained within the jar, and this was "hope". It is thought that, in spite of the analysis and criticisms above, there does still remain a great deal of hope regarding the legal regime surrounding protection from discrimination on grounds of religion or belief.

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<sup>69</sup> Hesiod, *Works and Days*, Lines 93-4

In the first place, that fact that such legislation exists shows a concrete and real willingness on the part of the legislature to eliminate discrimination on grounds of religion or belief and to encourage and preserve the immense value created by a diverse and multicultural society. Whilst there are very real problems, as identified in the three main areas of analysis in the preceding investigation, it is hoped it has been shown that these are not problems which are insurmountable.

In October 2010 the new Equality Act 2010 will come into force, and whilst it broadly follows the shape and structure of the previous equality and discrimination statutory regimes; its main purpose being to bring together the various pieces of legislation within a single Act, it does contain a number of promising changes. For example, when the new Act comes into force it will be possible for tribunals to make recommendations in discrimination cases which apply to the whole workforce and not just to the successful complainant. It also contains provisions which create a general duty on listed public authorities when carrying out their functions to have regard to eliminating conduct which the Act prohibits.

These are all positive changes, which are to be welcomed. However, the most disappointing aspects of the new Act in the context of the present investigation is that whilst it does offer some further guidance on the definition of a "belief"<sup>70</sup>, in that it now encompasses a lack of belief, it does not appear to exclude the continuing use of Burton J's test as outlined in *Granger*. Further, the 2010 Act does maintain the use of the "proportionate means" defence only in cases of indirect discrimination<sup>71</sup> and thus the solution mooted above as an alternative to reliance on Article 9 case law and its use in situations of clashes between protected characteristics is still excluded.

However, what is hoped is that with the new legal regime may come an impetus for change by the Courts, and differing solutions may be crafted through skilful and sensitive judicial interpretation of the new Act in a way which takes into consideration the problems identified above. This can certainly be done in such a manner as to ameliorate, if not entirely eliminate, these problems.

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<sup>70</sup> See S.10 of the Act

<sup>71</sup> At s.19(2)(d) of the 2010 Act

*'The ever increasing complexity of life leads to greater conflicts in which the English law of tort needs class action.'* Discuss.

M-DAVID YABA

*Legal premise: Statutory class action adjudication is a superior vehicle for the determination of group claims where common issues of law or fact are in dispute – notwithstanding the fact that the complexity of life leads to greater [legal] conflicts*

For the sake of clarity and explicitness, it is warranted that we commence with a well-established characterisation of class action, offered by the Australian Law Reform Commission, which provides that class action is:

'[A] legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant[s] to be determined in the one suit. One or more persons (representative plaintiff) may sue on his or her own behalf and on behalf of a number of other persons (the class members) who have a claim to a remedy for the *same* or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (common issues). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties, but are merely *described*. The class members are bound by the outcome of the litigation on the common issues, whether favourable or adverse to the class, although they do not, for the most part, take any active part in that litigation.'<sup>33</sup>

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<sup>33</sup> The definition is drawn and composed from the following: Australian Law Reform Commission (ALRC), *Access to the Courts –Class Actions* (Discussion paper No. 11, 1979), para. 4; South African Law Commission, *The Recognition of class Actions and Public Interest Actions in South African Law* (Report No. 88, 1998), paras. 2.3.1, 5.3.1; Alberta Law Reform Institute, *Class Actions* (Report No. 85, 2000) (Alberta Report), para. 57; ALRC, *Grouped Proceedings in the Federal Court* (Report No. 46, 1988) (ALRC Report), paras. 2, 5 and cited in: R. Mulheron, *The Class Action in Common Law Legal Systems: a Comparative Perspective* (Hart, Oxford, 2004) p.3.

## Introduction

The concept of negligence was not introduced into the product liability field until the case of *Donoghue v Stevenson*<sup>34</sup> in 1932. The facts show that a friend of Miss Donoghue's purchased ginger beer packaged in an opaque bottle. Mrs. Donoghue poured half of the ginger beer into her glass and drank it. After pouring the rest into her glass, she saw the remains of a decomposed snail and claimed to have suffered an illness as a result of having drunk the defected ginger beer. She sued the manufacturers of the ginger beer in negligence as she had neither a contract with the retailer nor the manufacturer, as it was her friend who actually purchased the ginger beer. Lord Atkin grappled with the contract fallacy and laid down the narrow rule in *Donoghue* which provides that:

‘A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation, or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care.’

