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ARTICLES

SHORT ARTICLE

CASE NOTES

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Legislative Drafting and Statutory Interpretation: A Comparative Analysis of the United Kingdom and Nigeria

Tonye Clinton Jaja[*]

Abstract

This article presents a study of comparative legislative drafting through a comparison of the legal regimes of the United Kingdom and of Nigeria. The presented analysis applies a novel approach to the study of legislative drafting, which is based on "Tetley's three themes of comparative analysis in legislative drafting. Besides case law, this research examines some modern theories, and innovations in the field of legislative drafting. It also examines the common law rules of judicial precedent, stare decisis, statutory interpretation that are applied in Nigeria and in the United Kingdom respectively. The purpose is that such an examination would prove instructive to legislators and legislative drafters themselves when they prepare legislation.

I. INTRODUCTION

"…*there are a variety of sometimes little-known [legislative drafting] conventions that will ease the way of a federal judge through the sometimes opaque world of legislation. Some of these [legislative drafting] conventions have statutory or case-law origin. This guide examines some legislative drafting conventions, the knowledge of which may help judges with statutory interpretation*".[1]

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[1] Martin Douglass Bellis, 'Statutory Structure and Legislative Drafting Conventions: A Primer for Judges' (2008) available online at: <http://www.fjc.gov/public/pdf.nsf/f385048e0431aa3c8525679e0055d35c/80a5e59799892a9a852574cd005a594c/$FILE/DraftCon.pdf > accessed 22 February 2015

"*In the United Kingdom, highly trained legislative drafters draft statutes and stylistically legislation tends to be detailed. Nevertheless, there are many problems of statutory interpretation. This is inevitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every situation that might arise. The principles of statutory interpretation are not codified. They are governed by the common law and are therefore capable of endogenous development by the courts to meet new technical problems or social needs.*"[2] – Rt. Hon. Lady Justice Mary Arden DBE, Member of the Court of Appeal of England and Wales.

The quotations above encapsulate the essence of this research study. The underlying purpose of this research study is borne out of the understanding that: "drafting style and practices are always capable of improvement"[3]. Whereas, the traditional view is that legislators and legislative drafters are the major authors of legislative drafting conventions. This research study applies a novel approach to the study of legislative drafting considering that it examines "Some [legislative drafting] conventions [that] have statutory or case-law origins" such as the judgments in the cases of *Bulmer v Bollinger*[4] and *Pepper (Inspector of Taxes) v Hart*[5]respectively.

This novel approach is based on "Tetley's three themes of comparative analysis in legislative drafting namely: rules of (statutory) interpretation, *stare decisis* and [legislative] drafting conventions and techniques".[6] Such themes of analysis are relevant when undertaking a study of comparative legislative drafting,[7] as it is the case in this study where a comparison of United Kingdom's and Nigeria's legal systems is done. Unlike others, the legislative drafting conventions that originate from case law have the advantage of carrying the authority of law based on the common law doctrines of precedent and *stare decisis*.

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[2] Mary Arden, 'The impact of judicial interpretation on legislative drafting' (2008) The Loophole – Journal of Commonwealth Association of Legislative Counsel-CALC available online at the website of CALC: <www.opc.govau/calc/docs/Loophole_papers/Arden_Aug2008.rtf> accessed 20 February 2015

[3] Garth Cecil Thornton, Legislative Drafting (London, Butterworths, 1996) v

[4] [1974] EWCA Civ 14

[5] [1993] AC 593

[6] See William Tetley, 'Interpretation and Construction of the Hague, Hague/Visby and Hamburg Rules' (2004) 10 Journal of International Maritime Law 30

[7] See Helen Xanthaki, 'Comparative Legislative Drafting' in Helen Xanthaki (ed), *Drafting Legislation-Art and Technology of Rules for Regulation* (Oxford, Hart Publishing, 2014) 202

Besides case law, this research examines some modern theories, and innovations in the field of legislative drafting that common law judges may not be familiar with. It is hoped that "This guide examines some legislative drafting conventions, the knowledge of which may help judges with statutory interpretation".[8] This study also examines the common law rules of judicial precedent, *stare decisis*, statutory interpretation that apply in Nigeria and the United Kingdom respectively. The purpose is that such an examination would prove instructive to legislators and legislative drafters themselves when they prepare legislation. For example, by providing an analysis of the judgement in *Bulmer v Bollinger*,[9] this study makes a case for the inclusion of purpose clauses in common law legislation and the application of purposive style of statutory interpretation.

Collectively, the case laws examined demonstrates that both United Kingdom and Nigerian Courts are capable of endogenous (homegrown) development to meet new technical problems or social needs. The role of Courts in this regard is evitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every situation.

II. GENERAL REMARKS

A. Background

Despite the best intentions of legislators and legislative drafters, it is "humanly impossible for the drafter or the legislator to draft legislation that would cover every situation".[10] For example, the legislators and legislative drafters did not envisage the uncertainty that would arise in relation with section 58 (5) of the 1999 Nigerian Constitution (as amended), which deals with the legislative procedure for the enactment of a legislative bill that is being vetoed by the refusal of the assent by the President. The judgment in the case of the *National Assembly v President of the Federal Republic of Nigeria*

[8] n 2
[9] [1974] EWCA Civ 14
[10] Thornton (n 3)

CA/A/15/2003[11] laid down the correct legislative procedure when it stated that the National Assembly ought to re-enact such a legislative bill *de novo* (afresh).

This research study examines judicial case law as a potential source of rules of legislative procedures. It also makes a case for inclusion of legislative drafting rules within the rules of legislative procedure.

Unlike previous studies that over-emphasis international law as source of solutions, this research advocates an endogenous (homegrown) approach in the search for solutions.

It is hoped that the outcome of this research report would be useful to the National Assembly Rules and Business Committees of the Senate and the House of Representatives for the purposes of amending their existing rules to incorporate legislative drafting rules. It is hoped that this would trigger a call for the amendment of the Interpretation Act 1964 to incorporate legislative drafting conventions. It is also hope this this research study will be published and distributed to the National Judicial Institute (NJI) for distribution to judges and magistrates.

B. Statement of the Problem(s)

Considering that legislative drafters[12] and the legislative drafting process are regarded as an integral part of the law-making process,[13] this study identified it as a fundamental gap that the relevant United Kingdom and Nigerian Rules on Legislative Procedure do not contain provisions on legislative drafting conventions and methodology. For example, in Nigeria, there is no mention of legislative drafting within the Tables of Contents of the 2011 Standing Orders of the Senate, 2014 Standing Orders of the House of Representatives, of the National Assembly and the 2013 Standing Rules of the Yobe State House of Assembly respectively. The situation is the same

[11] Legislative Law Reports (2002-2003) 2 Labour Law Research Network 903

[12] See Constantin Stefanou, 'Drafters, Drafting and the Policy Process' in Constantin Stefanou, Helen Xanthaki (ed), *Drafting Legislation-A Modern Approach* (Aldershot, Ashgate Publishing, 2008) 321-333, 326-327

[13] Epiphany Azinge, Vivian Madu (ed), *Fundamentals of Legislative Drafting* (Lagos, Nigerian Institute for Advanced Legal Studies (NIALS), 2012)

when one examines the Table of Contents of the United Kingdom's Rules on Parliamentary Procedure. [14]

This gap provides one of the justifications for resort to judgments of the Courts to ascertain the relevant legislative drafting conventions, which is the approach of this present study.

In the field of legislative drafting, this difficulty with ascertaining legislative drafting conventions and methodology is part of a wider problem.

The reason is aptly acknowledged by two major studies on legislative drafting thus:

"Caution should be exercised, however, in automatically applying any given convention precisely because the drafting of legislation is not the careful academic exercise we might hope for. Not only do various political imperatives bring in legislative language written by persons unfamiliar with the usual conventions, but the conventions themselves change over time to reflect changes in public thinking and legal trends."[15]

"For most [legislative] drafters, especially in the third world and emerging democracies, the main problem has long been the attempt to satisfy as many stakeholders as possible. Thus compromise bills are drafted, laws are copied from elsewhere, there's criminalisation of behaviour based on dominant party/government interests and there is a near complete lack of unified methodology in the drafting of legislation nationally".[16]

The problems above are present in Nigeria. For example, the Nigerian Interpretation Act of 1964, is the relevant legislation that prescribes some legislative drafting rules and conventions. However, one inherent problem that legislators and legislative drafters failed to envisage is that "the traditional legislative style" of the language of legislation which this legislation prescribed is no longer generally accepted. This has necessitated "in recent times, the calls for laws to be drafted in 'plain English'"[17] that

[14] See Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (London, Butterworths LexisNexis, 2011)

[15] n 8

[16] Constantin Stefanou, 'The Policy Process and Legislative Drafting' in Constantin Stefanou and Helen Xanthaki (ed), *Manual in Legislative Drafting* (London, 2005) 4

[17] Thornton (n 3) 49

will be easily understood by non-lawyers, and other users of legislation. Another example: it is obvious that none of the current Rules of Legislative Procedures envisaged that the legislative procedure for enactment of a legislative bill, that is vetoed by the President, would be a source of problem and controversy. This problem was later resolved by the court in the case *National Assembly v President of the Federal Republic of Nigeria*.[18] However, ever since that judgment, the relevant Rules of Legislative Procedure have not been amended to incorporate the judgment in this case as recommended by this research study.

C. Literature Review

As earlier observed, the study of the intersection between judicial interpretation and legislative drafting is a relatively new area of research in law that is still developing, considering that there are very few published studies devoted entirely to the topic.

This study identified Rt. Hon. Lady Justice Mary Arden DBE's[19] study, as the major published study about the United Kingdom approach to the subject. To the best of the knowledge of the researcher, there is currently no published legal study on the subject that approaches the subject of statutory interpretation from the perspective of legislative drafting in Nigeria.

However, the only relevant United Kingdom study by Arden, does not include an analysis of the judgement in *Bulmer v Bollinger*, as it is treated in this present research.

D. Research method(s)

Essentially, document analysis of primary and secondary sources is the research methodology employed throughout this research study. The relevant legislation, case law, judgements, Standing Rules of the National Assembly constitutes the primary sources, whereas journal articles, monographs comprise the secondary sources.

[18] CA/A/15/2003, Reported in Legislative Law Reports (2002-2003) 2 Labour Law Research Network 903

[19] Arden (n 2)

In undertaking the document analysis methodology, the doctrinal legal research method is applied throughout this research study. The doctrinal legal research method is applied to provide analysis of the major legal doctrines that appear in this research study.

There are two broad categories of legal doctrines that occur throughout this research study. On the one hand are the legal doctrines that apply to statutory interpretation such as: the common law doctrine of judicial precedents; the common law doctrine of *stare decisis*; the common law principles of statutory interpretation. On the other hand are the legal doctrines that apply to legislative drafting such as the doctrine of plain language in legislative drafting, just to mention a few.

As Adekunle has rightly admitted, the doctrinal legal research method is the major and preferred research method by lawyers in general and legislative drafters in particular: "Doctrinaire research is the primary research option of the legal practitioner as it directly enquires into the state of the law shorn of arguments, or value factors. It is, in this sense, practical research as distinct from pure or applied research"[20] However, it has been admitted that one of the limitations of doctrinal legal method is that: "Legal doctrine clearly have their geographical limitations, so that there is no claim to 'general validity' outside the geographical borders of the legal system concerned"[21]

In an effort to provide in-depth answers to six research questions, presented in this paper, the doctrinal legal research method will be combined with the comparative law method and the case study method respectively. For example, an analysis of the relevant comparative law method would be necessary to provide an answer to the fourth question of this research study. The most relevant question in this research are however: What are the common law Rules and Principles of Statutory Interpretation? What is the major civil law principle of statutory interpretation in the case of *Bulmer v Bollinger*? How is this applicable to legislative drafting in the United Kingdom and Nigeria respectively?

[20] Dawodu Adekunle, *Research Methodology in Legislative Drafting* (National Open University of Nigeria, 2008) 2

[21] Mark Van Hoecke, 'Legal Doctrine: Which Method (s) for What Discipline' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Oxford, Hart Publishing, 2011) 1

Such an analysis of the relevant comparative law method is necessary in order to identify which comparative law method is relevant to transplant and make the civil law principle of statutory interpretation applicable to legislative drafting in the United Kingdom and Nigeria.

This analysis of comparative law methods is relevant in view of the fact that this paper is in fact a comparative study of how to transplant a case law/legislative drafting solution from civil law jurisdiction to common law jurisdictions such as the U.K. and Nigeria.

Suffice it to state that in the field of legislative drafting, it is now generally accepted that the Functionality Method is the most relevant comparative law method whenever it is necessary to transplant legal, judicial and legislative drafting solutions. This is expressed thus: "The prevailing view in the theory of comparative law is expressed by Jhering, Zweigert and Kötz, who view the question of comparability through the relative prism of functionality. 'The reception of foreign institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden'".[22]

Based on Jhering, Zweigert and Kötz's "functionality" theory Nigeria and United Kingdom share a lot of similarities in terms of the judicial and legislative drafting systems. This much is also admitted by Onwe: "The British [legislative] drafting style and methodology, as a colonial legacy, was bequeathed to most commonwealth countries, especially Nigeria. Thus the history of legislative drafting in Nigeria could be said to have been generally influenced by the advent of colonial rule…The British Parliament legislated for the area now called Nigeria, and British drafters drafted Nigerian Laws even up to 1960 when Nigeria attained self-rule"[23]

Is therefore Nigeria's judicial and legislative drafting system, a system that warrants a legal transplant from the United Kingdom? And if it is, would the resultant legal transplant be "functional" in Nigeria?

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[22] Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constanin Stefanou, Helen Xanthaki (ed), *Drafting Legislation-A Modern Approach* (Aldershot, England, Ashgate Publishing Limited, 2008) 3

[23] H Onwe, *Groundwork of Legislative Drafting* (Enugu, Nigeria, Snaap Press (Nig.) Ltd., 2009) 3

The answer to both questions is in the affirmative. And it is best illustrated by the case of *Pepper (Inspector of Taxes) v Hart*.[24] In this instance, the specific need of courts was how to devise a method of discerning the intention of Parliament in the event that the words of legislation were not clear and ambiguous. In *Pepper (Inspector of Taxes) v Hart* the United Kingdom courts established the common law rule that "the intentions of Parliament can be discerned from the drafting instructions"[25] that formed the basis of the legislation such as the debate by the legislators as contain in the Hansard or official journal of the Parliament. Drafting instructions is the first stage of the legislative drafting process. This is significant considering that before this case law laid down this legislative drafting rule that was not in existence before. It can be therefore stated that "in the case of *Pepper (Inspector of Taxes) v Hart* the court held that if primary legislation is ambiguous or obscure the courts may in certain circumstances take account of statements made in Parliament by Ministers or other promoters of a Bill in construing that legislation. Until that decision, using Hansard in that way would have been regarded as a breach of Parliamentary privilege." [26]

This case was decided in the year 1993. The question since then is whether this principle been transplanted or applied in Nigeria and did it prove functional when it was applied in Nigeria. Onwe has confirmed writing on the topic of "legislative history"[27] as an aid to statutory interpretation. He provides details of at least three judgments and case law by Nigerian courts that successfully applied the decision in *Pepper (Inspector of Taxes) v Hart*. Those Nigerian cases are *Bronik Motors v Wema Bank Ltd*, *Attorney-General of Kaduna State v Hassan* and *Bishop Okogie v Attorney-General of Lagos State*. The case study research method involves a "wise choice of examples".[28] In this instance, the United Kingdom as the archetype of the common law is a wise choice of case study for Nigeria, being the recipient. The practical application of research methods to the research questions would now become evident in the successive parts below.

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[24] [1993] AC 593

[25] Francis Bennion, *Statutory Interpretation 5th edn* (Edingburgh, LexisNexis, 2008) 469

[26] Tonye Clinton Jaja, *Legislative Drafting-An Introduction to Theories and Principles* (Oisterwijk, Netherlands, Wolf Legal Publishers, 2012) 19

[27] Onwe (n 23) 84-85

[28] Terry Hutchinson, *Researching and Writing in Law* (Australia, Lawbooks/Thomson Reuters, 2006) 62

III. JUDGMENTS THAT RECOGNISE THE IMPORTANCE OF LEGISLATIVE DRAFTING

The fact that the Courts regard as serious the conventions and rules of legislative drafting is evident by the judgements in the Nigerian case of *Dr. Gabriel O. Omowaiye v Attorney-General of Ekiti State and Another*[29] In this case the Court of Appeal was invited to provide an interpretation of section 208 of the 1999 Constitution of Nigeria (as amended) which vests the Governor with powers to make appointments of certain categories of staff. The court held that "Above all, even if we, take the humble view that counsel's submission was borne out of a superficial reading of the drafting technique employed in section 208 (5) . He glossed over two devices in legislative drafting which adorn that subsection, namely, the punctuation mark "colon" and the proviso. An intimate reading of subsection 5 of section 208 (supra) would reveal that a full colon precedes the proviso therein. This indicates that it [the proviso] illustrates or explains the appointments contemplated in subsection 5 only".

The decision of the Nigerian Court of Appeal in the case of *Dr.Joseph Amedu v Federal Republic of Nigeria*,[30] more aptly demonstrates the fact that the Court of Appeal did not gloss over the wrong use of a legislative drafting expression by the counsel to the Appellant. In this instance, the Court held that: "what the Appellant described as supercession is generally referred to in drafting parlance as substitution". The Court went to great lengths to reach a determination of the appropriate legislative drafting convention or rule, that applies to the use of the word "deem". Both the Counsel for the appellant in this case and the judge that delivered the lead judgment had to make reference to the leading authoritative textbook on legislative drafting, namely: Gareth Cecil Thornton, *Legislative Drafting* 3rd edn .(London, Butterworths, 1987). The court held thus that "Dwelling on the word "deemed" as used in section 61 of the ICPC Act, the Appellant submitted that the same was ambiguous and in this regard referred to legislative Drafting by G.C. Thornton 3rd Edition at pages 86- 87 as showing the position of the law when the word "deemed" is used in a statute. It was submitted by

[29] [2010] Law Pavilion Electronic Law Reports-4779(CA)
[30] [2009] Law Pavilion Electronic Law Reports-8212 (CA)

the Appellant that the purported "deemed" power to prosecute under section 61 of the Act had been rebutted by Exhibits 'A' and 'B' which exonerated him, since the word "deemed" as used under section 61 of the ICPC Act is presumption of law that can be rebutted by facts".[31]

The Courts in the United Kingdom also adopt a similar approach considering that they pay great attention to the legislative drafting conventions. For example in the case of *Onu v Akiknu*[32] it is reported[33] that the Court of Appeal revealed a legislative drafting error inherent in the UK's Equality Act 2010, considering that section 106 of the Act did not apply to the legislative drafting technique of providing a definition for the use of a new word. The United Kingdom's Supreme Court in *Scottish Power (Scotland) v Morrison Sports Limited and Others*[34] held that "Against that background, while criticisms might be levelled at the style of drafting (in particular the apparent introduction of an important private right of action for damages by reservation in section 29(3) of the 1989 Act), we consider that the plain meaning of section 29(3) is that Parliament intended any member of the public who suffers 'any damage or injury which may have been caused by the contravention' of the 1988 Regulations to be entitled to raise an action for damages against the person who contravened the regulations, founding the action upon that breach of statutory duty".

Even when the legislative drafter's resort to their personal style results in inelegant drafting, the Nigerian Courts have taken a similar view that to the effect that "The courts have moved away from reliance on technicalities in favour of substantial justice. I am of the view and do hold that notwithstanding the inelegant manner in which the grounds of appeal are drafted, they are valid grounds of appeal."[35]

A word of caution is necessary; there are limits to the extent that courts of law can go to correct legislative drafting errors. As a general rule, courts would not usurp the function of the legislature through what it describes as "judicial legislation" in an

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[31] n 29

[32] [2014] EWCA Civ 279

[33] Hannah White, 'Drafting Error Revealed by Case Law' available online at <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2013/06/17/drafting-error-in-equality-act-revealed-through-case-law.aspx> accessed 18 February 2015

[34] [2010] UKSC 37

[35] *Alhaja Ayo Omidiran v Etteh Patricia Olubunmi* [2010] Law Pavilion Electronic Law Reports-9610

effort to correct a legislative drafting error. This view is well expressed in the case of *Enviroco Limited v Farstad Supply A/S*[36] "There is therefore no clear basis on which "the court must be abundantly sure" that there is a drafting error of the nature which the Court can correct: Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 at 592. The exercise which Enviroco would require from the Court would be an impermissible form of judicial legislation".

Generally, while making allowances, exceptions for personal styles, the general rule remains that, in their task of interpreting legislation, it is part of the primary duty of the courts themselves to point out instances when there is failure to comply with legislative drafting rules when such failure would result in substantial injustice.

IV. THE COMMON LAW DOCTRINE OF PRECEDENT AND *STARE DECISIS*

A. What are the common law doctrines of precedent and *stare decisis*?

The Nigerian Supreme Court in the case of *Clement v Iwuanyanwu*[37] defined a precedent as "an adjudged case or decision of a higher court considered as furnishing an example or authority for an identical or similar question afterwards arising on similar question of law". *Stare decisis* (an abbreviation of the Latin phrase, *stare decisis et non quieta movere*) meaning to abide by a former decision where the same issues come up again in litigation.

"The doctrine of judicial precedent or *stare decisis* is hinged on the fact that the principle of law on which a court bases its facts, or issues before it must be followed by courts lower in hierarchy and may be followed by a court of coordinate jurisdiction or a court which is higher in hierarchy in future similar cases. Thus, when a court is bound by a previous decision, the precedent is said to be binding. On the other hand,

[36] [2011] Law Pavilion Electronic Law Reports- 17800, UK Supreme Court
[37] [1998] 3Nigerian Weekly Law Report-NWLR (Pt. 107) 54 Oputa JSC

when a court has discretion whether or not to follow a previous decision, the precedent is said to be persuasive."[38]

It is worth noting from the onset, that it is only the legal principles forming part of the *ratio decidendi* (reasons for the decision) of the case[39] is what is binding and not the *obiter dictum*.

The overall objective of this research is to identify relevant rules and conventions of legislative drafting with a view to promoting consistency and legal certainty in the drafting and interpretation of legislation. This view is consistent with the purpose of the doctrine of precedent and *stare decisis* since "The purpose of *stare decisis* is to give uniformity, continuity and predictability to the law. In the common law world the principle is well established and traditionally it was considered one of the main characteristics of common law".[40]

However, it has been rightly noted that in the United Kingdom and in Nigeria respectively, there are exceptions to the operation of the doctrine of precedents and *stare decisis*. In the United Kingdom, it is noted that "the doctrine of precedent does not remain absolute or indeed purist in its *stare decisis* format. Nowadays decisions made in higher courts are binding upon courts below them, and to a certain extent on courts on the same level."[41]

In Nigeria, it has been established that there are circumstances wherein the doctrine of precedent and *stare decisis* would not apply. For the avoidance of doubt these conditions are reproduced below "Obilade observes that there is a general rule under the doctrine of *stare decisis* of which a court is bound to follow the decision of a higher court in the hierarchy. On the contrary, a lower court is not bound to follow the decision of a higher court which has been overruled. Thus, in the circumstances where the decision of a higher court is in conflict with a decision of another court which is above such high court in the hierarchy, a lower court is not bound by such decision: the principle of distinguishing. This principle states that the decision of court

[38] Ephraim Ikegbu, SA Duru, Emmanuel Dafe, 'The Rationality of Judicial Precedent in Nigeria's Jurisprudence' (2014) 4 American Journal of Contemporary Research 149
[39] House of Lords, 'Practice Statement (Judicial Precedent)' (1966) 1 WLR 1234
[40] Helen Xanthaki, 'Comparative Legislative Drafting' in Helen Xanthaki, *Drafting Legislation-Art and Technology of Rules for Regulation* (Oxford, Hart Publishing, 2014) 206
[41] ibid

does not constitute a binding precedent for any subsequent case if the cases differ with regard to material facts."[42]

For a better understanding of the doctrine of precedent and *stare decisis*, it would be necessary to summarise the hierarchy of courts in Nigeria as stipulated under Chapter Seven of the 1999 Constitution of the Federal Republic of Nigeria (as amended). This hierarchy is the following:

(1) Supreme Court of Nigeria

(2) The Court of Appeal

(3) The Federal High Court

(4) The High Court of the Federal Capital Territory Abuja

(5) The Sharia Court of Appeal of the Federal Capital Territory

(6) The Customary Court of Appeal of the Federal Capital Territory

(7) The State High Court

(8) The Sharia Court of Appeal

(9) The Customary Court of Appeal

(10) The Election Tribunal

The jurisdiction or powers to hear and determine the cases coming before them were also stated in the Constitution. Indeed the above listed Courts are referred to as Superior Courts. Please note that in some exceptional instances under the Constitution, the Court of Appeal serves as the last place where appeals terminate, especially in election petition matters, (see section 246 (3) of the 1999 Constitution of Nigeria (as amended). The only notable exception to the above is electoral matters concerning the office of the President or Vice President of the Federal Republic of Nigeria. In this case, the Court of Appeal has original jurisdiction and appeals go from there to the Supreme Court. See section 239 of the Constitution. Apart from the Courts mentioned earlier, the Constitution empowers States to create other Courts.[43]

In the United Kingdom, the hierarchy of courts is as follows:

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[42] n 54

[43] Global Rights Nigeria, *Paralegal Toolkit on Improving Women's Access to Justice in Northern Nigeria* (Abuja, 2010) 15-17, available online at <http://www.globalrights.org/sites/default/files/docs/Paralegal_toolkit_for_Northern_Nigeria__English__Website.pdf > accessed 24 February 2015

"Magistrates' Courts and County Courts are bound by decisions of the High Court, the Court of Appeal and the Supreme Court, but they are not bound by their own decisions and they do not bind other courts. The Crown Court is bound by decisions of the Court of Appeal and the Supreme Court, but its judgments have mere persuasive value for the other courts, especially if the judgment is made by High Court judges sitting in the Crown Court. The High Court is bound by the Court of Appeal and the Supreme Court, and its judgments are binding on inferior courts but not upon High Court judges. Moreover, High Court judgments are not always binding upon Divisional Court (civil or criminal). The Divisional Courts of the High Court are bound by their own judgments, by the judgments of the Court of Appeal, and by the Supreme Court. Their judgments are binding upon inferior courts (except the Employment Appeal Tribunal) and High Court judges sitting alone. The Court of Appeal (Civil Division) is bound by the Supreme Court, and its own decisions, unless there was a serious omission flawing the decision, the decision conflicts with an earlier contradictory decision, or the previous Court of Appeal decision was overruled by the Supreme Court. Its judgments are binding on the Divisional Courts of the High Court, individual High Court judges and the inferior courts including the Employment Appeal Tribunal. The Court of Appeal (Criminal Division) is bound by the Supreme Court and its own judgments, and is binding on lower courts. Finally, Supreme Court judgments are binding on all courts. The Supreme Court is persuaded by, but not bound be, inferior courts and, since 1966, is not bound by its own decisions. Moreover, in practice the Supreme Court may have to bow down to the European Court of Justice via the principles of supremacy and indirect effect, and the European Court of Human Rights by virtue of the [UK] Human Rights Act."[44]

B. Judicial precedent and *stare decisis* – what are the implications for legislative drafting?

Traditionally, strict adherence to the common law doctrines of precedent and *stare decisis* would have implied that the Courts would always insist on strict compliance with legislative drafting conventions.

