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Editorial
**NOT ANOTHER MISSED OPPORTUNITY: REGULATION OF HEALTH CARE
PROFESSIONALS**

Marc Cornock

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On the 1st March 2012 The Law Commission published proposals for reform of health care professional (HCPs) within the United Kingdom (Law Commission 2012). These proposals are part of a consultation on changes the way that HCPs are regulated.

Various consultation exercises, government reports and public inquiries have criticised aspects of the regulation of HCPs and made recommendations for change in recent years.¹ Some of these criticisms have been levied at the professional regulatory bodies and their failure to adequately protect the public and patients. There have resulted in calls for radical changes to the existing regulatory bodies, so that those deemed to be failing are reformed into effective agents of public protection

It would seem logical that if a particular part of the regulatory system was not working that it was fixed. Yet, this is not what has happened in previous HCP regulatory reform, instead of undertaking wholesale reform of these bodies and fixing what is broken, new regulatory bodies such as Council for Healthcare Regulatory Excellence are inserted into the regulatory framework as a check upon the professional regulatory bodies.

Instead of constant reorganising and adding to existing regulatory bodies, regulation of HCPs needs to be sorted once and for all. However, any regulatory system that is put in place needs to be effective.

Assessment of efficacy of the principles of regulation

In order to assess whether the regulatory framework that has been put in place is effective and achieves the desired purpose, there needs to be a number of set criteria against which the regulatory framework can be judged. However, the setting of criteria against which to judge regulatory frameworks can be as difficult to put in place, as can the implementation of

¹ For instance, see Secretary of State for the Home Department and the Secretary of State for Health (2004) Shipman Inquiry Fifth Report: Safeguarding Patients: Lessons from the Past - Proposals for the Future (Chair Dame Janet Smith DBE) Cm 6394 The Stationery Office, London; and Kennedy I (Chair) (2001) Learning from Bristol: The report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984 – 1995 CM 5207(1) Stationery Office, London.

the regulation in the first place. As Baggott states, 'it [is] difficult to assess the impact of regulation because there are different value judgments about the criteria that should be used' (Baggott, 2002, 32); a view echoed by Baldwin and Cave who believe that 'to decide whether a system of regulation is good, acceptable, or in need of reform it is necessary to be clear about the benchmarks that are relevant in such an evaluation' (Baldwin & Cave, 1999, 76).

The 'Better Regulation Task Force',² although not specifically looking at regulation of health care and HCPs, has identified a number of principles of good regulation, against which regulation can be assessed to identify its effectiveness. These principles are that any system of regulation should have: transparency; accountability; consistency; proportionality; and it should be targeted at the regulatory problem (Better Regulation Task Force, 2000, 29).

Pyne, on the other hand, has identified key principles which he believes should underpin professional regulation. These are:

identifying the purpose of regulation; clarifying the essential elements of a regulatory system; considering how the interested parties are and how they should be involved [interested parties includes HCPs; patients; employers; educators; Government; professional associations e.g. royal colleges of medicine; and trades unions e.g. British Medical Association]; recognising any hazards which must be avoided; and ensuring that the system is both fair and just for those regulated (Pyne, 2003, 176).

There are a number of areas that can be considered to be influential on regulatory efficiency and it is to these that I now turn.

Regulatory purpose

Braye & Preston-Shoot note that there are two assumptions made about regulation:

The first assumption is that regulation will lead to improved practice, and will promote accountability by making clear the requirements for the exercise of professional judgement. [Whilst] the second assumption is that inspection against set standards can improve accountability. (Braye & Preston-Shoot 1999, 238 & 240)

² The 'Better Regulation Task Force' is an 'independent advisory group' whose terms of reference are 'To advise the Government on action which will improve the effectiveness and credibility of government regulation by making sure that it is necessary, fair and affordable, and simple to understand and administer, taking particular account of the needs of small businesses and ordinary people'. Better Regulation Task Force' (1999) Self-regulation: interim report Cabinet Office, London, at Annexe A.

In order for these assumptions to become reality, any system of regulation needs to have a purpose, an aim that is both achievable and capable of being understood by both those who are being regulated and those the regulation is seeking to protect. The purpose of regulation should be communicated to the interested parties so that they can understand it. There should be an overarching cohesiveness to regulation, a framework that links it all together, so that the regulation put in place has both procedural and substantive accountability. It is important to identify the issues that need regulating and to ensure that the regulation addresses them and them alone.

With regard to procedural accountability, for Ogus, this means that 'procedures must be fair and impartial' (Ogus, 1999, 111) to both those regulated and to those for whom the regulation is to benefit. Further, Ogus states that substantive accountability means that 'the rules and decisions are themselves justifiable in terms of the public interest goals of the regulatory system' (Ogus, 1999, 111).

For Allsop and Mulcahy, any form of regulation has

to balance the interests of doctors, who claim to work according to the altruistic ethic of care, with those of the consumer of health care, who has a right to expect competence and information about treatment (Allsop & Mulcahy, 1996, 24).

These two interests, that of those being regulated and those being protected by the regulation, are often competing interests that need to be balanced against each other. For regulation to be effective, it has to have the confidence of those that it aims to provide protection for as well as those being regulated.

Regulation of HCPs has the general purpose of protection of the public and patient safety. Montgomery summarises the

principal functions of professional [that is regulatory] bodies [as being] to maintain a register of qualified practitioners and to remove those unfit to practise because of ill health or by reason of improper conduct, to oversee professional education, and to give guidance on matters of professional ethics (Montgomery, 2003, 134).

Whilst for Grubb, the principal function of regulatory bodies is the

maintenance of a professional register controlling admission to (and continued presence on) that register - based upon the satisfaction of

educational and training requirements ... and of good character (Grubb, 2004, 84) .

Any new regulatory activity 'must be consistent with existing regulations' (Better Regulation Task Force, 2000, 29); introducing new regulations that are out-of-kilter with those already in existence will only lead to confusion and uncertainty for those being regulated who will not know which regulatory process takes precedence. However, this does not mean that, once introduced, regulation is fixed; there is a need to be able to adapt regulation that is in place according to future changes in health care, the health care professions, and in society itself.

There should also be proportionality in the impact of the regulation. Constraining the clinical autonomy of a HCP should only be undertaken where the perceived benefit to patients and the public outweighs the negative impact that this will have upon individual HCPs, as well as clinical practice as a whole. There should not be 'unnecessary demands on those being regulated' (Better Regulation Task Force, 2000, 29).

Regulatory authority

Once the purpose of regulation has been settled, any regulation that is put in place needs to be supported by authority. Without the appropriate authority, there is no reason for those being regulated to feel that they are constrained by the regulatory processes and those supposed to be protected by the regulation may not feel that the regulation is adequate to meet this need.

For Baldwin and Cave, the important question is, 'is the action or regime supported by legislative authority' (Baldwin R & Cave M, 1999, 77)? In the case of regulation of HCPs, much of the regulation has been implemented through legislation, giving the regulation the authority of Parliament.

External review and accountability

One of the criticisms of regulation is that of a lack of external accountability. This was particularly so in relation to self-regulation where there is no apparent review of the regulatory process by an agency external to the regulatory body. Therefore in achieving effective regulation, there should be an appropriate level of accountability. Having the regulatory process subject to external review may be a positive factor from the viewpoint of both those subject to the regulation and those being protected by it.

The external review should be able to address the question of whether the regulator is 'acting with sufficient expertise' (Baldwin R & Cave M, 1999, 77).

The question arises as to what level this external review should be. The review could be from another regulatory body undertaking similar processes, for example, doctors review nurses who review physiotherapist who review doctors; or could be from an agency specifically created for the purpose; or, it could be from an agency of Parliament, either Ministers of State or a Select Committee of either House; or it could be through the judiciary element of the state apparatus.

Regulation is a form of administrative law, Ogus sees administrative law as having 'the power of the ordinary courts to review the activities of public authorities' (Ogus, 1994, 115). He goes further to suggest that

judges are well-equipped to assume the tasks imposed by procedural accountability and undoubtedly have performed a valuable function in this regard. On the face of it, judges might also seem to be appropriate instruments for monitoring substantive accountability. Their independence and autonomy, as well as the rules of the judicial process, suggest that they are insulated from political pressures to a greater degree than regulatory agencies; and there is a long tradition of addressing public interest issues on relation to judicial decisions (Ogus, 1994, 115).

For Allsop & Mulcahy:

administrative law performs a number of different functions in the modern state. First it has a control function, in the sense that it acts as a brake, or check, on the unlawful exercise of executive or administrative power. Second, it can have a command function, by making public bodies perform their statutory duties. Third, it encourages good administrative practice, by providing positive principles according to which an organization should operate. Fourth, it provides a remedy for grievances suffered by citizens at the hands of public authorities. Finally, the law facilitates accountability and participation. In addition, legislation acts to legitimise the activity of professional groups by granting special status to them and it empowers individuals and organisations to act in ways which would not otherwise be legal (Allsop & Mulcahy, 1996, 19 – 20).

Rules, functions and duties

Regulation has to say something to those it regulates; the rules of the regulating body have to be accessible to those being regulated. They need to know whether the regulation is enabling or restrictive, that is, is it telling the HCP to do something or not to do something and, if it is permitting the HCP to do something, is it telling them how to do undertake this action or permitting them to decide for themselves? There needs to be clear statement of any standard that is expected of the HCP.

The functions, powers and duties of regulatory bodies need to be clearly defined. Without this, it would be impossible to decide whether it is an appropriate source of regulation. How will the regulatory body, the bodies to whom it is accountable, those being regulated and those for whom the regulation exists to protect know if the regulation is working or, more importantly, if it is not working, that is, is not meeting its goal of public protection and patient safety?

In addition, there is a need for regulation to be predictable. This means that regulation has to be fair to those it regulates, they need to know that there is consistency in the way that the regulators will approach a given situation and the outcome that they should expect. Otherwise, the HCP would be unable to know how to act in a given situation for fear of being judged to have acted inappropriately by the regulatory body.

Another reason for fairness in the rules of the regulating body is that by making their rules open, all are able to access them and to judge their appropriateness. In addition, having onerous rules may mean that future generations of HCP are discouraged from applying to that particular profession.

One way of ensuring that the rules of regulatory bodies are accessible and fair is to have them originate from statute, so that they are subject to open debate and drafted with precision.

Enforcement

The major issue is whether the regulatory aim can be managed and enforced effectively, or whether it is too wide or cumbersome to be enforceable. Regulatory aims need to be such that they produce rules and regulations that can be enforced.

It is important to know how infractions of the regulatory body's rules and regulations can be raised. Is it possible, for instance, for the patient or members of the public to raise

complaints with the regulatory body? It is equally important to know how far the particular regulatory body can assist in protecting the public and patients from rogue HCPs.

Each infraction or complaint about a HCP needs to be dealt with consistently, according to agreed and accessible procedures. The rules and procedures need to be clearly available, so that they can be understood not only by the HCP against whom they are being used but also by the regulatory body officials who are applying them. As the Better Regulation Task Force states:

there should be no uncertainty regarding enforcement of rules and regulations. Those being regulated must be made aware of their obligations and be helped to comply by enforcing authorities (Better Regulation Task Force, 2000, 29).

It should be known how the regulatory body will deal with a HCP who is not demonstrating the required level of competence or who is performing below par.

Those who are looking to the regulatory body for protection need to feel that enforcement of rules and regulations is more than a gesture, that the regulatory body is taking this aspect of its role seriously and is implementing it effectively. If there is no enforcement of the regulatory body's rules and regulations, the HCPs who are subject to its jurisdiction may take the view that they are free to ignore them without fear of sanction.

Conclusion

The Law Commission consultation and its subsequent recommendation provide a vital opportunity to reform the regulation of health care professionals within the United Kingdom for once and all. To put in place a regulatory system that is efficient. A system that has a clearly defined purpose, with the requisite authority to undertake its role; a role that is clearly outlined in terms of functions and duties; thereby allowing enforcement to be effective but proportional, and also open.

As a former health care professional and academic lawyer with an interest in this area, I hope that this does not become another missed opportunity.

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IN THIS ISSUE

In this issue we continue the combined focus of the *Journal of Commonwealth Law and Legal Education* to provide thought provoking informative and interesting articles on issues concerned with Commonwealth law and also article that focus on legal education.

The issue opens with an article that examines the rule of law within Pakistan and the impact that the 'Lawyers Movement' has had upon this. In a thought provoking article Dr Ahmed provides an analysis of the 'Lawyers Movement' and whether it has been successful in restoring the confidence of the citizens of Pakistan in their judiciary.

We then move continent to Australia where Dr McQuigg analyses how the courts of Victoria have approached human rights through the Charter of Human Rights and Responsibilities. In her article Dr McQuigg outlines the position taken by the High Court of Australia in this area as well as interpreting cases within the Courts of Victoria. Dr McQuigg also draws comparisons between the Australian Charter and the United Kingdom Human Rights Act 1998.

Our focus, although remaining on Australia, then turns to legal education in Barnett and McKeown's article that evaluates the use of the virtual learning environment. In their article Barnett and McKeown outline a program at the University of Southern Queensland where external students were able to develop and enhance their advocacy skills in a virtual courtroom within the Second Life virtual environment. As well as outlining the use of virtual environment within education in general, the article examines both the negative and positive aspects of using such a learning environment and analyses a survey undertaken with students using this approach to their advocacy training.

The next article moves our attention to judicial review in Sri Lanka. Hammed & Silva provide an explanation of the operation of judicial review in Sri Lanka. Their article begins with an examination of the historical context in which they outline the origins of constitutional review of legislative action in Sri Lanka. Their article then concentrates on the Sri Lanka Supreme Court and looks at its organisation and function in relation to judicial review of legislative action.

The final article in this issue considers whether parties to commercial claims can bring an action at a time of their choosing in Islamic law, or whether there is a specific timeframe within which claims must be made. Hassan & Yusoff consider an element of Islamic law that that see say being untold and compare the principle that exists in Islamic law with that of the English law principle of equity.

As ever, I hope you find the articles in this issue of the *Journal of Commonwealth Law and Legal Education* to be interesting, informative and thought provoking.

We are pleased to accepted contributions to the *Journal of Commonwealth Law and Legal Education* at the following e-mail address: jclle@open.ac.uk. Please see the instructions for authors at the back of this issue regarding contributions.

Dr Marc Cornock
Editor

THE RULE OF LAW – A SUBSTRATUM OF JUSTICE: THE LAWYERS’ MOVEMENT AND ITS IMPACTS ON LEGAL & POLITICAL GOVERNANCE OF PAKISTAN

Dr Naveed Ahmed

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The ‘Lawyers Movement’ lays down a foundation stone for the restoration of Rule of Law culture in Pakistan. It has huge impact not only on the way politics is conducted but also provides an outlet through which corruption could be confronted in Pakistan. One of its appeals is that it rejects dictatorship, whilst also promoting the tenets of justice and peaceful order. By so doing, the Lawyers’ Movement attempts to restore the confidence of the people in the judiciary. This article seeks to explore the impacts of Lawyers’ Movement in the restoration of rule of law and internal governance of the judiciary.

Key Words: Rule of law; Lawyers’ Movement; Pakistan; Judiciary; Governance; Reforms.

The end of the law is, not to abolish or restrain, but to preserve and enlarge freedom. For, in all the states, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law: and is not, as we are told, a liberty for every man to do what he lists. (For who could be free when every other man's humour might domineer over him?) But a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be the subject of the arbitrary will of another, but freely follow his own (Locke, 1727: 174).

Social Movements in the World

The role of civil society had always been significant for bringing in a social change in society. In the decades of 1960s, 1970s and onwards, the US and Europe have experienced a tremendous increase in the demonstrations against social norms, regimes and governmental policies. These movements were about “anti-war, antinuclear, student, ethnic identity, feminist and environmental” issues (Meyer and Kretschmer, 2006: 541).