The neighbour principle was thus born in negligence. Who owes the duty? The duty is owed by manufacturers. A duty is owed to whom? The duty is owed to consumers (that is, anyone the manufacturer should foresee would be affected by the product).

Conversely, common law is not repealed by the principle of the Consumer Protection Act 1987. Its nature is one of strict liability; its purpose is to protect consumers from the negligent conduct of manufacturers and to hold those at fault liable for their defective products which reach consumers and directly cause them injury. Section 2 of the 1987 Act, the most important provision, provides:

‘Where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) applies

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<sup>34</sup> *Donoghue v Stevenson* [1932] AC 562.

[importer, manufacturer, producer, supplier and so on],  
shall be liable for the damage.'

The market-chain, pursuant to subsection 2(2)(b) catches the supplier regardless of the fact that it did not supply the goods directly to the consumer. The principle appears to be that the supplier's liability stems from the fact it 'had-a-hand-in-it'. Accordingly, the 1987 Act appears to add a wider framework of protection than common law.

#### The need for class action

The principle aim of the tort system is to secure 'just compensation' (monetary damages for disruption, pain and suffering). Claimants often view class actions as a tool, not only to obtain damages, but also to find retribution, accountability, deterrence, and to affect policy via such action.

The distinct advantages class actions afford for plaintiffs consist of, *inter alia*, a more powerful litigation posture. In numbers there is strength. Due to the immense exposure to liability of class damages, defendants are more likely to treat the litigation seriously in reference to defending mass tort claims or settlement than would be the case in purely individual claims.<sup>35</sup> Secondly, where injunctive or declaratory relief is sought, a primary advantage of class action is the avoidance of mootness due to loss of standing of the plaintiffs during the pending of litigation. For example, in *Associated General Contractors of California v California State Council of Carpenters*,<sup>36</sup> the Supreme Court affirmed partial summary judgment for a national class action of over 300,000 members against the Department of Health and Human Services in reference to enforcing disability payments to children wrongfully denied benefits.

Judicial advantages<sup>37</sup> of class actions are prominent, comprising of the avoidance of a multiplicity of actions which serve to increase court efficiency in the administration of litigation. Secondly, the avoidance of risk of incompatible standards or incomplete

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<sup>35</sup> Herbert B. Newberg, Esq., *Newberg on Class Actions*, 4<sup>th</sup> ed., Thomsom-West, Vol. 2 Chapter 5 (2002)

<sup>36</sup> *Associated General Contractors of California v California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983).

<sup>37</sup> Herbert B Newberg, Esq., Altba Conte, Esq., *Newberg on Class Actions*, .4<sup>th</sup> edn, Volume 2, Chapters 4 and 6 (2002) Thomsom-West

adjudications which result in increased legal certainties for all litigants, class plaintiffs and defendants alike is achieved.<sup>38</sup> Thirdly, class actions serve to enforce public policy through citizens' suits by fulfilling the subordinate goals of, (i) setting legal precedent that is important for future individual and class action cases, (ii) promoting public education concerning questionable industrial, business and pharmaceutical practices, and (iii) promoting intangible psychological benefits accruing to the public which would feel less frustrated about the unavailability of any redress when the vindication of group rights can be observed.

#### Influences on class actions

Do unsafe products influence class actions? Are they a complexity of life or a greater conflict? Since the 1980s, the development of multi-party claims in England has arisen out of product liability. The major factor that might affect the incidence of product liability multi-party claims is the prevalence of mass-produced 'unsafe' pharmaceuticals. The UK continually produced unsafe products for over four decades. In the 1960s the UK produced *Thalidomide*,<sup>39</sup> which caused birth defects, *Practolol* in the 1970s, causing eye defects, in the 1980s *Opren*<sup>40</sup> causing photosensitivity, in the 1990s *Sheep Dip*, causing neurological problems, and in the 2000s *MMR/MR vaccines*,<sup>41</sup> causing birth defects. The level of safety for pharmaceuticals should clearly be reviewed and legal guidelines for safety made comprehensively stricter – testing and research should be far-reaching, with the view that these pharmaceuticals will be consumed by a mass of fragile persons like the elderly, children and pregnant women. If products are made expansively safer, then mass-product liability claims might begin to decline.