[44] Xanthaki (n 40)

However, as demonstrated by the judgments in the cases of *Scottish Power (Scotland) v Morrison Sports Limited and Others*[45] and *Alhaja Ayo Omidiran v Etteh Patricia Olubunmi*[46]respectively, the modern view is that when strict adherence to legislative drafting conventions would result in substantial injustice, the Courts would not insist.

In addition to application of distinguishing cases, this demonstrates that the "principle of precedent in in common law its modern facet…is inherently limited".[47] This modern approach in itself presents a series of opportunity for legislative drafting.

In the first instance, as stated at the outset of this study, the judgments relating to exceptions to strict adherence to traditional legislative drafting conventions demonstrate that "drafting style and practices are always capable of improvement"[48]. A list of these judgments ought to serve as evidence that would accompany any memoranda or document calling for reform of the relevant legislation that prescribes the rules for drafting and construction of legislation. Apart of the Rules of Legislative Procedure of the Senate (2011) and the House of Representatives (2014) of the National Assembly, the Interpretation Act 1964 and the Acts Authentication Act 1962 have never undergone amendments since their enactment.

The opportunity to apply modern approaches, innovations and conventions in legislative drafting, is another opportunity that is offered by the common law doctrine of precedent and *stare decisis*. By applying the principle of distinguishing of cases the Courts have the opportunity to introduce novel legislative drafting conventions to new cases. And based on the doctrine of precedent and *stare decisis* lower courts are bound to comply with such new legislative drafting conventions introduced by superior courts of law. For example one instance where the Court of Appeal introduced a novel legislative drafting convention is the judgment in the case of O*rija & Others v the Chairman National Population Commission & Others*[49]. Hon. Justice Yahaya, J.C.A. held that: "It is an acceptable and modern method of legislative drafting, to make provisions for procedural rules, in a schedule to the law, and not in the main body of the law itself."[50]

[45] [2010] UKSC 37
[46] [2010] Law Pavilion Electronic Law Reports-9610
[47] Xanthaki (n 40)
[48] n 4
[49] [2013] Law Pavilion Electronic Law Report-20835(CA)
[50] ibid 16

This case shall be discussed in fuller details under the section on modern legislative drafting conventions.

This presents opportunity on two fronts for legislative drafters. On the one hand, when they appear in court as counsel, legislative drafters have the opportunity to introduce these new legislative drafting conventions in their brief of arguments. Within the Legal Services Directorate, National Assembly of Nigeria, there is an unwritten rule that every lawyer employed in this Directorate must undertake litigation on behalf of the National Assembly at some point during the course of their employment regardless of whether they are assigned to the Legislative Drafting Unit. Such periods of appearance in court, present an opportunity for legislative drafting lawyers to present novel legislative drafting conventions in their brief or during oral advocacy. This is also confirmed in the practice of the Directorate of Legal Services in the Yobe State House of Assembly. In the case of Yobe State, legislative drafting lawyers are compelled to undertake litigation in addition to their legislative drafting duties as a matter of necessity. This is due to the fact that there are only five lawyers in this Department to serve over twenty legislators.

On the other hand, while undertaking legal research, legislative drafters ought to scour the judgments of courts of law to identify such new legislative drafting conventions and find innovative methods to bring this to the attention of judges, legislators and other officials who have responsibility to enact or amend legislation or administrative rules governing legislative drafting. As shall be demonstrated under the research question discussed below.

V. WHAT ARE THE COMMON LAW RULES AND PRINCIPLES OF STATUTORY INTERPRETATION?

What is the major civil law principle of statutory interpretation as stated in the case of *Bulmer v Bollinger*? How is this applicable to legislative drafting in the U.K. and Nigeria?

Statutory Interpretation is one of the three of Tetley's themes of analysis in comparative legislative drafting which is discussed under this heading. The actual

meaning of statutory interpretation is best understood by Lord Reid's statement in the case of *Blacklawson International Ltd. v Papierwerke Aschaffenburg*[51] where it is stated that "We often say that we are looking for the intention of parliament, but that is not quite accurate. We are seeking the meaning of the words which parliament used, we are seeking not what parliament meant, but the true meaning of what they said".

From the onset, it is obvious that the focus of statutory interpretation which is to discern "the true meaning of what is said" has direct legislative drafting implications. This is because what Parliament says is often expressed in the wordings of a legislation which is itself written by legislative drafters. Therefore, it is of utmost importance that legislative drafters use clear and unambiguous words in expressing the intention of Parliament in legislation that they draft. This view finds support in a long line of cases such as, in the case of *Karsha v Commissioner of Police*[52], the Court stated that "what the legislature intended to be done or not be done can only be legitimately ascertained by express words or by reasonable or necessary implication". This view finds also further support in the case of *Abioye v Yakubu*[53] "if the words of a statute are clear and unambiguous, it is the words that govern and the courts must give effect to it because the words speak the intention of the legislature".

A. Discerning the intention of Parliament – what are the implications for legislative drafting?

1. Definition of "clear and unambiguous words of a statute"

Since the Courts have established that it is the "words of a statute" that constitute the litmus test and essential elements in determining the intention of the legislation, it logically follows that the legislative drafters whose primary task involves "putting the intention of legislature into proper written form" must choose the most effective "words of a statute". In accordance with the decisions of the Courts, in their choice of "the words of a statute" legislative drafters must choose words that are "clear and unambiguous". The implication is that legislative drafters must themselves have a clear

[51] [1975] AC at 613
[52] [1991] 2 NWLR (pt.172) 2002
[53] [1991] 5 NWLR (pt.190) 130

cut definition of what constitutes "clear and unambiguous words" when they are framing the "words of a statute".

Coincidentally, in accordance with the criteria (clear and unambiguous words) laid down by the courts of law, in the field of legislative drafting, the same criteria (clear and unambiguous) are recognised as part of the definition "effective" legislation. "Clarity, precise and unambiguity" are identified as the key pillars of "effective" legislation the highest goal that legislative drafter pursue when drafting legislation. The definition is as follows: "effectiveness of legislation means that the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results […] this includes but is not limited to implementation, enforcement, impact and compliance".[54] Furthermore, "clarity, precision and unambiguity are the tools of effectiveness […] clarity, or clearness, is the quality of being clear and easily perceived or understood. Precision is defined as exactness of expression or detail. Unambiguity is certain or exact meaning"[55]. "Ambiguity occurs when words can be interpreted in more than one way". Closely related tools are gender-neutral drafting and plain language.

A fuller examination of the concepts of gender-neutral drafting and plain language will be presented afterwards along with some of the modern and innovative legislative drafting conventions and techniques. Implications for legislative drafters when taking drafting instructions-discerning the intention of Parliament. In the field of legislative drafting, the receipt of drafting instructions by the legislative drafting is identified as the first step out of the five stages of the legislative drafting process.[56]

It is extremely important that at this stage of the drafting process, that the legislative drafter pays attention considering that the drafting instructions received from the legislator would eventually form the basis of the "words of a statutes". This is based on the principle of communication represented by the acronym: "GIGO (where GIGO stands for Garbage in, Garbage out). Drafting instructions should be clear, comprehensive and coherent.

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[54] Xanthaki (n 22) 6

[55] Helen Xanthaki, 'Drafting Manuals and Quality in Legislation' (2010) 4 Legisprudence – Journal of the Theory of Legislation 111, 116

[56] Thornton (n 3) 128 identifies the five stages of the drafting process as: 1. Understanding, 2. Analysis 3. Design 4. Composition and development 5. Scrutiny and testing

Holding interviews and consultations with legislators is a recognised method that the legislative drafter may employ to discern the intentions of the legislature as well as to seek clarifications on the drafting instructions. Public hearings of the Committees of the National Assembly are one of the legally recognised for seeking clarification on drafting instructions. At such members of the public and others (including legislative drafters) are permitted to seek clarification or make written and oral submissions on legislative Bills that are currently undergoing the law-making process. The holding of public hearings is done by virtue of the powers conferred upon Committees of the National Assembly by section 62 of the 1999 Constitution of Nigeria (as amended).

2. Implications for judges and legislative drafters – methods of discerning the intention of Parliament

The use of Hansard is another method of discerning the intention of Parliament. The Hansard is a written verbatim record of the debates that are conducted by legislators in legislature. It is the official record and journal of any legislature. As we earlier demonstrated through a long line of decided cases, such as the *Pepper (Inspector of Taxes) v Hart* the United Kingdom courts established the common law rule that "the intentions of Parliament can be discerned from the drafting instructions". Nigerian courts have consistently successfully applied the decision in *Pepper (Inspector of Taxes) v Hart*. The Nigerian cases are *Bronik Motors v Wema Bank Ltd*; *Attorney-General of Kaduna State v Hassan* and *Bishop Okogie v Attorney-General of Lagos State*.

Having established that there is a nexus between statutory interpretation and legislative drafting, it is necessary to examine the rules of statutory interpretation. Such an examination would reveal gaps and the need to apply a new approach.

B. What are the common law rules of statutory interpretation?

As stated at the outset of this research study, one of the major shortcomings of the common law rules or principles of statutory interpretation is that: "The principles of statutory interpretation are not codified." According to Onwe, these rules are

not strict rules of law. They are more or less tendencies and approaches which the courts have developed over the years to guide statutory interpretation".[57]

One of the disadvantages is that due to its unwritten nature it is difficult to ascertain with certainty what constitutes the rules of interpretation because the courts are always developing new rules.

However, there is a positive side to the unwritten nature of common law rules of statutory interpretation. It provides room for ability to develop new rules of interpretation to deal with new situations that are not addressed by the current rules.

This is the basis upon which the Courts in the United Kingdom have developed the rule of purposive approach to statutory interpretation as highlighted in the case of *Bulmer v Bollinger*. It is necessary to re-state the general rules of statutory interpretation considering that the purposive approach advocated in the case of *Bulmer v Bollinger* represents an exception and a departure from the general rules of statutory interpretation.

Generally, there are three recognised rules of statutory interpretation: (1) the literal rule; (2) the mischief rule and (3) the golden rule. Some authors have added several other rules, maxims, presumptions, and principles of interpretation which the courts have developed over the years. However, for the purposes of this research study we are limited to the three major rules.

In a nutshell, "the literal rule as evident in the *Sussex Peerage*[58] case demands adherence to the natural and ordinary sense of words. The mischief rule, as evident in *Heydon*[59] a requires identification of the problem that invited legislative intervention, and suppression of this mischief. The golden rule, evident in Lord Atkinson in *Victoria (City) v Bishop of Vancouver Island*,[60] requires the application of the literal rule where possible and engagement of the mischief where necessary".[61] In Nigeria, these rules of statutory interpretation have been applied as follows: (1) The literal rule-In the case of *Awolowo v Shagari and others*,[62] the exception to the literal rule was expressed as per the

[57] Onwe (n 23) 74
[58] [1844] 11 Cl & F 85
[59] [1584] 3 CoRep 7
[60] [1921] AC 384
[61] Xanthaki (n 40) 203
[62] [1979] 6-9 Supreme Court (SC) 31

dissenting judgment of Kayode Eso, to the effect that: "where the words are used in special contexts in connection with a usage of trade or profession, the literal rule may not be applied";[63] (2) *National Assembly v The President of the Federal Republic of Nigeria*[64] ("for a vivid dissection of the operation of the mischief rule of statutory construction");[65] (3) The golden rule, "For the import of the golden rule of interpretation, see the case of *ADH Ltd. V V.A.T. Ltd.*[66] See also the classical dictum of Idigbe JSC in the earlier case of *Bronik Motors Ltd. & another v Wema Bank Ltd.*[67]

C. The traditional approach – implications of rules statutory interpretation on legislative drafters and judges

In the case of *Bulmer v Bollinger*[68] Lord Denning has provided a classic exposition of the consequences and implications on legislative drafting and judicial interpretation. Due to the limitations of common law approach, he admonished common law judges to adopt the purposive interpretation which is the prevalent "European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent".[69]

According to Lord Denning when delivering the lead judgment in *Bulmer v Bollinger*, common law judges and legislative drafters are trapped in a sort of "rat-race" or "circle" wherein the common law legislative drafting style greatly impacts and determines the approach of the judges when applying of the common law rules of interpretation and *vice versa*. This is evident in his judgement especially the italicised portions:

"The draftsmen of our statutes have striven to express themselves with utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have come long and involved. In consequence, the Judges have followed suit.

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[63] n 93 at 75
[64] [2003] 9 NWLR
[65] ibid 77
[66] [2006] 10 NWLR
[67] [1983] Nigerian Supreme Court Constitutional Cases-NSCC 226 at 260
[68] EWCA Civ 14
[69] Lord Denning in *Bulmer Ltd. v Bollinger SA* (1974) 4 Ch 401 at 411; Willima Robinson, 'Drafting of EU Acts: A View from the European Commission' in Constantin Stefanou, Helen Xanthaki (ed), *Drafting Legislation-A Modern Approach* (Aldershot, Ashgate Publishing, 2008) 193

They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation - which was not foreseen - the Judges hold that they have no power to fill the gap. To do so would be a "naked usurpation of the legislative power", see *Magor and St. Mellons R.D.C. v Newport Borough Council.*[70] The gap must remain open until Parliament finds time to fill it".[71]

D. The modern approach – implications of rules statutory interpretation on legislative drafters and judges

It has rightly been admitted that "There are limits and restrictions inherent in the UK system of statutory interpretation".[72]

As a solution to the limitations of the traditional approach, Lord Denning in *Bulmer v Bollinger* recommended adoption of the European (civil) law style of legislative drafting characterised by laying down "general principles, aims and purposes. All sentences of moderate length and commendable style, with gaps and lacunae, to be filled by the judges or Regulations".[73] Traditionally, in drafting common law legislation, drafters do not include a statement of the purpose or a statement of general principles of the legislation as one of the provisions. However, following the decision in *Bulmer v Bollinger,* Thornton rightly stated that "Now that a purposive approach to statutory construction is routinely taken by the courts in many jurisdictions, there is increased obligation on drafters to make the aim and object of legislation clear on the face of it".[74] Sir William Dale described the purpose of purpose provisions, thus as "An enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the mind of the legislator, provides guidance to the Executive, explains the legislation to the public, assists the courts when in doubt about the application of specific provision".[75]

[70] (1952) A.C. 189
[71] ibid
[72] n 94 at 205
[73] ibid
[74] n 4 at 154
[75] [1988] Statute Law Review 15, n 101,155

Thornton argues that purpose provisions should appear in the preliminary portions of the legislation and he cites the examples of purpose provisions that appear in sections 3 and 4 of the New Zealand Sugar Loaf Islands Marine Protected Area Act, 1991, which are the following:

"Purpose of Act

The purpose of this Act is to ensure that the scenery, natural features, and ecosystems of the Protected Area that should be protected and conserved by reason of their distinctive quality, beauty, typicality, or uniqueness are conserved.

Principles

The Protected Area shall be administered and maintained so as to ensure that, so far as is practicable,

The area, and its scenery, natural features, and eco-systems are protected and conserved in their natural state:

The value the area has in providing natural habitats is maintained;

Members of the public have access to the area for recreational purposes and for the purpose of studying, observing, and recording any marine life in its natural habitat:

The provisions of any relevant management plan for the time being in force under the Fisheries Act 1983 or the Conservation Act 1987 are complied with"[76]

It appears that there is a reluctance to embrace the practice of inclusion of purpose provision from the point of view of legislative drafting in the United Kingdom and Nigeria. This is evident from a cursory reading of the Laws of the Federation of Nigeria, 2004. It is observed that there is no legislation that employs this approach by including a purpose provision. Also, from Thornton's in-depth study of purpose provisions within the common law jurisdictions, there is only one example of a legislation that mentions purpose: "The provisions of Schedule 2 shall have effect for the purpose of reducing stateliness".[77]

However, in other commonwealth jurisdictions such as Thailand, the courts and judges are already applying purposive interpretation as is evident in the judgment

[76] n 102 at 156-157

[77] ibid 158

in the case of *Medical Council of Hong Kong v Chow Siu Shek*[78]it was held that "it is necessary to read all of the relevant provisions together and in the context of the whole statute as a purposive unity in its appropriate legal and social setting [and] to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them".[79] Xanthaki rightly provides an explanation for the limited application of purpose provisions and purposive interpretation in the United Kingdom (and by extension Nigeria) which is as follows: "There are limits and restrictions inherent in the UK system of statutory interpretation whose legal value and consequent application in practice remains unaffected and continues to qualify rules of statutory interpretation, including purposive interpretation. First, interpretation is only invited when the meaning of words is unclear and disputed. So purposive interpretation is not needed and therefore not invited to tolerate for the purposes of everyday construction and application of the law. [purposive] interpretation is therefore limited to the extraordinary, albeit frequent, cases where there are either problems of [legislative] drafting arising from the words of the statute alone".[80]

With regards to the application of the principles of European civil law purposive interpretation in legislative drafting and statutory interpretation, this research recommends a cautious approach on a case-by-case basis. The legislative drafter must decide whether a purpose provision is required depending on the nature and content of each legislation. Also, courts of law and judges must decide based on the "words of a statute" whether a purposive interpretation is required. For example, it does appear that purpose provisions would be ideal when drafting legislation that are long, windy and made up many different parts such as the Petroleum Industry Bill 2012,[81] that is undergoing legislative enactment process in Nigeria's National Assembly since 2012.

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[78] [2000] 2 HKLRD 674

[79] Kemal Bokhary, 'Legislative drafting: a Judicial Perspective' (2010) Loophole-Journal of the Commonwealth Association of Legislative Counsel 26-40 available online at <https://www.opc.govau/calc/docs/Loophole/Loophole_Jan10.pdf> assessed 26 February 2015

[80] n 100 at 205

[81] Available online at http://www.nigeria-<law.org/Legislation/LFN/2012/The%20Petroleum%20Industry%20Bill%20-%202012.pdf> accessed 26 February 2015

E. How have court judgements impacted the traditional conventions and techniques of legislative drafting?

This section examines drafting conventions and techniques that are listed as the third theme of Tetley's analysis. It is helpful to begin with a statement of the meaning of and importance of legislative drafting conventions and techniques. On the importance of legislative techniques Bennion stated: "if you would understand statutes you need to know the technique employed by the people who draft statutes".[82] It is equally important to view judges, legislators and legislative drafters as team players considering that legislative drafters alone or single-handedly cannot achieve the objective of legislation, as rightly stated by Ulrich Karpen: that the achievement of the objective of any legislation: "is not the sole task of the legislative drafter. It involves interrelation of actors in the policy process and legislative drafting process. It is a multilevel effort of policymakers, drafters, legislators, interpreters (judges), and enforcers of legislation"[83].

It was admitted at the outset of this research that "some of these [legislative drafting] conventions have statutory or case-law origins".[84] For example, whereas the consensus of legislative drafters had stated that punctuation constitute an important part of legislation, during the 1960s it appears that the UK courts took an opposing view based on the judgment in the case of *Duke of Devonshire v O'Connor*[85] where it was stated by Lord Esher M.R. that "In an Act of Parliament there is no such thing as brackets any more than there are such things as stops". However, it does appear that during the 1960s the courts refined this view by taking the view that punctuation constitutes an important part of legislation as per the judgment in *Director of Public Prosecutions v Schildkamp* where Lord Reid stated that "it may be more realistic to accept the Act as printed as being a product of the whole legislative process, and to give weight to everything found in a printed Act. It is not very meaningful to say that the words of

[82] Francis Bennion, *Understanding Common Law Legislation-Drafting and Interpretation* (Oxford, Oxford University Press, 2001) 57
[83] Xanthaki (n 22) 5
[84] M Douglass Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges* (Washington D.C., Federal Judicial Center, 2008)
[85] [1890] 20 QBD 468,478

the Act represent the intention of Parliament but that punctuation, cross headings and side note do not Punctuation then forms a part of legislation. The language of the law is a part of the language of a people. That language comprises also the writings, the value of which lies in the beauty of form or emotional effect. Legislation is part of literature. The law is part of the literature of a people, Punctuation plays its part-a useful role a legislation as it does in language as a whole".[86]

During the 1970s, following that court's judgment, a leading author in the field of legislative drafting formulated the four legislative drafting conventions regarding punctuation. It was stated that "Exact principles cannot be prescribed for punctuation practice, but four rules should normally be followed: 1.Punctuate sparingly and with purpose (every punctuation mark must serve a purpose); 2. Punctuate for structure and not for sound; 3. Be conventional, (although a measure of individuality is permissive); 4. Be consistent (avoid haphazard and inconsistent approach to the use of punctuation marks especially the commas".[87]

It is worth mentioning the traditional legislative drafting conventions and techniques that formed the foundation of the modern common law legislative drafting style. For example the structure of common law legislation was laid down by Lord Thring, former First Parliamentary Counsel of the United Kingdom, who expressed his prioritisation of provisions in 5 rules:

- Rule 1: Provisions declaring the law should be separated from, and take precedence of, provisions relating to the administration of the law: Convenience demands a clear statement of the law as distinct from its administration. One must know the law before questions of administration can arise hence the precedence of the statement of the law over its administration.

Thus the advice is: state the law, then state the authority to administer the law, and then state the manner in which the law is to be administered".

An example is the setting up of the office of Coroners. It is advisable to establish the office of Coroner before stating the law of inquest. In such cases the law, as it were, emanates from the authority rather than the other way round.

[86] [1969] (11) TMI 44
[87] n 4 at 34

- Rule 2: The simpler proposition should precede the more complex and, in an ascending scale of propositions the less should come before the greater.
  Thus, in principle, assault should be provided for before aggravated assault.
- Rule 3: Principal provisions should be separated from subordinate provisions

The subordinate provisions should be placed towards the end of the Act, while the principal provisions should occupy their proper position in the narrative of the occurrence to which they refer. Principal provisions declare the material objects of the Act. Subordinate provisions are required to give effect to the principal provisions. They may deal with details, and thus complete the operation of the principal provisions.

- Rule 4: Exceptional provisions, temporary provisions and provisions relating to the repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings.
- Rule 5: Procedure and matters of detail should be set apart by themselves, and should not, except under very special circumstances, find any place in the body of the Act.

This will explain the use of Schedules and sometimes of Regulations. In company legislation model Regulations could be set out in a Schedule. Procedural and administrative matters can also be delegated to subordinate legislation. Thus Parliament deals with the substantive law, and the procedural law is settled by departmental officials."[88] In practice, the structure of legislation is as made up of four major parts as follows[89]:

Preliminary Provisions- Preamble
Enacting statement and title
Purpose Provision
Commencement
Definitions
Interpretation
Duration/expiry

[88] Samuel Azu Crabbe, *Legislative Drafting* (London, Cavendish Publishing, 1998) 148-150
[89] *Legislative Manual: Structure and Style*, New Zealand Law Commission Report No 35 (Wellington, 1996)

Application

Application to the Crown

VI. MODERN LEGISLATIVE DRAFTING CONVENTIONS AND TECHNIQUES

In recent times, there is the trend of innovations in the field of legislative drafting, characterised by departure from the traditional approaches and legislative drafting conventions.

In the United Kingdom, the requirement for supporting documents to accompany bills and legislation submitted to Parliament. This is now a statutory requirement since the 1998/1999 Parliamentary Session, all bills or legislation submitted to Parliament must be accompanied by two supporting documents namely an Explanatory Memorandum and a Financial Memorandum. The Explanatory Memorandum provides justification(s) for the Bill and explains the drafting rules that are applied in preparation of the Bill or legislation. The Financial Memorandum contains a cost-benefits analysis statement. In addition, under the UK Legislative and Regulatory Act 2006, there is the recent mandatory requirement to undertake consultations and impact assessment when drafting Bills or legislation that is likely to affect or impact the third sector (the charities or non-governmental organisations). The requirement for supporting documents was based on the recommendations of the UK Parliament's Select Committee on the Modernisation of the House of Commons.[90]

Other innovations in the UK are present, such as: "gender neutral drafting , the use of explanatory memoranda, the placement of definitions at the end and probably in a schedule, the increased use of Keeling schedules to name but a few".[91] In Nigeria, this study found only one instance wherein the Court of Appeal introduced a novel legislative drafting convention is the judgment in the case of O*rija & others v The Chairman National Population Commission & others*[92]as per Hon. Justice Yahaya, J.C.A.