Wagle notes that the social movements can flourish in the societies where the resources are enormous but the regimes are despotic or frail and few privileged people dominate the assets and the poor people are deprived of freedom of speech (Wagle, 1999: 530).

In the recent period, the wave of protests in the Arab region which initially started in Tunisia last year resulted in the emergence of mass movement against the dictatorial regimes which ultimately spread over other states such as Egypt, Jordan, Morocco, Algeria and gulf countries (Ottaway and Hamzawy, 2011: 1). People from various pressure groups such as religious associations, political groups, worker organizations, young people associations and online networks have actively participated in the movements. For a long time, the people of the Arab World were facing a limited access to human rights as well as economic deprivations by their dictatorial or semi-dictatorial regimes (Sarwar, 2012). However, some of these movements ended successfully with the announcement of social and economic reforms and the collapse of dictatorial regimes, whereas few of them are still striving hard to get rid of their rulers.

In Pakistan, the Lawyers Movement which was started in 2007 was a unique movement in its nature as it started as a result of various incidents in the legal and political history of the country.

Historical Background of the Lawyers Movement

In 2005, the opposition against the dictatorial rule of General Musharaf was strengthened by the formation of an Alliance for the Restoration of Democracy (ARD) by almost fifteen political parties including the Pakistan People's Party (PPP) and Pakistan Muslim League Nawaz PML (N). Later in 2006, the leadership of both political parties, Benazir Bhutto and Nawaz Sharif signed the Charter of Democracy (CoD). The political parties found a very good opportunity to strengthen anti-Musharaf campaign under the umbrella of Lawyers Movement (Fruman, 2011: 10-11). The Lawyers' Movement, which started in March 2007 is supposed to be a solid step and a milestone in the revival of independence of the judiciary and the rule of law in Pakistan (Zafar, 2010). The Harvard Law School awarded the "Medal of Freedom" and the American Bar Association an honorary life membership to the Chief Justice of Pakistan (CJP) as reward for his persistent struggles to safeguard the independence of the judiciary and rule of law in Pakistan (DAWN, 2007).

In 2007, Chief Justice Iftikhar Muhammad Chaudhry tried to stop political involvement in the affairs of the judiciary by the executive. On March 9, 2007, President General Pervez Musharaf summoned CJP and forced him to resign on the basis of frivolous allegations. The CJP was blamed for "misconduct and misuse of authority" by General Pervez Musharaf whereas the particular allegations were not disclosed publicly (Masood, 2007). The CJP refused and was subsequently detained in the Army House for five hours. He was soon after removed as the Chief Justice of Pakistan. The CJP was put under house arrest in his official residence until March 13, 2007, where he was denied visitors (Hassan, 2008: 2). For a country like Pakistan where the military had always played an influential role in the power

politics for the past sixty years, and where the military officials requires a privileged level of respect from the executive and the judiciary, the CJP's stance not only stunned General Musharraf, but also started a new era of judicial independence. As one of the active leading members of the movement and a jurist Hamid Khan notes, "[Chaudhry] became the symbol of the common man's protest against the elites in this country"¹ (Berkman et al, 2010: 1712). In many ways, Chaudhry's stance was the turning point for the start of the movement which boosted the confidence of the people of Pakistan to join hand for the restoration of rule of law, constitutional governance, democracy and judicial independence in Pakistan.

Moreover, some of the recent jurisprudence of the Supreme Court stood in the way of General Musharraf's 'Neo-liberal Post 9/11 Agenda'. Some of the well-known cases such as Privatization of Pakistan Steel Mills (which is considered as the major asset of Pakistan's economy), missing person's case² after 9/11 and accountability of Intelligence Agencies were considerable issues for General Musharraf as he required the Court to decide according to his own wishes (Hassan, 2008: 2).

When the news of detention and restraining of the Chief Justice was telecasted by some private TV channels, the lawyers and the people of Pakistan shocked. Everyone considered this act of General Musharraf unconstitutional and against the very spirit of law. Therefore, the leadership of the lawyers decided to start movement for the reinstatement of the CJP and his fellow judges which was warmly welcomed by the significant majority of lawyers. They started their peaceful protest by strikes and demonstrations by carrying pla-cards outside court rooms and on the roads and then afterwards gradually increased its strength when other civil society and political parties participated in it. The main demand of the lawyers was to reinstate the judges and to let CJP decide all the cases pending before the SC. The Chief Justice was reinstated on July 20, 2007, following intense pressure from the movement started by the majority of lawyers and civil society groups. Upon resuming office, the Chief Justice ordered intelligence agencies to present the missing persons in the court (Hassan, 2008: 3).

The most critical question arose when the question of President's eligibility³ in the next elections came before the Supreme Court. The problem was that he was contesting the election of President of Pakistan for the second term while holding the seat of Army Chief. However, General Musharraf was allowed to contest the Presidential election, but was aware that the Supreme Court was not prepared to give him support on the basis of holding two

¹ Berkman et al quoted this sentence from the interview of Mr Hamid Khan, the former President of the Supreme Bar Association conducted in Lahore, Pakistan in June 2008 (2010).

² The political prisoners who were under the custody of intelligence agencies and there was a presumption that they were handed over to the US forces without any trial in Pakistan and Dr. Afia sidiqi's case was one of them (Hassan, 2008: 2).

³ In the opinion of Supreme Court, this act was unconstitutional. Unfortunately, he was elected as the President of Pakistan with the support of his puppet parliament and PPP for the second term (Kiesow et al 2008: 14).

positions.⁴ Ultimately, he was elected President of Pakistan with the support of a rubberstamp parliament and a coalition of political parties. In the meantime, Musharaf lost the American confidence to some extent on the basis of useless support in so-called 'war on terror'. At the same time, the former Prime Minister, the daughter of the late Bhutto and chairperson of PPP, Benazir Bhutto got an opportunity to come back to Pakistan after eight years of self-imposed exile. On October 18, 2007, when she was returning to Pakistan, her entourage was attacked by a suicide bomb which killed almost one hundred and fifty PPP workers. She joined the 'Lawyers Movement' and decided to participate in the rallies of lawyers (Kiesow et al 2008: 14). While Musharraf's eligibility case was pending before the Supreme Court, he went on to suspend the Constitution and subsequently detained all the judges of the Supreme Court in their official residences. Only four of the judges who took oath under the 'new order' on the same day were exempted. The judges were forced to take fresh oath under the Provisional Constitutional Order (PCO) but the majority rejected this on the basis that it was unconstitutional. The judges were once again detained at their various residences. Many lawyers had been arrested during the peaceful demonstrations in favour of CJP and his fellow judges who made a history by rejecting an unconstitutional act of a usurper (Tariq, 2008).

Unfortunately, Benazir Bhutto was assassinated on December 27, 2007. This sudden change provided a favourable political atmosphere for the PPP in the next general elections. The leader of PML (N), Nawaz Sharif also came back to Pakistan before the general elections. The lawyers pleaded with all the political parties to boycott the general elections but few major parties such as PPP, PML (N), Pakistan Tehrek-e-Insaf (PTI) and some small parties actively participated in the elections. With an understanding on the 'Charter of Democracy' which was signed by the two former Prime Ministers of Pakistan Nawaz Sharif of PML (N) and Benazir Bhutto of PPP in London On May 14, 2006, the two coalition partners fully participated in general elections of 2008, and won the election. The newly elected Prime Minister Mr. Yousaf Raza Gilani of PPP ordered the release of the detained judges. On August 18, 2008, General Musharaf resigned and Asif Ali Zardari (the husband of deceased Benazir Bhutto) of PPP was elected as the President of Pakistan on September 6, 2008. After assuming office, Mr Zardari partly adopted Musharraf's policy and reinstated some of the judges of the Supreme Court except the Chief Justice. Zardari was not willing to reinstate Chaudhry as his cases of corruption were pending before the Supreme Court. On this issue, PML (N) separated from the coalition and decided to take part in the 'Lawyers Movement' for the total reinstatement of superior judiciary. The 'Long March' of lawyers got its full strength with participation of political parties, the civil society, the media and human rights activists, which started in the second week of March, 2009 was the historic moment of Pakistan when the government ultimately announced the reinstatement of Iftikhar Muhammad Chaudhry as Chief Justice of Pakistan on March 16, 2009. Finally, the movement

⁴ Under Article 43(1) of the Constitution of 1973, the President cannot hold any office of profit in the service of Pakistan.

ended successfully and a heavy responsibility has shifted on the shoulders of CJP to tackle the legal issues transparently and expeditiously (Tariq, 2008). The ‘Lawyers Movement’ had started a way forward for the reinforcement of constitutional governance and judicial independence in Pakistan. As in the words of a former U.S. President, Andrew Jackson; “All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them (the people) by an independent and virtuous Judiciary?” (quoted by Ellis, 1989).

The Lawyers Movement, though not the first movement in the history of Pakistan is considered a distinct movement because it succeeded in the collapse of the dictatorial regime of General Musharaf with the joint efforts of lawyers, political parties, civil society, students, NGOs and the media. In addition, it paved a way forward for the constitutional supremacy and democracy in the country (Fruman, 2011: 12). Therefore, the victorious end of the Lawyers’ Movement and reinstatement of the CJP led to the judicial and legal reforms which ensure two things: firstly, it insulates the judges from politically involving themselves in the affairs of the government. As per the National Judicial Policy (NJP) of 2009, judges are prohibited from accepting executive posts. Secondly, the CJP highlights the importance of rule of law and democracy while giving directions in the case of Karachi violence where he declares:

The court has buried the path of unconstitutional measures...in future neither any dictator would come nor any judge would take oath unconstitutionally. The judiciary has buried dictatorship and if now any attempt was made to wrap up courts, everything would stand undone (The Nation, 2011).

Recent Developments

It is an admitted fact that the legal and judicial unit of Pakistan have been neglected financially in the last three decades. Previously, executive interference in judicial matters not only challenged its independence but also disturbed the structure and reliability of the courts. However, this might not be unrelated to the attitude of subservience which characterised the judiciary in the past decades, particularly in their validation of four martial law regimes.⁵ Pakistan is probably the first country in the world where the principle of “Doctrine of Necessity”⁶ applied and provided a lawful basis for military involvement into

⁵ In these four martial law regimes, the court provides legitimacy and declared valid under the “Doctrine of Necessity”. (1-The State V Dosso and Others [1958] PLD SC 533. 2- Miss Asma Jilani V the Government of the Punjab and Another and Mst. Zarina Gauher V the Province of Sind and 2 Others [1972] PLD SC 139. 3- Begum Nusrat Bhutto V Chief of Army Staff and Federation of Pakistan [1977] PLD SC 657. 4- Syed Zafar Ali Shah V General Pervez Musharaf, Chief Executive of Pakistan [2000] PLD SC 869).

⁶ The law of ‘state necessity’ is a common law principle that granted an excuse for otherwise unlawful government behaviour for the period of a public emergency. However, it is the responsibility of the courts to confine strictly this common law justification because a freely imposed principle of necessity creates a probable

power politics of Pakistan in the future. The higher judiciary driven by some vested interests or maybe by the threat of their own survival validated the unconstitutional acts of these dictators and provided a sufficient space to influence the courts to introduce legal and constitutional amendments in order to provide the basis for their role in power politics (ICG, 2008: 1). The former Justice of Lahore High Court K.M.A Samdani after a careful analysis of the previous constitutional cases said that:

Most of the confusion that has arisen in the country as a result of which the institution of democracy has suffered almost irreparably, stemmed from the fact that by and large the judiciary in Pakistan tried, in times of crises, to avoid confrontation with the executive and went out of its way to take the path of least resistance. It upheld the de facto situation rather than declare the de jure position (Newberg, 1995: 7).

Justice Samdani has provided his opinion about the previous incidences in the judicial history of Pakistan but the recent Lawyers' Movement and the stance of higher judiciary has brought a real contribution to liberate this institution from the influence of other organs of the state. One of the biggest issues for Pakistan is pervasive corruption. According to Gilani, the Chairperson Transparency International of Pakistan (TIP), the National Reconciliation Ordinance (NRO)⁷ issued by the president General Pervez Musharaf in October 2007 provided a new trend to pervasive corruption in Pakistan. The politicians, bureaucrats and army officials accused of corruption were shielded by the blanket immunity from various charges including corrupt practices under NRO (Hussain, 2009). The Supreme Court of Pakistan took initiative and the 17 member's bench⁸ in Dr. Mubashir Hassan's case⁹ declares NRO illegal and ultra vires the constitution of Pakistan 1973 in its short order while exercising its power of judicial review. Recently, the Supreme Court full bench comprising 17 judges including the CJP in Federation of Pakistan's case¹⁰ delivered a detailed judgment while rejecting all the applications filed by the federal government and ordered the authorities to implement the short order decision of the court which was passed on

cause to justify considerable breaches of legitimate liberties and changes in the configuration of government. This principle is unfortunate to any judicial contemplation of the authenticity of a coup d'état, revolt or other severe disturbance of government. The principle can only be justified where aggrieved group have substantial evidence to build a case to demonstrate that the government is in severe infringement of law. In 1663, the British Court in *Manby and Richards V Scott* (1 Sid 109) held that "the law for necessity dispenses with things which otherwise are not lawful to be done" (Stavsky, 1983: 342-343).

⁷ On 5 October 2007, the president General Musharaf promulgated National Reconciliation Ordinance (NRO), which widely approved immunity to politicians, political workers and bureaucrats who were indicted of corruption, misappropriation, money laundering, murder and terrorism between January 1, 1986 and October 12, 1999, the period between 2 martial law regimes in Pakistan. On December 16, 2009, the Supreme Court of Pakistan takes an immediate step by declaring this act of the president unconstitutional and without lawful authority (Hussain, 2009).

⁸ Constitutional Petitions Nos. 76 to 80 of 2007 & 59/2009, and Civil Appeal No. 1094 of 2009 and HRC Nos. 14328-P to 14331-P & 15082-P of 2009.

⁹ Dr Mubashir Hassan & others V Federation of Pakistan & others [2010] PLD SC 265

¹⁰ CMA No. 5144 OF 2011 AND Civil Review Petition No. 129/2010 in Const. P. 76/2007 & CMAs No. 1427/2011 etc.

December 16, 2009. Therefore, the judiciary of Pakistan appears to be vigilant in its attempt to tackle corruption, human rights violations and the promotion of rule of law. However, it is facing some other severe problems in its internal governance structures.

Armytage identifies a number of other serious problems in the internal structure of the judiciary such as prolonged adjournments, insufficient services, inadequate number of judges and court rooms and miserable condition of reimbursement which results in corrupt practices. The ADB was the first International Financial Institution (IFI) to provide financial support as well as funds for reforms in the judicial institution of Pakistan. An amount of US\$ 350 million was disbursed for the Access to Justice Program (AJP) from 1998 to 2002 and onwards in three stages (Armytage, 2003: 5-6).

Previously, in case of AJP of ADB, the involvement of the Law and Justice Commission and National Judicial Academy were not so effective to achieve the required results. Presently, the USAID engaged the Ministry of Law and Justice as key role player with three other federal institutions such as the National Judicial Academy the Law and Justice Commission of Pakistan and the Supreme Court. Moreover, it emphasizes that the Supreme Court of Pakistan and National Judicial (Policy Making) Committee (NJPMC) are also to be included in the reforms process as some lessons learnt from the previous practice of ADB that the Ministry of Law and Justice alone may not be an effective institution to implement reforms (USAID, 2008: 45).

The USAID's rule of law project focuses on the following five objectives,

1. Improving the capacity of the judicial system to deliver more accessible and higher quality of justice.
2. Strengthening citizen legal awareness and access to legal advisory and representational services, and
3. Enhancing the quality of legal education and training.
4. Strengthen capacity of law enforcement to function according to international standards, thereby improving human rights and increasing citizen confidence in rule of law.
5. Clarify and improve Land Tilting and Land Registration systems, thereby helping to reduce current case load for provincial courts (USAID, 2008: 44-45).