Does the legal aid system influence class actions? Is it a complexity of life or a greater conflict? A striking feature of the English pharmaceutical group actions is that upwards of 95 per cent of plaintiffs have been funded by legal aid. Claimants say this is so because the middle class have been denied access to justice to litigate because they have not been

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<sup>38</sup> Rosenberg, *Rosenberg Class Actions For Mass Torts: Doing Individual Justice by Collective Means*, 62 *Ind. L.J.* 561 (1987)

<sup>39</sup> *In Re Taylor's Application* [1972] M. No. 3303; [1972] 2 W.L.R. 1337

<sup>40</sup> *Nash and Others v Eli Lilly and Others* [1993] 1 W.L.R. 782 [1993] 4 all E.R. 383 [1993]

<sup>41</sup> *Sayers v Smithkline Beecham* [2004] EWHC 1988 (QB)

able to afford the costs. Whilst defendants say the middle class have carried out a simple risk assessment and decided these claims are not worth pursuing, section 15 of the Legal Aid Act 1988 provides a *reasonableness* test which has the effect of shielding legal aid subscribers from being treated as second class citizens by a court of law.

Sir John Donaldson M.R. explained that Parliament has required the defendants to pay damages not to the plaintiffs, but to the Legal Aid Fund. It is only if after this has been done that anything which is left will be paid to the plaintiff. So where is the 'just compensation'?

However, Sir John Donaldson, Lloyd and Balcombe L.J.J. all agreed that trying 1500 cases together is much less costly than trying 1500 cases separately. The purpose of group action orders is for the benefit of all plaintiffs, defendants, and the public purse, in that the total costs to the Legal Aid Fund would be reduced, as would the use of the court's time, for example in *Davies (Joy Rosalie) v Eli Lilly*.<sup>42</sup> Nevertheless, a major example of the 'power and effect' of the legal aid system was seen in the *Benzodiazepine litigation* where 17,000 claimants' lawsuits collapsed in 1994, when the Legal Aid Board withdrew funding after spending £40 million on legal and medical expert costs.<sup>43</sup>

Recently, in 2004, in *Sayers v Smithkline Beecham*,<sup>44</sup> the Legal Aid Commission withdrew its funding and made it impossible for the many claimants (children injured by MMR/MR vaccines) to proceed. Keith J. said that Parliament conferred over the decision-making power of 'which claims should receive public funding', by the Commission, not the courts. The only role the courts have is in reviewing the Commission's decision. However, the power of review does not enable the court to substitute its own view for that of the Commission. It can only quash decisions of the Commission if they are illegal, irrational or reached by impropriety. Claimants depending on legal aid might get neither due process nor just compensation.

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<sup>42</sup> [1987] 1 W.L.R. 428 [1987] 1 All E.R. 801 [1987].

<sup>43</sup> E. Blankenburg, *The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid*, F. Regain, A. Paterson, T. Goriely and D. Fleming (eds), *The Transformation of Legal Aid* (Oxford, 1999).

<sup>44</sup> *Sayers v Smithkline Beecham Plc* [2004] EWHC 1988 (QB).

### Case illustrations

The first illustration of the complexity of life leading to greater [legal] conflicts involved the Thalidomide cases. In *Re Taylor's Application*<sup>45</sup> Lord Denning M.R. of the Court of Appeal, gave the material facts of the case. Distillers Company (Biochemicals) Ltd. put Distaval, containing thalidomide, on the market in 1959. It was withdrawn November 1961. It was prescribed as a sedative to pregnant women. After some mothers gave birth to deformed children (some children were born without arms and legs), it was discovered that thalidomide might be the cause. There were over 400 cases in England. The parents of 62 children brought actions against the company within three years of birth and alleged thalidomide was at fault and that manufacturers failed to make adequate tests before putting this drug on the market. Important questions arose, such as: when did the cause of action accrue? The first doctor, who has since died, told Mrs. M (one of the 62 parents) that her child's defects were due to 'inherited factors'. In April 1968, a second doctor told her that her child was a 'thalidomide baby'. Therefore, the mother, under the Limitation Act 1963, did not know the material facts until she was informed by the second doctor. (This raises the issue of 'limitation' discussed, *infra*, in *Opren*).

Five parents (or next friends) refused settlement conditions, because by accepting they believed that they would breach their parental duty of care to their children. Bowen LJ in *Rhodes v Swithenbank*<sup>46</sup> stated a next friend is 'the officer of the court to take all measures for the benefit of the infant in the litigation in which he appears as next friend.' This leads to the question: are the parents who refused settlement being unreasonable? The refusal of these five parents seems to peril the whole settlement since the defendants said they will only settle with everyone and not any one separately. Lord Denning M.R. commented that each parent is 'entitled to each consider the case of his own child without being swayed by the cases of other children; [...] that being a minority is no evidence of unreasonableness; that it is the stipulation that is unreasonable.'