[90] Editorial, 'Legislative Scrutiny and Supporting Documents' (2000) Statute Law Review v-vi

[91] Helen Xanthaki, 'Legislative drafting: a new sub-discipline of law is born' (2013) 1 Institute of Advanced Legal Studies (IALS) Student Law Review 69

[92] (2013) Law Pavilion Electronic Law Report-20835(CA)

held that: "It is an acceptable and modern method of legislative drafting, to make provisions for procedural rules, in a schedule to the law, and not in the main body of the law itself".[93]

VII. CONCLUSION – WHAT IS THE DIRECTION FOR FUTURE RESEARCH ON THE SUBJECT OF THE INTERSECTION BETWEEN STATUTORY INTERPRETATION AND LEGISLATIVE DRAFTING?

Inspired by the knowledge that "drafting style and practices are always capable of improvement",[94] this research has examined the important role that judges have played.

So far the efforts of judges in improvement of legislative drafting have been remedial, reactive and not deliberate, uncoordinated or not well thought out. This research recommends a more proactive, planned, direct role for judges in the legislative drafting process. The justification is that legislative drafting itself is a highly "specialist" task that requires "special legal skills"[95].

Judges by virtue of their training and job description are identified as one of the category of specialists who are capable of making "recommendations for changes that will raise the textual quality of law-making instruments generally"[96] by acting as "external resource persons" or proof readers before bills are submitted to the Parliament. This is somewhat similar to the role played by judges in France, who play a fundamental role in legislative drafting by acting as scrutinisers of all legislation before

[93] n 4 at 16

[94] ibid

[95] Keith Patchett, 'Law Drafting and Regulatory Management in Central and Eastern Europe' (1997) 18 OECD Publishing 34 available online at <http://www.oecd-ilibrary.org/docserver/download/5kml618wrlg7.pdf?expires=1425023249&id=id&accname=guest&checksum=BB018D2A25486AF3E984713A9897ECFD> accessed 27 February 2015

[96] ibid at 29

submission to Parliament. In this capacity, judges are constituted as the "conseil d'etat".[97]

The recommendation is part of a more holistic system for improvement of legislative drafting based on Patchett's model of seven strategies. Patchett's model is founded on the understanding that improvement of legislative drafting undertaken in a systematic manner recognising that "law drafting calls for special legal skills. Those skills derive, in part, from a special understanding of legislative methodology and, in part, from distinctive experience in drafting techniques. Drafting legislation calls for a systematic often painstaking, application of a particular expertise in a range of analytical and writing skills".[98]

It is hoped that a future research would apply Patchett's model to undertake a comparative study of legislative drafting from an European and civil law perspective with a goal of identifying the methods for the beneficial application of technology, the norms of traditional African laws and norms of Islamic law for the improvement of legislative drafting in Nigeria.

[97] Jean Massot, 'Legislative Drafting in France: The Role of the Conseil d'Etat' (2001) 22 Statute Law Review 96–107

[98] n 36, n 34

The Complaints Mechanism to the Convention on the Rights of the Child: UN Tokenism or Effective Tool?

Michael J. J. Boulton[*]

Abstract

This paper explores the new individual communications (complaints) mechanism to the United Nations Convention on the Rights of the Child. It seeks, in particular, to review the validity of the new procedure as a mechanism to achieve justice for victims of children's rights violations and to enhance domestic implementation of the Convention. The following analysis provides a contextualised approach towards the new complaints mechanism, by providing a focus on the core challenges which confront the attainment of its objectives. In the final analysis, a mitigation strategy is suggested in order to maximise the efficacy of the new instrument, the hallmark of which is a re-conceptualisation of the role of the individual within the UN human rights framework as part of a necessary transition to a constitutional justice model.

I. INTRODUCTION

The international human rights framework of the United Nations (hereinafter "UN") comprises a Charter-based system and a treaty-based system.[1] Under the Charter-based system, institutions such as the Human Rights Council have a remit to consider both thematic and country-specific human rights issues. Because the mandate for

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[1] For an overview of the various human rights bodies within this framework see the website of the UN Office of the High Commissioner for Human Rights (OHCHR) available at <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> accessed 12 January 2015

this activity comes directly from the UN Charter itself, all UN Member States are subject to its jurisdiction. Under the treaty-based system, each treaty has a specialised body, usually called a committee, which is mandated to receive and consider reports from States Parties to the respective treaty. Due to this limitation, which only enables the committees to consider the reports of states that have ratified their respective instrument, the jurisdictional space of the treaty bodies is much narrower. But while the scope of UN treaty bodies may be restricted in this way, they are arguably better situated to conduct a more penetrative analysis on certain key human rights issues, due to their more exclusive thematic focus. In this way, the UN treaty-based system may be seen to complement the breadth of focus under the Charter-based system.

UN treaty bodies conduct a number of important functions. Through the state reporting function, outlined above, and through the publication of 'General Comments', the committees of the UN human rights treaties provide their interpretation on the normative content of certain provisions or issues, in accordance with their respective mandate. Thus, for example the Committee to the UN Convention on the Rights of the Child (hereinafter "CRC Committee") has published a number of important comments, which seek to outline the precise normative scope of the key treaty on children's rights.[2] In addition, all of the treaty bodies of the nine core human rights treaties[3] now enjoy an extended mandate to be able to receive communications from individuals. This process, usually known as individual "complaint", "communication" or "petition" procedures, enables an individual, who has satisfied certain admissibility requirements, to lodge a complaint concerning a human rights violation(s) in regard to

[2] To date there are nineteen such comments, available at: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11> accessed 12 January 2015

[3] These are the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic Social and Cultural Rights (ICESCR) 1966, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, the Convention Against Torture (CAT) 1984, The Convention on the Rights of the Child (CRC) 1989, Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 1990, the Convention on the Rights of Persons with Disabilities (CRPD) 2006, and the Convention for the Protection of All Persons from Enforced Disappearances (CED) 2006, available at: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> accessed 12 January 2015

a particular State Party. When functioning in this context, the UN treaty bodies become akin to a quasi-court. The value which individual complaints mechanisms add to the UN human rights framework is twofold.

Firstly, by allowing individuals to access the inherently state-centric organisation of the UN, individual complaint procedures are important symbolically. They bring the focus back on to the very subject of this branch of international law; human beings. Secondly, by receiving individual communications, treaty bodies are enabled to develop a body of jurisprudence. The sophisticated factual and legal nature of individual cases in theory allows for a deep consideration of particular issues regarding the legal obligations of the state in question, in respect of the particular treaty.

It is something of a paradox that the most widely ratified of all UN human rights treaties, the UN Convention on the Rights of the Child 1989 (hereinafter "UNCRC")[4] has been without an individual complaints mechanism for so long. While structural enhancements were made to the other core human rights treaties, usually by way of an optional protocol, to allow treaty bodies to accept individual petitions, for decades children have been deprived of such a mechanism.

This is no longer the case. The Third Optional Protocol to the UNCRC[5] provides for such a mechanism and since entry into force on 14 April 2014, three months after the instrument received its tenth ratification,[6] it has allowed children to complain of a violation of their rights directly to the CRC Committee.

But how effective is the new complaints mechanism likely to be? While such procedures have risen in popularity within the UN human rights framework over the last twenty years,[7] their value as mechanisms for the realisation of individual justice and for the enhancement of human rights standards remains questionable. Until the

[4] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577 at 3

[5] UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (Third Optional Protocol), resolution 66/138 adopted by the General Assembly on 19 December 2011

[6] United Nations Treaty Collection, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en> accessed 12 January 2015

[7] Harrington, 'Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties' (2011-2012) 22 Duke Journal of Comparative & International Law 153

entry into force of the Third Optional Protocol, the only child-specific complaints mechanism had related to the African regional system. Based on the number of communications received to date, this has proven to be a resounding failure.[8] This paper examines, through analysis of the Third Optional Protocol to the UNCRC, whether the UN model of individual complaints procedure is optimal for the promotion and protection of children's rights. In doing so, frequent comparison is made to the most established individual complaint procedure to a human rights treaty, that of the European Court of Human Rights (hereinafter "ECt.HR").

Following a brief overview of the function, scope and objectives of the new mechanism (Part 1), I explore critically some of the major challenges which are likely to confront the Third Optional Protocol in pursuit of its stated objectives (Part 2). This forms the core of my analysis and allows for a contextualised understanding of how the mechanism may or may not work as intended. Finally, I provide a basic argument in favour of a constitutionalised approach towards the operation of the Third Optional Protocol, as a rational basis for maximising its potential to advance normative protection in international human rights law. In following this analytical structure I hope to achieve two objectives. My primary objective is to contextualise the new instrument within the framework of the UN treaty body system, specifically in terms of what, if any, value it can add. The second objective is a more discursive one, whereby I seek to provide a modest re-conception, through a lens of international children's rights, of the role of the individual within the UN human rights treaty body system.

[8] The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) is mandated to receive individual communications under Article 44 of the African Charter on the Rights and Welfare of the Child, which entered into force on 29 November 1999. It has so far received two communications and has delivered just one decision, available at <http://acerwc.org/communications/> accessed 12 January 2015

II. OVERVIEW OF THE THIRD OPTIONAL PROTOCOL

A. Background

Discussion of a complaints procedure for the UNCRC has been a part of the international child rights discourse for some time. Yanghee Lee, former Chairperson of the CRC Committee, describes how the idea for a child rights-specific communication mechanism surfaced during the negotiation phase of the UNCRC itself as well as on multiple occasions since,[9] but lacked the requisite support to ensure adoption. A renewed push in 2000 by German-based non-governmental organisation (hereinafter "NGO") Kindernotilfe triggered a more holistic advocacy campaign on behalf of children's rights NGOs, which by 2007 had attracted widespread support.[10] This campaign was endorsed by the CRC Committee and the UN Human Rights Council and the establishment of an open-ended working group was duly authorised.[11] Later this group was tasked with the preparation of a draft instrument, which was subsequently approved.[12]

B. Objectives

An exploration of the background to the Third Optional Protocol reveals that multiple reasons were given on behalf of NGO groups, governments, experts and members of the CRC Committee itself as to why a complaints mechanism for the UNCRC was required. Several participants in the negotiation process noted the fact that the UNCRC was the only core human rights treaty without an individual complaints mechanism. In addition, participants in the negotiating process extolled the

[9] Lee, 'Communications procedure under the Convention on the Rights of the Child: 3rd Optional Protocol (2010) 18 International Journal of Children's Rights 567, at 569

[10] Details of the NGO advocacy campaign are available on the web site of the Child Rights Information Network (CRIN) at <http://www.crin.org/en/home/law/complaints> accessed 18 January 2015

[11] UN General Assembly, Human Rights Council, *Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure*, resolution 11/1 adopted by the General Assembly on 17 June 2009, available at <http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_11_1.pdf> accessed 18 January 2015

[12] For a detailed overview of the background to the negotiation and drafting of the Third Optional Protocol see: Egan, 'The New Complaints Mechanism for the Convention on the Rights of the Child: A Mini Step Forward for Children?' (2013) 22 International Journal of Children's Rights 205

virtues of the Third Optional Protocol as a way to promote children as "rights holders", provide justice to child claimants where national systems had failed to do so and contribute to furthering the normative understanding of rights under the UNCRC through the articulation of clear jurisprudence. A summary of the discussion surrounding these reasons is provided in the first report of the open-ended working group[13] with greater detail provided in the individual submissions to the working group, notably those of expert Peter Newell and the joint submission on behalf of NGOs.[14]

There are two clear objectives, however, which receive particular emphasis in the preamble to the Third Optional Protocol and which I argue are its primary objectives. The first, quite logically, is the provision of a remedy for children who have experienced a violation of their rights. This objective, which I refer to throughout this paper as the "justice objective", is the acknowledged purpose of all individual complaints mechanisms to human rights treaties. The central aim is the provision of a remedy to an aggrieved individual. The second objective, which receives less attention in the instrument's preamble, but which is still clearly visible, is the enhancement of national implementation of the UNCRC together with the two existing optional protocols.[15] I refer to this objective in the present paper as the "implementation objective". The intended outcome is clearly that jurisprudence will be developed by the CRC Committee, which will supplement the normative content of the UNCRC as articulated by the Committee through its state reporting function and in the publication of its General Comments. The new individual complaints mechanism therefore can be seen as the third limb in a tripartite strategy for developing an enhanced monitoring and implementation framework within international children's rights.

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[13] Report of the first session of the open-ended working group to explore the possibility of elaborating an optional protocol to the Convention on the Rights of the Child to provide a communications procedure (First Report of the working group), UN Doc A/HRC/13/43, 21 January 2010, with greater detail provided in the individual submissions to the working group, notably those of expert Peter Newell and the joint submission on behalf of NGOs

[14] The First Report of the working group and individual submissions are available at <http://www.ohchr.org/EN/HRBodies/HRC/WGCRC/Pages/OpenEndedWorkingGroupSession1.aspx> accessed 18 January 2015

[15] These are the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 25 May 2000, A/RES/54/263, and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, A/RES/54/263

What appears less clear, however, within the structure of the Third Optional Protocol itself is how the instrument is intended to function so as to maximise the potential for the achievement of its stated justice and implementation objectives. The instrument contains three distinct procedures. These are the "individual communications procedure",[16] the "inter-state procedure"17 and the "inquiry procedure".[18] The CRC Committee would appear, therefore, to have a range of procedural tools at its disposal in order to protect and promote children's rights.

But this is misleading. The inquiry procedure is only designed to be triggered in respect of "grave or systemic violations" and on the basis that the inter-state communications procedure has proved a resounding failure in the context of existing complaint mechanisms due to the almost universal unwillingness of states to use it, a logical observation is that the individual communications procedure will in fact form the strategic backbone regarding the achievement of the instrument's objectives. A procedural imbalance is therefore visible already within the Third Optional Protocol and a significant reliance would appear to have been placed on the performance of the individual communications mechanism. Accordingly, the individual complaints procedure will form the focus of the analysis for the present purposes, in respect of the two objectives described above.

C. Structure and form

The individual communication mechanism under the Third Optional Protocol is designed to allow children, acting either directly or through an adult representative, who allege a violation of one of their rights as contained in the UNCRC or one of the two existing optional protocols to complain of their violation to the CRC Committee. The intended scope of the instrument is therefore broad.

The individual complaints procedure of the Third Optional Protocol bears a close resemblance in content and in form to the existing complaints mechanisms of the core human rights treaties.[19] While progressive elements of the more recent UN

[16] n 5 at Article 5
[17] ibid at Article 12
[18] ibid at Article 13
[19] Egan n 12 at 3

treaty body complaints procedures have been accommodated, such as the "friendly settlement" procedure,[20] the foundation stone of the instrument remains the individual-centric justice model. This is built around the common admissibility criteria of the UN complaints mechanisms, which on their surface provide access to the committee for any individual who has suffered a violation of any right enshrined in the particular treaty and who has satisfied the necessary procedural steps, such as the exhaustion of domestic remedies. The Third Optional Protocol does not deviate substantively from this model and it is within this institutional framework that it seeks to achieve both the justice and implementation objectives.

III. CHALLENGES TO THE ACHIEVEMENT OF THE JUSTICE AND IMPLEMENTATION OBJECTIVE

The Third Optional Protocol has expanded the competency of the CRC Committee to receive individual complaints. In doing so, it has the potential to be an effective tool for the Committee in enhancing the international children's rights framework. The primary means through which the objectives of the Third Optional Protocol may be accomplished will be the new corpus of jurisprudence of the CRC Committee. The realisation of justice for individual claimants will depend in large part on the extent to which national legal orders acknowledge and follow the decisions of the CRC Committee. Similarly, the wider goal of enhanced implementation of the UNCRC may hinge on the characteristics of the new body of case law emanating from the CRC Committee as a result of the new individual complaints mechanism. The value added by such decisions in terms of legal precedent for national legal orders is likely to be affected by such issues as the quantity and quality of the CRC Committee's decision-making.

The following chapter provides a critical examination of the individual communications procedure, in light of significant challenges. These challenges are in reality

[20] This mirrors the Optional Protocol to the ICESCR in this regard, which entered in to force on 5 May 2013. See UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly*, 5 March 2009, A/RES/63/117 at Article 7

multidimensional, but have been partitioned according to dominant characteristics of a conceptual, normative, institutional or practical nature. By doing so, my aim is to provide a basic analytical framework through which to question fully the effectiveness of the new mechanism of the Third Optional Protocol as a tool for the protection and promotion of children's rights. The analysis penetrates beyond the design quality of the instrument, in order to explore broader issues of concern. Through this methodology, I hope to shed light on why the individual complaints mechanisms of the UN human rights framework may not have lived up to initial expectations and prepare a platform for discussion of their enhancement in the third and final chapter.

A. Conceptual challenges

Within the specific field of children's rights there is a need for conceptual clarity regarding theoretical approaches to children's issues. Whether or not the CRC Committee utilises the Third Optional Protocol to deliver this clarity may impact significantly on the quality of the Committee's jurisprudence.

Fortin describes the "considerable wealth of scholarship"[21] surrounding conceptual approaches to children, their issues and whether or not they have "rights". Without investigating the jurisprudential debate,[22] a discussion of which falls outside the scope of the present work, a number of basic observations may be made regarding the conceptual disconnect in children's rights. This conceptual divide centres on two prevailing schools of thought; the "welfare-based approach" and the "rights-based approach". The welfare-based approach, in simplified form, views children as passive beneficiaries in whose best interests adults have a moral obligation to act. As the overriding principle is obtaining the best outcome for the child, the views of the child may be discounted, notwithstanding her relatively evolved capacity. Alternatively, the rights-based approach recognises children as holders of unique claims and seeks to empower children in making these claims by respecting their dignity and autonomy.

[21] Fortin, *Children's Rights and the Developing Law* (3rd Edition, Cambridge, Cambridge University Press, 2009) 29

[22] For a detailed overview of this discussion see Freeman (ed.) *Children's Rights*, Volume 1, Dartmouth, 2004, in particular at Parts I and II, and Fortin, ibid., at chapter 1

Accordingly, the views of the child in such a conceptual framework are provided far greater weight.

Both theoretical approaches have their merits as well as their weaknesses. As O'Neill argues, the rights-based approach may overlook those 'imperfect obligations', which play a fundamental role in children's lives.[23] On the other hand, the welfare-based approach does not adequately accommodate for when relationships between adults and children are poor and may overlook "the asymmetry of relationships where rights, and therefore power, is on one side only".[24] The welfare-based approach is also open to criticism on the basis that it can lead to multiple outcomes due to the subjective nature of the decision-making process, leading to judicial inconsistency. As Baroness Hale has remarked in the United Kingdom context in connection with juvenile criminal behaviour, "one of the problems with a welfare-based approach is that children who have committed the same offence may be dealt with in different ways".[25]

A deficit with both approaches is that in cases which involve a conflict of rights and which require a discrete balancing exercise of competing claims and interests, they provide little guidance on where the fulcrum should be located. Thus, while these approaches serve "as different lenses on the legal regulation of children's lives",[26] neither approach has been shown evidentially to produce automatically better outcomes for children.[27] The exploration of theoretical approaches to children's rights therefore remains valid.

Unfortunately, the UN has made a committed "paradigmatic shift"[28] towards the rights-based approach, but without conducting the requisite conceptual analysis needed to explain why this is so important within the international children's rights

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[23] O'Neill, 'Children's Rights and Children's Lives' (1988) 98 *Ethics* 445, at 461

[24] Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 International Journal of Children's Rights 5, at 19

[25] *R (on the application of R) v. Durham Constabulary and another* [2005] UKHL 21, per Hale LJ at paragraph 31

[26] Ferguson, 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights' (2013) 21 International Journal of Children's Rights 177, at 201

[27] ibid at 205

[28] UN Committee on the Rights of the Child (CRC), *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, in particular at paragraphs 3(b), 13 and 59, available at: <http://www.refworld.org/docid/4e6da4922.html> accessed 18 January 2015

legal framework. In attempting to cement the paradigmatic shift away from a welfare-based approach to a rights-centric one, the CRC Committee has used absolutist language. Thus, in General Comment 13, the Committee states that "strategies and systems to prevent and respond to violence *must* therefore adopt a child rights rather than a welfare approach".[29]

Similarly, in General Comment 14, the Committee delimits in strict terms the scope of the welfare approach, stating that: "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention." It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests.[30]

There are three core problems created by such an absolutist position. Firstly, without demonstrating solid evidential analysis for such a position, the CRC Committee has given official backing to one conceptual approach over the other. In a highly specialised field of international human rights law, this omits adequate attention to the all-important question of *why* such an approach is the preferential one. Secondly, the universal application of a particular theoretical approach in preference to another is counter-desirable. As discussed above, there is no singular concept to children's rights, which adequately provides the flexibility necessary to encompass the diversity and complexity of children's rights. Taken literally, the aforementioned extract from General Comment 14 could operate to prevent a parent from having her child treated against the child's wishes. In certain situations this may be the right decision on the facts, but in other situations it may not be. Because the paradigmatic shift of the UN to the rights-based approach regarding children is not underpinned with sound evidential analysis, it lacks credibility. Thirdly, the CRC Committee has arguably 'muddied the waters' further still by actually *conflating* the two concepts. Frequent reference is made to the "best interests of the child" within the context of a rights based approach.

[29] ibid at paragraph 13 (emphasis added)

[30] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken a s a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, at paragraph 4

There is clear potential for this to cause confusion within national and regional legal orders.

In failing to undertake a serious theoretical investigation regarding conceptual approaches, the CRC Committee has potentially made a 'rod for its own back'. When it comes to the production of jurisprudence under the Third Optional Protocol, the CRC Committee may be confronted with a real challenge regarding the adjudication of alleged violations of the UNCRC. Should the Committee maintain its own inflexible dogma or should it endeavour to afford greater flexibility to the interpretation of legal obligations in respect of children's rights? Legal and policy frameworks, which fail to recognise and accommodate the flexibility needed to resolve natural conflicts within and between rights, risk becoming inherently rhetorical, as noted by Greer[31] regarding the ECt.HR's failure to reconcile the conflict between a kidnapped child's right to life and a kidnapper's "absolute" right not to be threatened with torture, in his comment on the case of *Gäfgen.*[32] The obvious danger is that unless national legal orders value the judgements of the CRC Committee, as part of its new institutional mandate, the decisions are unlikely to have impact at the domestic level and thus pose a challenge to enhance implementation of the UNCRC and raise protection standards in the domestic setting.

B. Normative challenges

Within the context of the UNCRC itself, the "normative imprecision" concerning the content of certain rights, and the elaboration of this content by the CRC Committee, is problematic. Related to this internal challenge, is the external dimension of how the UNCRC is perceived as a normative framework within the context of national legal orders, including developed regional frameworks such as the Council of Europe.

[31] Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the *Gäfgen* Case' 11 Human Rights Law Review (2011) 67, at 78
[32] *Gäfgen v. Germany* (2010), 52 EHRR 1

1. Normative imprecision

The rights contained in the UNCRC vary considerably in terms of how they have been articulated within the text. Certain rights appear clear, whereas others require far greater levels of explanation. The fact that the provisions of a treaty require interpretation is normal. Treaties are often highly complex legal agreements and for the sake of brevity usually omit the finer details regarding substantive terms. The established mechanism for providing such interpretation of the UNCRC is the General Comments function of the CRC Committee. But the major normative problem with the UNCRC is that certain provisions, notably those of a socio-economic character, require more than just interpretation.

Thus, for example, Article 6 UNCRC states that "States Parties shall ensure to the maximum extent possible the survival and development of the child".[33] No further elaboration is provided in the UNCRC text itself and the potential standard here, together with associated cost implications, is enormous. Similarly, Article 24 UNCRC refers to the child's right to the "highest attainable standard of health".[34] The potential standard is again high, but Article 24 does go on to provide focus areas of healthcare as an informative guide to States Parties in the implementation of their objectives. The supportive language, however, is weak and provides a vague contextualisation of the high initial normative standard. The utilisation of phrases such as "shall pursue"[35] and "with a view to achieving progressively"[36] substantially diminish the normative content of the rights in question by bringing into doubt the precise obligations of the State Party.

The key follow-up problem is of course how rights-holders could enforce such rights, in light of such normative ambiguity. The potential solution to this problem also lies in the General Comments of the CRC Committee.