Although, AJP and the USAID programs were not successful to achieve their overall objectives immediately, however these contributed largely to develop the idea of the judicial

and legal reforms in Pakistan. For example, in 2009, the National Judicial Policy was announced which mainly focuses on speedy trial of cases, abolition of corruption, misuse of power and judicial independence. After the reinstatement of Chief Justice of Pakistan (CJP), the judiciary entered into a new era of reforms which extended to the lower judiciary and legal institutions (LJCP, 2009).

In 2009, the National Judicial (Policy Making) Committee (NJPMC) under the chairmanship of CJP was constituted for reforms in the judiciary. These reforms were basically the aftermath of the reinstatement of the judiciary on November 3, 2007. The focus of these reforms was on three major issues such as, “backlog and delays in the system of administration of justice”, independence of the judiciary, speedy and inexpensive justice and to eradicate corruption from judiciary. In order to have capable, transparent and independent judicial structure, the National Judicial Policy strictly disallows judicial officers from accepting any executive post (LJCP, 2009: 1-2). The other underlying issues also attracted the attention of the committee for,

1. Improving the capacity and performance of the administration of justice;
2. Setting performance standards for judicial officers and persons associated with performance of judicial and quasi-judicial functions;
3. Improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and
4. Publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts, courts subordinate to High Courts, Administrative Courts and Tribunals (LJCP, 2009: 7).

Conclusion

The ‘Lawyers Movement’ lays down a foundation stone for the reinstatement of rule of law culture in the country. It has enormous influence not only on the way politics is conducted but also provides an outlet through which corruption could be challenged in Pakistan. One of its appeals is that it rejects dictatorship, whilst also promoting the tenets of justice and peaceful order. By so doing, the Lawyers’ Movement attempts to restore the confidence of the people in the judiciary.

The judiciary of Pakistan has recently attempted to overcome its internal problems as well as fighting against corruption. Previously, the role of the judiciary was deemed to have been compromised due to some vested interests or some other reasons. The military as well as

civilian regimes try to drive higher judiciary in their own favour in order to strengthen their control over the institutions which devastated the structure of judiciary which not only lost trust of the people but also has been criticised by various groups of the society. The weak judiciary breed various other problems such as violence which challenges the writ of government, distrust on the institutions, corruption, land grabbing and inequality. The Lawyers Movement has made tremendous strides in re-establishing confidence in the judiciary, but a heavy duty shifts on the shoulders of the CJP to control the menace of corruption and to ensure the rule of law in Pakistan.

In recent times, the Supreme Court took some very good decisions and it is hoped that the judiciary will play its role in the reinstatement of social justice in the society. The handsome pay package for the lower judiciary is a good decision by the provincial government which will hopefully decrease corruption in the internal system of judiciary. However, it is important that efficient judiciary of any country can play a vital role in the economic development of a country but in case of Pakistan, the future decisions of the judiciary will show its performance.

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THE USE OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES IN THE COURTS OF VICTORIA

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This article analyses the initial use of the Charter of Human Rights and Responsibilities in the courts of Victoria. The approach taken towards human rights in Australia as a whole by the High Court of Australia and the position in the Australian Capital Territory, the other Australian jurisdiction with a bill of rights, are examined briefly. The remainder of the paper focuses on the main features of the Victorian Charter of Rights and how these provisions have been interpreted and used in the case law of the courts of Victoria. The Charter was based essentially on the United Kingdom's Human Rights Act 1998 and comparisons are drawn between the two pieces of legislation.

Keywords: Human Rights, Australia, Victoria, Courts, Charter of Human Rights and Responsibilities Act 2006, Human Rights Act 1998.

Introduction

The Charter of Human Rights and Responsibilities Act 2006 came into force in the Australian State of Victoria in January 2008. At present, Victoria is one of only two jurisdictions in Australia which have bills or charters of rights. The aim of this article is to examine the initial use of Human Rights and Responsibilities in the courts of Victoria. The paper will begin by outlining the approach taken towards human rights in Australia as a whole by the High Court of Australia. The position in the Australian Capital Territory, the other Australian jurisdiction with a bill of rights, will also be examined briefly. The remainder of the paper will focus on the main features of the Victorian Charter of Rights and how these provisions have been interpreted and used in the case law of the courts of Victoria. The Charter was based essentially on the United Kingdom's Human Rights Act 1998 and comparisons will be drawn between the two pieces of legislation.

The Approach taken to Human Rights in Australia

Australia as a whole does not have a bill of rights. The primary sources of human rights law in Australia are its Constitution, which came into being in 1901, and the various international

human rights treaties to which Australia is a party. The High Court of Australia is the highest judicial authority, and this Court is regularly faced with the challenge of dealing with human rights issues in the absence of a bill of rights, a role which it performs with a varying degree of success.

The Australian High Court was created by the Constitution and first sat in October 1903. It is charged with the task of applying the Constitution and has the power to strike down inconsistent legislation. However, the Australian Constitution contains few express rights. Essentially, the views of those who drafted the Constitution were that responsible democratic government was the best guarantee of justice and that little else was needed to safeguard rights. They did not intend for the Constitution to provide comprehensive protection of the rights of individuals, and therefore the attention paid to rights in the Constitution is very patchy. Under section 51, Parliament may only acquire property on just terms; section 80 contains a right of trial by jury for indictable offences; freedom of religion is established in section 116; and freedom from discrimination based on State residence is established in section 117. However, apart from these provisions, the Constitution contains little mention of rights.

The High Court of Australia addressed the area of human rights on very few occasions during the first 90 years of its operation. It has only been in approximately the last 20 years that the Court has begun to pay more attention to human rights principles in cases such as *Australian Capital Television Pty Ltd v Commonwealth*;¹ *Mabo v Queensland (No 2)*;² *Dietrich v The Queen*;³ and *Minister for Immigration and Ethnic Affairs v Teoh*.⁴ However, in so doing the Court has been met with criticism for overstepping its boundaries and being too activist in its approach. As Stevens and Williams comment:

“Much of the debate over human rights protection centres upon the judiciary as the only independent institution seen as capable of checking the actions of Parliament. But when the judiciary lacks the constitutional or legislative tools to perform such a role in the area of human rights, the outcome may be disagreement and discord”.⁵

¹ (1992) 177 CLR 106.

² (1992) 75 CLR 1.

³ (1992) 177 CLR 292.

⁴ (1995) 183 CLR 273.

⁵ A. Stevens and G. Williams, ‘A Supreme Court for the United Kingdom? A view from the High Court of Australia’ (2004) 24 *Legal Studies* 188, 200.

The Australian Capital Territory's Human Rights Act

The Australian Capital Territory (ACT) was the first jurisdiction in Australia to enact its own bill of rights. The Territory covers a very sparsely populated area of Australia, however those who supported the ACT Human Rights Act hoped that it would provide a catalyst to the enactment of other bills of rights throughout the country as a whole. A Consultative Committee was established to investigate the issue of whether a bill of rights for the ACT was necessary. The Committee reported in 2003 and recommended that a bill of rights should be enacted. The reasons given included the fact that the Australian Constitution did not contain an express catalogue of rights. There were a few ACT laws that addressed the issue of discrimination, however these were by no means comprehensive. The Human Rights Act for the ACT was subsequently passed, and came into force in July 2004.⁶

The ACT Human Rights Act contains was modelled on the UK's Human Rights Act and bears striking similarities to this legislation. For example, one of the key mechanisms for the protection of rights in both enactments is an interpretative obligation. Section 30(1) of the ACT Human Rights Act states that in 'working out the meaning of a Territory law, an interpretation that is consistent with human rights is to be preferred to any other interpretation.' Also, section 32 gives the ACT Supreme Court the power to declare that a law is not consistent with a human right, however such a declaration does not affect the validity of the law in question. This provision is very similar to the procedure of making a declaration of incompatibility under the UK's Human Rights Act.

A detailed study of the provisions and operation of the ACT Human Rights Act lies outside the scope of this paper. However, as mentioned above, it was hoped that this legislation would lead to the enactment of other bills of rights in Australia, and it seems that this aspiration has come to fruition, at least to a certain degree. In 2006 the State of Victoria passed the Charter of Human Rights and Responsibilities Act, which came into force in January 2008. It is to this legislation that the focus of the paper now turns.

The Victorian Charter of Human Rights and Responsibilities

The Preamble to the Victorian Charter of Rights states that it is founded on four principles. Firstly, that 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'. Secondly, that 'human rights belong to all people without discrimination'. Thirdly, that 'human rights come with responsibilities

⁶ See further T. Poole, 'Bills of Rights in Australia' (2004) 4 *Oxford University Commonwealth Law Journal*, 197.

and must be exercised in a way that respects the human rights of others'; and fourthly, that 'human rights have a special importance for the Aboriginal people of Victoria'. As with the ACT Human Rights Act, the Victorian Charter of Rights was modelled on the UK's Human Rights Act. However, those who drafted and introduced the Victorian Charter were also able to note and learn from the experiences of the UK during the enactment and early years of operation of the Human Rights Act. One of the criticisms that have been levelled at the Human Rights Act is that it is 'a charter of rights without responsibilities'. It seems that the drafters of the Victorian Charter took note of such comments and were careful to make clear that the Charter included not only rights, but also responsibilities.

Again, one of the key mechanisms for the protection of human rights under the Victorian Charter is an interpretative obligation. Section 32(1) states that, 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' This provision is almost identical to section 3(1) of the UK's Human Rights Act, which states that, 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Section 36(2) of the Victorian Charter provides that 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to this effect'. However, under section 36(5), such a declaration of inconsistent interpretation 'does not affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made'. Again, this mechanism is very similar to that of making a declaration of incompatibility under section 4 of the Human Rights Act. The other main method of protection of human rights contained in the Victorian Charter is found in section 38(1), which states that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.' This provision is similar to section 6(1) of the Human Rights Act, which states that, 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

The rights contained in the Victorian Charter are also fairly similar to those contained in the European Convention on Human Rights, as incorporated into UK law by the Human Rights Act. As with the Convention rights, the Charter rights are largely civil and political in nature. However, there are certain differences between the two catalogues of rights. For example, section 7(2) of the Victorian Charter states that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human

dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

There is no such general limitation clause applicable to the Convention rights under the Human Rights Act. Instead certain rights contain particular individual limitations, which vary according to the rights in question. For example, article 8, the right to respect for private and family life, contains the clause:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9, the right to freedom of thought, conscience and religion, includes the proviso that:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The first substantive right set out in the Victorian Charter is the right to recognition and equality before the law, which is found in section 8 of the Charter and which states:

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

‘Discrimination’ is defined in section 3 as meaning discrimination on the basis of section 6 of the Equal Opportunity Act 1995, which sets out a list of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity; sex; and sexual orientation. It is noteworthy that this provision is much more detailed than the prohibition of discrimination contained in article 14 of the European Convention on Human Rights, which states simply that, ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’ The particular attention paid to equality by the Victorian Charter is unsurprising, given the particular discrimination that has been suffered by the Aboriginal people of Australia. Indeed, as mentioned above, two of the four principles on which the Charter is founded are that ‘human rights belong to all people without discrimination’ and that ‘human rights have a special importance for the Aboriginal people of Victoria’.

Sections 9-16 of the Victorian Charter contain provisions concerning the right to life; protection from torture and cruel, inhuman or degrading treatment; freedom from forced work; freedom of movement; privacy and reputation; freedom of thought, conscience, religion and belief; freedom of expression; and peaceful assembly and freedom of association. These provisions are largely similar to the equivalent Convention rights, however they tend to be framed in more specific language. For example, section 13 of the Charter, concerning the right to privacy, includes the provision that ‘A person has the right not to have his or her reputation unlawfully attacked.’ Likewise, section 15, which contains the right to freedom of expression, states that:

Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether –

- (a) orally; or
- (b) in writing; or
- (c) in print; or
- (d) by way of art; or
- (e) in another medium chosen by him or her.

Section 17 of the Charter gives explicit protection to the family as 'the fundamental group unit of society' and states that, 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.' Section 18(1) emphasises that, 'Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.' Section 18(2) contains the right to vote and be elected at State and municipal elections, and the right to have access to the Victorian public service and public office.

Section 19 of the Victorian Charter relates to cultural rights, a category of rights which is not included in the Convention rights under the Human Rights Act. Section 19(1) states that, 'All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.' Again particular attention is paid to the position of Aboriginal people, section 19(2) stating that:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Section 20 relates to property rights, and is similar to the right to property contained in Article 1 of the First Protocol under the Convention rights. Section 21 contains the right to liberty and security of person; section 24 is the right to a fair hearing; and section 25 relates to rights in criminal proceedings. Again these sections are similar to provisions contained in the Convention rights under the Human Rights Act. However, sections 22 and 23 relate to matters which are not expressly addressed in the Convention rights. Section 22(1) states that, 'All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.' Section 22(2) proceeds to add that, 'An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.' Under section 22(3), 'An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.' Section 23 addresses the position of children in the criminal process, stating that, 'An accused child

who is detained or a child detained without charge must be segregated from all detained adults.’ The section also makes clear that an accused child should be brought to trial as speedily as possible and that children who have been convicted of offences must be treated in a manner appropriate to their ages. Section 26 contains the right not to be tried or punished more than once for the same offence, and section 27 relates to the right not to be found guilty of a criminal offence because of conduct that was not a criminal offence when it was committed.

The Victorian Charter of Rights and Responsibilities therefore bears very strong similarities to the UK’s Human Rights Act. As with the Human Rights Act, the Charter relies primarily on placing an interpretative obligation on courts and a duty on public authorities to act in accordance with human rights standard. The specific rights set out in the Victorian Charter are also similar to those contained in the Convention rights under the Human Rights Act. The primary emphasis is on civil and political rights, however the inclusion of cultural rights is notable. The approach taken to the limitation of rights is somewhat different, with the Charter containing a general limitation clause, as opposed to including limitations specific to each of the rights in question. In addition, the Victorian Charter contains more of an emphasis on non-discrimination than do the Convention rights under the Human Rights Act. The rights contained in the Charter also tend to address the relevant issues in more detail than do the Convention rights, for example, express attention is paid to the right to humane treatment when deprived of liberty; and to the position of children in the criminal process.

The Application of the Victorian Charter by the Courts

However, how do the courts in Victoria apply the Charter in practice? In the very important case of *Kracke v Mental Health Review Board*,⁷ Bell J made various comments on the approach which should be adopted by the courts towards the Charter. He began by describing the Charter as being ‘fundamental law’⁸ and ‘historic legislation’,⁹ and stated that, ‘At the individual level, it protects and promotes human rights, and thereby respects the bedrock value that every person without exception has unique human dignity.’¹⁰ He then proceeded to address the communitarian purposes of the Charter and commented that, ‘Those purposes include strengthening respect for the rule of law and our fundamental democratic institutions. This strengthens society itself, and every individual in society. Laws

⁷ [2009] VCAT 646 (23 April 2009).

⁸ At para. 22.

⁹ At para. 23.

¹⁰ At para. 23.

and public institutions that respect individual human rights are deserving of society's respect.'¹¹ These remarks seem to emphasise the fact that the Victorian Charter is intended to be a charter of responsibilities, as well as a guarantee of individual rights and freedoms.

Bell J then proceeded to address the question of the approach which should be taken in interpreting the Charter and stated that 'its intention to enhance our system of government by protecting and promoting those human rights which are fundamental to the rule of law in a democratic society' must be kept firmly in mind.¹² He commented that, 'The interpretation of the provisions of human rights instruments and legislation is...evolutionary, dynamic and responsive to changing social and economic conditions. Such provisions are not interpreted according to the originalist notion that their meaning is confined to the intention of those who made them.'¹³ Nevertheless, 'interpreting human rights provisions has its limits...The process is one of interpreting the relevant provisions, not legislating in favour of new ones.'¹⁴ Bell J also stressed that the Charter is not the exclusive source of human rights law in Victoria, and that rights contained in international law and the common law must still be recognised.