Had the judge (4) erred in law in making an order to the effect that the infant(s) should be barred from prosecuting his or her claim for damages at law? Mr. M., a parent and leader

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<sup>45</sup> *In Re Taylor's Application* [1972] M. No. 3303; [1972] 2 W.L.R. 1337.

<sup>46</sup> *Rhodes v Swithenbank* (1889) 22 ABD 577, 570.



of the dissentients, pointed out that because he is in good financial position, his daughter may not qualify to receive any benefit under the proposed charitable trust settlement offered by the defendants. He would prefer a lump sum (damages) to be put aside for his daughter now and does not wish her to rely on a charitable trust. To deny Mr. M. of his right to provide a good life for his child might, *inter alia*, offend Article 8 of the European Convention on Human Rights (ECHR).

A second illustration of the complexity of life leading to greater conflicts in the Opren cases can be seen through the circumstances of the representative plaintiff. In *Nash v Eli Lilly* the legal issue was 'whether putting Opren on the market, with such warnings as were given, constituted negligence on the part of the defendants.' The lead defendant was a US company headquartered in Indiana. The plaintiffs resided in the UK. Attempts to file suit in Indiana failed on the basis of *forum non conveniens* (meaning, *inter alia*, it was inconvenient to adjudicate in a US forum since the injuries occurred in the UK). Opren was co-manufactured in England by Dista Products Ltd. The claimants ranged from 60 to 80 years of age. Here, geographical location of the parties and evidence appear to be a greater conflict, along with the age range of the claimants.

This leads to the question, is the Limitation Act 1980 a conflict of law or a greater [legal] conflict in *Nash*? Hidden J (management judge), in reviewing Mrs. Nash's evidence, observed that in June 1982 her doctor had recorded: 'Photosensitive reaction [...] advised to stop Opren'. She blamed the manufacturers of Opren for her condition, stating:

'It had to be somebody's fault, hadn't it? I assumed it was the drug company. That is all.' (*Nash* p. 59)

The issue, in Hidden J's view, was 'whether the claim was within three years from the date of knowledge of the plaintiff under s.11(4)(b) of the 1980 Act.' Hidden J decided that in August 1982 (when Opren was withdrawn and her husband wrote to the manufacturers) Mrs. Nash had (i) actual knowledge by (s.11(4)(b)) within the meaning of s.14(1); (ii) that her injury was significant and attributable to the alleged act or omission of the defendants by (s.14(2)); and (iii) that she had constructive knowledge of the identity of other defendants. He concluded that her date of knowledge under s.11(4)(b)

was *more* than three years before the issue of her writ in April 1988. Thus, it would be inequitable to allow her action to proceed under s.33 of the 1980 Act, discussed below. Hence, Mrs. Nash was time barred from access to justice. Hidden J's focal point for each claimant appeared to centre on the 1980 Act (*Nash* pp. 6-41). A major example of the effect of the 1980 Act is shown by the fact that in 1992, 587 Opren claimants were time-barred for limitation – and thus from seeking redress for their injuries.

Hidden J further relied upon the *McCafferty v Metropolitan Police Receiver*<sup>47</sup> test of Geoffrey Lane LJ to resolve the issue of significant injury. Is this test a greater [legal] conflict? It appears partly subjective by asking: 'would this plaintiff have considered the injury sufficiently serious?' It appears partly objective by asking: 'would he have been reasonable if he did not regard it as sufficiently serious?' The appellants argued that the judge failed to take into account the 'side effects' of the drug and how they appeared to the patient taking the drug, that is, not taking into account relevant factors. The test serves only to frustrate the claimants, and cause both sides auxiliary time and costs.

The claimants' appeals concerned ss.11, 14 and 33 of the 1980 Act. In analysing these provisions, it is submitted that s.11 requires the plaintiffs to rely on medical experts, and that they were vigilant and forthcoming on their behalf. Section 14 requires plaintiffs, even where doctors were unaware or not forthcoming of the side effects of Opren, to determine the merits of their own cases based on the significance of their injuries. Section 33 gives the court discretionary power, independent of ss.11 and 14, to allow an action to proceed if it would be equitable to do so. This equitable provision is concerned with ensuring that all the circumstances of the case shall be considered; however, its discretionary nature places the decision-making power in the individual judge's hand. As a result, on a case-by-case basis, uncertainties in law may prevail.