Regrettably, this function does not appear to have been put to good use in respect of children's socio-economic rights. As Nolan comments, the Committee has

[33] n 4 at Article 6(2)
[34] ibid. at Article 24(1)
[35] ibid at Article 24(2)
[36] ibid at Article 24(4)

failed in its duties in two clear respects.[37] Firstly, there is a notable absence of General Comments on fundamental socio-economic rights. This is disconcerting when one considers the textual ambiguity of certain rights in the UNCRC, discussed above, and the blatant need for clarification on the precise scope of relevant standards. Article 6 UNCRC, which codifies the fundamental right for children to survive and develop, has not been made the exclusive subject of a General Comment and the reference to Article 6 at paragraph 10 of General Comment 7[38] is general and largely descriptive. Secondly, the Committee has replicated key normative principles articulated by the Committee on Economic, Social and Cultural Rights (hereinafter "ComESCR"), the treaty body of the ICESCR, by not engaging directly with economic, social and cultural rights through a child rights-specific lens. Nolan explains how the CRC Committee's affirmation of the "progressive realisation" principle in the context of Article 4 UNCRC "has failed adequately to acknowledge and address the difference in language (and hence potentially in content) between Article 2(1) ICESCR and Article 4 CRC".[39]

The failings of the CRC Committee in regard to the elaboration of socio-economic rights may be contrasted with the stance taken on certain rights of a civil and political character. Thus, for example, while the UNCRC is silent on the issue of corporal punishment, General Comment 8 provides a detailed elaboration of how the phenomenon may violate a child's rights[40] and calls for its specific prohibition in national legislation.[41] General Comment 13 builds on this in providing clarification that corporal punishment falls within the definitions of both "physical violence"[42] and "harmful practices".[43] From a normative standpoint, the work of the Committee in

[37] Nolan, 'Economic and Social Rights, Budgets and the Convention on the Rights of the Child' (2013) 21 International Journal of Children's Rights 248, at 254

[38] UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev 1

[39] ibid at 261

[40] UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8, at Part IV

[41] ibid at paragraph 34

[42] n 28 at paragraph 22(a)

[43] ibid at paragraph 29(a)

this context is significant. The Committee makes clear in General Comment 8, regarding the absence of discussion on the issue of corporal punishment within the *travaux préparatoires* to the UNCRC,[44] that the articulation by the Committee on the issue of corporal punishment is based on the treaty being a "living instrument".[45] In this context the work of the Committee goes beyond interpretation into the realm of normative advancement. While this may be controversial, bearing in mind that legal obligations that were carefully negotiated by states are being altered without their input and agreement, it is also necessary in order to ensure the continual normative validity of the Convention and the rights contained therein.

The failure by the CRC Committee to adequately elaborate economic, social and cultural rights, in contrast to its active normative work in connection with civil and political rights, results in the appearance of an implicit prioritisation of civil and political rights over those of an economic and social character.[46] The core challenge, which is likely to confront the CRC Committee when it begins receiving individual communications under the Third Optional Protocol, will be how to adjudicate on such rights. Langford exemplifies national court decisions as evidence that socio-economic rights are indeed enforceable,[47] but in the context of the imprecise standards of the UNCRC, reaching sound determinations on the extent of legal obligations may be problematic. For the jurisprudence of the CRC Committee to warrant inclusion in national legal orders, thereby advancing protection standards for children and promoting domestic implementation of the UNCRC, decisions will need to evidence clear normative content, underpinned by solid legal analysis. The provision of effective remedies and clear jurisprudence may therefore require the Committee to engage progressively with technical and politically sensitive issues, including national budgetary allocations.

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[44] n 40 at paragraph 20

[45] ibid

[46] Khadka, 'Social rights and the United Nations – Child Rights Convention (UN-CRC): Is the CRC a help or hindrance for developing universal and egalitarian social policies for children's wellbeing in the 'developing world'?' (2013) 22(1) International Journal of Children's Rights 616, at 619

[47] Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 11 International Journal on Human Rights at 91

2. Normative significance

The second issue of a normative character, which may become problematic for the CRC Committee in connection with its work under the Third Optional Protocol, concerns the level of judicial deference afforded to the UNCRC within national and regional legal orders.

The UNCRC is celebrated as the most widely ratified of all UN human rights treaties.[48] Despite this impressive fact, the actual normative impact of the UNCRC within national legal orders varies considerably. The issue of non-domestication, whereby dualist legal systems such as the United Kingdom (hereinafter "UK"), Sweden and Australia, are yet to enact the necessary legislation required to enable the provisions of the UNCRC to be enforced in national courts, is an obvious challenge in this regard. A 2008 study conducted by UNICEF has noted that civil law countries "are more likely than common law countries to incorporate the CRC directly into national law",[49] a finding which may be attributable to the high proportion of monist legal systems among jurisdictions of a civil law character, which allow for automatic incorporation of international treaties within the respective domestic legal order.

Domestication is clearly a significant barrier to the potential for the UNCRC to have a real normative impact within national courts and rightly forms an important component of the CRC Committee's official guidance on implementation.[50] The issue of normative significance is sophisticated and goes beyond whether or not the UNCRC

[48] The UNCRC currently has 194 States Parties, United Nations Treaty Collection, available online at <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en> accessed 18 January 2015

[49] Innocenti Research Centre, 'Law Reform and Implementation of the Convention on the Rights of the Child', UNICEF, 2008, at 104, available at <http://www.unicef-irc.org/publications/493> accessed 18 January 2015

[50] UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003), General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, in particular at paragraphs 18 – 25, available at <http://www.refworld.org/docid/4538834f11.html> accessed 18 January 2015

has domestic effect from a technical perspective. The UNICEF study reveals that several countries, while domesticating the UNCRC, have placed its legal standards at a similar or lesser level than that occupied by existing national legislation.[51]

The CRC Committee acknowledges, tacitly at least, the complexity of the challenge posed by normative significance. Thus, it recommends the systematic review of national legislation to ensure full complementarity with the international norms enshrined in the UNCRC, in addition to making the Convention directly enforceable in national courts. But the fact remains that the task of domestic harmonisation is complex, time-consuming and expensive, and may result in normative conflict in certain jurisdictions. In Tanzania, for example, Doek notes how the age of lawful marriage is fifteen in accordance with the Law of Marriage Act 1971, but the age of sexual consent is eighteen in accordance with the Sexual Offences Special Provision Act 1998,[52] resulting in blatant normative conflict at the national level.

Considerable normative significance may still be attributed to the content of the UNCRC, even in non-domesticated settings where the adoption of enabling legislation is yet to occur. The problem, however, is that the normative significance attributed to the UNCRC by judges in national legal orders varies considerably, not just between States, but within individual jurisdictions and even within individual courts. This point is exemplified by two Australian High Court cases. In *Teoh*[53] considerable reliance was placed by the Court on the fact of Australia's ratification of the UNCRC[54] as support for the majority's finding that a "legitimate expectation" had been created that the best interests of the child would be considered in the administrative decision-making process.[55] This analysis was then subsequently rejected by the same court in

[51] n 49 at 5

[52] Doek, 'In the Best Interests of the Child: Harmonising laws in Eastern and Southern Africa' (2007) The African Child Policy Forum 4, available at <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Harmonising-Laws-on-Children-in-eastern-and-southern-Africa.pdf> accessed 18 January 2015

[53] *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 128 ALR 353

[54] ibid at paragraphs 25 – 42

[55] ibid at paragraph 22

Lam,[56] which held that while the UNCRC could indeed be utilised to resolve an ambiguity with a domestic statute, the mere fact of Australia's ratification could not operate regarding the "development of some existing principle of the common law".[57] Similarly, in the UK context, there are numerous cases where the UNCRC has been referenced as an appropriate source of international legal standards for children's rights. The judgements of Baroness Hale, in particular, reveal a progressive attitude towards viewing legal issues through a lens of children's rights[58] and in so doing, help to embed the normative relevance of the UNCRC within the national legal order of the UK. But there are numerous other judges within the higher courts of the UK who do not display the same willingness to regard the UNCRC as a paramount normative framework within children's rights and it may be appropriate to distinguish Hale LJ's opinions from a broader judicial approach.

The lack of clarity regarding the normative weight of the UNCRC has also been visible within the context of the most advanced regional human rights framework, the European Convention on Human Rights[59] (hereinafter "ECHR"). While several authors have extolled the virtues of the ECHR concerning complementarity with the UNCRC,[60] the jurisprudence of the ECt.HR reveals a discernable hesitancy in this regard. Technically, the ECt.HR has no remit whatsoever to look beyond the substantive content of the ECHR by referencing the standards embodied in the

[56] *Minister for Immigration and Multicultural Affairs ex parte Lam* [2003] HCA 6, at paragraph 101, per McHugh and Gummow JJ and at paragraph 147 per Callinan J

[57] ibid at paragraph 29

[58] *R (on the application of Williamson and others) v. Secretary of State for Education and Employment and others* [2005] UKHL 15, at paragraph 71 regarding Baroness Hale's re-framing the issues from a child rights perspective and at paragraphs 80-84 in her referencing the UNCRC as the applicable normative source; *R (on the application of R) v. Durham Constabulary and another* [2005] UKHL 21, at paragraph 26 concerning Baroness Hale's confirmation that the UNCRC ought to be taken into account when interpreting national law

[59] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

[60] See, in particular, Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 Human Rights Quarterly 308, at 326 and Fortin, 'Rights Brought Home for Children' (1990) 62 Modern Law Review 350, at 359

UNCRC in interpreting the obligations of the Contracting Parties, as to do so would be *ultra vires*, creating for the UNCRC a "right of petition through the back-door".[61]

However, within the specified mandate of the ECt.HR, there would appear to be adequate space for the norms of the UNCRC to inform the Court's approach to the elaboration of ECHR provisions as they impact on and affect children. The present paper does not provide sufficient scope for a full survey of the child-related jurisprudence of the ECt.HR, but the litmus test regarding assessing the weight attributed by the ECt.HR to the norms of the UNCRC is revealed where the ECt.HR has decided on matters which have already been considered by the UNCRC. In such circumstances, does the normative content of the UNCRC, as elaborated by the CRC Committee, inform decision-making by the ECt.HR? The Court's treatment of corporal punishment would suggest not. Indeed, significant divergence exists between the position taken by the ECt.HR and that taken by the CRC Committee in this regard. Thus, while the CRC Committee has established that corporal punishment constitutes "physical violence"[62] and a violation of a child's right not to be subjected to inhuman or degrading treatment or punishment,[63] the ECt.HR has rejected bringing this phenomenon within the ambit of Article 3 of the ECHR, notwithstanding the firm policy drive of the Council of Europe in this direction.[64] In the case of *A v the United Kingdom*,[65] which involved a young boy who was severely beaten by his stepfather, the reference to Articles 19 and 37 of the UNCRC at paragraph 22 of the judgement is cursory and no attempt is made to elaborate on the normative standards set out in the UNCRC regarding the protection of children from violence and abuse.

So while reference to the UNCRC frequently appears in the case law of the ECt.HR,[66] this appears indicative of good judicial etiquette rather than evidence of a meaningful reliance on the normative content of the UNCRC. For this reason, Van

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[61] Van Bueren, *Child Rights in Europe*, Council of Europe Publishing, Strasbourg, 2007 at 19

[62] n 42

[63] n 40 at paragraph 18, n 26 at paragraph 22 (a)

[64] Council of Europe, 'Raise your hand against smacking', available at: http://www.coe.int/t/dg3/children/corporalpunishment/default_en.asp accessed 18 January 2015

[65] Application 25599/94, Council of Europe, 23 September 1998

[66] Lyon, 'Interrogating the Concentration on the UNCRC Instead of the ECHR in the Development of Children's Rights in England?' (2007) 21 Children & Society 147, at 150

Bueren is correct to delimit the normative significance of *Sahin v Germany*,[67] where the ECt.HR affirmed the substantive provisions of the UNCRC as "the standards to which all States must aspire",[68] on the basis that "the Court was only establishing an aspirational goal and not a jurisdictional expansion".[69]

The risk posed by such a challenge to the CRC Committee, in light of the specific objectives of the Third Optional Protocol regarding justice and implementation, is that its decisions may not be treated with a sufficient degree of respect. The evolution of strong judicial precedent in international children's rights under the Third Optional Protocol to the UNCRC requires national legal orders to give appropriate normative significance to the determinations of the CRC Committee. A failure to do so may render the new mechanism far less effective.

C. Institutional and practical challenges

The Third Optional Protocol seeks to achieve two objectives; the provision of remedies for victims of violations of children's rights and enhanced national implementation of the UNCRC. There is an implicit assumption within the Third Optional Protocol that the work of the CRC Committee in the context of receiving and deciding upon individual communications is capable of realising both of these objectives. But is the delivery of justice even possible? In the event that it is, can it be mutually compatible with the objective to enhance implementation of the UNCRC? The following chapter considers how the institutional design of the new mechanism, together with other practical challenges, may actually hamper the work of the CRC Committee in this regard.

1. Access to the procedure

States Parties to UN human rights treaties on the whole demonstrate a casual engagement with the various treaty bodies. This problem afflicts all UN treaty bodies,

[67] (2004) 38 EHRR 736
[68] ibid at paragraph 39
[69] n 61 at 18

including the CRC Committee. As Hathaway notes in her empirical evaluation of human rights treaty ratification,[70] states ratify treaties for different reasons and one such reason, the principle of *pacta sunt servanda*[71] notwithstanding, may be to accumulate political capital through the very process of ratification.[72]

The individual complaints mechanism under the Third Optional Protocol requires states to ratify the new instrument before it will become effective in their respective jurisdiction.[73] For children to have access to the procedure, states must engage formally with the process. Smith notes how "of the world's most populous countries, China, India, Indonesia and the United States of America generally do not accept individual communication mechanisms for treaties to which they are a party".[74]

But for the instrument to work effectively as a mechanism for victims of child rights, there must also be substantive engagement with the process. The engagement of states with the state reporting procedure of the UN treaty bodies has thus far lacked this substantive character. This is manifested in the late submission of state party reports, the subject of which has formed the centre of gravity of recent efforts on behalf of the UN Secretary-General[75] and UN High Commissioner for Human Rights[76] to reform and enhance the treaty body system. But while Pillay's observation that "only 16% of the reports due in 2010 and 2011 were submitted in strict accordance with the due dates established in the treaties or by the treaty bodies"[77] may indicate a relaxed commitment by states to the UN treaty bodies, the simple fact is that the UN treaty bodies would be unable to cope in the event that most States Parties submitted reports

[70] Hathaway, 'Do Human Rights Treaties Make a Difference' (2001-2002) 111 Yale Law Journal 1935

[71] The Latin maxim, which translates as 'agreements must be kept' has been codified by Article 26 of the Vienna Convention on the Law of Treaties 1969

[72] n 70 at 1341

[73] n 5 at Article 1(3)

[74] Smith, 'The Third Optional Protocol to the UN Convention on the Rights of the Child? – Challenges Arising Transforming the Rhetoric into Reality' (2013) 21 International Journal of Children's Rights 305 at 312

[75] Ban, 'Measures to improve further the effectiveness, harmonization and reform of the treaty body system', Report of the Secretary-General, UN Doc. A/66/344, 7 September 2011

[76] Pillay, 'Strengthening the United Nations human rights treaty body system', June 2012, available at <http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf> accessed 18 January 2015

[77] ibid at 21

on time. This is evidenced by the substantial backlog of reports and individual communications currently pending.[78]

The capacity constraints of time and resources ensure that UN treaty bodies have the opportunity to consider no more than a few hundred complaints annually. This is broadly confirmed by the 2011 statistics, which show that on average treaty bodies reviewed 320 state party reports, but reached just 120 decisions on individual communications.[79] Perhaps, this is not wholly surprising considering the relatively low financial investment, which the UN makes towards the support of the UN treaty bodies. Of the $448.1 million, which the Office of the High Commissioner for Human Rights (hereinafter "OHCHR") itemised in its 2012-13 Management Plan,[80] just under $30 million had been earmarked for "supporting the Human Rights Treaty Bodies".[81] This investment relates to all UN treaty bodies, in respect of *both* their state reporting function and, if applicable, their capacity to receive individual complaints. By contrast, the budget for the ECt.HR, which in 2012 enjoyed a markedly higher output of 1,093 judgments,[82] was just under $90 million.[83]

The CRC Committee may not be able to receive and decide on applications in a timely manner. As at 1 February 2012, cases before the Human Rights Committee took on average three and a half years from the date of registration until the date when a decision was reached.[84] A key point is that, from a practical perspective, international complaints mechanisms will always be seriously challenged to deliver effective justice to individuals. This issue may be especially problematic for victims of child rights,

[78] ibid at 19. Pillay's report confirms that in 2012 there were 214 state party reports and 478 individual communications pending consideration by UN treaty bodies

[79] ibid

[80] OHCHR Management Plan (OMP) 2012-2013, at 97, available at <http://www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_mp_2012_2013_web_en/index.html#/home> accessed 18 January 2015

[81] ibid at 98

[82] Council of Europe, European Court of Human Rights Annual Report 2012, at 73, available at: <http://www.echr.coe.int/Documents/Annual_report_2012_ENG.pdf> accessed 18 January 2015

[83] Council of Europe, Programme and Budget 2012-13, at Table 1, available at <https://wcd.coe.int/ViewDoc.jsp?id=1888543&Site=CM> accessed 18 January 2015

[84] n 76 at 19

when one considers the "temporality of childhood".[85] If the time taken to exhaust domestic remedies, which is one of the admissibility criteria for the new mechanism, is factored in to the equation, it becomes difficult to view the Third Optional Protocol as being capable of delivering justice for adolescent applicants, in particular, giving credibility to O'Neill's often-cited comment that the main remedy for children "is to grow up".[86]

These obvious practical limitations, outlined above, have the potential to impact negatively on both the justice and the implementation objectives of the Third Optional Protocol. Children who experience a rights violation in the jurisdiction of a state where the Third Optional Protocol is not effective will have no access whatsoever to the CRC Committee. Victims seeking to complain of a violation relating to a state which has ratified the new instrument will still face the challenge of resource constraints within the UN treaty body system. Bearing in mind these logical constraints, it is somewhat surprising that the individual complaints mechanism under the Third Optional Protocol replicates the institutionalised format of existing UN procedures so closely. The CRC Committee is likely to be operating in a context of hundreds rather than thousands of decisions each year. But the design of the instrument's admissibility criteria,[87] as with existing complaints mechanisms, is largely procedural not substantive. The communications procedure is open to all and every victim of a violation of children's rights, provided that the admissibility criteria have been satisfied.

The absence of an institutionalised quality control measure built into the Third Optional Protocol obstructs the CRC Committee in prioritising those complaints, which relate to serious constitutional deficits within national legal orders, versus those complaints, which may be of less significance in the broader sense. Considering the crucial nature of the CRC Committee's jurisprudence as its main strategic mechanism for achieving the enhanced domestic implementation of the UNCRC within national

[85] Langford and Clark, 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child' (2010) Working Paper No.1, Socio-Economic Rights Programme, Norwegian Centre for Human Rights 20

[86] n 23 at 463

[87] n 5 at Article 7

legal orders, this may constitute a serious challenge and reduce the effectiveness of the new procedure.

2. Utilising the new procedure

Litigation is inherently complex. This is particularly so in regard to children's rights, which may require specially trained lawyers who are capable of handling children's claims in a delicate, but legally sophisticated way. Appell explains how due to the fact that "children are not able to direct their lawyers as forcefully or coherently as adults, lawyers for children should exercise extra care and special strategies to ascertain children's needs and wishes, such as viewing children through multiple lenses".[88] Representing children and capacitating children to represent themselves requires experience and a range of skills. As Smith comments, a "more strategic, child centred approach to children's rights is necessary when it comes to complaints to national and international bodies to ensure the best interests of the child are adequately represented".[89] The point is that children's rights litigation is a bespoke aspect of legal work and utilising the new complaints mechanism, which has the essential characteristics of a litigious process, is going to require specialist legal assistance.

The provision of such specialist assistance will be necessary on an individual level, regarding assistance to applicants, but may also be required on an institutional level. A positive feature of the Third Optional Protocol is its explicit reference to international assistance and cooperation,[90] which recognises that the new procedure will not operate in a vacuum, and implicit request for institutional support. Specialised institutions, such as a children's ombudsperson or commissioner, may possess a mandate to receive individual complaints on behalf of children already.[91] Accordingly, they may be well situated to extend their function in this regard to encompass the provision of

[88] Appell, 'Children's Voice and Justice: Lawyering for Children in the Twenty-First Century', (2005-2006) 6 Nevada Law Journal 692, at 695

[89] n 74 at 306

[90] n 5 at Article 15

[91] For an overview of the functions of different models of ombudsman regarding children's rights, see Reif, 'The Ombudsman and the Protection of Children's Rights' 17 *Asia Pacific Law Review* (2009) 27

technical guidance to would-be claimants under the Third Optional Protocol. Alternatively, National Human Rights Institutions (hereinafter "NHRIs") and NGOs may also be well positioned to disseminate guidance to child claimants and their representatives.

Providing technical support to national legal systems, however, is likely to require a far stronger institutional presence. Because utilisation of the new complaints mechanism necessitates involving children either directly or indirectly in national litigation in the first instance, in accordance with the admissibility criteria, adjustments may be required at the domestic level. In particular, it may be necessary to make existing litigation routes to national courts more child-friendly and lawyers acting on behalf of children may require special training and technical assistance. Presently, there does not appear to be a singular UN agency equipped to carry out such a task. The UN Children's Agency (UNICEF) enjoys both the specialised mandate regarding children and a strong country presence. But supporting child rights litigants, for example through *amicus curiae*[92] interventions in national courts, is a highly specialised activity and requires teams of experienced and highly skilled lawyers. The UN High Commissioner for Refugees (hereinafter "UNHCR"), for example, possesses a specialist legal team in its Geneva Headquarters, which provides technical assistance to lawyers working on behalf of refugees in domestic litigation proceedings.[93] OHCHR, on the other hand, while noticeably expanding its in-house expertise on children's rights, has a broader protection-oriented focus and may also currently lack the requisite capacity to underpin the Third Optional Protocol with solid technical support. Making the Third Optional Protocol most effective may require a cross-institutional approach and any mandate extensions of specialist UN agencies should form part of a considered strategy.

[92] Latin, literally meaning 'friend of the court', see Cornell University Legal Information Institute, available online at <http://www.law.cornell.edu/wex/amicus_curiae> accessed 18 January 2015

[93] Information on UNHCR's work on legal protection is available online at: <http://www.unhcr.org/pages/49c3646cce.html> accessed 18 January 2015

IV. A MITIGATION STRATEGY FOR THE CRC COMMITTEE

The analysis thus far has included a description of the primary objectives of the Third Optional Protocol and a review of some of the major challenges to the attainment of those objectives. Many of these issues of course impact far more widely than the new communication procedure itself, or even the entire international children's rights framework. Beyond encouraging States Parties to ratify the new protocol, the CRC Committee can do little to tackle issues such as state engagement and direct access, for example. Likewise, the Committee is unlikely to be able to alter radically the existing resources of the UN treaty bodies. These are challenges of a formal dynamic, the mitigation of which may be extremely difficult. Other challenges may be summarised as being of an impact dynamic. These would include the normative imprecision of the UNCRC, the lack of conceptual clarity within children's rights, and the normative location of the UNCRC within national legal orders. Challenges of this nature have the potential to affect the core outcome of the CRC Committee regarding the Third Optional Protocol; the Committee's jurisprudence. Depending on *how* the Committee develops its jurisprudence, it may be possible to mitigate effectively against the dangers posed by such issues. The central premise is that the evolution of clear jurisprudence, underpinned by sound legal reasoning, which addresses key issues in children's rights substantively, is the most effective way for the Third Optional Protocol to be used by the CRC Committee.

The following chapter sets out a mitigation strategy with which the CRC Committee can enhance the effectiveness of its jurisprudence under the Third Optional Protocol and reduce the negative impact of some of these major challenges. This entails a significant re-conceptualisation of the role of the individual within the UN treaty body system, as part of a constitutional justice approach towards the new complaints mechanism.

A. "Constitutional Justice Approach" to the work of the CRC Committee

At the conceptual heart of the constitutional justice approach lies the notion that complaint mechanisms should prioritise issues, such as deficits in national legislation and policy, which may relate to problems of a constitutional character within national legal orders. The individual remains important as a conduit through which applications are made to the Committee. The delivery of remedies to individuals becomes the means, rather than an end in itself, and incentivises individuals to make applications. The rationale of such an approach, which builds heavily on the analytical framework with which Greer has viewed problems with the ECt.HR,[94] is that it accepts the real limitations of the system.

A major point is that, in a context where the CRC Committee has the opportunity to determine no more than a few hundred applications each year, it is imperative that these decisions are useful for national legal orders. To be of most use, the case law must focus on deficits within national children's rights frameworks, thereby helping to strengthen the very legal systems through which children realise their rights. Not only do cases of a constitutional character potentially impact on much larger numbers of children, owing to the possibility that others may experience a similar violation of the same deficit in the system, but they provide clear guidance across multiple jurisdictions. The 2005 decision by the Committee Against Torture in the case of *Agiza v Sweden*,[95] and the subsequent case before the Human Rights Committee of *Alzery v Sweden*[96] for example, sent a clear message to the nations of Europe that participation in CIA rendition programmes was unlawful and constituted a grave violation of human rights.[97]

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[94] Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (Cambridge, 2006). See also, Greer and Williams, 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?' (2009) 15 European Law Journal 462; Greer and Wildhaber, 'Revisiting the Debate about 'constitutionalising' the European Court of Human Rights' (2013) 12 Human Rights Law Review 655

[95] *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, CAT/C/34/D/233/2003 (2005) 12 IHRR 958 (2005)

[96] *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005 (2006); 14 IHRR 341 (2006)

[97] Izumo, 'Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence' (2010-2011) 42 Columbia Human Rights Law Review 233, at 241

In the context of children's rights, a constitutional justice approach to the work of the CRC Committee under the Third Optional Protocol implies a focus on applications relating to a serious flaw in a domestic system. This may call for the prioritisation of cases which are less serious from a factual perspective, but which retain a strong focus on the system, over those applications which involve grave violations from a factual perspective, but where no systemic deficit has been suggested.