Section 32(1) – The Interpretative Obligation

As discussed above, one of the key mechanisms in the operation of the Victorian Charter is found in Section 32(1), which states that:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

However, what approach have the courts in Victoria taken to this interpretative obligation? Bell J in the *Kracke* case also made a number of insightful and instructive comments on the way in which the courts should apply the provision. He stated that there were four stages of analysis involved in interpreting legislation against the Charter – engagement, justification, reinterpretation and declaring inconsistency.

As regards engagement, the first question to be asked is whether the statutory provision at issue apparently limits a human right. In deciding this matter, the provision should be

¹¹ At para. 26.

¹² At para. 28.

¹³ At para. 33.

¹⁴ At para. 36.

interpreted according to the standard principles of interpretation; the right should be interpreted so as to identify its scope; and the two should then be compared. In interpreting the scope of the right, a broad approach should be taken, focusing on the purpose of the right and the interests it protects. If it is found that the provision limits the scope of the right, the next question to be considered is whether the limitation can be justified under section 7(2) of the Charter. In order to establish whether the limitation is justified, the requirements of legality and proportionality must be examined. For a limitation to fulfil the legality requirement, it must be accessible, of sufficient precision and not arbitrary. In establishing whether the limitation is proportionate, the nature of the right and the importance of the purpose of the limitation should be analysed. The limitation must also be rationally connected to its purpose, and it should impair the right as little as possible.

If the limitation is not justified, the next step is to address the issue of whether it is possible to interpret the legislation compatibly with human rights under the section 32(1) interpretative obligation. Bell J outlined a number of principles in relation to the use of this mechanism. He emphasised that the application of section 32(1) is mandatory and that it applies even where the legislation in question is clear and unambiguous. The court may be obliged to depart from the legislative intention of parliament and from previous pre-Charter interpretations. As with section 3 of the UK's Human Rights Act, courts may be required to read words into legislation, read legislation down or use a narrow interpretation, or read legislation broadly. If it is impossible to interpret the legislation in such a manner as to be compatible, the next stage is to issue a declaration of inconsistent interpretation. However, only the Supreme Court can make such a declaration and therefore Bell J declined to discuss this issue in any depth.

RJE v Secretary to the Department of Justice¹⁵ concerned the interpretation of section 11 of the Serious Sex Offenders Monitoring Act 2005, which states that a court may make an extended supervision order in respect of an offender if it is satisfied to a high degree of probability that the offender is likely to reoffend. Prior to this case 'likely' had been interpreted as being capable of meaning 'less likely than not'. The majority of the Court of Appeal held that the previous authority should be overturned and that 'likely' should be deemed to mean 'more likely than not'. They considered that this was determined by ordinary principles of statutory interpretation and therefore it was not necessary to resort to section 32(1) of the Charter. The third judge, Nettle J, gave a concurring decision, however in doing so he considered the application of section 32(1) to the case. Nettle J commented that it was necessary to construe section 11 of the 2005 Act in such a way as to subject the

¹⁵ [2008] VSCA 265 (18 December 2008).

appellant's rights to freedom of movement, privacy and liberty only to such reasonable limits as could be justified in a free and democratic society. He concluded that:

[T]he making of an extended supervision order of itself so restricts an offender's right to move freely within Victoria and to enter and leave it (s 12), and his right to privacy (s 13), if not his right to liberty (s 21), that it is not capable of demonstrable justification in the relevant sense unless the risk of the offender committing a relevant offence is at least more likely than not.¹⁶

In coming to this conclusion, Nettle J cited the judgment of Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* in which he stated in relation to section 3 of the Human Rights Act:

It is difficult to overestimate the importance of section 3...When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when section 3 applies, the courts have to adjust their traditional role in relation to interpretation so as to give effect to the direction contained in section 3. It is as though legislation which predates the (Human Rights Act) and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of section 3.¹⁷

In *Guss v Aldy Corporation Pty Ltd & Anor (Civil Claims)*¹⁸ the dispute between the parties concerned the marketing of an apartment in the Melbourne Dockland area. During the course of the proceedings, an order was made directing a compulsory conference between the parties. However, the applicant failed to attend the second day of the conference and the application was dismissed in the applicant's absence. Section 120 of the Victorian Civil and Administrative Tribunal Act 1998 permits a person in respect of whom an order is made to apply to the Tribunal for a review of the order if the person was not represented at the hearing at which the order was made. The issue arising concerned whether the term 'hearing' could encompass a compulsory conference.

It was held that 'hearing' should be construed as to include a compulsory conference. In arriving at this decision the Tribunal stated that a narrow interpretation of section 120 of the 1998 Act would be incompatible with the right to a fair hearing as contained in section 24 of

¹⁶ At para. 113.

¹⁷ [2002] QB 48 at 72.

¹⁸ [2008] VCAT 912 (1 May 2008).

the Victorian Charter. It was therefore necessary to use the section 32(1) interpretative obligation in such a manner as to construe the term 'hearing' so as to encompass a compulsory conference, despite the fact that this would overturn the previous interpretation of the legislation.

Re an application under the Major Crime (Investigative Powers) Act 2004¹⁹ involved an application by the police for a coercive powers order under which an individual may be compelled by witness summon to attend before the Chief Examiner to provide evidence. Under section 39 of the 2004 Act, the individual is not excused from answering questions on the ground that the answers may be self-incriminating. This evidence can be used directly against the individual in a subsequent proceeding, however the question at issue in the case was whether there should be a 'derivative use immunity', which would protect the individual from having the incriminating testimony used to obtain other evidence against him. It was held that section 39 of the 2004 Act must be interpreted to incorporate a derivative use immunity, in order to protect the right to a fair trial and the right not to be compelled to testify against oneself, as contained respectively in sections 24(l) and 25(2)(k) of the Charter. Derivative use immunity must be extended to a witness questioned under the 2004 Act where the evidence elicited could not have been obtained by other means.

It can therefore be seen that the courts of Victoria appear to have engaged relatively quickly with the section 32(1) interpretative duty. Cases such as *Guss v Aldy Corporation Pty Ltd & Anor (Civil Claims)*²⁰ and *Re an application under the Major Crime (Investigative Powers) Act 2004*²¹ clearly demonstrate the willingness of the courts to use section 32(1) in such a manner as to ensure compliance with the human rights standards contained in the Charter.

Section 36(2) – Declarations of Inconsistent Interpretation

The seminal case on declarations of inconsistent interpretation under section 36(2) of the Victorian Charter is that of *R v Momcilovic*.²² In this case, the applicant was convicted of drug trafficking after drugs were found in her apartment. Section 5 of the Drugs, Poisons and Controlled Substances Act 1981 states that 'any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever,

¹⁹ [2009] VSC 381 (7 September 2009).

²⁰ [2008] VCAT 912 (1 May 2008).

²¹ [2009] VSC 381 (7 September 2009).

²² [2010] VSCA 50 (17 March 2010).

unless the person satisfies the court to the contrary.’ The applicant appealed, one of the grounds being that under section 32(1) of the Charter, section 5 of the 1981 Act should be interpreted as placing only an evidentiary burden on an accused.

In considering the interpretative obligation, the Court commented that, ‘Section 32(1) does not create a “special” rule of interpretation, but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question.’²³ It stated that the correct approach to be adopted was, firstly, to ascertain the meaning of the legislative provision in question by applying section 32(1) of the Charter in conjunction with common law principles of interpretation and the Interpretation of Legislation Act 1984. Secondly, it should be considered whether, so interpreted, the provision breaches a human right contained in the Charter. Thirdly, if a human right is violated, section 7(2) of the Charter should be applied in order to determine whether the limitation on the right is justified. If the limit is not justified, the Court may issue a declaration of inconsistent interpretation.

The Court of Appeal referred to the decision of the House of Lords in *Ghaidan v Godin-Mendoza*²⁴ in which Lord Nicholls of Birkenhead stated that:

Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s 3 may none the less require the legislation to be given a different meaning...In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.

However, the Court of Appeal in *Momcilovic* decided to adopt a different approach, stating that ‘our view that s 32(1) does not permit a departure from the intention of the enacting Parliament is reinforced by the fact that s 32(1) requires provisions to be “interpreted” compatibly with human rights. “Interpretation” is what courts have traditionally done.’²⁵

The Court held that placing the legal burden of proof on the accused was a clear violation of the presumption of innocence. However, it refused the appeal, holding that it was not possible to interpret section 5 of the 1981 Act in a manner consistent with the right to the presumption of innocence under section 25 of the Charter. The Court commented that, ‘The

²³ At para. 35.

²⁴ [2004] UKHL 30.

²⁵ At para. 77.

question of construction is a straightforward one. The phrase “unless the person satisfies the Court to the contrary” conveys unambiguously the legislative intention that the accused should carry the legal burden of establishing, to the Court’s satisfaction, that he/she was not in possession of the relevant substance.²⁶ In considering whether the limitation on the presumption of innocence was justified under section 7(2) of the Charter, the Court held that there was no reasonable justification for reversing the burden of proof in such a manner. It stated therefore that it intended to make a declaration of inconsistent interpretation. In another departure from the approach adopted by the UK courts under the Human Rights Act, the Court of Appeal in *Momcilovic* commented that such declarations should not be viewed as a measure of ‘last resort’ but instead as ‘epitomising the intended relationship between the courts and the legislature’.²⁷

It seems therefore that the approach of the Victorian courts towards the making of declarations of inconsistent interpretation under the Charter will diverge somewhat from the approach of the UK courts towards the making of declarations of incompatibility under the Human Rights Act. It appears from *Momcilovic* that it is likely that declarations of inconsistent interpretation will appear on a more frequent basis in the Victorian jurisprudence than do declarations of incompatibility in the UK case law. It will certainly be interesting to see how the Victorian jurisprudence develops in this regard.

Section 38(1) – Obligation on Public Authorities

The other main mechanism for the protection of rights that is contained in the Victorian Charter is section 38(1), which states that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.’ This provision is similar to section 6(1) of the Human Rights Act, which states that, ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ However it is noteworthy that the Charter emphasises the point that public authorities must not only act compatibly with human rights standards, but must also ensure that they give due consideration to any relevant human rights in their decision making processes.

The definition of a public authority is found in section 4(1) of the Charter, part of which states that:

For the purposes of this Charter a public authority is –

²⁶ At para. 19.

²⁷ At para. 92.

- (a) a public official within the meaning of the Public Administration Act 2004; or
- (b) an entity established by a statutory provision that has functions of a public nature; or
- (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise);.....

but does not include –

- (i) Parliament or a person exercising functions in connection with proceedings in Parliament; or
- (j) a court or tribunal except when it is acting in an administrative capacity.

It is interesting to note that under the Victorian Charter courts and tribunals are not deemed to be public authorities except for when they are acting in an administrative capacity, for example, when listing cases, adopting procedures or issuing warrants. Nevertheless, section 6(2)(b) states that the Charter applies to courts and tribunals to the extent that they have functions under Part 2 of the Charter, which lists the protected rights, and Division 3 of Part 3 which contains inter alia the provisions relating to the duty to interpret legislation compatibly with human rights and the making of declarations of inconsistent interpretation. This differs from the approach adopted under the UK's Human Rights Act, section 6(3) of which states that the term 'public authority' includes a court or tribunal.

The duty imposed on public authorities by section 38(1) of the Charter was considered in a case involving the application of the Charter to the Victorian Mental Health Act 1986 and the associated Mental Health Review Board.²⁸ The case concerned the failure of the Board to conduct a review of the involuntary treatment of a patient. It was held that the Mental Health Review Board fell within the definition of a 'court or tribunal' when exercising its decision-making powers. The question then arose as to how section 6(2)(b) should be applied. It was decided that section 6(2)(b) required a court or tribunal to give effect only to the rights under Part 2 of the Charter which were explicitly addressed only to courts and tribunals. However, the only rights which fall into this category are certain aspects of the right to liberty and security of person under section 21, and the right to a fair hearing as contained in section 24. It was held that the Board was therefore bound by section 24, however the adoption of such a narrow approach as regards the application of section 6(2)(b) could well serve to place significant limitations on the effectiveness of the Victorian Charter.

²⁸ 09-003 [2008] VMHRB 1 (8 July 2008).

The issue of the correct application of section 6(2)(b) arose again in *Kracke v Mental Health Review Board*.²⁹ In this case Bell J. examined the question of how to reconcile section 4(1)(j), which excludes courts and tribunals from definition of 'public authority' except when they are acting in an administrative capacity, with section 6(2)(b), which makes the Charter applicable to courts and tribunals to the extent that they have the specified functions. Bell J. considered the adoption of a broad interpretation of section 6(2)(b), which would place a duty on courts to enforce and apply human rights in the same way as the courts in the UK do so. He commented that, 'As institutions of justice with responsibility for interpreting and enforcing human rights, it seems natural and appropriate that courts and tribunals should apply those rights themselves.'³⁰ However, he proceeded to reject such a broad construction as being inconsistent with the structure of the Charter, as it is clear that courts and tribunals acting in a judicial capacity are not public authorities for the purposes of the Charter and are not therefore obliged to observe the human rights contained therein. Instead, Bell J. was of the view that the functions under Part 2 referred to in section 6(2)(b) were 'the functions of applying or enforcing those human rights that relate to court and tribunal proceedings.'³¹ Rights falling into this category included various aspects of the right to liberty and security of person;³² aspects of the rights of children in the criminal process;³³ the right to a fair hearing;³⁴ rights in criminal proceedings;³⁵ the right not to be tried or punished more than once;³⁶ provisions relating to retrospective criminal laws;³⁷ and also the right not to be treated or punished in a cruel, inhuman or degrading way.³⁸

Although in *Kracke* a slightly broader approach was adopted, nevertheless it remains the case that when acting in a judicial capacity, courts and tribunals in Victoria are not obliged to observe the majority of the human rights contained in the Charter. This is substantially different to the position of the UK courts under the Human Rights Act. In the UK, the courts have used section 6 of the Act to contribute to the development of the concept of 'horizontal effect.' The courts, as public authorities, are under a duty to act compatibly with the Convention rights, and they interpret this duty as meaning that they can apply these rights in cases involving only private parties. However, the terms of the Charter largely prevent the courts in Victoria from adopting such a course of action. Although a degree of

²⁹ [2009] VCAT 646 (23 April 2009).

³⁰ At para. 243.

³¹ At para. 250.

³² Sections 21(5)(c), 21(6)-(8).

³³ Section 23(2)-(3).

³⁴ Section 24(1)-(3).

³⁵ Section 25.

³⁶ Section 26.

³⁷ Section 27.

³⁸ Section 10(b).

horizontal effect can still arise through the use of the section 38(1) duty on courts to interpret legislation in such a way as to be compatible with human rights, nevertheless the decision to exclude courts and tribunals from the definition of public authorities is likely to curtail substantially the development of a concept of horizontal effect under the Charter.

Conclusion

The coming into force of the Charter of Human Rights and Responsibilities Act was certainly a momentous development as regards the protection of human rights in Victoria. A wide range of rights are included in the Charter. These rights are similar to those contained in the Convention rights under the UK's Human Rights Act, however it is notable that a number of the rights in the Charter are described in more detail than are their counterparts under the Human Rights Act. Indeed it is interesting to note that although the Victorian Charter was modelled on the Human Rights Act, those who drafted the Victorian Charter had clearly taken note of the experiences of the UK during the early years of operation of the Human Rights Act. For example, the Charter is framed in such a way as to use not only the language of rights, but also that of responsibilities.