Is judicial review a greater [legal] conflict? The Court of Appeal in *Conry v Simpson*<sup>48</sup> established where a judge, in exercising his discretion under s.33 of the 1980 Act, either took into account factors which he should have ignored, or ignored factors which he

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<sup>47</sup> [1977] 1 W.L.R. 1073 and 1081.

<sup>48</sup> [1983] 3 All E.R. 369.

should have taken into account; the European Court of Justice is therefore under a duty to interfere on the basis of judicial review. Further examples can be seen in: *Donovan v Gwentoy*,<sup>49</sup> *Padfield v Minister of Agriculture*,<sup>50</sup> *Ex parte Venables*,<sup>51</sup> and more recently in 2004, *Sayers v Smithkline Beecham*.<sup>52</sup> Where there is too much discretion left to a single judge, improprieties are bound to occur.

All other appeals were dismissed because claimants were unable to surmount the hurdles of the 1980 Act and prove direct causation, that is, the *novus actus interveniens* complications due to other prescriptions that were taken before, during or after their Opren in-take. Moreover, in *Berger v Eli Lilly*<sup>53</sup> Purchas LJ concluded that Hidden J's misapplication of s.33 of the 1980 Act was a strong case for legislative action to provide a jurisdictional structure for the collation and resolution of mass-product liability claims. Purchas LJ echoed the remarks made by Lord Donaldson of Lynton MR in *Davies (Joy Rosalie) v Eli Lilly*<sup>54</sup> that, 'The concept of the "class action" is yet unknown to the English courts.'

It is submitted that English multi-party suits appear to be a collection of individual cases, tried and analysed individually pursuant to the legal issues and particular circumstances. The court spends its time and the taxpayers' money on one plaintiff at a time, whilst labelling it 'class action' – when, in practical terms, it is 'a succession of single actions' within a group action. Further examples can be seen in *Randall v Eli Lilly*,<sup>55</sup> *Nash v Eli Lilly*,<sup>56</sup> *Davies (Joseph Owen) v Eli Lilly (No. 3)*,<sup>57</sup> *Beal v Eli Lilly*,<sup>58</sup> *Davies (Joy Rosalie) v Eli Lilly (No. 1)*,<sup>59</sup> *Walker (Valerie) v Eli Lilly*.<sup>60</sup>

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<sup>49</sup> [1990] 1 W.L.R. 481.

<sup>50</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; [1968] 2 W.L.R. 924.

<sup>51</sup> *Secretary of State for the Home Department, Ex p. Venables* [1998] A.C. 407; [1997] 3 W.L.R. 23.

<sup>52</sup> *Ibid.*, [2004] EWHC 1899 (QB).

<sup>53</sup> [1992] 3 Med. L.R. 233 1992 @L 984159.

<sup>54</sup> *Ibid.*, [1987] 1 W.L.R. 428 [1987] 1 All E.R. 801 [1987],

<sup>55</sup> *Times*, February 4, 1988 *Independent*, February 4, 1988, 1988 WL 623620.

<sup>56</sup> [1991] 2 Med. L.R. 169 *Times*, February 13, 1991, 1991 WL 839556.

<sup>57</sup> *Times*, January 16, 1988, *Independent* January 15, 1988, *Guardian*, January 15, 1988, 1988 @L 622851.

<sup>58</sup> *Independent*, March 30, 1988, 1988 @L 624250.

<sup>59</sup> [1987] 1 W.L.R. 428 [1987] 1 All E.R. 801 [1978] E.C.C. 340 (1987) 84 L.S.G. 826 (1987) 131 S.J. 360 1987 WL 493251.

<sup>60</sup> [1986] E.C.C. 550 [1986] 136 N.L.J. 608 *Times*, May 1, 1986, 1986 WL 408341.

A third and recent illustration of the complexities of life leading to greater conflicts can be seen in *Taylor v Nugent Care Society*,<sup>61</sup> where the question arose of whether or not time-barring one of these multi-party claimants, based on missing the GLO (discussed *infra*) deadline to opt-in, is a violation of Article 6 of the ECHR? In 2004, it held that the defendants' attempt to time-bar Mr. Taylor from access to justice (he filed a subsequent individual lawsuit) solely because he missed the GLO deadline to 'opt-in' would not be a 'proportionate' response to a defendants' claim of parallel litigation. To do so would, indeed, offend Article 6. This case was clearly decided correctly as it draws on the conscience to ensure legal infants, wronged by a government entity, have access to justice notwithstanding offending national procedural orders.