The delineation between applications in this manner is a delicate process and is, perhaps, best articulated by reference to the case law of the ECt.HR. The case of *Osman v United Kingdom*[98] involved a child who received unwanted attention from a teacher at his school. While reasonable steps were taken by relevant authorities to protect the child from harm, the teacher had in fact developed a dangerous fascination with the child and ultimately shot both the boy and his father in their family home. The child survived, but the father died. Factually speaking, the case involved a harrowing ordeal for the child in question. But the core argument of the applicant was not that the system was deficient as such, but that it had been misapplied on the facts. *Osman* argued that the police, and therefore the UK state, was on notice of the threat posed by the child's teacher and that the resultant harm was foreseeable. The ECt.HR, however, found no violation of the State's operational duty within the scope of its positive substantive obligation regarding either the right to life under Article 2 ECHR or the right to private and family life under Article 8 ECHR.[99] The police were unable to arrest the child's teacher in the absence of evidence of criminal wrongdoing. The system, which was designed to protect *Osman*, was also designed to protect the rights of his teacher against arbitrary imprisonment and false arrest. Implicit in the decision is the recognition that systems are imperfect. The fact that a tragic event had undoubtedly occurred did not equate to a rights violation and was not necessarily indicative of a deficit within the UK's national legal system. By contrast, *Costello-Roberts v United Kingdom*[100] involved the administration of a relatively modest form of corporal punishment to a child at a private school in the UK. The focal point of the application was

[98] *Osman v. The United Kingdom* (2000); 29 EHRR 245

[99] By a majority of seventeen votes to three, ibid. at 48

[100] *Costello-Roberts v. The United Kingdom* (1994); 19 EHRR 112

the UK legal system and the alleged deficiency regarding the fact that corporal punishment was lawful in private schools. The applicant claimed that such treatment amounted to inhuman or degrading treatment or punishment, contrary to Article 3 ECHR. The constitutional character of the case provided an entry point for the ECt.HR to go beyond consideration of the facts and engage in a more discursive consideration of the extent of state obligations. While on the facts, the ECt.HR found no violation of Article 3, it did establish "for the first time that the state could be held responsible for breaches of the ECHR which occur in the private sphere".[101]

The constitutional justice approach embraces the technical limitations of the UN treaty-based system, including the absence of strong enforcement machinery. This explains, from a factual perspective, why existing UN complaints mechanisms already function on a platform of constitutionalised approaches to justice. The non-binding nature of treaty body decisions means that "justice" can never actually be dispensed to an individual directly through an individual complaints mechanism. Whether or not a state party found to be in violation of a particular UN human rights treaty adopts the recommendations of the respective Committee, such as the payment of reparations to the aggrieved individual, is ultimately a decision for the respondent state. Similarly, where an effective remedy requires the repeal or amendment of national legislation, this will be a decision for the state. Mr. Toonen's right to enjoy a same-sex relationship was not altered by the decision of the Human Rights Committee.[102] From a justice perspective, the denial of his human rights remained the same until the Australian government took appropriate steps within their national legal order.

A constitutional justice approach therefore promotes a paradigmatic shift away from individual-centric models of complaint to those which place the national legal framework in a more central location of critical review. In the context of the Third Optional Protocol, it would lead the CRC Committee away from providing justice in an individual sense, to the promotion of justice in the constitutional sense and would prioritise the implementation objective. But this shift in approach may not be as radical as it appears. If the above analysis is correct, in terms of the resource and technical

[101] Kilkelly n 60 at 316

[102] *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994

limitations of the UN treaty body system, and if factually speaking, existing mechanisms are indeed working already on such an approach, albeit tacitly, then embracing such an approach within the CRC Committee would appear logical, sensible and in the best interests of children.

B. Entry points for a constitutional justice approach within the Third Optional Protocol

The implementation of a constitutional justice approach to the work of the CRC Committee relating to the individual complaints procedure of the Third Optional Protocol would require certain adjustments to be made. Ideally, these adjustments would be of both a formal and an operative character.

Firstly, the admissibility criteria under Article 7 of the Third Optional Protocol would need to be re-considered, in order to provide the CRC Committee with greater control over its caseload, so as to enable the prioritisation of certain cases. The formal amendment of the complaints mechanism to make express provision of a 'leapfrogging process' regarding the accelerated consideration of particular applications by the CRC Committee would be optimal from an equality and transparency perspective. If a shift towards a constitutional justice approach is made, it is in the interests of all participants in the complaint process to be aware of such a development. This would allow applicants to plan for the contingency that their case is not heard in accordance with the original time frame. While a formal amendment to the admissibility criteria may be optimal, it may also be highly unpopular in the circumstances. Following the recent drafting process and coming into force of the instrument, it may be something of an embarrassment to acknowledge so openly that the instrument requires amendment for it to have full effect. Such an acknowledgement would be tantamount to an admission of getting it wrong first time, and in any event the official amendment of the protocol would require state involvement in the negotiation process and no doubt take considerable time.

However, provided that agreement can be reached on the validity of a constitutional justice approach as a way to enhance the effectiveness of the new complaints procedure, there may be scope to inject a stronger degree of control over the inflow

of cases without formally amending the instrument. In accordance with Rule 17 of the Rules of Procedure,[103] the CRC Committee may decide to depart from the standard procedure that communications will be considered in the order in which they arrive if "the Committee decides otherwise, having regard, inter alia, to the urgency of the issues raised".[104] The rules do not elaborate further on what factors would permit the departure from the standard procedure, but there would appear sufficient room in which to prioritise those complaints, which potentially identify major structural deficiencies within the framework of national legal orders. It is regrettable from a constitutional justice standpoint that the notion of a "collective complaints" procedure did not prove more popular during the drafting process of the Third Optional Protocol.[105] Applications of a constitutional character will automatically lend themselves to forming the basis of collective complaints, owing to the potential for the alleged deficit within the domestic framework to impact on multiple children. The express incorporation of such a mechanism would, therefore, have permitted the CRC Committee to encourage NHRIs, ombudspersons and other organisations working in children's rights, such as national and international NGOs, to frame constitutional issues collectively and thereby have consideration of their applications accelerated.

The inquiry procedure for grave or systematic violations[106] of children's rights may also offer limited scope for the adoption of a constitutional justice system. In theory at least, the most serious apparent deficits in national legal orders may be interpreted as possessing the necessary "grave or systemic" qualities necessary to trigger this particular procedure of the Third Optional Protocol. The CRC Committee could potentially operate on a platform of constitutional justice in the implementation of this procedure. The major drawback of such a strategy, however, would appear to be the design of the inquiry procedure. It is clear from both the text of the Third Optional Protocol and from the Rules of Procedure that this mechanism is oriented deliberately

[103] Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN Doc CRC/C/62/3, 8 April 2013, available at <http://www2.ohchr.org/english/bodies/crc/index.htm> accessed 18 January 2015

[104] ibid at Rule 17(1)

[105] Egan n 12, at 7 describes the reluctance of states to incorporate such a procedure for fear of diluting the attention and resources of the CRC Committee

[106] n 5 at Article 13

towards the rapid, but discrete involvement of the Committee. The transfer of information may well occur on a confidential basis and even if the CRC Committee utilises its powers under Article 13(6) to publish a summary of its findings in its report to the General Assembly, the result is a far cry from the development of hard jurisprudence.

Implementing and utilising a constitutional justice approach to the work of the CRC Committee would be more simple in the event that States Parties are prepared to elect for the politically-sensitive option of amending the instrument. In the likely event that they will not opt to do so, implementing a constitutional justice approach indirectly will necessitate a flexible interpretation of the admissibility and consideration of complaints, in accordance with Rule 17, but could still be achieved. The central tenet of the constitutional justice approach is that the CRC Committee identifies with a clear institutional goal of promoting the constitutional variety of justice, thereby enhancing prospects for domestic implementation of the UNCRC.

V. CONCLUSION

The Third Optional Protocol sets out to achieve or assist in the achievement of two worthy objectives within the children's rights framework. The first, most obviously prioritised within the text of the protocol, is the delivery of justice to children seeking to allege a violation of their rights. The second objective is the enhancement of national level implementation of the UNCRC. The primary mechanism through which the instrument is designed to achieve these twin objectives is the individual complaints procedure of the Third Optional Protocol, which has allowed the CRC Committee to join the ranks of existing UN treaty bodies and develop bespoke jurisprudence on children's rights.

The analytical focus of this paper has been on the challenges of a conceptual, normative, institutional and practical character, which are likely to confront the CRC Committee in its work under the Third Optional Protocol. As it is still too early for individual communications to reach the CRC Committee, this discussion largely takes place in the hypothetical vein. It does appear clear, however, that serious limitations are likely to prevent the CRC Committee from operating as an effective mechanism

for the delivery of individual justice. The very real practical limitations of the UN treaty-based system are likely to confine the CRC Committee. This confinement may be of a geographical dimension, in the event that the ratification rate of the Third Optional Protocol is low, which will prevent children in non-ratifying jurisdictions from having access to the new complaints mechanism. But even victims enjoying access to the procedure in theory will have the odds heavily stacked against them in terms of having their communication admitted. In a context where the CRC Committee is likely, at best, to be able to determine no more than one or two hundred cases annually, how is the Third Optional Protocol supposed to even come close to achieving its objective of delivering justice to children? Even the best-case scenario, whereby a complaint is admitted and determined in a timely manner, will culminate in the delivery of a non-binding decision. At the end of the long procedural road, justice in the true sense of the word remains subject, as it has always been, to the will of the state. By continuing to design individual complaint mechanisms in the traditional UN individual-centric model, the pretence is maintained that beyond the highest national court lies a remedy at the international level.

Enhancing domestic implementation of the UNCRC, however, is a far more attainable objective for the CRC Committee under the Third Optional Protocol. Critical to the attainment of this goal is the jurisprudence of the Committee, which must be clear normatively and demonstrate a willingness to engage in fundamental issues in need of clarification within international children's rights. The development of a strong body of jurisprudence is of huge value to the international children's rights framework. Through a focus on constitutional rather than individual justice, a strong legal precedent may be created, specific to children's rights and the development of case law with a core focus on systemic deficits within national legal orders will maximise the prospects for the Committee to utilise the Third Optional Protocol as an effective mechanism for the strengthening of national children's rights frameworks. Considering that national jurisdictions is the level at which children seek to realise their rights, this objective is highly worthwhile and well within the grasp of the CRC Committee. Time will tell us whether or not the CRC Committee is able to realise its potential in this regard for the normative advancement of international children's rights.

The Law of Company Groupings, a Comparative Overview – Germany, France and Poland?

Mateusz Wiśniewski *

Abstract

The following article deals with the one of the most important aspects of international and national company law –company groupings. It undertakes to compare the two most prominent models of approach to the issue of company groupings with the, as it seems, still growing model of Polish law regarding that matter. The presentation of the developed and Europe-wide famous models allows for an analysis of the most important issues that, altogether, create the general scheme for company groupings in Europe, and gives the opportunity to review how differently the problem can be approached. This article also aims at making it clear what the company groupings generally are about and why it is so important for a country to have a developed system of legal norms relating to that matter.

I. INTRODUCTION

Over the last tens of years of the economic history of the world, world trade has been mostly undertaken in the form of legal persons, mainly companies. In considerate volume this activity is happening within the frames of complex (often international) economic entities, consisting of many legal persons, bound with each other by capital and factual links. Those organisms usually comprise a mother company, which controls its subsidiaries that also have their subsidiaries, and so on – they therefore create whole chains of controlling entities, subsidiaries and sub-subsidiaries. Over the years, it has become increasingly important for the world trade to try to regulate the interactions between the companies within a group in order to facilitate them to properly operate as healthy economic and legal mechanisms.

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As Polish law contains no single body of law or any kind of a well-established doctrine regarding company groupings, this article aims at providing a brief comparison on how a developing system operates from the perspective of two established, however not perfect, models.

II. GERMAN REGULATION – THE CONCERN LAW MODEL

A. The introduction of the concern law regulation and its essence

The German law of company groupings appeared in the German system through the introduction of specific provisions into the act on the joint-stock company - *Aktiengesselschaftgesetz* (hereinafter "AktG")[1] in 1965. The German solution is an example of a strictly regulated model, based on the construction of the concern – a quasi-entity, within the frames of which single companies become tools in the hands of a dominant entity. The German legislator described ways, by which a concern may be created: it may be a result of a concern agreement being concluded in one of its main forms – controlling agreement (*Beherrschungsvertrag*) or the agreement on (whole) company's profit transfer to the dominant entity (*Gewinnabführungsvertrag*) – or other, intermediate forms, to which the act more or less directly relates. What is specific about the described regulation, is that it was not accidentally placed within the given legal act. Even though the European practice shows that most companies, which are acting as subsidiaries, are various forms of limited liability companies, still – the German legislator at the moment of introducing the regulation granted the ability of creating groupings only to undertakings in the form of a joint-stock company. This limitation applied only to the participating subsidiaries, since the AktG does not limit by any means the entity, which may exercise the role of a dominant entity. It may well be a national natural person, a limited liability company or a foreign law joint-stock company, or other entities. The German practice and jurisprudence noted that such lack of regulation, which was expressed *inter alia* in one of the more important rulings of the German Supreme Court - *Bundesgerichtshof* (hereinafter "BGH"). The BGH in its ruling from the

[1] Aktiengesetz, 6.9.1964, BGBl. I S. 1089

23rd of September 1991[2] advocated for the application of the actual concern model (which means only the part of the whole regulation) to the German limited liability company – *Gesselschaft mit beschränkter Haftung* (hereinafter "GmbH"). The later jurisprudence of the German courts provided the scope of the *mutatis mutandis* application of the regulation and provided for some new rules relating solely to GmbH companies,[3] which however has not been reflected in German statutory law, so far.

The concern law was placed in the third book of the AktG, under the title of "Affiliated Enterprises" (*Verbundene Unternehmen*). Principally, two groups of provisions were introduced – the ones on the concern by agreement (paras 291-310 of the AktG) and on the management powers and liability in relation to the existence of a subordination relationship (paras. 311-318 of the AktG), with the second group containing the provisions establishing the factual/actual concern.

B. Concern by agreement and factual concern

The construction of the German regulation is based on two significant legal institutions – the concern by agreement (*Vertragskonzern*), regulated by provisions of paras 291-310 of the AktG and the actual/factual concern (*faktischer Konzern*), regulated by provisions of paras 311-318 of the AktG. Before describing those two institutions, the attention must be brought to the definition of an enterprise – understood as the concern enterprise (*Unternehmen*), to which the German legislator ascribes its own significant meaning within the concern regulation. The German provisions apply only to such dominant entities, which fulfill the essence of this concept.[4] To begin with – the title of the third book of the AktG – "affiliated enterprises" (*Verbundene Unternehmen*) points out to this concept as one of significant value. In case of the German regulation – the *Unternehmen* is considered to be "[a group of] shareholders, economically engaged

[2] BGH – 23.9.1991 – II ZR 135/90; 'Zur Haftung in qualifizierten faktischen GmbH-Konzern' (1992) 47 Juristenzeitung 728-733

[3] Adam Opalski, *Prawo zgrupowań spółek* (Warsaw, 2012) 60-69

[4] Volker Emmerich, Mathias Habersack, *Konzernrecht* (München 2008) 25; Karen Schmidt *Gesellschaftsrecht* (Köln, 2002) 935

outside of the company"[5] (*Unternehmensgesselschafter*). Only a shareholder who acts outside the given joint-stock company or joint-stock partnership[6] is considered to be an enterprise within that meaning. What is incredibly important, and may not seem as a direct conclusion of the above – the only enterprise that may enter into the concern agreement with a dependent entity is an entity being the shareholder of the other party to the agreement.

The concern agreements are a specific construction of the contract and companies law.[7] The attention must be brought to the fact, that not only they create the relationship between the parties to the agreement "on the inside" (*inter partes*) but also in a generally binding way, on the basis of the agreement, they establish the duties of other entities (such as the officers) and regulate the principles, under which given companies operate, thus influencing their actions "on the outside" (*erga omnes*). From the execution of the concern agreement, arise not only specific rights and obligations of the participating entities, but also a certain company law construction is being brought to life thereby. That entity is in its own way a separate legal form (over the participating companies) – namely, the aforementioned concern. Such grouping brought to life by the agreement is subject to provisions of the German law and terms and conditions of the agreement executed between the parties. The German regulation is not perfect, as it needs to be noted, that, as A. Opalski states, the concern by agreement is not very popular amongst German entrepreneurs.[8] Those provisions are nevertheless undoubtedly important given their complexity, and their importance in the discussion over the law of company groupings cannot be overvalued.

C. Concern and its specifics

What actually is a concern? The German legislator indirectly replies to that question in the provision of §18 of the AktG. In accordance with the first section of that paragraph, concern enterprises are those companies, amongst which one or more is subject to an uniform management of a dominant entity. It may also be noted, that

[5] Opalski (n 3) 40
[6] ibid
[7] Opalski (n 3) 41
[8] ibid

in the second section of that paragraph, the German legislator points out that the exact same result is achieved by submitting some enterprises under uniform management (*einheitliche Leitung*).

D. The concern by agreement and concern agreements

The concern agreements (the agreements between enterprises – *Unternehmensverträge*) are the agreements, by which a joint-stock company or a joint-stock partnership passes on the management of the company or partnership to the other enterprise (in terms of the controlling agreement – *Beherrschungsvertrag*) or obliges itself to transfer its whole profit to another enterprise (the profit transfer agreement – *Gewinnabführungsvertrag*).[9] Other types of similar agreements may also be concluded. The execution of the agreement is subject to the consent of the general meeting of shareholders (*die Hauptversammlung*). The appropriate resolution requires the majority of ¾ of votes (per representation of the share capital), however more stringent requirements may be introduced by the articles of association.[10] The agreement must also be approved by the general meeting of the dominant enterprise, however only when there is such. After the relevant approvals are granted, there are a few more steps towards the final execution of the agreement. The management board of each of the participating companies must provide a specific report in writing in which the entering into the concern is given proper legal and economic background, including the reasons for which the type and amount of the compensation granted on the basis of §304 of the AktG or the damages to be paid under §305 of the AktG.[11] The requirement to report may be completely discharged when all shareholders of all participating entities conclude certified statements on resignation thereof.

In further stages, the concern agreement is subject to auditory enquiry. It may also be waived, on the same basis as the management report. The auditor provides a report of the control of the agreement to be concluded. There must be a written report

[9] § 291 AktG
[10] Uwe Hüffer *Aktiengesetz-Kommentar,* (Munich 2004) 1393-1395
[11] § 293a, point 1 AktG

on whether any and if yes, which methods shall be used in compensation for the execution of the agreement and whether they are justified or not. After the above-mentioned actions, before the general meeting of shareholders regarding the conclusion of the concern agreement, the existing and newly made corporate documents of the participating entities relating thereto must be made available for review in the companies' offices. During the general meeting of shareholders, the management boards of the participating companies are obliged to orally elaborate on any issues relating to the conclusion of the agreement to the shareholders.[12]

After the conclusion of the concern agreement, the management boards of participating entities are obliged to report the execution of the agreement to a relevant trade register, together with a specification of participating parties.[13] The agreements become valid only upon their disclosure in the trade register relevant for the seat of each of the companies. The agreement may be changed and also suspended.

The concern agreement may also be terminated[14]. It may be done without the proper termination period, however only for important reasons (*aus wichtigem Grunde*).

E. The protection of the company and its stakeholders

Dependent companies were granted direct protection by the German legislator against the adverse quasi-legitimate influence of the dominant entities aimed at inducing their subsidiaries to conclude such an agreement. Through the provisions of §299 of the AktG with respect to concern agreements, the management boards of the dependent companies may not be provided with binding guidance regarding the conclusion, maintaining and termination of such an agreement.

The German regulation pays a lot of attention to the protection of subsidiaries' stakeholders, in the first place to their minority shareholders. Sections (*Abschnitt*) three and four of the first part of the third book of the AktG, provide for mechanisms, by which the company and its stakeholders are to be protected from malevolent attempts

[12] §293g AktG
[13] Hüffer (n 10) 1419-1423
[14] ibid

of the dominant entrepreneur to abuse them and make the company go bankrupt or insolvent, which is a natural hazard for a dependent company.

The company is also granted protection by defending it from the abuse of its capital e.g. by way of providing under §301 of the AktG for a maximum value of profit that may be transferred to the dominant entity (*Höchstbetrag der Gewinnabführung*).

F. The assumption of losses

The German legislator, not only in order to protect the stakeholders and the company in case of any negative results of actions of the dominant entrepreneur, but also to facilitate for a deterrent against the dominant entrepreneur's actions being aimed at abusing the company, in §302 of the AktG has created a mechanism of assumption of losses of the dependent company (*Verlustübernahme*) by the dominant enterprise. In case of a concern contract being made, the dominant enterprise during its existence should compensate for any balance losses which arose in that period on the side of the dependent company.

G. Creditors

The creditors of the dependent company are protected amongst others on the basis of provisions contained in §303 of the AktG. When the concern agreement ceases to bind, the dominant company is obliged, when they reasonably request so, to provide security to the creditors of the company.[15] The creditors are entitled to make such a request, before the cease of existence of the agreement is entered into the commercial register. Instead of providing security, the dominant enterprise may grant a suretyship for the company's debt towards a specific creditor[16] - however it needs to be noted that it is just a simple specification of security, as a suretyship is an instrument of such character in itself.

[15] §303, point 1 AktG
[16] §303, point 3 AktG

H. Protection of minority shareholders

The key stakeholders of a dependent company – the minority shareholders, are protected by the German legislator within the frames of the concern by agreement by the provisions of paras 304-307 of the AktG, found in section four, titled "Securing of the minority shareholders (*außenstehenden Aktionäre*) by the controlling agreements and profit transfer agreements". Norms contained therein are a model example of how the interest of the minority shareholder may be protected, providing him with a chance to consider whether it is more beneficial for him to stay within the company, given the compensation granted to him upon the execution of the agreement or other profit, or whether it would pay off more to move into the circle of shareholders of the dominant company or to sell the owned shares to the dominant entity.

The protection of the minority shareholders is firstly granted by way of a so called 'fair compensation' (*Angemessener Ausgleich*).[17] In accordance thereto, the profit transfer agreement must provide repetitive (*wiederholend*) pecuniary payments for the benefit of the minority shareholders bound with their rights to the shares and having a compensatory character (*Ausgleichszahlung*).[18] The controlling agreement, when the company is not obliged to transfer the whole of its profits, must prescribe a fair compensation for the benefit of the minority shareholders by way of a defined yearly share in the company's profits. Such payments may only be resigned upon, when on the date of issuing the permission for the conclusion of the concern agreement by the general meeting of shareholders, there is not a single one minority shareholder within the company.[19] Thereby, the German legislator very firmly underlines a strict and unconditional character of this institution of protection, not even allowing the interested shareholders to give up on that way of compensation. The dominant entrepreneur could try to manipulate them and facilitate a situation in which the shareholders would be economically forced to abandon the company, or to undertake other detrimental acts. Furthermore, in accordance with §304 of the AktG Shareholders may be entitled to at least yearly payment of the amount, determined on the basis of the

[17] Hüffer (n 10) 1459-1460
[18] ibid at 1460-1462
[19] ibid

company's profitability hitherto and the perspective of the future profits (*Ertragsaussichten*) with taking into account the fair deductions, report valuations (*Wertberichtungen*), without taking into account other profit-based funds of the company (*Gewinnrücklagen*), which would fall for a single share, as compensation. If the dominant enterprise is a joint-stock company (*Aktiengesselschaft*) or the joint-stock partnership (*Komanditgesselschaft auf Aktien*), the compensation may consist of the amount corresponding to the value of the profit acquired from one share of the dominant company.[20] The accuracy and fairness of such calculation is established on the basis of its relation to the sum, under which the shares of the dependent entity would be bought-out in case of an acquisition (*Verschmelzung*) of that company.[21] When the agreement contains no compensation, the legislator provides that it is null and void. The interested entity may apply to a court to establish fair compensation, in case where the one provided for in the agreement is (in the opinion of the minority shareholders) inadequate. When the court decides on compensation, then the obliged party may terminate the agreement within 2 months after the judgement becomes final, without keeping the termination period.

The German legislator also indicated compensation which must be established in case when the shareholders would decide to leave the dependent company. The buy-out amount (*Abfindung*) was provided for in §305 of the AktG. Besides the compensation of profit loss, the concern agreement must contain an obligation of the dominant entity to fairly buy-out the shares belonging to the minority shareholders upon their demand at any time. As the buy-out, the agreement must provide:

a) If the party to the agreement (dominant enterprise) is not a dependent company (joint-stock company or joint-stock partnership) and has a seat in the European Union or the party to the European Economic Area – granting of the shares of that company;

b) If the party to the agreement (dominant enterprise) is a dependent company (joint-stock company or joint-stock partnership) and its dominant entity is a joint-stock company or joint-stock partnership having a seat in the European Union or the party

[20] §304, point 2 AktG
[21] ibid

to the European Economic Area - granting of the shares of that dominant company or a specified amount of money;

c) In all other instances – a specified amount of money (*Barabfindung*).[22]

The ratio of the granted shares is considered as fair, when such ratio corresponds with the price that would be paid for one share of the dependent company in case of its acquisition, however it may be finally balanced with an amount of money.[23] The fair buy-out amount having a pecuniary character (*Barabfindung*) must take into account the status of the dependent company at the moment of adopting the resolution of the general meeting of shareholders granting consent for the conclusion of the agreement. It is also subject to a yearly indexation of the base amount calculated on the basis of the percentage of the maximum statutory interest plus 5% from the moment of its execution.[24] In accordance with §305 of the AktG, claims for damages exceeding that amount are not excluded thereby. The obligation to buy-out shares may be limited to a term, passing at the earliest in two months after the day of disclosure of the agreement being executed in the register.[25] In case when the concern agreement was made when there were no minority shareholders in the dependent company, it expires at the latest in the passing of the fiscal year, during which minority shareholders appear in such a company.[26]

I. The concern by agreement and its role

The German concern by agreement subjects at least two parties, upon their decision to enter into such an agreement, to very complicated relations and a very stringent regime of stakeholders' protection. Such approach may be (and is, as noted above) perceived by entrepreneurs as a disadvantageous one. It may be too stringent on the dominant entity and not allow for a necessary amount of flexibility in the course of dealings of such a company.