It is also abundantly clear that the Victorian courts are not content to follow the approach of the UK courts in every respect, but are instead intent on forging their own path in applying the Charter. For example, it seems likely that declarations of inconsistent interpretation will appear more frequently in the Victorian case law than do declarations of incompatibility in the UK jurisprudence. Also, the exemption of courts and tribunals from the definition of 'public authority' under the Charter, except when acting in an administrative capacity, has had substantial ramifications as regards the Charter's application. Section 6(2)(b), which states that the Charter applies to courts and tribunals to the extent that they have functions under Part 2 of the Charter and Division 3 of Part 3, has been interpreted in a limited manner, resulting in the position that courts and tribunals in Victoria are not themselves obliged to observe the majority of the human rights contained in the Charter. This is substantially different from the approach of the Human Rights Act, under which courts and tribunals fall within the definition of public authorities. In the UK, the courts have used section 6 of the Act to contribute to the development of the concept of 'horizontal effect' and it is likely that the approach adopted under the Victorian Charter in this regard may well curtail significantly the development of such a concept in the Charter jurisprudence. Nevertheless, what is certain is that it will prove very interesting to observe how the case law of the Victorian courts will develop in applying the still very new Charter in the future.

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THE STUDENT BEHIND THE AVATAR: USING SECOND LIFE (VIRTUAL WORLD) FOR LEGAL ADVOCACY SKILLS DEVELOPMENT AND ASSESSMENT FOR EXTERNAL STUDENTS – A CRITICAL EVALUATION.¹

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In 2009 the virtual world Second Life (SL) provided a setting for the flexible delivery, in a sustainable cost effective courtroom, of an advocacy exercise to external students enrolled in a Criminal Law course (Law programs) at the University of Southern Queensland. In doing so SL added an enhanced overlay to the already widely recognized pedagogies regarding advocacy skill development through situated role play, which would not have otherwise been available to external students using alternative communication technology.

“The student behind the avatar: Using Second Life (virtual worlds) for legal advocacy skills development and assessment for external students – a critical evaluation” explains the advocacy exercise skills development program in the Criminal Law course (USQ) as against professional accreditation requirements (Au) and pedagogical value. It discusses the positive and negative aspects of the delivery of the program to external students in a SL courtroom and presents the results of a survey of participating students regarding their advocacy experience in SL.

Keywords: Virtual worlds, Second Life, law, advocacy, skills, teaching, learning.

Introduction

Virtual worlds are 3D digital graphical animated multi user environments that are persistent and interactive, as between networks of people personified by their avatar (Bell 2008: 2). Within some virtual worlds such as Second Life (SL), users can contribute to the creation of

¹ The authors would like to thank Professor Michael Robertson for his feedback on an early draft of this article.

their environment and engage in business which supports a financially active economy;² although access to and navigational use of SL is free.

The use of SL as an innovative teaching and learning (TaL) resource in tertiary education is gradually gaining worldwide momentum. According to Molka-Danielsen and Deutchmann (2009:7) over 190 higher education institutions have engaged in teaching in this virtual world.³ Education based initiatives in SL such as the merging of Moodle learning management software (Sloodle) (see generally Livingstone and Kemp 2008)⁴ will increase its potential and attraction in an educational context as will the new “shared media” capability that allows web pages to be viewed and manipulated in world. The scope for educational activity and the pedagogical value of virtual world TaL are numerous, particularly for online external (distance) education,⁵ and discourse on this is becoming more prolific as interest and research increases.

Livingstone and Kemp (2008: 13) group SL TaL activities into several categories: role plays and simulations; group work and team building (community); events and presentations; constructive activities, such as building 3D objects and developing properties. Maharg (2007: 171-175) identifies an advantage of virtual worlds in legal education simulations as a setting in which to practice and reflect on professional legal transactions without real world consequences, and as an assessment, communication and collaborative learning tool. Jakobsdottir *et al* (2009) describes the use of virtual worlds in terms of roles played: location, content, context, community or material.

Recognizing this, the University of Southern Queensland which has a student cohort of over 75% who study in distance online mode,⁶ created a virtual campus (USQ Island) in SL

² In early 2010 the exchange rate was \$260 Linden, the Second Life currency, for 1 AUD.
[http://wiki.secondlife.com/wiki/L\\$ Marketplace](http://wiki.secondlife.com/wiki/L$%20Marketplace) accessed 21 March, 2010.

³ Cf Linden Lab, Education Directory: Academic organizations in Second Life (2009)
<http://edudirectory.secondlife.com/> accessed 20 December, 2010, which lists 140 (including 5 K-12) entries, however many are missing for example, the University of Southern Queensland and Harvard.

⁴ Cf Blackboard which is losing market share <http://mfeldstein.com/bad-news-for-blackboard-good-news-for-moodle/> and <http://www.zacker.org/higher-ed-lms-market-penetration-moodle-vs-blackboard-vs-sakai> accessed 21 March, 2010.

⁵ For reasons such as geographical location, work and care giving commitments, many are choosing to study in distance mode (externally), and online education is making it easier to do so.

⁶ USQ, Distance and e-learning centre <http://www.usq.edu.au/dec> accessed 21 March, 2010. A 2020 vision of the University is to be recognized as a world leader in open and flexible higher education
<http://www.usq.edu.au/hr/polproc/partb/strategy> accessed 21 March, 2010.

complete with teaching and meeting spaces, and two courtrooms.⁷ After a Second Life Awareness event on campus, the founding head of the School of Law (Faculty of Business)⁸ initiated an investigation into the use of USQ Island to support TaL within the new law programs. The Criminal Law courses were identified as courses which may benefit from its utilization. The authors of this article, one of whom is the course leader for the Criminal Law courses, planned trials for the use of SL in 2009 in three contexts, two of which supported the advocacy skills development component of Criminal Law B and Advanced Criminal Law B taught in second semester:

1. The production of two short advocacy education videos (machinima);
2. Conducting assessable advocacy exercises (moots or mock trials) for external students;
3. Engaging in student consultation with external students.

The development of skills for criminal law practice, and more specifically advocacy, have long been recognised as necessary for meeting minimum standard requirements for legal education and pre vocational competency.⁹ The advocacy exercise designed for the Criminal Law (USQ) courses seeks to provide a courtroom role play simulation based on a real case as a method for the development of introductory advocacy skills for both on campus and external students. Because the advocacy exercise is integrated into the criminal law course, it also serves to consolidate substantive knowledge of criminal law and procedure, and as such they complement one another whilst simultaneously achieving their own outcomes (Wolski 2009: 63). The pedagogical values of situated role play in the development of skills, and in this context advocacy, is widely recognized.¹⁰ They include student engagement in a deeper, active, problem-based learning experience, which is congruent with action,

⁷ Co author Lindy McKeown, played a significant role in creating the SL USQ Island campus. The main court is a replica of the Toowoomba Court (Qld) and there is also an elevated sky court designed without outer walls for purposes of filming educational videos.

⁸ Professor Geraldine MacKenzie, 2008.

⁹ Law Admissions Consultative Committee (Priestley Committee) (Priestly 11); Australian Professional Legal Education Council, Standards for the Vocational Preparation of Australian Legal Practitioners (1997); Law Admissions Consultative Committee Uniform Admission Rules 2008 http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=3043E5A9-1C23-CACD-2244-5630B0BFA046&siteName=lca accessed 9 December, 2010; D Pearce, E Campbell and D Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (the Pearce Committee Report) (1987). Modern legal education pedagogy has been the subject of significant research and discourse, see for example M Le Brun and R Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (1994); Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early 21st Century* (2007)).

¹⁰ Including by the students, see for example J Yule et al (2009) for student responses to a survey regarding the perceived benefits of moots.

constructive and authentic learning theories.¹¹ In that the advocacy situated role play engages students in an activity that will best achieve intended outcomes, it is outcomes based (Biggs and Tang 2007: Ch 1; Ramsden 2003).

Whilst on campus students deliver the advocacy exercise in a moot court the experience cannot be easily replicated for external students. This prompted the investigation and trial of SL as an optional setting for the role play. Different communication technologies each have their own advantages and limitations, depending on the task, adaptability and suitability (Jaeger and Helgheim 2009: 117; Newberry 2001: 2). For advocacy role play simulations media richness is important, the rating criteria for which is “the ability to relay immediate feedback, transmit multiple cues such as body language, permit tailoring the message to the intended receiver, and relay communicator feelings and emotions” (Jaeger and Helgheim 2009: 117; see also Newberry 2001). These criteria are important components of advocacy. For a myriad of reasons, virtual worlds are considered a superior (rich) media in contrast to video conferencing for situated role play (see for example Jaeger and Helgheim 2009: 119).

For the Criminal Law courses (USQ) SL provided an avenue for the flexible delivery of the advocacy exercise to external students; in a sustainable cost effective courtroom setting with synchronous communication (real time), and in an environment where there is a heightened sense of immediacy and social connection. In doing so, SL added an enhanced overlay to the already widely recognized pedagogies regarding advocacy skill development through situated role play which would not have otherwise been available to external students using alternative communication technology.

On the other hand, there are also impediments to virtual world TaL including the digital divide;¹² its adequacy as a non-verbal communication tool; and ethical considerations regarding the introduction of students to a potentially immersive and a sometimes dark virtual world. However the reality is that if educational institutions are going to offer external (distance) education or indeed flexible online delivery per se, then sustainable cost effective computer technology becomes the key (Butler 2008: 226).

¹¹ See for example J Yule et al (2009) which refers to a number of insightful publications on mooting and advocacy some of which are also referred to in Sanson et al (2009); Wolski (2009); Smith (2010); Butler (2007); and Lynch (1996).

¹² “The disparity in skill readiness and ability to access computers and the Internet together with the ability to effectively use this technology to enable full participation”. Australian Flexible Learning Framework Quick Guide Series: Definition of Key terms used in e-learning, <http://pre2005.flexiblelearning.net.au/guides/keyterms.pdf> accessed 18 March, 2010. This divide can operate on an institutional as well as academic and student levels.

This article will detail the trial of SL in supporting the Criminal Law courses offered at the University of Southern Queensland. It will explain the advocacy exercise program and how it is delivered and then go on to explore some of the pedagogical benefits of, and impediments to, the use of SL as a TaL resource for the exercise. The relative merits of using SL in this context will be considered in the light of existing literature on advocacy skills development and online virtual world TaL, and student responses to surveys regarding their experiences with SL in the criminal law courses in 2009.

The advocacy exercise

The School of Law operates on two campuses: Toowoomba (regional South East Queensland) and Springfield (outer suburban Brisbane). The enrolment status of students in the School of Law (Faculty of Business) law programs, are approximately 30% on campus and 70% external. Unless external students attend the occasional intensive on campus session, or visit the campus, they study courses wholly online.

Within the undergraduate law (LLB) and the postgraduate law (JD) programs there are two criminal law core courses.¹³ Criminal Law A and Advanced Criminal Law A are foundation courses which take students on a journey through the Queensland criminal justice system from arrest through to sentencing and appeal. These courses cover a range of offences that would most commonly be encountered by criminal law practitioners in the Magistrate and District Courts, and introduces some excuses to criminal responsibility, general principles of sentencing and ethics in a criminal law context.¹⁴ Building on this foundation Criminal Law B and Advanced Criminal Law B extends knowledge of the Queensland criminal justice system covering some of the more serious criminal offences, and associated excuses and defences, the sentencing of serious violent offenders and miscellaneous criminal law concepts such as double jeopardy.¹⁵ Skills which are targeted for development in the courses include research, problem solving, writing and advocacy.

¹³ The enrolment status of students involved in Criminal Law B in 2009 were 43% on campus and 57% external for the undergraduate degree program, and 3% on campus and 97% external for the postgraduate degree program.

¹⁴ USQ Programs and courses, Course synopses LAW2205: Criminal Law A (2010) <http://www.usq.edu.au/course/synopses/2010/LAW2205.html> accessed 26 March, 2010.

¹⁵ USQ Programs and courses, Course synopses LAW3423: Criminal Law B (2010) <http://www.usq.edu.au/course/synopses/2011/LAW3423.html> accessed 26 March, 2010.

Advocacy is a focus for skills development in the Criminal Law B courses and is assessed by way of an advocacy exercise. The exercise requires students to deliver written and oral submissions on a criminal law matter from either a prosecution, defence, appellant or respondent perspective. The exercises based on appeals are reserved for the postgraduate students enrolled in the JD program, and the undergraduate exercises are based on trials and sentencing. Two or four students are allocated to an exercise, each acting as opposing counsel to present legal arguments at a hearing before a judge; a member of the teaching team for the courses. Oral submissions must be delivered in 10 minutes, extending out to 15 minutes depending on the number of questions asked by the judge. The exercises which are based on real cases are kept as simple as possible so as to avoid overwhelming the students. They are also linked to substantive areas covered by the course so that substantive knowledge is also developed and assessed.¹⁶ Throughout the semester, and after substantive course content relevant to the advocacy exercise is covered, the advocacy exercises are progressively released and students are given two weeks to prepare and then present written submissions and then oral arguments.

Resources provided to assist students prepare for the exercise and scaffold advocacy skills development include: class instruction on advocacy, a recording of which is posted onto the course area of the online learning management system (Moodle) for external students; a study guide, including links to useful internet sites with information and videos on advocacy; references to texts and a discussion forum. In addition two educational videos, produced in SL (machinima) using avatar actors with professional voice over's, are available for students to view:

- "Advocacy", introducing the fundamentals of advocacy; and
- "Advocacy demonstration", comprising snippets of a scripted situated role play in the USQ SL Island Courtroom.

Statistics obtained from the Moodle logs for the courses indicated that most external students viewed the videos with some viewing them several times. The statistics also showed that whilst the videos were shown to on campus students in class time, many also viewed the videos again online.

The exercise is assessed at an introductory skills development level. Feedback is provided by way of a criteria referenced assessment sheet, including original comments. For on campus and SL students additional feedback is provided by way of discussion following the exercise.

¹⁶ For a useful discussion regarding concerns about the complexities and negative impacts of traditional mooting particularly in the context of appellate mooting refer to Wolski (2009).

Many students are excited by and look forward to taking part in the advocacy exercise, viewing it as a quintessential experience in or a rationale of their choice to undertake the study of law. Others however approach the experience with trepidation. Whatever their feelings for many, participating in the advocacy exercise will play a role in validating their choice to study law and future professional directions. The learning experience extends beyond discipline and skills development, and the importance of building student confidence is something that was considered in its design and the teaching team is mindful of in its implementation.

On campus students deliver their oral submissions in a courtroom setting during scheduled class time.¹⁷ External students are given three options for delivery:

1. attendance on campus at Springfield or Toowoomba on nominated days during recess;
2. attendance on nominated nights in the USQ SL Island Courtroom (photograph below); or
3. a digital recording, including responses to two or three questions they anticipate could be asked by the presiding judge.

In so far as the exercise is an advocacy role play that replicates a real world criminal matter and for most, trial environment, students are participating in authentic learning and assessment (Lombardi 2007). Unfortunately for the external students who opt for delivery of oral submissions by of way a digital recording, this realism and with it some of the pedagogical benefits of authentic situated role play and post exercise discussion and feedback, is somewhat diminished.



USQ Island Court (Second Life)

¹⁷ A dedicated Moot court on the Toowoomba campus and in a teaching space, with courtroom furniture, on the Springfield campus.

In 2009, 20% of the external students enrolled in the Criminal Law B courses elected to participate in the SL courtroom advocacy exercise,¹⁸ including one residing in New York and interestingly, several who resided in Brisbane and could have done the advocacy exercise on campus at Springfield.

The students gained access and were inducted into SL by way of tutorials posted onto the Moodle course site. The tutorials provided links to the software to download and the location of USQ SL Island where custom orientation materials were provided. It is estimated that these tutorials would have taken approximately one hour for students to complete successfully; that is to develop basic SL navigation, communication and avatar control competencies that would be sufficient for students to undertake the exercise. The tutorials circumvented normal access into SL via Orientation Island, avoiding the need to complete SL provider tutorial requirements which would have involved the investment of considerably more time. Two orientation sessions were then conducted in world on USQ SL Island in order to ensure that students were comfortable with and confident about doing the exercise in SL. The exercises were then conducted throughout the latter part of the semester on nominated evenings, using home computers, before presiding avatar judge Eola Azalee.¹⁹

Only a few problems were encountered during in world activities; communication, as a result of inappropriate headsets; lagging, due to bandwidth and or SL server issues; and on several occasions students experienced difficulty coming in world (one due to dial up access issues). These issues did not affect the actual delivery of oral submissions for the advocacy exercises which were all completed successfully on the original dates scheduled.