Can the modern US approach to statutory class actions, with advantage, be adopted in whole or in part in the in the U.K.?

At the outset, in part, the answer is a resounding 'yes'. However, first we briefly trace the development of UK class actions to the present. Various versions of the representative rules enacted in England (r.19.6 CPR) appear similar to that first introduced in 1873. The English representative rule contains two prerequisites, the 'numerosity' and 'same interest'<sup>62</sup> requirements. The most authoritative interpretation of 'same interest' per Fletcher Moulton LJ, in *Markt & Co Ltd v Knight Steamship Co. Ltd*,<sup>63</sup> was expounded by Lord Macnaghten in *Duke of Bedford v Ellis*,<sup>64</sup> who stated that:

'[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.'

The general view of academic writers is that the representative rule has not been effective in assisting multi-party actions.

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<sup>61</sup> [2004] EWCA Civ 51; 1 W.L.R. 1129 (CA (Civ. Div.)).

<sup>62</sup> *Independent Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch. D) at page 35.

<sup>63</sup> [1910] 2 K.B. 1021 (CA)

<sup>64</sup> [1901] A.C. 1, HL at 8.

The 'common ingredient' test in *Prudential Assurance Co. Ltd v Newman Industries Ltd*,<sup>65</sup> followed Vinelott J's statement that: 'there must be a common ingredient in the cause of action of each member of the class', or 'some element common to the claims of all members of the class', which the representative claimant purported to represent. The purpose was to overcome the restrictions of the representative rule. This was a significant step as it mirrored the law of statutory class actions in established modern jurisdictions (such as, the US, Canada and Australia) and stretched commonality over identity of interest. Yet the straining of the representative rule by judges should not mean that England can do without a class action statute because the representative rule 'does the procedural job'. This is an unbalanced approach as it addresses only the procedural law and overlooks the need for the strict guidelines provided only by substantive law.

Today, the group litigation order (GLO) regime, established in May 2000 and covered by Part 19 of the CPR, appears to be a 'testament of the *ongoing efforts* to provide greater access to justice for those similarly situated', although in the view of many academics, 'the GLO falls short of the mark'.<sup>66</sup> In England, the High Court can make a GLO for the case management of claims which give rise to common or related issues of fact or law. Once the GLO issues are identified, a register of group claims must be established,<sup>67</sup> and a 'management court' must be nominated which will oversee the claims.<sup>68</sup> Once judgments or orders given on a GLO are issued, they are binding over the parties on the Group Register.<sup>69</sup>

In *Sayers v Smithkline Beecham*<sup>70</sup> Keith J demonstrates that the role of a judge in making GLOs appears overwrought, as he has to identify the claims which should be continued and discontinued, supervise management conferences, order sanctions, make cost-capping orders (for example in *A v Leeds Teaching Hospital*<sup>71</sup>), exercise the court's

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<sup>65</sup> [1981] Ch. 229.

<sup>66</sup> Mulheron, Rachel, *From Representative Rule to Class Action: Steps Rather than Leaps*, C.J.Q. 2005, 24 (Oct), 424-449.

<sup>67</sup> Rule 19.11(2)(a), PD 19B, para. 6.

<sup>68</sup> FCA (Aus), s.33Q(2); CPA (Ont), s.6(5); FRCP 23(c)(4)(B) (U.S.).

<sup>69</sup> FCA (Aus), s.33Q(1); CPA (Ont), s.25; FRCP 23(c)(4)(A) (U.S.).

<sup>70</sup> *Ibid*, [2004] EWHC 1899 (QB) at p. 1905.

<sup>71</sup> *A v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

inherent power to control its own procedures (as per Steyn LJ in *AB v John Wyeth*<sup>72</sup>), admit evidence, decide the discovery and treatment of lead claims and decide if litigation friends can stand in the way of settlement terms (as in *Rhodes v Swithenbank*<sup>73</sup>). It is submitted that the need for the substantive law to give structure to application and adjudication is overshadowed by this power of procedure held by the management judge.