[22] §305 point 2 AktG
[23] Hüffer (n 10) 1466-1467
[24] ibid
[25] §305 point 4 AktG
[26] §307 AktG

J. Officers' liability and the factual concern

The German legislator, by regulating the liability of companies' officers in concerns (part two) (*Teil*), titled as "Management powers and liability in light of the dependence of enterprises" (*Leitungsmacht Und Verantwortlichkeit bei Abhängigkeit von Unternehmen*) – paras. 308-318 of the AktG), also created the institution of the factual concern. Section one relates to the liability and management powers in light of the existence of the controlling agreement (*bei Bestehen eines Beherrschungsvertrags*). §308 of the AktG, regarding the management powers (*Leitungsmacht*) states, that where the controlling agreement was entered into, the dominant enterprise is entitled to issue orders (*Weisungen*) to the management board of the dependent company.[27] This provision requires particular attention, as it touches upon an institution, the presence of which is especially very controversial as viewed in light of Polish law. According thereto, the dominant enterprise, theoretically a legal entity which is separate from the dependent enterprise, is being granted a right to influence the dependent company in a binding manner, with that company still being a separate legal person. Such solution is in principle contradictory to the relevant principles of Polish civil law. It is however a very useful and effective tool, allowing for efficient management of a group, while the criteria for action of the dependent management boards remain clearly defined. German provisions are of particular importance, as they provide a decision-making procedure and a step by step safeguard of process. §308 point 1 of the AktG says that, unless the agreement provides otherwise, the issued orders may also be detrimental to the dependent company if it serves the interest of the dominant company (*den Belangen des herrschenden Unterhnehmens*), so that the activity of the dependent company may be submitted solely to the interest not of the grouping as a whole, but only to one of a single enterprise. Furthermore, the last sentence thereof indicates, that the detrimental result may be justified even by the interest of another concern entity associated with the dominant enterprise. It is an expression of a far-reaching submission of interest of the dependent company and drawing of its scope.

[27] §308 point 1 AktG

K. The duty to act upon the orders

In accordance with §308, point 2, sentence 1 of the AktG, the management board is obliged to perform the orders made by the dominant enterprise. It is not empowered to refuse performance of such an order even if convinced that resulting actions would not be in the interest of the dominant enterprise or other concern-associated enterprise, except when it evidently does not serve such interest.[28] The whole decision-making burden by a binding order is almost wholly put on the dominant entity. In case when the management board receives an instruction to undertake action normally requiring approval of the supervisory board of the company,[29] and such approval will not be granted within the prescribed term, the management board must inform the dominant entity. If the instruction will be repeated, the approval will no longer be necessary. In such cases, the last resort scenario is the approval by the supervisory board of that dominant enterprise, if it is required in such circumstances. Only in case of its lack, the whole process may be stopped. If there was a controlling agreement concluded, the legal representatives (*gesetzliche Vertreter*) of the dominant enterprise are obliged to exercise due care and diligence and rely on rules, which should be applied by a wise and reasonable enterprise manager (*Geschäftsleiter*).[30] If such representatives act against their duties, they face liability to compensate the company for the loss sustained thereby.[31] When it is disputable whether the proper diligence and care were exercised, the dominant entity's representatives bear the burden of proof in proving that they acted properly. Certain time limits were prescribed, in order to protect the company and its stakeholders, towards the possible resignation or waiver of claims for compensation for damages sustained. A company may only waive its claims at the earliest three years after such claims come to existence and only when the minority shareholders representing at least 10% of the share capital decide so in a special resolution, which may not be objected.[32] Each shareholder of the company has a right to demand compensation, however not for himself but only for the company, so that

[28] Hüffer (n 10) 1531
[29] §308 point 3 AktG
[30] Hüffer (n 10) 1534-1536
[31] §309, point.2 AktG
[32] Hüffer (n 10) 1538

he would not be enriched personally.[33] Thereby, the German legislator, making this an *actio pro socio* claim, allowed for the enforcement of such claims by any shareholder without limitations. Such claims may also be pursued by the creditors of such dependent company. Notably, they are not bound by the resignation or waiver of the aforementioned claims made by the company itself.

L. Liability

The liability of the managing officers of the dependent company was described in §310 of the AktG. It was construed as accessory to the one that is borne by the legal representatives of the dominant entity, following the principle of protecting the dependent officers from negative consequences of decisions imposed upon them by the dominant entity. According to section 1 of that paragraph, the management board and supervisory board members of the dependent company are jointly and severally liable together with those responsible under §309, only if they acted with disregard of their duties. In any doubt, they are also bearing the burden of proof in proving that their actions were in accordance with applicable norms of behavior.[34] The liability is not excluded also whenever there is a requirement for consent of the supervisory board, even when such consent was granted,[35] it only happens in the case of an order coming from the dominant company. It needs to be noted that the solution offered by the German legislator is not mistake-free. Most importantly, no rules on the form such as mandatory written or any recorded form are imposed on how the orders are made. It may result in a situation, where the board members, afraid of losing their position or other negative consequences, theoretically bound by the obligation to act upon the orders of the dominant entity, would act against the interest of their company while also bearing liability for not being able to prove the releasing factor, being the fact of exercising an order of the dominant. Such an officer may of course require some kind of a recorded confirmation from the dominant entity (sometimes he will not even have to, as the making of such an order via specific corporate mechanisms of the dominant

[33] ibid 1538-1539
[34] Last sentence of §310 point 1 AktG
[35] §310 point 2 AktG

may well be mandatory and therefore recorded in the corporate documents thereof such as resolutions, consents or others), which may well be met with a negative reaction of the dominant entity or a representative thereof.

M. Factual concern

In section two of part two of the third book of the AktG, the German legislator described the rules relating to the liability for damages incurred as a result of existence of a dominant relationship, when no concern agreement was concluded. Those provisions relate to situations in which the concern laws are binding solely because of owning a majority of capital in the share structure of a dependent entity. It is therefore an intermediate model between the intensively regulated concern by agreement and the French, highly elastic jurisprudence model.

§311 of the AktG describes the limits of influence (*Schranken des Einflusses*) on the dependent entity. When there was no controlling contract concluded, the dominant enterprise may not utilise its influence in order to induce the dependent joint-stock company or joint-stock partnership (as well as the GmbH – according to the earlier mentioned jurisprudence) to undertake a legal act or means, that would cause damage to such a company, unless it would be compensated. If this does not actually occur within the fiscal year in which the damage arose, at the latest by its end, it must be prescribed when and by way of what benefits the company shall be compensated. The dependent company may be also granted with a claim for specified benefits.[36] What seems interesting about those provisions is that the only criterion which needs to be fulfilled is to point out when the actions against the interest of the company are to be compensated, not even right after such damages were caused. Within this scope the model of the factual concern is near to the *Rozenblum doctrine*, in the light of which a benefit for the dependent company needs to be offered in some further, yet possible to grasp from the dependent company's point of view, perspective. According to §312 of the AktG, the management board of the dependent company is obliged to issue a report describing its relations with other enterprises (within the concern meaning). If no controlling agreement was concluded, the management board of the dependent

[36] Last sentence of §311 point 2 AktG

company is obliged to issue a report within the first 3 months of the fiscal year, regarding its relationship with the enterprises. The report should indicate all legal acts made between the company and the dominant entity or enterprises affiliated therewith or made at the request or on behalf of such an enterprise, which occurred in the past fiscal year.[37] Regarding the legal acts, some relevant circumstances must be described – what the company provided and what it received as a consideration, by undertaken means – what benefits were the results thereof and what kind of adverse effects occurred. By describing compensation, it must be indicated how it shall be done or what benefits will the company be entitled to. In the summary of the report, the board is obliged to elaborate on whether the company, according to the circumstances of which it was aware at the time of the undertaken deeds, received fair proper consideration and did not sustain any damages.[38] Otherwise, the board must also explain if the damages were compensated. Those explanations must also be placed within the annual report of the company's activity (*Lagebericht*). The management board's report is also subject to verification by the supervisory board.[39] The supervisory board provides its conclusions of the control to the general shareholders' meeting of the given company.[40] It must contain the answer to the question whether complaints against the management board's elaborations should be raised.[41]

N. Extraordinary revision

A specific kind of protection was introduced in the German regulation. It is the special audit, called the extraordinary revision (*Sonderprüfung*). Under §315 of the AktG, at the request of a shareholder, the relevant court is obliged to appoint an extraordinary auditor in order to investigate the relationships of the company with its dominant enterprise or the affiliated dependent enterprises, in case where:[42]

a) The auditor limits or skips comments on the report regarding the relationships between the affiliated enterprises.

[37] §312 point 1 AktG
[38] §312 point 3 AktG
[39] Hüffer (n 10)1577-1580
[40] ibid 1577-1580
[41] ibid
[42] §315 AktG

b) The supervisory board stated that complaints should be raised against the management board's elaborations contained within the annual report.

c) The management board itself admitted that due to the undertaken legal acts or means, the company suffered damages, which were not compensated for.

In other instances, justifying suspicions of illegal and illegitimate actions being taken against the company's interest, shareholders having at least 1% of the share capital or shares equal to 100,000 EUR therein (provided that they prove they had possession of shares at least 3 months prior to the filing of the motion) may demand court intervention within this scope.[43] The court ruling may be appealed. The report is not being issued, and paras. 312-315 of the AktG do not apply, when a profit transfer agreement was made.[44] Thereby it can be assumed that the factual concern is an institution separate from the concern by agreement, and provisions expressed therein are a specific solution, aimed at being applied whenever capital, not contractual links exist between the relevant enterprises.

O. Liability of the dominant enterprise

The liability of the dominant enterprise and its legal representatives was regulated in §317 of the AktG. In case when the dominant enterprise undertakes a legal act *via* dependent company, with which no controlling agreement was made, or when it undertakes measures detrimental to that company and by the end of the fiscal year the damages were not compensated, the dominant entity is obliged to compensate for damages sustained by the dependent company.[45] The dominant enterprise is also obliged to compensate for the damages sustained by the shareholders, irrelevant from those sustained by the company itself. The obligation to compensate is only waived, where the same action would be undertaken by a reasonable businessman, acting in accordance with the art of the trade and having an independent company.[46] The dominant enterprise and its representatives are jointly liable. The liability of the members

[43] Second sentence of §315 AktG
[44] Hüffer (n 10) 1583-1584
[45] ibid 1585-1587
[46] §317 point 2 AktG

of the management board of the dependent company in the factual concern was provided by §318 of the AktG. The members of the management board of such a company are liable for their actions jointly with those liable under the previous paragraph when they acted with violation of their duties, did not disclose the company making a specific legal act or measure undertaken, detrimental to that company. In case of doubt whether they acted properly, they bear the burden of proof. The members of the supervisory board of the company are liable under principles equal to those providing for the liability of the managers if in the result of a detrimental legal action or measure they did not analyse the management board's report of the relationships with the affiliated enterprises or they did not disclose the results of their inquiry to the shareholders of a given company.[47] The claims are excluded only in case where the action was a result of a lawfully adopted resolution of the shareholders of a given company.[48]

P. Summary

The German regulation is a model example of a contract-based company grouping and a rather stringent piece of legislation. The analysis of solutions applied within and methods used to organise the concern, makes clear how intense and thereby to an extent – impractical the German way is. However, it may not be ignored as it is an overthought and deep piece of law with institutions such as the factual concern and several elements of the concern by agreement, for example - the methods of minority shareholders' protection and rules of compensation being very important for the general idea of company groupings' regulation.

[47] §318 point 2 AktG
[48] §318 point 4 AktG

III. THE FRENCH APPROACH – ROZENBLUM DOCTRINE AS A SIMPLIFIED JURISPRUDENTIAL MODEL OF COMPANY GROUPINGS' LAW

A. The Rozenblum doctrine and its role in the discussion over the law of company groupings'

The French model, based essentially on a single court judgment, is an incredibly important element of the discussion on company groupings' regulation and it contrasts greatly with the intense and complex German regulation. It proves that lack of legislation and basing the company groupings' law on a relatively simple jurisprudential doctrine, enriched by over 30 years of practice, may well be an interesting measure. As a model contradictory to the German one, it is a great contributor in the general discussion about the law of company groupings.

B. The Rozenblum doctrine – sources and core

In contrast to the German regulation, the Rozenblum doctrine may be relatively shortly described. What is the source? The doctrine is a result of the activity of the French *Cour de cassation*, in detail meaning the criminal chamber thereof. This court produced a judgment on the 4th of February 1985 in the case of Mr Rozenblum.[49] This judgment, based on the provisions analogical to those that, until recently, were present in Polish criminal law – the actions undertaken to the detriment of a company (the so called: *abus de biens sociaux*), was made in a case, where Marc Rozenblum, a management board member of one of the companies belonging to a grouping, undertook actions, which – even though justified from the perspective of the group, were however detrimental to the company run by himself. Mr Rozenblum chaotically carried out various dispositions of assets between the companies and kept establishing securities over the assets of some companies to save others.[50] The specifics of this grouping was that it consisted of unaffiliated companies, which shared Mr Rozenblum as their management

[49] Arrêt du 4 février 1985, *Rozenblum et Allouche,* Cour de cassation, Chambre pénale, D.1985 478
[50] Opalski (n 3) 100

boards' member.[51] In its judgment, the French court decided that Mr Rozenblum was guilty of the charges brought against him,[52] however also it formulated rules, in compliance with which actions of the board members of dependent companies shall not constitute a so called 'abuse of their assets' (*abus de biens sociaux*). Under the Rozenblum doctrine, the actions detrimental to a company from a group are allowed when, firstly, the company belongs to a group characterised by capital links (which is important insofar as one can imagine links being solely made by way of having a joint member of the management boards of such companies, just in the case of Mr Rozenblum, or similar). Secondly, a strong, effective business integration must exist between the companies within the group. Thirdly, financial support coming from one company must be made for economical consideration and may not exceed the balance of service provision between the two companies. Lastly, the support coming from the company may not exceed its abilities, i.e. may not result in it becoming insolvent.[53]

The model of the Rozenblum doctrine at a glance seems very elastic and also one that puts pressure on the protection of companies, not *a priori,* as it is done by the German regulation, which provides a toolkit of specified actions – so complicated, that compliance therewith is to some extent necessary so that a grouping could legally function at all, but *post factum.* The formulation of the first and second conditions, which are the existence of 'capital links' and 'effective business integration', allows for a degree of interpretation, especially with respect to the second condition. However, an experienced lawyer should not find it hard to differentiate between an organised grouping, having a joint policy and between e.g. a group of enterprises running a joint-venture undertaking. Although it may be a controversial assumption, because it opens a wide field of discussion before courts, one can still say that by the way of systemic and teleological interpretation some very satisfying and convincing results may be achieved. The third condition – the economical consideration, or as it is described by A. Szumański, a perspective of compensation for damages, losses or disadvantages resulting from conforming with the instructions of the dominant entity, aimed at acquiring

[51] ibid

[52] ibid

[53] Marie-Emma Oursier, 'Le fait justificatif de groupe dans l'abus de biens sociaux: entre efficacité et clandestinité' (2005) Revue des Sociétés 273

a result being an action to the detriment of the dependent company and with the abuse of its (very strictly understood) interest,[54] is rather problematic. In light of the German regulation, which provided many criteria and rules according to which the compensation for damages done to the dependent company and its creditors, such broad indication of how damages done should be justified is risky and controversial. It may result in large misconduct and justification of minor actions for the benefit of the company as an equivalent of heavy losses suffered by that company within the grouping. Of course, on the other hand, honest managers and a transparent grouping should allow for a swift, quick and effective management of a group, allowing for much freedom in action and leaving the companies as even more instrumental entities in the hands of the dominant. The fourth condition is rather easy to interpret and in a natural way corresponds to the need of securing companies against insolvency, which is aimed at reaching the goal of protecting creditors thereof.

C. Summary

Undoubtedly, the main virtue of the Rozenblum doctrine is its applicability to all kinds of companies. Furthermore, it defines the interest of a company, which seems acceptable for a part of the Polish doctrine, being against the German model.[55] Equally interesting is the emphasis on the court protection and interpretation of the conditions for the doctrine within court proceedings, as it was for sure its main purpose. Of course, it draws certain lines and standards of action, and relying on the principle of legal certainty and internal coherence of stable and steady court lines of case law, one may assume that it is a binding standard. Yet still, it is not guaranteed by law. This model emphasizes mostly the liability of the managers. It is the evaluation of the fact, whether Mr. Rozenblum should had been convicted as a result of actions beneficial for the grouping but detrimental to a single company, caused this model to come to existence and brought the whole concept to life. It allows companies' managers to have a certain amount of certainty about their scope of duties, within the meaning of acting

[54] Andrzej Szumański, 'Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie' (2010) 5 Przegląd Prawa Handlowego 13
[55] Szumański (n 54)

in the interest of a company they run. The French model is an intelligent one, the kind of 'technologically advanced', very highly fragile against any abuse, and in comparison – the German model presents itself as a solid, stable and straightforward, which also makes it an imperfect system, that has however guarantees which are key from the perspective of the certainty of law principle and protection of stakeholders acquired thereby. The French approach is more flexible and attractive to the grouping managers, offering them a larger portfolio of actions and ways of managing the grouping.

IV. THE SHALLOW REGULATION OF POLISH LAW

A. Article 7 of the Polish Code of Commercial Companies (hereinafter "CCC")[56] and related issues

It may be said, in terms of existence of a system or a uniform body of law regulating the company groupings that as such – Polish law of company groupings does not exist. Polish law has no rules, which were introduced as norms addressed solely to groupings (except those in tax law, introduced by EU regulations and directives). Indeed, there are many norms which apply thereto, rules on compulsory buy-out – article 418 of the CCC, as well as many concepts adversely influencing the law on groupings' – such as the Polish concept of the interest of a company. Interestingly, Polish law contains a practically inactive provision within article 7 of the CCC. For unknown reasons, it seems like an attempt to codify in three paragraphs of the Polish CCC rules, analogical to those contained in part three of the German AktG. In reality, dreading the lack of any provisions for the application of these paragraphs or any case law in that respect, it is not widely utilised in the practice of Polish groupings. Because of the Polish principle of legal separation of legal persons, so fiercely fought for by the Polish doctrine, or others, it may not be assumed that even within the freedom of contracts one may establish a model similar to the German one solely under article 7 of the CCC.

[56] Act dated 15.9.2000 – Kodeks spółek handlowych (J.L. No 94, pos. 1037 as amended)

B. Polish jurisprudence as a shy attempt of following the Rozenblum doctrine

As a result of a lack of regulations and a natural need to supplement the existing norms in order align them with the economic reality, Polish law on company groupings started to develop within the case law. At least two relatively important rulings of Polish courts may be mentioned here, where courts provided an interpretation of norms regarding issues related to company groupings' law. The first one is a regional court's (*sąd okręgowy*) ruling issued on the 2nd of April 2008.[57] The subject of analysis of the court in Szczecin was the management of the Szczecin's shipyard violating criminal law in terms of article 296 of the Polish Penal Code[58] (hereinafter "PC") in light of actions being taken for the benefit of a grouping with a simultaneous detrimental result on the part of a single company. The ruling related to agreements made between the entities within the grouping, aimed at acquiring credit dedicated to the activity of the companies in the group. The court assessed such actions as legal in accordance with the Polish law.[59] All accused were relieved from charges based on an assumption that the officers of a dependent (holding) companies may in their actions follow the interest of a whole grouping, under the condition that the company acquires benefits from belonging to the grouping, at least in a long term perspective – meaning that the court almost directly called upon, quoted in the reasons for the judgment, the Rozenblum ruling.[60] Even though in the appeal[61] and cassation proceedings[62] the court's judgment defended itself, it is still too insignificant and one of very little examples of calling upon the idea of company groupings and an attempt to interpret the interest of a company wider than only within the frames of a single company, belonging to a group.

[57] Judgement of the Regional Court in Szczecin, Case III KK 288/03 dated 2.04.2008
[58] Act dated 6.6.1997 - Kodeks karny (J.L. No 88, pos. 553 as amended)
[59] Stanisław Sołtysiński, 'Czy regulować stosunki w holdingu' (2008) 8.10. Rzeczpospolita
[60] ibid
[61] Judgement of the Appellate Court in Szczecin, case II Aka 142/08
[62] Judgement of the Polish Supreme Court, Case V KK 22/10

C. Case V ACa 702/12

Another interesting ruling, similar in its tenor to the shipyard case, is a ruling by the Appellate Court in Katowice dated 20th November 2012, this time in a civil case,[63] under the claim for declaring a shareholders' meeting resolution as invalid made by the defendant of a joint-stock company (*spółka akcyjna*) engaged in the production of electric energy. In the reasons for the judgment the interest of the grouping was absorbed into the interest of a given single company. The case is however so complex, that it is very fruitful to describe it in more detail, discussing the arguments of the Appellate Court.

The subject of claim was a resolution of a joint-stock company, which related to the accession to some company grouping (described as the Capital Group) together with the adoption of a "Group Codex binding within the group. This group was created on the basis of the government program "Program for electro-energy", and a part of this program consisted in creating holdings in order to lower costs of undertaking economic activities regarding production and delivery of electric energy. What was the matter of controversy, were the provisions of the Group Codex stating that the dominant company "assumes competence of the Board of the defendant within the scope of running the strategic management, leaving to the defendant only the current management. The Board of the defendant was ordered to undertake all action within the interest [of the group] as a whole and not within the interest of the company it run". [64] In this scope, such provisions were contrary to article 368 §1 of the CCC with respect to article 375 of the CCC. The dominant company was empowered to create additional bodies, so called Committees, issuing opinions regarding the conformation of the decisions of the dependent company with the Corporate Strategy. The defendant argued that "the management function is still in hands of the defendant company, leaving the management board the freedom to decide on the company's matters. (…) [it] provides grounds to undertake only such actions, which are both in alignment with the interest of the defendant, as well as the whole Group, and also comply with generally binding

[63] Judgement of the Appellate Court in Katowice, Case V ACa 702/12 dated 20.11.2012
[64] Judgement of the Appellate Court Katowice (n 63) 1

provisions of law and take into consideration justified interests of the minority shareholders and creditors".[65] The regional court ruled in favour of the defendant, saying that the resolution claimed against did not comprise any specific orders of action in terms of running of the company by the management board of the dependent company. It may be noted, that the court went rather far in light of the Polish law, by stating that "the provisions of the Group Codex (…) indeed consist of relocating competence to run the dependent company to the dominant company, however only by means of imposing on the dependent company with performing the orders, guidelines, but do not lead to substitution of the dependent company's management board with the board of the dominant".[66] Thereby, the regional court assumed that in the light of the Polish law, it is allowed that a dominant company may issue orders to the dependent company. Given that, it is worth to quote the content of article 375 of the CCC, which states *verba legis*: "The shareholders' meeting and supervisory board may not issue binding orders on running of the company to the management board". It seems that the court rather boldly (however from the perspective of functioning of a group rationally) in the perspective of generally binding law assumed that orders of the management board of the dominant company are not the same thing as the ones stemming from the shareholders' meeting and the supervisory board of the dependent company, whenever it is justified by the interest of the grouping. The regional court said: "Any action in the common interest of the Group, not against the interest of a given company and not against any generally binding rules of law, is not only economically justified but also allowed by law". [67] This statement is a downbeat of the breakthrough character of the lower-instance court's judgment, as it depends on the necessity of the measures undertaken by the dependent company being not against its own interest. It seems obvious that in any grouping, all actions undertaken in the interest of the grouping or the dominant company or any other company from the grouping are not *per se* against the interest of the dependent company and the court expressed what is widely known. After the case review as a result of the appeal of the claimant, the court mostly sustained its statements. In the end, the case ended up in the Appellate Court, which

[65] ibid 2
[66] ibid 3
[67] ibid 4

also sustained the regional courts' approach. However, the court brought up an interesting argument, which provides ground for a 'freshened' approach to the interest of a company in Polish law. In its conclusions, the Appellate Court stated that: "It needs to be firmly underlined, that if the Codex relates to the interest of the Group, which consists also of the defendant company, then submission of the actions being taken in the interest of the Group are also actions in the interest of the defendant". [68] This means, that the dependent company, acting in the interest of the grouping, acts not only in its interest, but also in its own. Following that statement, although the court remained silent on that matter, may mean that companies are allowed to undertake measures detrimental to their interest (interpreted narrowly) in light of the assumption that in the broad interpretation of the interest, such actions are in fact in the interest of that company due to the fact that they reflect the interest of the whole grouping. It is a very interesting construction and because the judgment is relatively fresh (2012), possibly broadening jurisprudential action is to be expected and may follow in that context.

D. Summary

The Polish law, as mentioned in the introductory remarks, does not actually have rules on the company groupings' law in the *sensu stricto* meaning. Although in light of how intensive the economical practice is, of how many groupings operate within the Polish legal reality – new jurisprudential attempts appear in that context. They aim at trying to work out some kind of a model of operations within a company grouping. Furthermore, since few years, the legislature has faced two widely commented projects of regulation,[69] and even though the resistance against adoption of any thereof is too large and not much may change soon one can still say that the Polish legislator recognizes the necessity of regulation of the matter and in the perspective of a few years it

[68] ibid 12

[69] Project prepared by the Commission for Codifying of the Civil Law – Projekt ustawy o zmianie ustawy Kodeks spólek handlowych i ustawy o Krajowym Rejestrze Sądowym, version dated 25.6.2010, unpubl., and project prepared by the Ministry of Economy - Projekt ustawy o ograniczaniu barier administracyjnych dla obywateli i przedsiębiorców, version dated 8.3.2010

may be expected that some kind of legislative action may indeed be introduced, responding to market expectations and problems resulting in the currently applicable law.