Student consultation sessions for the courses were also offered once students were inducted into SL, and included a disability student who came in world but interestingly chose not deliver their advocacy exercise in world electing to do it by way of a digital recording instead. On their own initiative the SL students also formed a study group conducting several study group sessions, including a session for another course in which the participating students were also enrolled. Some of these students still intermittently meet in SL.

¹⁸ 27% elected to do the exercise on campus and the remaining 53% submitted a digital recording.

¹⁹ Aka Eola Barnett.

The student experience

Student views on their SL experience were ascertained by way of responses to the student evaluation of the courses and a focused survey conducted at the close of the semester.²⁰ Via a series of questions seeking Likert scale responses (strongly disagree to strongly agree) the focused survey canvassed a variety of issues relating to the SL trail, from ease of use of the technology through to learning experience. The overall response was positive.

All respondents to the focused survey found it fun and exciting, and enjoyed using SL as part of the course; recommended the continued use of SL; would take another course that used SL. All agreed or strongly agreed that SL offered opportunities for interaction and communication, and in so far as communication was concerned all felt like they were communicating with a 'real person' in 'real time'. All but one felt they were able to communicate verbally, non-verbally and express themselves in SL. Again all but one felt that they were able to develop relationships with their classmates and the course leader as a result of the experience.

In so far as learning was concerned, all respondents either agreed or strongly agreed that SL was engaging; beneficial to their learning; that they were better able to understand course concepts by using SL. They considered that it was an enriching experience.

Prior to their induction into SL only one of the respondents had any prior experience with SL. A third were not confident computer users, and half had never played computer games. All found it easy to gain access into SL, however a third had some problems using SL despite the fact that they found the tutorials clear and believed that they had adequate support in completing their SL activities.

The overall positive response was supported by written comments on the student evaluation of the course where several external students identified the use of SL as a helpful and effective aspect of the course. Comments included: "excellent use of online interaction via SL very beneficial"; "available to meet individually in SL"; "use of SL for assessment task on advocacy was excellent"; "I hope that other lecturers will adopt this technology which provides better access for external students"; "continue with use of SL for external students".

²⁰ Approved by the Ethics committee (USQ). The response rate to the focused survey was 42%.

Some initial feedback was also given by students in world following the delivery of the advocacy exercise and included many positive comments that were reiterated in the surveys and other comments including: that the experience was surreal or weird; they were still nervous about the advocacy exercise; that it was awkward not being able to read or give non verbal cues.

Although not specifically mentioned by respondents to the surveys, one feature of the SL advocacy exercise option was that external students who participated in the trial were able to come in world and observe the exercises scheduled for the week just as students were able to do on campus.²¹ The educational benefits to be derived by observing and reflecting on others in action are self-evident.

The survey responses confirm the educational benefits of using SL to support external education in an advocacy skills development context. The advocacy exercise engaged students in constructive, experiential and authentic learning, and to be able to offer it to external students, albeit in a virtual world, enhanced their overall learning experience.

In so far as flexible delivery is concerned, SL also provided for a more consistent opportunity for advocacy skills development between the different student cohorts undertaking the same course; on campus and external. As such there was greater coherence with the learning objectives and outcomes of the exercise.

All that is Pedagogy²²

The University of Southern Queensland, relying on taxonomies such as Bloom's, uses a three level guide for skills development that reflects three levels of learning: foundational; intermediate; and advanced.²³ As the Criminal Law B and Advanced Criminal Law B courses provide students with their first opportunity for developing court advocacy skills in both the LLB and JD programs respectively, the skills are introduced, developed and assessed at an introductory level only. In alignment with the introductory skill level in written and oral

²¹ 26 different exercises were written so that student observers would not derive any content advantage in that observation.

²² Refer to n 10 and 12 above for useful references to literature regarding legal education theory, particularly in the context of skills development and specifically advocacy (moots).

²³ USQ Learning and Teaching Support, *Thinking about different learning levels for your course*, <http://www.usq.edu.au/~media/USQ/learn/learn/Information%20flyers/Gradqualitiesdifferentlevels%209%20Dec%2009.ashx> accessed 19 March, 2010.

communication, students “compose[d] a piece of writing [*written submissions*] that broadly adheres to disciplinary or professional conventions” and then “deliver[ed] an oral presentation [*submission*] that demonstrates a general structure and purpose [*advocacy*]”.²⁴ In preparing for and supporting this, students rely on intermediate ethical research and enquiry skills; analytical and problem solving skills; academic, professional and digital literacy skills; and management planning and organizational skills the foundations for which are provided within the criminal law courses and other core course such as Legal Process and Research. Before engaging in the advocacy exercise students have also been introduced to written and oral communication skills in other contexts in other core law courses such as Law in Context. As such, knowledge and skills development is scaffolded and constructed within the criminal law courses and across courses within the law program, building “*disciplinary mastery*”, where students must comprehend foundational disciplinary knowledge before they can engage in intermediate and advanced skills”.²⁵

The advocacy exercise itself is underpinned by situated, authentic, experiential, constructive and problem-based learning pedagogies. Advocacy skills development is scaffolded and constructed occurring by way of the resources that support the task; the task itself; and feedback and reflection following the task (Oliver and Herrington 2003: 13).

Lynch (1996: 77) citing Resnick (1989: 1) identifies three characteristics of constructed learning: “Firstly, there is a process of knowledge constructed, not of knowledge recording or absorption. Second, knowledge is learning-dependent; people use current knowledge to construct new knowledge. Thirdly, knowledge is highly tuned to the situation in which it takes place”. Problem-based learning is a recognized pedagogy that is used for “assisting deeper, critical active learning strategies and thus fostering the development of higher quality learning outcome” (Edwards et al 2007: 28. Referring to Ramsden 1992). The advocacy exercise enables students to build their knowledge and skills based on existing foundations and experiences in other contexts, from course resources and through their interaction with a realistic problem in a courtroom environment.

In so far as the advocacy exercise matches as nearly as possible advocacy in practice, as the nature of the problem on which the exercise is based and the manner in which it is delivered preserves “the complexity of the of the real-life setting” (Reeves *et al* 2002: 6. See also Herrington *et al* 2007 and Lombardi 2007); requires investigation over a sustained period; seamlessly integrates assessment; culminates in the creation of a whole; provides

²⁴ Ibid. [*Author inserts*].

²⁵ Ibid (Referring to Morgan *et al* (2002)).

opportunities to consider perspectives collaborate and reflect on the experience (Herrington *et al* 2007: 67. See also Reeves *et al* 2002 and Lombardi 2007), then it can be considered authentic learning; described as essentially ‘learning by doing’ (Lombardi 2007: 2). This is also characteristic of experiential learning and other pedagogical theories also apply, for example action learning which is based on the cycle of exploration, planning and reflection and can be, among many other things problem-based, experiential, collaborative and interactive (McKeown 2009: Ch 6). Feedback and reflection are important components of these pedagogies and complete the scaffolded learning process (Oliver and Herrington 2003:113-114).

Given the pedagogical foundations of the advocacy exercise, what role then can virtual worlds play in supporting the exercise and pedagogy? In a nutshell, Lombardi states that:

the value of authentic activity is not constrained to learning in real-life locations and practice, but that the benefits of authentic activity can be realized through careful design of Web-based learning environments (Lombardi 2007: 6. Quoting Herrington *et al* 2001).

Rosenberg reiterates and adds that:

through the power and creativity of simulations and the ubiquitous nature of the Internet, scenarios can be created that rival the real world, making training more relevant, more effective, more challenging, and, where appropriate, more fun (Rosenberg 2006: 47-48).

Even considering cogent arguments by Herrington *et al* (2007: 82) that it is the “cognitive realism” of the task which is much more important than it’s realistic or virtual simulation; that it is “the task itself” which is the “key element of immersion and engagement in higher order learning”; and that “cognitive engagement can be realized without high fidelity immersive virtual reality technologies”, it cannot be denied and it is recognised that problem and discipline based simulation in a realistic environment is synergistic and can enhance learning outcomes, especially when resources for a task are a seamless integrated whole (Maharg 2007: 178, 239 and Part 3). Some argue that this type of learning requires real world authentic environments and others, like Rosenberg and Lombardi above, that it can occur in carefully constructed environments; “the skilful management of digital resources can help replicate the scholarly or workplace practices associated with a profession or vocation. Using technology to reproduce real-world practices can bring learning to life and

build learners' confidence as they develop professional skills" (JISC 2009: 19. See also Jones 2007: 470).

The opportunity presented by SL for the flexible delivery of the advocacy exercise in a replica virtual courtroom involving real time communication, interaction and feedback, and particularly the ability to ask questions during the exercise as happens in real life supports relevant pedagogy.

In addition to making the experience more meaningful, the virtual courtroom is stimulating and motivational. It arguably offers a more explorative, positive and fun (Morse *et al* 2009: 184; Balkun *et al* 2009: 147) learning environment than alternative visual communication technology conferencing options have to offer. The virtual courtroom also gives a heightened sense of presence in an environment where students perform as an advocate, engage in appropriate behavior and where demeanor and appearance does matter.

As many external students study wholly online, offering a form of connection though virtual worlds can only enhance their university and learning experience. The students who participated in the SL advocacy exercise trial confirmed this by facilitating, on their own initiative, study groups in SL during the same semester of the trial. In a virtual world student interaction with content, other students and instructors, albeit behind their avatar, increases perceptions of verbal and non verbal immediacy (Maharg 2007: 243 and Anderson 2009: 194), social and psychological presence and sense of connectedness (Albion 2008; JISC 2009: 40; Steventon *et al* 2008: 976), all of which have significant positive impacts on student motivation and corollary learning experience (Albion 2008; JISC 2009: 40; Maharg 2007: 245). The value of social connection in online TaL cannot be under estimated; "Learning is a social activity as well as a cognitive one, and unless this 'sociability' is guaranteed -- only the most motivated students will persist" (Brennan 2003: 39). For the digitally bred generation "social relationships assume particular importance" (Carver and Cockburn 2006: 4). It is also recognized that this generation also "prefer 'active learning' or learning experiences that engage the student actively within the learning process and encourage them to construct their own learning by 'doing' rather than simply being told" (Carver and Cockburn 2006: 13).

Although the development of online TaL can be costly (Cunningham *et al* 2000: 1), considering that universities have already invested in technology infrastructure, access to SL is free and the costs of setting up a virtual campus,²⁶ or in this context a courtroom,²⁷ in SL is

²⁶ Establishment cost of US\$700 and approximately US\$1770 per annum (2009).

²⁷ US\$200 (2009).

comparatively minimal, the use of SL is cost effective both as a location for TaL and as medium for creating educational videos (machinima). For universities which use Moodle as a TaL management system there are further benefits as materials already created and used online can be easily integrated into SL. Using existing platforms such as SL to enhance rather than immerse TaL avoids dangers of the online technology burden that some universities have faced to their demise: “were so bleeding edge we’re hemorrhaging” (Cunningham *et al* 2000: 2).

Costs are also reduced if SL is adopted as a TaL platform for flexible delivery within courses within a program and across programs within the institution. If SL is to be adopted the aim should be to maximize its utility, which makes sense from both a cost as well as a student familiarity perspective; the results of survey for the advocacy exercise trial support this.

Impediments

The digital divide is arguably one of the biggest impediments to the effective use of virtual worlds in TaL. Although this concept is more often applied in the context of student users in terms of their access and ability to use technology, the digital divide can also operate on an institutional level in terms of appropriate institutional commitment to and support for innovative technologies, and academic staff ability and confidence to effectively use the technology;²⁸ as the years pass more and more incoming students are “digital natives” whilst many academic staff remain “digital immigrants” (Note Butler 2007: 11 and Carver and Cockburn 2007: 8. Terms coined by Prensky 2001).

Institutional commitment is imperative for the support of technological innovation in TaL. Appropriate funding will need to be directed to the acquisition of ICT to support activities and pedagogy, as identified by staff, and support services, which will include training (Enyon

²⁸ For a summary of literature on “the effectiveness of dissemination and implementation of innovations in teaching and learning in Australia and overseas” see B dela Harpe and A Radloff, “Lessons learned for three projects to design learning environments that support ‘generic’ skill development” (2006) 1(2) *Journal of Learning Design* <http://www.jld.qut.edu.au/publications/vol1no2/documents/lessons%20learned.pdf> accessed 21 March, 2010. See also J McKenzie, S Alexander, C Harper, and S Anderson (2005) *Dissemination, Adoption & Adaptation of Project Innovations in Higher Education*, A report for the Carrick Institute for Learning and Teaching in Higher Education, University of Technology (2005) <http://www.altcexchange.edu.au/system/files/handle/Dissemination%2C%20Adoption%20and%20Adapti%20on.pdf> accessed 22 March, 2009; and R Enyon, “The use of ICT’s for teaching and learning in law education: some innovators’ perspectives” [2006] 3 *Web JCLI* <http://webjcli.ncl.ac.uk/2006/issue3/eynon3.html> accessed 22 March, 2010.

2006). In terms of some technologies, timely decisions will have to be made one way or another as to whether the proposed innovation will be supported; “institutions report reluctance to facilitate the use of immersive virtual worlds due to concerns over firewalls and the supply of the necessary resources such as sufficient bandwidth” (Steventon et al 2008: 2). Due recognition is also important as the investigation, implementation and management of innovative technology in courses is time consuming and relies on the good will, personal interest and enjoyment (Enyon 2006) of academics who recognize the educational benefits that the technology has to offer, but who are still required to meet other commitments for purposes of appraisal and advancement; the academic overload dilemma.²⁹ Where funding or recognition is wanting, it will lead to a culture of resistance. Academics who are reluctant to accept the technology invasion or unwilling to investigate the potential for online TaL are unlikely to change if institutional commitment is half hearted or driven primarily by managerial economic and marketing priorities (see also Pastellas and K Maxwell 2005; Enyon 2006; Butler 2007).

In so far as students are concerned the digital divide is slowly closing but will never disappear as technology continues to develop. Access to appropriate hardware and high speed internet connection will invariably remain an issue for some; however technological competency may not, at least not to the same degree that it is today as we still have digital immigrants on board. Even if students are competent in the use of technology the challenge then becomes meeting the learning technology preferences of the student cohort in order to enhance their learning outcomes (Carver and Cockburn 2006: 13). At the end of the day learning in a virtual world will not be attractive to everyone.

For some, virtual worlds present a “steep learning curve before students can fully utilize them for learning -- The more immersive the online environment gets the more complex it becomes to use” (Pfeila *et al* 2009: 227). One of the authors, a self confessed technophobe, sometimes described Luddite and very much a digital immigrant, found it easy enough to acquire the rudimentary navigation skills necessary to conduct the advocacy exercise but is finding it difficult to master, particularly avatar animation. In its present form learning to master navigation and avatar animation in SL may be an impediment to many, even if only

²⁹ Academics first and foremost need to be discipline qualified and specialists in their field. They are also educationalists, requiring knowledge of education theory, and participate in administration. Both of which, together with technology, support the academic role in teaching and research. The technology competency required relates not only to the technology used within their discipline profession and within the educational institutions in which they work, but also the technology that will support their teaching. Academics are also required to perform services back to their discipline profession, education and community, and are now also engaging in marketing.

from a time constraint perspective. This together with communication limitations may present difficulties for students and “any difficulty students or tutors face in handling the virtual world itself will unnecessarily decrease the quality of the learning/teaching experience” (Pfeila *et al* 2009: 233. See also Butler 2007).