There are six criteria for the commencement of a GLO; however, comparison is made with the most important element of commonality, which provides that:

‘(2) The claims must give rise to common *or* related issues of fact or law’.<sup>74</sup>

Contiguously, let us examine the US Federal Rules Civil Procedure 23(a) and 23(b)(3)<sup>75</sup> along with the GLO. Rule 23 specifies that a party seeking class certification must meet all four requirements under Rule 23(a) *and* meet one of the three requirements under Rule 23(b). Rule 23(b)(3) intends to dispose of all other cases in which a class action would be ‘convenient and desirable’ including those involving large-scale, complex litigation for money damages. Focus is made on two of the most useful requirements of commonality and typicality which, respectively, provide:

‘Rule 23(a)(2), commonality requirement, that there are *questions of law or fact common* to the class;

Rule 23(a)(3), typicality requirement, that the plaintiff’s claims and the class’s claims are *so interrelated* that the interests of the class members will be [...] protected in their absence’

There are key differences between the GLO regime and the duo of Rules 23(a) – 23(b)(3). Since the UK’s and US’s numerosity, adequacy and superior requirements are not materially different, focus is made on commonality. First, the GLO is a procedural law order; whereas Rule 23 is a statute, superior to all laws. Secondly, the GLO is an opt-

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<sup>72</sup> *AB v John Wyeth & Brother Ltd (No. 2)* [1993] 4 Med. L.R. 1.

<sup>73</sup> *Ibid*, (1889) L.R. Q.B.D. 577.

<sup>74</sup> Rules 19.10 and 19.11(1)

<sup>75</sup> Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice*, Vol.1 (December 2005) Chapter 4, 2<sup>nd</sup> edn., Thomson/Legalworks.

in regime, which means the individual claimant must be proactive in order to litigate; whereas Rule 23(b)(3) is an opt-out regime, which means that members of the class are entitled to opt-out and not be bound by the final judgment of the class. They can then pursue their individual rights in a separate lawsuit, as in *Van Gemert v Boeing Co.*<sup>76</sup> Thirdly, opt-in procedures tend to stack-up the costs for those represented toward the ‘beginning of the litigation and constitute reasons why the procedure provides less favourable access to justice than an opt-out regime. In contrast, many US attorneys ‘await’ their attorneys’ fees and rely on forty per cent of the mass profits expected from settlement or success at trial. Fourthly, the GLO has been drafted in a ‘loose manner’. This has the effect of leaving too much discretion to the management-judge. Rule 23, in comparison, is an established, detailed, elemental legislative provision governing modern class actions.

For an illustration of the GLO being ‘loosely drafted’, the second element provides that, ‘[...] [t]he claims must give rise to common *or* related issues of fact or law’<sup>77</sup>. This is clearly broader than the commonality requirement in Rule 23(a)(2), which provides that a class may not be certified, unless ‘there are questions of law or fact common to the class’, such as in *La Fata v Raytheon Co.*<sup>78</sup> Here, the word ‘common’ is used solely, which is much narrower and more exclusive than the GLO word ‘related’. Might the GLO word ‘related’ be inclusive and serve to dilute the commonality factor of the GLO criterion? This said dilution may tend to widen the class and flay commonality evidence. In contrast, commonality, supplemented by Rule 23(b)(3), ensures that there are shared factual or legal issues among claimants such that it is efficient, fair and sensible to permit a single adjudication of similar claims, such as in *General Tel. Co v Falcon*.<sup>79</sup>

Commonality works hand-in-hand with the typicality requirement which further ensures that ‘the ... plaintiff’s claim and class-members’ claims are *so interrelated* that the interests of the class members will be fairly and adequately protected in their absence’, as

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<sup>76</sup> 259 F.Supp. 125, 130 (S.D.N.Y 1966).

<sup>77</sup> Rules 19.10 and 19.11(1)

<sup>78</sup> 35, 42 (E.D. Pa. 2002)

<sup>79</sup> 457 U.S. 147, 155 (1982).

in *General Telephone Company of Southwest v Falcon*.<sup>80</sup> If the claims arise from a similar course of conduct and share the same legal theory, factual differences (such as plaintiffs who have used a product made by different manufacturers, in different quantities, during different periods) will not defeat typicality, as in *Stirman v Exxon Corp.*<sup>81</sup> The law threshold for commonality required by most US courts is usually satisfied by subjects relating to, *inter alia*, the defendants' conduct, such as, the design, testing, manufacturing, labelling of a product, or whether a substance is *capable* of causing a specific injury allegedly sustained by class members, as in *re Orthopedic Bone Screw Prods. Liab. Litig.*<sup>82</sup> A further example can be seen in *re West Virginia Rezulin Litig.*<sup>83</sup> where the Appellant Court *reversed* denial of certification of a class action by identifying as 'commonality' issues of (i) whether the drug was defective because its instructions and warnings were not adequate for the reasonable prudent consumer, (ii) whether there was negligent conduct on the part of the defendants in reference to manufacturing, design, testing, researching of the product, and/or (iii) whether the defendants acted with each other and third parties to *mislead physicians* and the *public* about the efficacy and safety of the drug.