When Principles of Equity Mix with Contract Law

Daniel Zatorski[*]

Abstract

This article presents an overview of the common law principles of equity and the rules of their application in English contract law. The analysis looks at link between equity and damages and remedies. It follows the path adopted by English courts, which elaborated the principles of equity through a series of seminal rulings.

I. INTRODUCTION

John Selden coined the famous phrase that equity varies with the length of the Chancellor's foot.[1] This is due to the fact that equity was formed during the time of Chancery Courts, i.e. courts of conscience;[2] and conscience differs substantially depending on a person. One may indeed shudder at the thought of how arbitral the law may be – when guided by conscience. However, it was due to the flexibility of equity that remedies in contract law flourished and led to judgments which seemed fitting to particular cases. The aim of this essay is to demonstrate the way in which flexible principles of equity influenced the notion of damages in English contract law. This will be achieved through the analysis of case law that dealt with a particular type of contract law problem, i.e. an enrichment without a subtraction situation – that is a situation "where the defendant has been unjustly enriched as a result of a breach of contract but

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[1] Frederick Pollock, *Table Talk of John Selden* (Lincolnshire, Quaritch, 1927) 43

[2] Robert Pearce, *The Law of Trusts and Equitable Obligations* (5th Edition, Oxford University Press, 2006) 16

there is no measurable loss suffered by the claimant".[3] After a brief introduction to equity and damages in contract law, four landmark cases will serve for the purpose of this analysis *Wrotham Park Estate Co. v Parkside Homes Ltd.*,[4] *Attorney-General v Blake*,[5] *Experience Hendrix LLC v PPX Enterprises Inc.*[6] and *WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc.*[7]

II. THE RUDIMENTS OF EQUITY

It is a common affliction in Polish scholarly writing to begin with a definition. Nonetheless, this affliction might serve as a healthy starting point. Under the simplest of definitions equity is „a body of law, consisting of rights and remedies, which evolved historically through the Courts of Chancery."[8] As will be explained below, this evolution was historically justified by the imperfections of the old common law.

English law developed from two separate court systems: the system of common law and the system of equity. Historically, common law in the middle ages was based on a closed catalogue of writs, i.e. causes of action. This confined the amount and types of cases that could be brought before a court. Consequently, common law was considered as inflexible and as leading to unfair results. Nonetheless, justice remained a royal prerogative – "the King retained a residuum of justice which enabled aggrieved parties to appeal directly to him for redress."[9] The King ruled on the basis of his perception of justice and fairness. This gave birth to equity and to the Courts of Chancery. Equity hence introduced flexibility into the law, as it was underlined in the *Earl of Oxford's* case:

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[3] Jill Poole, *Textbook on Contract Law* (10th edition, Oxford University Press, 2010) 414

[4] *Wrotham Park Estate Co. v Parkside Homes Ltd.* [1974] 1 WLR 798

[5] *Attorney-General v Blake* [2001] AC 268 available at <http://www.bailii.org/uk/cases/UKHL/2000/45.html> last accessed 29 May 2015

[6] *Experience Hendrix LLC v PPX Enterprises Inc.* [2003] EWCA Civ 323, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2003/323.html> last accessed 29 May 2015

[7] WWF World Wide Fund for Nature v World Wrestling Federation Entertainment Inc. [2007] EWCA Civ 286, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2007/286.html> last accessed 29 May 2015

[8] Pearce n 2 at 13

[9] Pearce n 2 at 15

"[M]en's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppression of what nature so ever they be, and to soften and mollify the extremity of the law".[10]

Until the 19th century, the two systems operated separately. However, the Judicature Acts 1873 and 1875 merged them into one court system.

The role equity played in the development of today's English law cannot be underestimated. From the establishment of trusts, fiduciary relationships or beneficial ownership, equity introduced new remedies, such as injunctions or specific performance. Some scholars even went so far as to say that "[p]erhaps one of the singularly most useful contributions of equity to the modern legal system, and certainly one of the most often used, is the range of remedies is has created."[11] It also found space within the rules on damages under contract law. It is this aspect of equity that lies at the core of this essay.

III. THE RUDIMENTS OF DAMAGES AND RESTITUTION

Damages are, as a rule, compensatory.[12] Under the common law, this entails the protection of a party's expectation interest, i.e. the prospect of gain from the contract.[13] That means that a party may recover an amount of money that will place it in the position, in which it would be, had the contract been properly performed.[14] This principle was famously reiterated by Justice Parke in the landmark case of *Robinson v Harman*:

[10] *Earl of Oxford's Case* [1615] 1 Rep Ch 1 at 6
[11] Pearce n 2 at 7
[12] *Blake* n 5
[13] John Calamari, Joseph Perillo, *The Law of Contracts Fourth Edition* (West Group, St. Paul Minnesota, 1998) 545
[14] John McCamus, 'Disgorgement for Breach of Contract: A Comparative Perspective' (2003) 36 Loy. L.A. L. Rev 943, 944

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed".[15]

The logical conclusion of this approach is that any benefit obtained by the contract-breaker is irrelevant whilst assessing damages.[16] Case law did confirm the notion that when measuring the amount of damages "the question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the claimant".[17]

In certain situations, however, the principle of restitution may operate. Under the restitutionary principle one cannot be permitted to profit from his wrongdoing.[18] Thus restitution is not strictly a claim "for 'damages' since its purpose is not to compensate the claimant for a loss but to deprive the defendant of the benefit".[19] In such cases the person who receives an unauthorised profit has a duty in equity to account for it, i.e. disgorge the profit.[20] Hence the aim of restitution is to restore a party to the position in which it would have been, if the contract had never happened.[21]

Therefore, to differentiate between restitution and damages seems to be simple; one just needs to ask where one wants to get to. In other words, restitution and damages have different aims. Under the law of damages, the goal is "to place the aggrieved party in the same economic position the aggrieved party would have obtained if the contract had been performed".[22] On the other hand, "the aim of restitution is to place both of the parties in the position they had prior to entering into the transaction".[23]

When one knows these two principles, one comes to the problem with which English courts had to grapple. Namely, what should be done when a party has been

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15 Justice Parke in *Robinson v Harman* [1848] 1 Ex Rep 850, 855

16 Mathias Siems, *Disgorgement of profits for breach of contract: a comparative analysis* (2003) Edinburgh Law Review 27

17 *Tito v Waddell (No 2)* [1977] Ch 06 332

18 McCamus n 14

19 Guenter Treitel, *The Law of Contract* (Thomson Sweet & Maxwell, 2003) 941

20 Pearce n 2 at 917

21 Treitel n19 at 941; Calamari, Perillo n 13 at 599 ("[T]he aim of restitution is to place both parties in the position they had prior to entering into the transaction")

22 Calamari Perillo n 13 at 599

23 ibid

unjustly enriched as a result of a breach of contract but there is no measurable loss suffered by the claimant? This is called an enrichment without subtraction case.[24] Such a situation is problematic in terms of the abovementioned principles. On one hand, applying the compensatory approach seems absurd. After all, how can one be compensated for loss without an actual loss? On the other hand, applying restitutionary principles – via an account of the defendant's profit where the claimant has suffered no loss – would appear to constitute punishment for a breach and would enrich the claimant.

IV. THE *WROTHAM PARK* REMEDY

A case that tackled this particular problem was *Wrotham Park Estate Co. v Parkside Homes Ltd*. The case concerned a breach of a restrictive covenant in the claimant's favour. The covenant stipulated that the defendant shall "not develop the land for building purposes except in strict accordance with a lay-out plan to be first submitted to and approved in writing by the vendor or the surveyors".[25] Despite this stipulation, the defendant built more houses on the Wrotham Park Estate than he was allowed to and was thus in breach of the restrictive covenant. Because the court had refused to grant a mandatory injunction requiring the demolition of the houses, the claimant requested damages in lieu of the injunction under section 2 of the Chancery Amendment Act 1858.

There was, however, a dilemma in terms of quantifying the amount of damages. As the defendants argued "the damages are nil or purely nominal, because the value of the Wrotham Park Estate as the plaintiffs concede is not diminished by one farthing in consequence of the construction of a road and the erection of 14 houses on the allotment site".[26] The Court tackled this problem by creating a hypothetical negotiation scenario – Justice Brightman presumed that had the parties negotiated, the defendant would have had to pay a sum of money to be released from the negative covenant:

[24] Poole n 3 at 414
[25] *Wrotham Park* n 4 at 799
[26] ibid

"In my judgment a just [award] would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant".[27]

Because of this presumption *Wrotham Park* damages are also referred to as hypothetical negotiation damages. In light of this, the court decided that the damages amounted to 5% of the contract's value.

In summary, the claimant received damages, because it was not possible to award an injunction. For this reason, in a subsequent case the Privy Council took on the task of defining briefly *Wrotham Park* damages. Lord Walker decided that the best definition is "damages awarded (in lieu of specific performance or an injunction) under the jurisdiction created by section 2 of the Chancery Amendment Act 1858 ("Lord Cairns's Act")".[28] In terms of quantification, *Wrotham Park* is classified as applying a compensatory approach, i.e. providing compensation for the lost opportunity to bargain or apply for an injunction.[29]

The approach adopted in Wrotham Park may raise some doubts. After all, what if the claimant would have never released the defendant from the restrictive covenant? Under the *Wrotham Park* principle this is not an issue, because "[b]oth parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored".[30]

V. AWARDING AN ACCOUNT OF PROFITS – *BLAKE*

Lord Nicholls of Birkenhead noted at the very beginning of the *Attorney-General v Blake* judgment: „George Blake is a notorious, self-confessed traitor".[31] An employee of the security and intelligence services, Blake switched sides and started working for the Soviet Union. Because of this, he was sentenced to 42 years' imprisonment. However, he escaped and fled to Moscow. In 1989, Blake wrote a book *No Other Choice* and

[27] ibid
[28] ibid para 46
[29] Poole n 3 at 420
[30] *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd & Others* (Rev 2) [2009] UKPC 45, 49; *Wrotham Park* at 815
[31] *Blake* n 5

entered into a publishing contract with Jonathan Cape Ltd, a publisher that was granted the exclusive right to publish the book. The Crown did not – and indeed did not even try to – prevent the book from being published. It did not notice the publication and, after all, by that time, the information in the book was no longer confidential. However, the Crown did not want Blake to profit from the publication.

The case was eventually decided by the House of Lords. An important part of the Lords' analysis was dedicated to the application of *Wrotham Park*. The House of Lords approved the *Wrotham Park* decision describing it as a "solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach".[32] The Crown, however, wished to take a step further than the *Wrotham Park* damages. It wished for a full account of profits.

The problem the Crown faced was the basis on which it could receive Blake's profits. It was rejected that Blake breached a fiduciary duty. If he had had, the case would have been simple, because the normal remedy for such a breach is an account of profits. The Crown, therefore, put forward arguments under contract law; it argued that Blake breached his employment agreement which stipulated that he could not disclose official information. Under normal contract law principles, the hurdle that the Crown was not able to overcome was that it could not "claim compensatory damages for breach of contract because it has suffered no loss as a result of the publication".[33]

Nevertheless, the House of Lords established that "[t]he undertaking, if not a fiduciary obligation, was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of breach".[34] For this reason an account of profits was allowed but the remedy was limited to exceptional circumstances:

When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract.[35]

[32] ibid
[33] ibid
[34] ibid
[35] ibid

What constitutes exceptional circumstances? According to Lord Steyn, these were to be "hammered out on the anvil of concrete cases."[36]

It, therefore, seems that the *Blake* remedy was a different creature from the *Wrotham Park* remedy. The House of Lords seemed to treat it as restitutionary by concentrating not on the claimant's losses but on the defendant's gains.

VI. *EXPERIENCE HENDRIX* – HAMMERING OUT THE APPLICATION OF *BLAKE* AND *WORTHAM PARK*

Both *Wrotham Park* and *Blake* were subsequently analysed in *Experience Hendrix LLC v PPX Enterprises Inc.*

Before Jimi Hendrix became successful he entered into an exclusive service agreement. Under the said agreement, Jimi Hendrix was to produce and play or sing exclusively for PPX for three years as of the date of the agreement. The said agreement was later settled to restrict PPX from using certain master tapes of Hendrix's music. The legal nuances of the judgment concerned more than one case. However, it is sufficient to state that after Hendrix's death, the company owned by the family of Jimi Hendrix sued PPX for breach of contract, due to PPX's use of the master tapes.

Similarly to the previous cases, the claimant "made clear that he had no evidence, and he said that he did not imagine that he could ever possibly get any evidence, to show or quantify any financial loss suffered by the appellant as a result of PPX's breaches".[37]

The importance of the Experience Hendrix case is twofold. Firstly, it established that both the *Wrotham Park* and *Blake* remedies are alternatively available gain-based damages.[38] Secondly, the Court took the words of Lord Steyn seriously and hammered out the application of the Blake remedy,[39] as well as the Wrotham Park remedy.[40]

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[36] ibid

[37] *Experience Hendrix* n 6 at 14

[38] Ross Cunnington, 'Rock, Restitution and Disgorgement' (August 2004) Journal of Obligation and Remedies 46

[39] *Experience Hendrix* n 6 at 16

[40] ibid

The court refused to order PPX a full account of its profits and thus did not apply the Blake measure. In essence, the application of Blake was still limited to exceptional cases; cases where – as in Blake – „the contractual undertaking was closely akin to a fiduciary obligation, where an account of profits is a standard remedy in the event of a breach".[41]

The exceptional nature of Blake's case lays, first of all, in its context – employment in the security and intelligence service, of which secret information was the lifeblood, its disclosure being a criminal offence Blake had furthermore committed deliberate and repeated breaches causing untold damage, from which breaches most of the profits indirectly derived in the sense that his notoriety as a spy explained his ability to command the sums for publication which he had done.[42]

Although Lord Justice Gibson acknowledged that "deliberate breaches of contract occur frequently in the commercial world",[43] he concluded that "something more is needed to make the circumstances exceptional enough to justify ordering an account of profits, particularly when another remedy is available."[44] In other words, for Lord Justice Gibson the *Blake* remedy was simply too harsh.

Nevertheless, the claimant was not left without a remedy, as the Court applied the *Wrotham Park* principle – the defendant was ordered to pay the sum that might reasonably be demanded by the Hendrix estate to release the negative stipulation in the contract. But how was such a reasonable demand to be measured? The answer was restitution. Lord Justice Mance namely underlined the importance of concentrating on the wrongdoer's profits:

"In a case such as *Wrotham Park* the law gives effect to the instinctive reaction that, whether or not the appellant would have been better off if the wrong had not been committed, the wrongdoer ought not to gain an advantage for free, and should make some reasonable recompense. In such a context it is natural to pay regard to any profit made by the wrongdoer …. The law can in such cases act either by ordering payment over of a percentage of any profit or, in some cases, by taking the cost which

[41] ibid
[42] ibid
[43] ibid
[44] ibid

the wrongdoer would have had to incur to obtain (if feasible) equivalent benefit from another source".[45]

Subsequently Lord Justice Gibson concurred with this line of reasoning by stating that „the present case is a suitable one in which damages for breach of contract may be measured by the benefits gained by the wrongdoer from the breach".[46]

In essence what the Court did was to, firstly, expand the scope of *Wrotham Park* damages beyond an infringement of a property right. In the Court's opinion, "it is noticeable that Lord Nicholls did not treat the significance of the case as so limited".[47] Secondly, the court interpreted Wrotham Park as providing for a resitutionary remedy.[48] On a final note, it is important however to note that this interpretation of Experience Hendrix is not shared by all. Namely, in the Court's opinion Lord Justice Nicholls "regarded the case as a guiding authority on compensation for breach of a contractual obligation".[49] Such an interpretation gave the *WWF* Court the possibility to adopt a new approach to *Blake* and *Wrotham Park*.

VII. *WWF* – WRESTLING WITH *EXPERIENCE HENDRIX*

The final case concerned a dispute over the use of the initials "WWF". Under a contract, the World Wide Fund for Nature and the World Wrestling Federation Entertainment restricted the use of the initials by the latter. The contract was allegedly breached by the Wrestling Federation and proceedings ensued. In previous proceedings the Fund for Nature requested, but was not awarded, an account of profits, i.e. the *Blake* remedy. Therefore, it subsequently applied for the *Wrotham Park* remedy. In response to this the Wrestling Federation claimed that "[t]he remedy now sought by the Fund is the same as, or a juridically highly similar remedy to, the relief previously

[45] ibid
[46] ibid
[47] ibid
[48] David Campbell, Philip Wylie, 'Ain't no telling (which circumstances are exceptional)' (2003) 62 Cambridge Law Journal 605 ("Hendrix goes a long way towards eradicating this particular uncertainty by awarding hypothetical release damages on an unambiguously restitutionary basis and saying that an account of profits, though not justified in the circumstances of the case, might also have been awarded on this basis")
[49] *Experience Hendrix* n 6

sought".[50] Hence the issue was mainly procedural and directly concerned whether there was res judicata. Nevertheless, the key material issue was whether an account of profits was similar to the *Wrotham Park* remedy.

The Court of Appeal ruled that *res judicata* applied, because both remedies were similar, since they are both compensatory. First of all, the Court provided a novel interpretation of *Eperience Hendrix*. Lord Justice Hooper was namely "not persuaded that, on a true analysis, the outcome in the *Experience Hendrix* case provides support for the proposition that an award of damages on the *Wrotham Park* basis is to be characterised as a gains-based remedy (…) it is clear from the speeches in the House of Lords in *Attorney General v Blake* that it is not".[51] He noted further that "[i]n *Experience Hendrix* there were compelling reasons why the appropriate order was for payment over of a percentage of turnover (by way of royalty); but that outcome does not lead to the conclusion that this Court saw the remedy as other than compensatory in nature".[52] For this reason the Court of Appeal elaborated on the application of the remedies involved:

When the court makes an award of damages on the *Wrotham Park* basis it does so because it is satisfied that that is a just response to circumstances in which the compensation which is the claimant's due cannot be measured (or cannot be measured solely) by reference to identifiable financial loss. Lord Nicholls' analysis in *Blake* demonstrates that there are exceptional cases in which the just response to circumstances in which the compensation which is the claimant's due cannot be measured by reference to identifiable financial loss is an order which deprives the wrongdoer of all the fruits of his wrong. The circumstances in which an award of damages on the *Wrotham Park* basis may be an appropriate response, and those in which the appropriate response is an account of profits, may differ in degree.[53]

Hence, Lord Justice Hooper rejected the notion of having two competing and distinct remedies that functioned in a similar fashion; both in his opinion had a common denominator:

[50] *WWF* n 7
[51] ibid
[52] ibid
[53] ibid

"[T]he underlying feature, in both cases, is that the court recognises the need to compensate the claimant in circumstances where he cannot demonstrate identifiable financial loss. To label an award of damages on the *Wrotham Park* basis as a "compensatory" remedy and an order for an account of profits as a "gains-based" remedy does not assist an understanding of the principles on which the court acts. The two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him".[54]

The *WWF* Court thus considered the remedies to be closely related due to their compensatory nature. However, despite the Court of Appeal's creative interpretation of *Experience Hendrix*, an argument may be put forward that the *WWF* Court indeed departed from the reasoning of the *Experience Hendrix* Court. One may even be so bold as to say that the Court of Appeal reshaped the equitable remedy of an account of profits into a remedy more related to common law damages.

VIII. CONCLUSION

Wrotham Park and *Blake* seemed initially to apply two distinct approaches. *Wrotham Park* appeared to be compensatory; as damages should be. *Blake*, on the other hand, created the impression of applying an equitable remedy in a contract law situation. The latter remedy was said to be applied in exceptional circumstances, as the underlying contractual obligation was closely akin to a fiduciary obligation. The former remedy – through the *Blake* judgment – found a permanent place within the collection of remedies. The *Experience Hendrix* judgment maintained the exceptional nature of an account of profits; however, it expanded the scope of the *Wrotham Park* damages and, most probably, considered that remedy as restitutional. The decision, however, left room for interpretation, which the *WWF* exploited. The *WWF* Court applied its own interpretation of both remedies and considered them to be compensatory in nature.

The judgments described above demonstrate great flexibility of English courts. The outlined evolution of case law shows how intertwining common law and equitable

[54] ibid

remedies served to provide an adequate response to a novel situation. This undoubtedly required a degree of creativity. Nevertheless, it may be said that such creativity was still within the boundaries of the law, because equity allows for such a degree of freedom. After all, as one of the maxims of equity states, "equity will not suffer a wrong to be without a remedy".[55]

[55] Pearce n 2 at 28

Unicaja Banco, Case C-482/13: Yet Another Needed Clarification of the Consequences of Unfairness in Consumer Contracts

*Alejandra García Sánchez**

Abstract

In the context of the economic crisis, consumer protection has given rise to many controversies in the Spanish legal system surrounding the proceedings for enforcement of mortgages. This case note analyses the influence of a judgment[1] that clarifies (once again) that in contracts that fall under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[2] (hereinafter "Directive 93/13/EEC") national judges cannot moderate the clauses that are deemed to be unfair, but have to annul them. Although this has been previously stated by the Court of Justice of the European Union (hereinafter "CJEU" or "the Court"), the added value of the judgement relies on the fact that it provides a guidance to national judges confronted with a provision that, taking into account the tendencies of the Spanish legislator, can be interpreted in the sense that it allows Spanish national judges to moderate certain unfair clauses in particular consumer contracts.

I. FACTS AND LEGAL PROVISIONS AT STAKE

The main proceedings of the cases at hand concerned the enforcement of mortgage loans in front of the *Juzgado de Primera Instancia e Instrucción de Marchena* (hereinafter "the referring court"). Unicaja Banco and Caixabank concluded mortgage loans

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[1] Joined cases C-482/13, C-484/13, C-485/13, C-487/13, *Unicaja Banco SA v José Hidalgo Rueda and Others* (C-482/13), *Caixabank SA v Manuel María Rueda Ledesma and Rosario Mesa Mesa* (C-484/13), *José Labella Crespo and Others* (C-485/13) and *Alberto Galán Luna and Domingo Galán Luna* (C-487/13) [2015] (not yet reported)

[2] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts O.J. L 095 21/04/1993, P. 0029 - 0034

between the 5th of January and the 20th of August 2010 for sums ranging between EUR 47 000 and EUR 249 000. In case C-482/13, Unicaja Banco had arranged mortgage loans with four individuals and a company, subject to a default interest rate of 18%. This interest could be increased by the lender through the addition of four percentage points to the adjusted interest rate which would result in a higher percentage than 18%, with a maximum interest of 25%. In cases C-484/13, C-485/13 and C-487/13, Caixabank concluded mortgage loan contracts with eight individuals, subject to a 22,5% interest rate.

Both Unicaja Banco and Caixabank had introduced a clause in their contracts allowing them to require the payment in advance of all the outstanding capital debt, the interest, default interest, commission, expenses and costs if the borrowers did not comply with their payment obligations. The whole debt could then be required to be paid in advance, with the default interest being calculated in relation to the whole amount borrowed. The cases where joined.[3]

The referring court analysed the clauses concerning the interest rates and the right that the contract gave to the banks to require the payment of the whole debt in advance and concluded that the clauses were abusive, and thus Directive 93/13/EEC[4] was applicable to the cases.

The Spanish procedural law applicable to the enforcement of the contracts was Law 1/2013 concerning measures for the strengthening of the protection of mortgagors, the restructuring of the debt and social rent,[5] (hereinafter "Law 1/2013") and more precisely its Second Transitional Provision. The doubts of the referring court relate to this provision.

The referring court feared that the Second Transitional Provision of Law 1/2013, dealing with the temporal scope of application of Law 1/2013, grants judges the power to moderate unfair clauses in consumer contracts in enforcement proceedings commenced and not concluded by the time of the entry into force of this

[3] Order of the President of the Court of 10 October 2013

[4] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 095 , 21/04/1993, P. 0029 - 0034

[5] Ley de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social of 14 May 2013 BOE Nº7 of 8 January 2000 at 575

Law, inasmuch as it provides that "for enforcement proceedings that were initiated and not concluded before the entry into force of the Law, the Judicial Secretary will give the enforcer a delay of 10 days in order to recalculate the default interest rate".[6]

The referring court raised doubts about the compatibility of the power of "re-calculation" with Directive 93/13/EEC and referred to the CJEU. Three questions where submitted for preliminary ruling.

The first question relates to the powers of the national courts regarding the presumably abusive clauses included in the contracts the enforcement of which is pending before them. The referring court asked whether a national court, when it finds a default-interest clause in a mortgage loan to be unfair, must declare the clause void and not binding or whether it should moderate such interest clause, by asking the enforcement seeker to adjust his interest rate.

The second and third questions focus on the Second Transitional Provision itself. The second question, inquires whether the 'obligation', imposed, on the competent court, to moderate an abusive interest rate, in cases where the enforcement proceedings where commenced and not concluded before the entry into force of Law 1/2013, is a limitation of consumer protection. The third question seeks to know whether the Transitional Provision contravenes Directive 93/13/EEC,[7] particularly its article 6 (1), insofar as it prevents the application of the principles of equivalence and effectiveness regarding the protection of consumers by precluding the possibility of declaring the nullity and non-binding nature of unfair clauses.

II. THE RULING

The CJEU reformulated the three questions into a single one aiming to find out whether article 6(1) of Directive 93/13/EEC must be interpreted as precluding national law according to which the national court competent for the enforcement of a mortgage-loan contract is required to adjust the amounts due under a clause in the

[6] The translation is the Author's

[7] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 095 , 21/04/1993, P. 0029 - 0034

contract providing for a default interest at a rate more than three times greater than the statutory rate, by applying a default interest which does not exceed that threshold.