Communicative confidence is a key to successful advocacy (see generally McCarthy 2006) and relies on both verbal and, arguably to a lesser extent, non verbal cues and as such a sense of self awareness and the awareness of others; although ultimately one would hope that cases are won and lost on their merits (a sentiment shared by many see for example Kozinski 1997; and McCarthy 2006). The effective use of SL as a non verbal communication tool requires a mastery of avatar animation, which takes time (Sanson *et al* 2009), and even then the richness of the communication is still considered deficient (Morse *et al* 2009: 194; Yule *et al* 2009: 242). For self awareness a visual of your avatar’s animations, which is not always possible, is also important and even then for some there can still be a sense of detachment. One would think that as technology improves so to will this aspect of virtual world ‘reality’. However one also wonders whether the avatar interface will ever replicate the level of self awareness required and as such the truly authentic experience (Yule *et al* 2009: 242) that comes with real world advocacy.

It is also easy to jump to the conclusion that the “digital natives” will take to SL or other virtual worlds like ducks to water, after all they are technology (including media) savvy and may indeed “assume a technologically enabled context in which to learn” (Carver and Cockburn 2006: 3). In the case of virtual worlds, it has been suggested that because students are from a generation which has grown up blending virtuality with reality, in some senses virtuality has in itself become a reality (Herrington *et al* 2007: 81). However, as pointed out by Carver and Cockburn students are more likely to “engage better with materials anchored within their own experience” (2006: 3. See also Carver and Cockburn 2007). So whilst they may find it easier to acquire navigational and animation competency largely as a result of playing virtual 3D games, because many students “have never taken part in an online community -- and see social networking as having value only to support face-to-face socializing -- they may see the use of virtual world technologies as ‘weird’ or ‘sad’” (Steventon *et al* 2008: 2. See also Sanson *et al* 2009: 249).

There is a real difference between ‘real live’ interactions and ‘virtual world’ mediated avatar to avatar interaction. In a virtual world some may struggle with identity and as a result may not find SL attractive or if engaged in a SL educational activity, feel disconnected (Savin-

Baden 2010: 25).³⁰ On the other hand others, for a variety of personal and cultural reasons, may find this 'semi-anonymous', 'once removed' or 'standing in another's shoes' interaction attractive and beneficial (Bell and Pearce 2009: 51; Sanson *et al* 2009: 248). In the Criminal Law B course offering in S 2 2010, two on campus students requested if they could do their advocacy exercises in SL as a result of performance anxiety issues. As such, these students were afforded the opportunity of engaging in a possibly less stressful and more meaningful learning experience as a student behind an avatar.

Considering these issues and pending further research into TaL experiences in virtual worlds, it may be prudent to use virtual worlds as supplemental in flexible delivery (Steventon *et al* 2008: 981) and as such an optional TaL resource. In the absence of providing a truly authentic advocacy experience, if one outside of a real courtroom indeed exists, virtual world technology can provide a situated simulation alternative. It then becomes a matter of assessing the cost effectiveness, availability, suitability and richness of the technology chosen as against other options and the task, taking into consideration the level at which it is directed; introductory, intermediate or advanced. Additionally, the use of technology serves a subsidiary learning experience in itself, and whatever the student response is to virtual world TaL, it has been argued that situation and technology adaptability is a necessary quality for vocational competency (Yule *et al* 2009: 231; Butler 2008: 213).

A further potential impediment is presented in the form of ethical considerations regarding the introduction of students to an immersive world and all it entails, the darker side of which is subject to periodic media scrutiny; drug and sex simulations, and crime.³¹ Universities using SL as an educational platform will need to investigate the legal implications of this, and employ mechanisms to deal with it.

Verification of identity, especially during an assessable task, is also a potential problem. However this is a problem in any online class and in fact there is no guarantee that an external student or an on campus student who submits an assignment was the actual author. As in all online learning situations, the best effort must be made by staff to be wary of this and ensure they know their online students.

Finally there are also concerns regarding SL provider (Linden Labs) problems in that SL longevity cannot be guaranteed; there are questions of inherent instability due to traffic and

³⁰ To some extent this could be overcome by personalizing ones avatar by way of appearance and by using first names.

³¹ Although during the trial at USQ nothing untoward was encountered, others have been less unfortunate see for example Sanson *et al* (2009: 253).

bandwidth requirements; content control; backup; as well as tentative legal issues, for example, intellectual property (Pfeila *et al* 2009: 234; 237; Sanson *et al* 2009: 254). However with increasing outsourcing of technology by institutions, these are risks that go beyond virtual worlds. More solutions are becoming available for on and off campus hosting of federated worlds owned by the universities themselves such as those created using OpenSim and Hypergrid software.³² This will allow universities greater control of their own destiny and distance them from commercial providers of worlds shared with other activities not of an educational nature.

Conclusion

SL is an easily accessed and cost effective virtual world that can greatly enhance the learning experience of external students, allowing for a 'richer interaction' in terms of greater engagement in role play tasks, real time communication and a sense of presence (Mazoue 1999: 104; Love *et al* 2009: 67-69).

The conduct of the criminal law advocacy exercise in a SL courtroom provided a setting in which advocacy came to life for external students, giving greater scope for motivation, engagement and a more meaningful learning experience. The use of SL in the manner it was used did not involve the juggling of pedagogical virtues to the extent as seems to be the case with certain other forms of online learning (Steventon *et al* 2008). Rather, in the simple context that it was used, SL provided an enhanced overlay to and complemented the already existing sound TaL pedagogy of an activity that would not have otherwise been available, to a similar approximate extent that it was to on campus students, to external students. Even considering SL impediments and taking into account the fact that the advocacy exercise is aimed at developing introductory level skills, the cost effectiveness of SL, the benefits of flexible delivery and the positive response of students to the trial, there is sufficient justification for its continued use.

Nothing done in a TaL context is truly authentic in the sense that TaL does not involve real world work related consequences. The aim then becomes to make it as authentic as possible given operative restraints. SL as a location for advocacy role play goes some considerable way to achieving authenticity in online learning and external education.

³² For example New Zealand Virtual Worlds Grid <http://nzvwwg.org/> accessed 15 September, 2010.

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JUDICIAL REVIEW OF LEGISLATIVE ACTION IN SRI LANKA

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This article will examine and explain the nature of judicial review of legislative action for constitutionality under the Constitution of the Republic of Sri Lanka and the mechanism set up for achieving it. An outline of the system of review that existed under the previous constitutions will be given to set the historical context, and thereafter it will focus on the organisation and functions of the Supreme Court in which the power of review is located under the Constitution. The provisions governing the review will be critically examined and some conclusions drawn.

Keywords: Constitutional Law, Fundamental Rights, Interpretation of legislation, Independence of the Judiciary, Judicial Review of legislation, Judicial Role in interpreting Constitutional Provisions, Rule of Law, Sri Lanka.

The origins of constitutional review in Sri Lanka

The Soulbury Constitution, the first constitution of independent Sri Lanka, was structured along the lines of the Westminster model of cabinet government. Legislative power was exercised by a bicameral Parliament consisting of the House of Representatives and the Senate. The Governor General represented the British sovereign as the nominal head of the executive¹. A cabinet of ministers were charged with the general direction and control of the government and they were collectively responsible to Parliament.²

Bills could be introduced in either chamber except money bills which could be introduced only by the House of Representatives. Subject to certain exceptions relating to money bills,

¹ Section 45 of the Soulbury Convention provided: "The executive power shall continue vested in Her Majesty and may be exercised on her behalf by the Governor General in accordance with the provisions of this Order in Council and of any other law for the time being in force."

² S 46 of the Soulbury Constitution.

a bill in order to become law required approval by both chambers³ and had to be presented to the Governor General for royal assent.⁴

The Soulbury Constitution provided for separation of powers and an independent judiciary. It did not incorporate a bill of rights,⁵ but in s 29 it provided a safeguard for the minorities.⁶ Parliament had power to make laws “for the peace, order and good government of the Island.”⁷ This power had to be exercised subject to the restrictions in s 29. It was provided further that any law made in contravention of s 29 (2) was void⁸ and an amendment or repeal of the Constitution required approval by a two thirds majority in the House of Representatives.⁹

The Soulbury Constitution did not provide for a separate court to deal with constitutional issues. Indeed, it did not by express language provide that the judiciary shall exercise such power, but the judiciary assumed that power by a process of interpretation,¹⁰ as will be seen

³ S 32 of the Soulbury Constitution.

⁴ S 36 of the Soulbury Constitution. Parliament, for the purpose of law making, was defined as the House of Representatives, the Senate and the Governor General. By convention the Governor General did not refuse his assent to a Bill presented to him. See s 4 (2) of the Soulbury Constitution: “All powers, authorities and functions vested in Her Majesty or the Governor-General shall ... be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by Her Majesty.” S 45 of the Constitution provided that the executive power of the Island “shall continue vested in His Majesty and may be exercised, on behalf of His Majesty, by the Governor-General ...”

According to Jennings, *The Constitution of Ceylon*, at 170, executive power remained vested in the Queen “and may be, but need not be, exercised by the Governor-General. If the queen visited Ceylon she could do formal acts in person”.

⁵ Sir Ivor Jennings, who was the principal architect of the Soulbury Constitution, was opposed to it.

⁶ It read: “S 29 (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.

S 29 (2) No such law shall-

(a) prohibit or restrict the free exercise of any religion; or
(b) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable: or
(c) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or
(d) ...”

⁷ S 29 (1) of the Soulbury Constitution.

⁸ S 29 (3) of the Soulbury Constitution.

⁹ S 29 (4) of the Soulbury Constitution.

¹⁰ *Liyanage v The Queen* (1966) 1 All ER 650; (1965) 68 NLR 265 PC. In *Liyanage*, citing the provisions in the Constitution, Lord Pearce said: “These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the

in cases such as *Bribery Commissioner v Ranasinghe*,¹¹ *Liyanage v The Queen*¹² and *Kodeeswaran v The Attorney General*.¹³

Issues affecting constitutionality of legislation were considered in proceedings brought to court in the exercise of its ordinary jurisdiction.¹⁴ In the leading case of *Bribery Commissioner v Ranasinghe*¹⁵ it was said by Lord Pearce in the Privy Council, which was at the time the court of last resort, that “where a legislative power is given subject to certain manner and form that power does not exist unless and until the manner and form is complied with.”¹⁶ Lord Pearce further stated that a restriction on the legislature requiring a special majority to make certain laws did not amount to a fetter on its sovereignty, and Parliament “does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority.”¹⁷ On s. 29 (2) Lord Pearce said that ‘these represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which, inter se, they accepted the constitution, and these are therefore unalterable under the Constitution.’¹⁸ Lord Pearce also declared obiter that the restrictions in s 29 (2) of the Constitution referred to matters which shall not be the subject of legislation.

Lord Pearce’s obiter dictum came as an irritant to Ceylonese politicians who interpreted his remarks as evidence that the country had not achieved real independence. It led to demands for a break with the past.

judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution’s silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to, or be shared by, the executive or the legislature.” See 68 NLR at 282.

¹¹ (1964) 66 NLR 73 PC; [1964] 2 W L R 1301.

¹² (1966) 1 All ER 650; (1965) 68 NLR 265.

¹³ (1969) 72 NLR 337.

¹⁴ Thus in *Kodakanpillai v. Mudanayake* (1953) 54N.L.R. 433 the validity of certain provisions in legislation passed by Parliament was considered in an application for a writ of certiorari to quash a decision refusing the inclusion of the applicant’s name in the register of electors. In *P S Bus Co Ltd v Ceylon Transport Board* (1958) 61 NLR 491 the challenge to the validity of the statute was made by way of an application for a writ of quo warranto and writ of certiorari.

¹⁵ (1964) 66 NLR 73 PC; [1964] 2 W L R 1301.

¹⁶ [1964] 2 WLR at 1312. The Privy Council upheld the Supreme Court’s decision that the finding of guilt for bribery made by a tribunal could not stand, because the statute under which the tribunal had been appointed by the Minister concerned was inconsistent with the Constitution.

¹⁷ (1964) 66 NLR 73 at 83; [1964] 2 W L R 1301, at 1307

¹⁸ 66 NLR at 78.

It was argued that s. 1(2) of the First Schedule to the Ceylon Independence Act 1947 did not grant the authority either to the Parliament of Ceylon or that of the UK to repeal the Ceylon Independence Act 1947 and that it 'raised a knotty legal problem and it is not clear whether it can be resolved at all.'¹⁹ It was further contended that s 29(2) of the Ceylon (Constitution) Order in Council 1946 cannot be amended in any way'.²⁰

The First Republican Constitution (FRC)

The framers of the 1972 Republican Constitution wished to overcome what they considered to be a legal impediment that prevented the Parliament under the Soulbury constitution from functioning as a fully independent and sovereign body.

Two methods were suggested to achieve this: either amend the constitution within the framework of the existing constitution or make a complete break with the past and set up a new constitution outside the framework of the existing one. It was the second method that was eventually adopted in the drafting of the 1972 constitution.²¹ The constitution was drafted, discussed and adopted by a Constituent Assembly consisting of all the members of the National State Assembly who met at a location outside the premises of the Assembly in order to disassociate themselves in every way with the constitution under which they were elected. The fiction of a legal revolution was called in aid to legitimise their efforts and the Constitution itself was proclaimed as an 'autochthonous' or home grown constitution, locating the sovereignty in the people.

In reality, the Constitution produced by the Constituent Assembly was based on the proposals produced by the ruling party, the United Left Front. The mandate to formulate a new constitution too was sought only by the ruling party. The constitution making process did not command the support of all the parties represented in Parliament and members of various opposition parties left the Constituent Assembly during the deliberations because their views were not taken seriously.

¹⁹ See on this LJM Cooray, *The Reflections on the Constitution and the Constituent Assembly*, Hansa Publishers Ltd, Colombo (1971); MJA Cooray, *Judicial Role under the Constitution of Ceylon/Sri Lanka* Cooray (1982);

²⁰ Ibid. See also C F Amerasinghe, *The Doctrine of Sovereignty and Separation of Powers in the Law of Ceylon* (1970).

²¹ Cooray LJM *supra* no 21 at p. 120

Dr Colvin R de Silva, the principal architect of the new constitution, relied on Kelsen's theory of grundnorm²² in a case²³ he later argued before the courts in relation to an industrial dispute. The issue there was whether the earlier decisions of higher courts were binding on the courts constituted under the new constitution after it came into force. He argued that (1) the repeal of the old Constitution terminated the legal order it had embodied, and (2) the new Constitution which took its place began a new legal order. The fact that those who opposed the adoption of the new constitution subsequently took the oath of allegiance under it rendered the new constitution efficacious and valid.

The framers of the FRC intended to make the National State Assembly the supreme organ of the state with no limits on its legislative power.²⁴ With this in mind they removed from the

²² During the early decades of the last century Hans Kelsen had propounded the doctrine of grundnorm or the basic norm from which all the other norms of the legal system derived their validity. The grundnorm however required the compliance by the population for efficacy. When the grundnorm failed to become efficacious it ceased to be the basic norm. In its place a new grundnorm may emerge. Kelsen provided the theoretical basis for the framers of the First Republican Constitution to bury the Soulbury Constitution and adopt a new one. A new grundnorm had emerged establishing a new legal order.

²³ Walker & Sons v Gunathileke and Others [1978-79-80] 1 Sri LR 221

²⁴ The relevant sections in the Constitution are as follows :

s. 1. Sri Lanka (Ceylon) is a Free, Sovereign and Independent Republic.

Art 2. The Republic of Sri Lanka is a Unitary State.

s. 3. In the Republic of Sri Lanka, Sovereignty is in the People and is inalienable.

4. The Sovereignty of the People is exercised through a National State Assembly of elected representatives of the People.

The National State Assembly is the supreme instrument of State power of the Republic. The National State Assembly exercises—

(a) the legislative power of the People;

(b) the executive power of the People, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and

(c) the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.

s.44. The legislative power of the National State Assembly is supreme and includes the power

(a) to repeal or amend the Constitution In whole or in any part, and

(b) to enact a new Constitution to replace the Constitution

Provided that such power shall not include the power—

(i) to suspend the operation of the Constitution or any part thereof; and

(ii) to repeal the Constitution as a whole without enacting a new Constitution to replace it.