Clearly, UK legislature (like Canadian legislature) can adopt, with advantage, the commonality and typicality provisions of Rule 23(a)(2)(3), along with the two supplementary provisions of Rule 23(b)(3), based on the following analysis.

Rule 23(b)(3) has two supplementary requirements, the most important being that: (i) the question of law or fact common to the members of the class must predominate over any questions affecting individual members. The predominance test is 'whether the proposed class is sufficiently cohesive to warrant adjudication by representation?' A court must determine whether generalised evidence could be offered to prove the elements of the claim on a class-wide basis or whether individualised proof will be needed to establish each class member's entitlement to relief based on the facts and law of the case, as in

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<sup>80</sup> 457 U.S. 147, 158, n.13 (1982)

<sup>81</sup> 280 F.3d 554, 562 (5<sup>th</sup> Cir. 2002)

<sup>82</sup> 176 F.R.D. 158, 174 (E.D. Pa. 1997)

<sup>83</sup> *Simer v Rios* 585 S.E.2d 52, 67 (W. Va. 2003)



*Klay v Humana, Inc.*<sup>84</sup> This provision is especially important where each class member's state of mind, reliance or conduct is relevant to the claims or defences. Inquiry into predominance takes two steps: (i) focus must be on the substantive elements of the plaintiff's cause of action and enquire into the proof necessary for the elements, and (ii) the procedural devices available in trying class actions, as in *Simer v Rios*.<sup>85</sup> The Eight Circuit Court (a high US federal court) in *Blades v Monsanto Co.*<sup>86</sup> explained that:

'[i]f, to make a *prima facie* showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If, however, the same evidence will suffice for each member to make a *prima facie* showing, then it becomes a common question.'

Based on the effectiveness of the statutory and supplementary elements of Rule 23(a)-Rule 23(b)(3) respectively, a highly functional management device of common evidence of large-scale class actions has been established by US courts. It is further submitted that such a device would prove advantageous if adopted by UK courts. If adopted, it might, *inter alia*, preclude the loss of numerous claims as was demonstrated in mass product liability cases over the last four decades. Illustrative of this management device is a US asbestos litigation case involving 2,298 plaintiffs, which was brought together in a class-action where the *common* issue of *liability* was tried first. Then the 2,298 class members were divided into five disease categories based on their injury claims. The court selected a *random sample* from each disease category and submitted a sample case to a jury to decide individual causation and damages. Each plaintiff whose damages case was submitted to the jury was awarded that particular award with the average verdict for each disease category constituting the damages for each non-sample class member. By participating in the class in this way the individual plaintiffs agreed to waive their right to individual trials in which their own damages claim could be determined.<sup>87</sup> This device

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<sup>84</sup> *Ibid*, 1250 (11<sup>th</sup> Cir. 2004) at 1254.

<sup>85</sup> 661 F.2d 655, 672 (7<sup>th</sup> Cir. 1981)

<sup>86</sup> 400 F.3d 562, 560 (8<sup>th</sup> Cir. 2005)

<sup>87</sup> *Ibid*, McLaughlin on Class Actions: Law and Practice, Vol.1 (December 2005) Chapter 4, 2<sup>nd</sup> edn., Thomson/Legalworks.

could have served the claimants, the court and the public purse in, *inter alia*, the Opren cases, very well.

Lord Woolf observed in 2004 that, subsequent to *Taylor v Nugent Care Society*<sup>88</sup>, *supra*, that over forty GLO cases, which were vastly mishandled and mismanaged by the Court, judges and solicitors (via *ad hoc*) unambiguously ‘indicat[e] the ineffectiveness of the group litigation order to date.’<sup>89</sup>

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<sup>88</sup> *Ibid*, [2004] EWCA Civ 51; 1 W.L.R. 1129 (CA (Civ. D)).

<sup>89</sup> Woolf Final Report, Ch.1, para. 1, *Ultimate responsibility for the control of litigation must move from the litigants and their legal advisers to the court*, Ch.17, paras. 14, 27, and Woolf Interim Report, Ch.4, para. 2, Cha.5.