Thus, the Court recalled[8] its previous case-law on consumer contracts and stated that: article 6 (1) of the Directive imposes on national courts the requirement of excluding the application and binding nature of unfair clauses, without authorising them to moderate the terms of such clauses.[9] It restated that national courts are not entitled to reduce a penalty clause which they consider to be unfair in a contract concluded between a seller and a consumer.[10] The Court clarified that such an authorisation would undermine the achievement of the objective of article 7 of the Directive, since it would not impede a continued use of unfair clauses by sellers or providers who are in a position of dominance in relation to that of the consumer.[11] Thus, the Court concluded that, in view of its previous case-law, article 6 (1) does preclude a national provision that allows a national court to revise and adjust the content of a term of a contract concluded between a seller and a consumer where it finds it unfair and void.[12]

However, the Court drew attention to the possibility of the national courts to substitute a supplementary provision of national law for an unfair term, provided that the substitution is in accordance with article 6 (1), where the court would otherwise have to annul the whole contract to the detriment of the consumer.[13] But this was not the case in the main proceedings, since the elimination of the clauses at stake would lead to a reduction of the quantity claimed by the banks.[14]

The Court turned then to the analysis of the Second Transitional Provision of Law 1/2013 itself. It clarified that such a provision applies to any mortgage loan contract, whilst Directive 93/13/EEC applies only to unfair terms in consumer contracts, thus, the obligations imposed by Law 1/2013 are applicable regardless of the unfair

[8] *Unicaja* n 1 para 28

[9] Case C-618/10, *Banco Español de Crédito SA v Camino* [2012] not reported para 65; Case C-488/11, *Asbeek Brusse and de Man Garabito* [2013] not reported para 5

[10] Case C-618/10, *Banco Español de Crédito SA v Camino* [2012] not reported para 29; Case C-488/11, *Asbeek Brusse and de Man Garabito* [2013] not reported para 59

[11] Case C-618/10, *Banco Español de Crédito SA v Camino* [2012] not reported paras 30-31, 68-69, 78-79

[12] ibid paras 32, 73, 77

[13] *Unicaja* n 1 para 33; *Banco Español de Crédito* n 9 para 73; Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] not reported para 77

[14] *Unicaja* n 1 para 34

nature of the clauses.[15] It also recalled that the unfairness of a contractual term must be assessed in view of all the circumstances attending its conclusion, including therefore the law applicable to it.[16]

Finally, the Court went on to consider that the Second Transitional Provision of Law 1/2013 does not preclude a national court from drawing the consequences of the unfairness of a contractual term included in a consumer contract imposed by Directive 93/13, namely, the elimination of the unfair clause.

The CJEU concluded that a term included in a consumer contract complying with the thresholds settled in Law 1/2013, can still be considered to be unfair within the meaning of Directive 93/13/EEC, and thus be annulled by the national court. It further stated that, when a term included in a consumer contract is considered to be unfair by the national court because it exceeds the thresholds settled by Law 1/2103, the Second Transitional Provision of Law 1/2013, must not prevent the court from annulling such a term, instead of moderating it. Thus, according to the CJEU, the national court must apply the moderation provided by the Second Transitional Provision only in relation to contracts that do not fall within the scope of Directive 93/13/EEC. Since the Provision allows for it, it concluded that Directive 93/13/EEC does not preclude a national regulation such as the one in question in the main proceedings.[17]

III. COMMENT

A. A closer look at the provision at stake and the doubts of the national court

Law 1/2013 amended several provisions within the Spanish legal system in order to make it compliant with the case law of the CJEU on consumer protection (more on this in Section C). Article 3(2) of Law 1/2013, establishes a limitation of the

[15] ibid para 36
[16] ibid paras 37-38
[17] ibid paras 40-42

default interests that can be applied to mortgages on habitual dwellings, however according to the Second Transitional Provision of Law 1/2013, the threshold applies only to mortgages that came into force after Law 1/2013 did.

From the reasoning of the Court and the Advocate General, it seems that the national court incorrectly related the Second Transitional Provision of Law 1/2013 to Directive 93/13/EEC. It is true that the scope of the Provision is wider than that of the Directive, but the fact that the drafting of the provision does not make any reference to an exception to the "power of recalculation" settled therein is at least puzzling.

The rationale behind the adoption of Law 1/2013, which was motivated by *inter alia* the *Aziz* judgement,[18] shows that the national court was not so disorientated. Law 1/2013 aims precisely to palliate the abuse of unfair clauses included in consumer mortgage contracts. A simple quick read of the preamble of Law 1/2013 shows that it mainly addressees families who are dealing with a hard economic crisis and are under the risk of losing their habitual dwellings. Thus, a teleological interpretation shows that a provision that openly allows for a court to moderate/recalculate the default interests set out in certain clauses, that surpass a limit, is to be viewed as bizarre within a consumer-protective law. The reason why the Spanish legislator included an authorisation to moderate the default interest settled in a contract (without further clarification) in a regulation that was adopted to limit abuses in consumer contracts remains obscure and gives rise to precisely those doubts that the national court referred to the CJEU.

B. The added value of the judgment

The added value of the judgment is twofold. First, it clarifies that, even if the provision at stake may give the impression of granting moderating powers to national judges in every contract, it can only be applied to moderate the default interest clauses in contracts that do not fall within Directive 93/13/EEC, in order for the provision to be compatible with EU law. Secondly, the doubts of the national judge highlight the tendency of the Spanish legislative power to grant wider chances to sellers and suppliers for being successful. If this had not been the classical approach of the Spanish legislator, the national Court would not have considered the possibility of there being

[18] Case C-415/11, *Mohamed Aziz v. Catalunyacaixa* [2013] not reported

a national provision granting a moderation power in relation to unfair clauses included in certain consumer contracts. The referred questions are thus welcomed since, although the previous case law of the CJEU was clear in respect of the prohibition of moderation of unfair clauses in consumer contracts, the national regulation at issue could have, in the absence of this ruling, lead to misunderstandings by other national courts. The clarification of the CJEU in the context of Spanish law is thus pertinent and needed in order to keep the effectiveness of the rights that EU law grants to consumers.

C. The importance of the CJEU for the development of the regulation of consumer protection in the Spanish legal system.

As mentioned above, the economic crisis has highlighted that, in the Spanish legal system, lenders have traditionally and surprisingly enjoyed a wide margin of discretion in order to settle the clauses of their contracts vis-à-vis consumers. Concretely, the regulation of the enforcement proceedings under Spanish law has traditionally granted (and still does) Spanish lenders very advantageous procedural rights to the detriment of the consumers. Article 695 of the Code of Civil Procedure was at stake in the *Aziz* ruling, where the CJEU said that Directive 93/13/EEC precluded legislation that did not allow a consumer to oppose to the enforcement of a clause, on the basis of its unfairness. Furthermore, the legislation in questions did not permit the court before which declaratory proceedings have been brought, which has jurisdiction to assess the unfairness of such a term to grant interim relief measures, including the staying of those enforcement proceedings, to grant such relief when it was necessary to guarantee the full effectiveness of its final decision.[19]

Following the *Aziz*[20] judgement, the real added value of which was the confirmation of the powers of the national courts to grant interim measures,[21] Law 1/2013 came into force in order to amend several provisions of the Spanish legal system and to equalise the balance between the consumers and the lenders. Article 695 of the Civil

[19] *Banco Español* n 9 paras 59-61

[20] See n 13

[21] Sara Iglesias Sánchez, 'Unfair terms in mortgage loans and protection of housing in times of economic crisis: *Aziz v Catalunyacaixa*' (2014) 51 Common Market Law Review 955-974

Procedural Code was then amended and the unfairness of a contractual clause was included as a ground for objection against an enforcement order.

Prior to the *Aziz* judgement, the CJEU preliminary rulings on consumer protection referred by Spanish jurisdictions have been abundant[22] and have shaped national legislation towards a regulation that is more coherent with EU standards on consumer protection.

However, the *Sánchez Morcillo* saga is a perfect example of how the Spanish legislator keeps on granting less procedural rights to consumer-debtors than to sellers or suppliers. It is clear that the interests of the creditors are considered to be predominant over those of the debtors, no matter what the condition of the latter is (consumer or not). In the *Sánchez Morcillo* cases, the national court has taken into account the Charter of Fundamental Rights of the European Union[23] in order to ask whether article 695(4) of the Spanish Civil Procedural Code is compatible with EU law. Thus, although Law 1/2013 introduced in article 695 (1) the unfair nature of a contractual clause as a ground for objection by a debtor against an order of enforcement of a contract, paragraph 4 of the same article is still considered to be restrictive of consumers' procedural rights.

In the case *Sánchez Morcillo,* C-169/14, the Spanish Court questioned whether it was in compliance with Directive 93/13 and Article 47 of the Charter to restrict the right of appeal to orders discontinuing enforcement proceedings or disapplying an unfair clause, excluding an appeal in other cases. The Spanish court highlighted that the consequence of this is that, whilst the creditor may appeal when an objection to enforcement is upheld and the proceedings are brought to an end or an unfair term is disapplied, the consumer party against whom enforcement is sought may not appeal if his objection is dismissed. The CJEU ruled that EU law precluded such a regulation[24] and article 595 (4) was modified in order to comply with the judgement.[25] However,

[22] Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] I-10421; Case C-40/08, *Astucom Telecomunicaciones* [2009] I-9579; C-240/98, C-241/98, C-242/98, C-243/98, C-244/98, *Océano Grupo Editorial et Salvat Editores* [2000] I-4941; Case C-473/00, *Cofidis* [2002] I-10875; Case C-618/10, *Banesto-Joaquín Calderón* [2012] not reported; Case C-169/14 *Sánchez Morcillo* [2014] not reported

[23] Charter of Fundamental Rights of the European Union, 2010, O.J. C 83/02

[24] *Sánchez Morcillo* n 22 para 51

[25] Real Decreto Ley 11/2014 de 6 de septiembre 2014

the referring court considered that the amendment was not enough and thus asked in the pending case *Sánchez Morcillo* C-539/14, whether article 7(1) of Directive 93/13/EEC in conjunction with articles 47, 34(3) and 7 of the Charter of Fundamental Rights of the European Union,[26] must be interpreted as precluding article 695(4) of the Spanish Law on Civil Procedure, which allows an appeal to be brought only against an order staying the proceedings, dissaplaying an unfair term or dismissing an opposition based on an unfair term, the immediate consequence of which is that more legal remedies on appeal are available to the seller or supplier seeking enforcement than to the consumer against whom enforcement is sought.

It is expected that the CJEU's ruling in the second *Sánchez Morcillo* case C-539/14, will encourage the Spanish legislator to finally establish pure equality between the procedural rights of consumers and sellers.

IV. CONCLUSION

The drafting of the national provision at stake in the *Unicaja Banco* ruling (the Second Transitional Provision of Law 1/2013) is not clear enough and opens possibilities for different interpretations. Thus, the added value of the ruling is that it clarifies the interpretation that should be given to this provision in order for it to be compatible with EU law. Furthermore, this referral for a preliminary ruling highlighted that legislative measures in the field of consumer protection tend to be in favour of creditors or lenders.

The case law of the CJEU has been of utmost importance in order to develop the regulation of consumer protection in the Spanish legal system, promoting modifications that gradually eliminated major inequalities in the rights conferred upon creditors and those conferred upon consumer. However, the continuous flow of preliminary ruling referrals highlights that the Spanish legal system still has provisions that do not comply with EU consumer protection standards.

It is thus expected that the CJEU's case law will give rise to the necessary amendments and to the consciousness of the Spanish legislator that consumers should

be granted, at least, the same substantial and procedural rights as professional lenders or creditors.

Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten:* National Support Schemes for Green Energy Production and the Free Movement of Goods

Magdalena Brodawka[*]

Abstract

The following case note concerns the Ålands Vindkraft AB v Energimyndigheten case decided by the Court of Justice of the European Union on 18 July 2014. The case note analyses the issue of compatibility of the subsidy schemes for energy produced from renewable sources with the rules of the internal market. The Court considers that the support scheme for energy produced from renewable sources available only for domestic producers of energy from renewable sources is compliant with the provisions relating to the free movement of goods.

I. INTRODUCTION

The issue of compatibility between European Union law (hereinafter "EU law") and national support schemes for energy produced from renewable sources has been discussed at length, both in literature[1] and in the case law of the Court of Justice of the European Union (hereinafter "Court" or "CJEU").[2] On 18 July 2014, the Court has spoken again on that topic in its judgement in the *Ålands Vindkraft AB v Energimyndigheten* case. The CJEU analysed whether the system of Swedish electricity certificates (the so-called 'green certificates') may be considered as constituting a quantitative restriction on imports or a measure with equivalent effect in the light of article 34 of the

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[1] Angus Johnston, 'The Proposed new EU Renewables Directive: Interpretation, Problems and Prospects' (2008) 17 European Energy and Environmental Law Review

[2] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt* [2014] ECR not yet reported

Treaty on the Functioning of the European Union (hereinafter "TFEU").[3] The Court adopted a position which claims that the support scheme for energy produced from renewable sources (hereinafter "green energy" or "green electricity") available only for domestic green electricity producers does not violate internal market rules and is compliant with the provisions relating to the free movement of goods. However, it can be seen that the opinion of the CJEU is not a universal one. A different view was expressed by Advocate General Yves Bot in his opinion of 28 January 2014.[4] The Advocate General argued that the Swedish support scheme should be declared incompatible with EU law. This proves that the issue of compatibility of support schemes for green energy with the rules of the internal market is not transparent and its requires a thorough analysis.

II. THE DISPUTE IN THE MAIN PROCEEDINGS

The judgement of the Court was made in connection with a dispute between Ålands Vindkraft AB (hereinafter "Ålands Vindkraft") and Energimyndigheten (Swedish Energy Agency) on the basis of the provisions of a Swedish Law establishing a system of green certificates and implementing the Directive of the European Parliament and the Council 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (hereinafter "Directive 2009/28/EC" or "Directive").[5]

The support scheme stipulated in Swedish law[6] consists in awarding green certificates to producers of green energy. Ålands Vindkraft sought approval from a competent Swedish authority for the Oskar wind farm located in Finland (operated by Ålands Vindkraft) with a view to being awarded green certificates pursuant to Swedish

[3] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

[4] Opinion of Advocate General Bot delivered on 28 January 2014; Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] not reported

[5] Directive of the European Parliament and the Council 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140

[6] Law No 1200 of 2011 on electricity certificates

legislation. The support scheme established by the Swedish legislation is based on the award of green certificates to producers of green electricity and on the correlative obligation incumbent upon electricity suppliers and certain users to purchase a certain number of certificates. Additionally, green certificates are tradable and can be sold on a competitive market. The Swedish Energy Agency rejected Ålands Vindkraft's application for approval of the Oskar wind farm. It has justified its position by saying that the green certificates scheme is open solely to electricity production installations located in Sweden, whereas Ålands Vindkraft was located in Finland.

In response to that, Ålands Vindkraft brought an action before the Swedish Administrative Court for the annulment of that decision and approval of its application. The company claimed that Swedish regulations contradicted the provisions relating to the free movement of goods stipulated in article 34 TFEU which says that quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States. Ålands Vindkraft submitted that Directive 2009/28/EC did not harmonise national support schemes and that, consequently, the national measures adopted in order to transpose that directive into national law must be consistent with primary law, whether or not they are consistent with the directive. On the other hand, the Swedish Energy Agency argued that the conflict between the territorial restrictions and article 34 TFEU should be considered as impossible, since primary law would only apply in the scope in which there would not be any relevant secondary law.[7]

Due to the doubts concerning the interpretation of Directive 2009/28/EC and the implications of article 34 TFEU, the referring court made a request to the Court for a preliminary ruling with regard to the following questions:

- Are point (k) of the second paragraph of article 2 of Directive 2009/28/EC and article 3(3) to be interpreted as permitting a Member State to implement a national support scheme, from which only producers established in the territory of that State may benefit, the result of which is that those producers have an economic advantage over producers who are not eligible for electricity certificates?

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- In the light of article 34 TFEU, can a system such as that described in the first question be regarded as constituting a quantitative restriction on imports or a measure having equivalent effect?
- If the answer to the second question is affirmative, can such a scheme be regarded as compatible with article 34 TFEU in the light of its objective of promoting the production of green electricity?
- Does the fact that there is no express provision in the national law requiring the support scheme to be confined to national producers have any bearing on the answers to the above questions?

III. THE SUPPORT SCHEME FOR GREEN ENERGY AND THE FREE MOVEMENT OF GOODS

A. The opinion of the Advocate General

The Advocate General indicated that with the first question for a preliminary ruling the referring court aims to determine (i) whether a system like the one being at issue in the main proceeding constitutes a support scheme within the meaning of article 2, second paragraph, point (k) of Directive 2009/28/EC and (ii) whether the provisions of Directive should be interpreted as prohibiting any restriction whereby access to such a scheme is reserved to producers whose installations are located in the Member State concerned. The Advocate General indicated as a preliminary point that a system of green certificates, such as that which is the subject of the main proceeding, constitutes a support scheme within the meaning of Directive 2009/28/EC. Additionally, he pointed out that the provisions of Directive (article(2)(k) and the article 3(3)) should be interpreted in as meaning that national legislation under which the producers of green electricity are awarded green certificates of which electricity suppliers and certain users must compulsorily purchase a certain quota is a support scheme within the meaning of Directive 2009/28/EC. In the Advocate General's opinion, the Directive allows Member States which introduced such systems to reserve the award of green certificates exclusively to green electricity producers located on the territory of those States.

The Advocate General pointed out that with questions two and three the referring court aims to determine whether article 34 TFEU objects to a territorial restriction which is a feature of the scheme at issue. To that end, the Advocate General analysed whether (i) article 34 TFEU applies, (ii) the contested provisions constitute its violation and (iii) the violation may be justified. In the Advocate General's opinion, the assessment of the Swedish support scheme with regard to article 34 TFEU should be made with account being taken of the principle that the primary law prevails over other sources of EU law. The Advocate General indicated two material consequences resulting from the adopted position. The first of them concerns the interpretation of the secondary law, which must be in a sense which renders it consistent with primary law and the general principles of the European Union.[8] The second consequence relates to the validity of the secondary law, which must be assessed by reference to the rules of primary law relating to freedom of movement. This is because it follows from the case-law of the CJEU that the prohibition of quantitative restrictions and of measures having equivalent effect, as laid down in article 34 TFEU, "applies not only to national measures but also to measures adopted by the institutions of the European Union",[9] which themselves must also have due regard to freedom of trade between Member States, which is a fundamental principle of the common market.[10]

The Advocate General noted that the restrictions mentioned in article 34 TFEU may not only consist in a discrimination of imported products as compared to domestic ones, but also in a benefit granted to domestic production as compared to imported goods[11] or in a regulation, which does not restrict any benefits solely to domestic products, but it introduces additional conditions for obtaining them for imported products.[12] Having the above in mind, the Advocate General decided that although the Swedish green certificate scheme does not prohibit the importation of electricity, it indisputably confers an economic advantage which may favour producers of

[8] Case C-305/05 *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres* [2007] ECR I-5305; see also Case C-19/12 *Efir OOD v Direktor na Direktsia* [2013] not reported

[9] Case C-59/11 *Association Kokopelli v Graines Baumaux SAS* [2012] not reported; see also Case C-15/83 *Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR I-2171

[10] Case C-37/83 *Rewe-Zentrale v Landwirtschaftskammer Rheinland* [1984] ECR 1229

[11] Case C-103/84 *Commission v Italy* [1986] ECR 1759

[12] Case C-443/10 *Bonnarde v Agence de Services et de Paiement* [2011] ECR I-9327

green electricity located in Sweden as compared to the producers located in other Member States. The Advocate General noticed that whereas the former benefit from additional income from the sale of green certificates, which is in effect a production premium, the income of the latter is derived solely from the sale of green electricity.

Additionally, in the Advocate General's opinion there are no arguments which would lead to show that restrictions like those in the main proceeding are appropriate for securing the attainment of the objective of environmental protection. Considering the aforementioned, the Advocate General stated that territorial restrictions such as those at issue in the main proceedings are inconsistent with the principle of the free movement of goods. Based on that, the Advocate General assumed that article 3(3) of Directive 2009/28/EC is invalid in that it confers on Member States the power to prohibit, or to restrict, access to their support schemes on the part of producers whose sites for the production of electricity from renewable energy sources are located in another Member State.

B. The Judgment of the Court

As was shown at the beginning of this article, the Court did not uphold the opinion expressed by the Advocate General. The Court decided that the provisions of point (k) of the second paragraph of article 2 and article 3(3) of Directive 2009/28/EC must be interpreted as allowing a Member State to establish a support scheme, which provides for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of that State. Moreover, the Court showed that such national legislation does not violate article 34 TFEU.

The Court assumed, similarly to the Advocate General, that the Swedish support scheme bears the features mentioned in the provisions of point (k) of the second paragraph of article 2 and article 3(3) of Directive 2009/28/EC. This is because it provides for the award of tradable certificates to producers of green electricity solely in respect of green electricity produced in the territory of the Member State concerned and which places suppliers and certain electricity users under an obligation to surrender annually to the competent authority a certain number of those certificates, correspond-

ing to a proportion of the total volume of electricity that they have supplied or consumed. The CJEU also noted that article 3(3) of Directive 2009/28/EC clearly states that without prejudice to articles 107 and 108 TFEU Member States shall have the right to decide, in accordance with articles 5 to 11 of the Directive, to which extent they support green energy which is produced in a different Member State. The Court noted that EU law does not require Member States which opted for a support scheme using green certificates to extend that scheme to cover green electricity produced on the territory of another Member State. With regard to the issue of compatibility of the Swedish support scheme for green energy with the principle of free movement of goods stipulated in article 34 TFEU, the Court indicated that first it should be determined whether the harmonisation brought about by Directive 2009/28/EC may preclude an examination of whether legislation such as that at issue is compatible with the TFEU. This is because, according to the case law, an exhaustive harmonisation of a particular area at the level of the EU causes that all national measures regulating the issue are to be evaluated on the basis of the provisions of the harmonising measure instead of primary law.[13] The analysis of the recital 25 to Directive 2009/28/EC, as well as the provisions of article 1, article point (k) of the second paragraph of article 2 and article 3(3), led the Court to a conclusion that there was no exhaustive harmonisation executed with regard to the area to which green energy support schemes belong. Therefore, on the basis of the subject proceeding, the analysis of compliance with the provision of TFEU was justified. In the Court's opinion, the Swedish legislation could be capable of hindering, at least indirectly and potentially, imports of electricity, especially green electricity, from other Member States. Consequently, it could therefore constitute a measure having equivalent effect to quantitative restrictions on imports, which is in principle not compliant with article 34 TFEU, unless the legislation can be objectively justified. In that context, the CJEU referred to settled case law[14] which suggests that national measures which are capable of hindering intra-Community trade may *inter alia* be justified by overriding requirements relating to the protection of the

[13] Case C-309/02 *Radlberger Getränkegesellschaft and S. Spitz KG v Land Baden-Württemberg* [2004] ECR I-11763

[14] Case C-524/07 *Commission v Austria* [2008] ECR I-00187. See also Case C-463/01 *Commission v Germany* [2004] *ECR* I-11705; Case C-389/96 *Aher-Waggon GmbH v Germany* [1998] ECR I-4473

environment. Subsequently it was explained that the promotion of renewable energy sources is useful for the protection of the environment inasmuch as it contributes to the reduction in greenhouse gas emissions. In the Court's opinion such an increase in the use of energy from renewable sources is designed to protect the health and life of humans, animals and plants, which are among the public interest grounds listed in article 36 TFEU.

Additionally, the Court noted that in the light of the current state of EU law, the territorial restriction introduced with the Swedish law, consisting in electricity certificates being awarded only to green energy produced domestically, may in itself be considered as required to attain the legitimate objective pursued in the circumstances, which is to promote increased use of renewable energy sources in the production of electricity.

IV. CONCLUSION

Whilst executing the analysis of compatibility of the Swedish support system for green energy with the principle of free movement of goods stipulated in article 34 TFEU, the Court noticed that the system may result in decreased imports of electricity from other Member States. At the same time, it referred to overriding requirements relating to protection of the environment, which, according to settled case law, may justify the use of national measures which may hinder intra-Community trade, pursuant to article 36 TFEU. The Court also showed that the objective consisting in a promotion of use of renewable energy sources for the production of electricity, such as the one which is the objective of the legislation at issue in the proceeding, may, in principle, justify the possible hindrance in the free movement of goods. The position adopted by the Court is important from the perspective of the compliance of the Polish support scheme stipulated in the new Act of 20 February 2015 on Renewable Energy Sources (hereinafter "RES Act"). The Polish support scheme for energy produced from renewable sources is based on a so-called auction system and a green certificate system as well. Pursuant to the article 52 (1) of the RES Act, entities listed in the provision (an energy agency, a final recipient, an industrial recipient and a commodity brokerage house) are obliged, especially, to obtain certificates of origin for electricity

produced in renewable energy installations located on the territory of the Republic of Poland or located in an exclusive economic zone and to submit them to the President of the Energy Regulatory Office for redemption. Therefore, the aforementioned provisions indicate that Polish certificates of origin (similarly to the green certificates stipulated in the provisions of Swedish law) have territorial restrictions and apply solely to electricity produced domestically or in an exclusive economic zone. As a result it should be assumed that the position adopted by the CJEU is significant not only for the Swedish support scheme for green energy, but also, for instance, for the Polish support scheme under the RES Act.

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