A Bill passed by the National State Assembly shall become a law of the National State Assembly when the certificate, as provided by section 49 is endorsed upon it. Such law may provide for the retrospective operation of any or all of its provisions or for the appointment of a date on which the law or any provision thereof shall come into operation.

judiciary its power to review legislation for constitutionality.²⁵ This was justified on the basis that the elected legislative body should not be subject to control by an unelected judiciary. However, the constitution made provision for the review of Bills before they were enacted by the National State Assembly²⁶.

Judicial Review of Bills under the FRC

The Constitution provided for the establishment of a Constitutional Court²⁷ for the review of Bills. The Speaker of the National state Assembly (NSA) was required to refer to the Constitutional Court the question whether any provision in a Bill was inconsistent with the constitution if:²⁸

- (a) the Attorney General communicated such an opinion to the Speaker, or
- (b) the Leader in the NSA of a political party or the members forming the quorum in the NSA informed the Speaker in writing, within one week of the Bill being placed on the agenda of the NSA, of such a question, or
- (c) the Speaker took the view there was such a question, or
- (d) the Constitutional Court was moved by a citizen within the one week of the Bill being placed on the Agenda of the NSA and the Court advised the Speaker there was such a question.

The Court was composed of five persons appointed by the President for a term of four years. Whenever the occasion arose for the determination of any matter coming within the purview of the Court three members were chosen in accordance with the rules of the Court to determine the matter²⁹. No qualifications were stipulated for appointments to the Court. It was intended, perhaps, to accommodate persons who were conversant with the socio economic conditions of the country in addition to their legal expertise, as Dr. Colvin R de Silva himself explained: 'In the matter of this question of Constitutional Court, it must be realised that expertise in legalism alone is not enough'³⁰

²⁵ See s.48 (2) No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce-upon or in any manner call in question the validity of any law of the National State Assembly.

²⁶ S.54 of the FRC.

²⁷ S.54 of the FRC.

²⁸ S.54(2) of the FRC.

²⁹ S.54 of the FRC.

³⁰ Marasinghe M.L., The Evolution of Constitutional Governance in Sri Lanka , p. 156

The first appointees to the Court, however, were judges from the Supreme Court and District Court except for one renowned academic lawyer³¹. In the course of time persons with political affiliations were appointed to the Court. Although it was said that the persons appointed to the Court would have an appreciation of socio economic conditions in the country, in reality it meant that they were expected to have an appreciation of the agenda of the party in power. The appointments to the Court tended to cast doubts on the impartiality of the Court.

A case in point is the Associated Newspapers of Ceylon Limited (Special Provisions) Bill. The declared purpose of the Bill was to change the status of the company, to provide for the redistribution of the shares of the company, and for the reconstitution of the existing management and administration of the business and affairs of the Lake House group of companies, the publisher of the leading newspapers at the time.³² The real objective of the measure was to have the Company taken over by the State. It was common knowledge that the company was owned and managed by persons who were sympathetic to the main opposition party in Parliament. The Attorney General had conveyed to the Speaker of the Assembly his view that certain clauses of the Bill were inconsistent with sections 18(1)a, 18(1)f and 18(1)g of the Constitution, which guaranteed equality before the law and equal protection of the law, freedom of assembly and association, freedom of speech and expression including publication. Although the Attorney General had the right to be heard under the relevant provisions of the Constitution, he abstained from doing so on 'personal grounds'. The government retained private counsel to appear on their behalf.³³

The freedom of the press is one of the most important attributes of a democratic society, however biased or partial the press may be. The remedy in such situations is not the acquisition of the establishment in question by the state but to promote other media organisations to express competing views. Nevertheless, the Court determined that the Bill did not offend any of the provisions of the Constitution. The Court rejected the argument that the Bill infringed the right of equality before the law on the ground that this right did not strictly come within the purview of the Court. The Court relied on an Indian decision according to which "the principle of equality before the law does not come into play in any controversy as to the legality of a law enacted by the State. It comes into play in the sphere of its enforcement. So when Prof. Dicey speaks of the principle being an essential part of the

³¹ Dr J A L Cooray was the academic.

³² As per long title to the Associate Newspapers of Ceylon Ltd (Special Provisions) Law

³³ Marasinghe M.L, supra n 32 at pp. 157-158. There were 6 petitioners who challenged the Bill mainly on the same grounds on which the Attorney General had expressed his reservations.

Constitution it only means that the laws of the land shall be enforced against all persons equally without any distinction being made on any ground whatsoever.”³⁴

In regard to the equal protection of the law, the Court believed that the Company can be classified and treated differently because of their monopoly in the newspaper business, and they occupied ‘a very powerful and influential position in the life of the country’. They also rejected the argument based on the rights to association and publication on the ground that fundamental rights of association and publication cannot be claimed by juristic persons such as an incorporated company.³⁵

The Categorisation of Bills

The constitution spoke of two categories of Bills, one which was ‘urgent in the national interest’, and the other an ordinary or non urgent Bill. With regard to the second category of Bills the citizens, among others, were afforded the opportunity of making representations before the Constitutional Court within seven days of a Bill being placed on the Order Paper of the National State Assembly. The time thus given to the citizens was wholly inadequate to make a thorough and fully informed study of the proposed law.

Urgent Bills

The position was further confounded by the provisions relating to ‘Urgent Bills’. In the case of a Bill certified by the Cabinet of Ministers ‘as urgent in the national interest’³⁶ even the limited opportunity available to make representations on it was denied by this provision.

Since the decision that a Bill was urgent was a decision of the Cabinet of Ministers, it was arguably an executive decision. There is no reported decision to indicate that the Constitutional Court had considered whether a Bill certified as urgent in the national interest was in fact so.

The Courts have regularly reviewed administrative action under their ordinary jurisdiction applying administrative law principles. In several of those cases, the Courts have reviewed the actions of the executive notwithstanding ‘ouster’ and ‘finality clauses’ when such actions have been shown to be ultra vires, or taken in bad faith or unfairly.³⁷ The Constitutional

³⁴ W G Row v State of Madras, AIR 1951 Madras, 147 (FB)

³⁵ Decisions of the Constitutional Court of Sri Lanka vol 1, p.50

³⁶ s.55. (1) of the FRC.

³⁷ Following *Anisminic v Foreign Compensation Commission* [1969] 2 QB 862

Court did not take a robust view of its role when examining Bills that seemingly violated the fundamental rights guaranteed by the constitution.

The Time Limit

The Constitutional Court was required to communicate to the Speaker its advice on non-urgent Bills within two weeks of its reference to the Court³⁸ and urgent Bills as expeditiously as possible and in any case within twenty-four hours of the assembling of the Court³⁹. The advice of the Court was to be on the question whether a Bill was consistent with the Constitution or whether they had any doubts as to whether Bill or any of its provisions were consistent with the constitution.⁴⁰

It would be a very difficult task for any court to consider comprehensively the constitutionality of a Bill, especially urgent Bills, within such a short time. For example, the Bribery (Special Jurisdiction) Bill was referred to the Constitutional Court on the 21st of February 1973. The Court Assembled at 9.45 a.m. on the 24th of February 1973 and the determination was sent to the Speaker of the National State Assembly on the same day. The Bill was intended to give the Minister of Justice, where he considered expedient, the power to nominate for trial of offences under the Bribery Act, an appropriate court anywhere in the country, irrespective of the place where the offence had been committed. The appropriate Court was defined to mean a District Court or an 'additional' Court. Upon the Minister making such an order, any case under the Bribery Act pending in any other court, in which no evidence had been recorded, was to be transferred to a court nominated by him.⁴¹

The Bribery Act gave Courts special powers to try and, upon conviction, to punish offenders under the Act. As such, the proposed Bribery (Special Provisions) Bill impacted on the liberty of the citizens who had no opportunity to present their views on it to the Constitutional Court. The question that the Court had to determine was 'whether the Minister was given 'judicial power' under s. 5(3) of the Constitution. It is difficult to find any reason as to why the Bill was considered urgent. Although the Court stated that it had the advantage of hearing the views of the Attorney General, no serious consideration was given to the fact that the Minister was afforded the discretion to transfer pending cases to any court that the Minister deemed appropriate. The Attorney General as the chief law officer of the government, having found the Bill to be consistent with the Constitution, could not have

³⁸ S.65 of the FRC.

³⁹ S.55(2) of the FRC.

⁴⁰ S.55(2) a, b, & c of the FRC.

⁴¹ Decisions of the Constitutional Court of Sri Lanka vol I, .p 23 - 25

been realistically expected to raise issues affecting the rights of the ordinary citizens before the Court. Under the constitution it was his duty, in the first instance, to examine any proposed legislation for inconsistencies with the constitution⁴². After giving his approval, he could not have raised any issue that would lead to a determination unfavourable to the government. If, however, the opportunity was available to the public to present arguments about the constitutionality of the Bill, the Court would have been able to consider it from different perspectives.

One matter which evoked controversy related to the question whether the time limit within which the Court was required to make its determination was mandatory or directory. There was no decision with regard to 'urgent bills' by the Constitutional Court but there was one with regard to ordinary Bills. In the case of an ordinary Bill the Court was required to give its decision within two weeks of assembling of the Court.⁴³ In the matter of the Sri Lanka Press Council Bill, the Court decided that the requirement was directory only and proceeded to deliberate beyond the stipulated period, whereupon the National State Assembly made it clear that it would proceed with the Bill and ignore the outcome of the Court's deliberations. This resulted in the resignation of the three members of the Court.⁴⁴ This incident displayed the attitude of the government towards the Court.

Subsequently, a new panel of judges was appointed. The Chairman of the panel that heard the case anew was a Supreme Court judge.⁴⁵ The new panel of judges commenced their deliberations with the comment that they considered the time limit of two weeks to be mandatory and that they would submit their decision within two weeks.⁴⁶ They gave no reasons why they considered it mandatory to give their decision within two weeks of the reference, especially in view of the earlier Bench's view that it was not mandatory.

The Second Republican Constitution

The FRC did not last as long as the Soulbury Constitution did and a change of government in 1972 resulted in a change in the basic law itself. The United National Party, which had

⁴² S.53(1) of the FRC.

⁴³ S. 65 read: 'The decision of the Constitutional Court shall be given within two weeks of the reference together with the reasons. A dissentient member of the Constitutional Court may also state his reasons for his dissent and these shall be forwarded together with the majority decision and reasons.'

⁴⁴ Cooray JAL, Constitutional and Administrative Law of Sri Lanka at p.74

⁴⁵ He was Justice Jaya Pathirana who, before he assumed judicial office, was a Member of Parliament from the ruling party.

⁴⁶ Decisions of the Constitutional Court of Sri Lanka, vol 1 1973 p. 3

opposed the adoption of the previous constitution, was elected to form the government in 1977 and went about the task of drafting a brand new constitution. The party claimed to have a mandate to enact one with a Presidential system of government in which the head of the executive would be elected directly by the people in place of the nominal head of state.

As Sri Lanka already had a home made constitution, any further appeals to Kelsen and legal revolution would have sounded hollow, and the framers avoided any such pretension and acted within the framework of the 1972 constitution to amend it.

The new constitution brought in important changes. First, powers are no longer concentrated in the legislature, once again called the Parliament.⁴⁷ Not only is the judiciary separated from the legislature but there is separation between the legislature and the executive to a degree not provided for in the previous constitution. The President, who is the head of the executive branch, is elected directly by the people and holds office for a specified term. He has immunity from suit so long as he is in office. Fundamental rights are guaranteed and they are justiciable.⁴⁸ A person whose rights have been violated by 'executive or administrative action' can petition the Supreme Court for relief.⁴⁹ All organs of government are required to respect them.

In many important respects the new constitution is very much similar to its predecessor. Significantly, the constitution does not provide for a mechanism for post-enactment review of legislation by the Courts. No court or tribunal shall inquire into, pronounce upon or in any manner call into question the validity of an Act of Parliament on any ground whatsoever.⁵⁰

As before, pre-enactment review continues to find a place in the constitutional scheme, subject to certain important changes. Unlike in the First Republican Constitution, the power to conduct pre-enactment review is vested in the Supreme Court which is at the apex of the regular judiciary.

The Supreme Court is the highest and the final superior court of record and shall exercise, inter alia, final appellate jurisdiction, jurisdiction for the protection of fundamental rights

⁴⁷ Art 3 declares sovereignty is in the People and is inalienable and it includes the power of government, fundamental rights and the franchise. Art 4 says how sovereignty shall be exercised. The legislative power shall be exercised by Parliament, the executive power by an elected President, and judicial power by Parliament through courts, tribunals and institutions created and established or recognized by the Constitution or by law.

⁴⁸ The First Republican Constitution too had a bill of rights but it did not provide a mechanism to enforce them.

⁴⁹ Art 126 of the SRC.

⁵⁰ Art 80 (3) of the SRC.

and jurisdiction in election petitions.⁵¹ It is to this court that the Constitution has conferred “jurisdiction in respect of constitutional matters”. More specifically, the Supreme Court is also charged with the “sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.”⁵²

The separate constitutional court that was created by the 1972 constitution was unpopular and did not command much respect because of the perception that politically motivated appointments were made to that body. The framers of the new constitution probably desired to have a forum free from political influence which brought discredit to the Constitutional Court.

Judges of the Supreme Court are appointed by the President by warrant under his hand.⁵³ Every judge of the Court shall hold office during good behaviour⁵⁴. He shall not be removed from office except for proved misbehaviour or incapacity. As a preliminary to his removal, Parliament must pass a resolution by a majority including those not present.⁵⁵ The judges’ salaries are charged on the Consolidated Fund.⁵⁶ It is an offence to interfere with the exercise of a judge’s powers or functions.⁵⁷

By these provisions the Constitution seeks to safeguard the independence of the judiciary. The provisions in the Second Republican Constitution represented a marked improvement compared to the safeguards enjoyed by the judiciary under the First Republican Constitution.

In practice, however, there have been criticisms about the Court, and about the process of appointments to fill vacancies in the Court. It is not proposed to go into those criticisms in detail⁵⁸ but critics have pointed out that the Court does not get the best appointments it deserves, largely because of the desire of the government to have a judiciary that would not rock its boat.

The unfettered power enjoyed by the President in the appointment of the judges to the higher courts is a major structural deficiency that has contributed to the loss of public

⁵¹ Art 118 of the SRC.

⁵² Art 120 of the SRC.

⁵³ Art 107 (1) of the SRC.

⁵⁴ Art 107 (1) of the SRC.

⁵⁵ Art 107 (2) of the SRC.

⁵⁶ Art 108 (1) of the SRC.

⁵⁷ Art 116 (2) of the SRC.

⁵⁸ See on this, Sri Lanka’s Judiciary: Politicised Courts, Compromised Rights, International Crisis Group Report 30 June 2009

confidence in the Court.⁵⁹ In *Silva v Bandaranaike*,⁶⁰ the appointment to the Supreme Court of an academic was challenged invoking the Court's fundamental rights jurisdiction. The appointment created considerable controversy among the legal profession. The principal question which concerned the Court was whether the President's power of appointment to the Court may be exercised without consultation with the judiciary or any other form of co-operation. The Court accepted the submission of the Attorney General, himself appointed later as the Chief Justice of the Court, that the President had a sole discretion in the matter.

The undermining of the judiciary that began with the 1972 Constitution continued during the term the United National President J R Jayawardene, the architect of the 1978 Constitution. All the judges who had held office before the Constitution was promulgated were forced to resign, with seven of them not getting reappointed. Junior judges were promoted over the heads of senior judges and appointed to the Court leading to allegations of court packing.⁶¹ When, in 1988, the post of chief justice of the Supreme Court fell vacant, instead of filling it with the most senior judge someone very much junior was appointed.⁶²

Presidential appointments since the introduction of the new Constitution seemed not to follow any criteria or convention, and appointments that did not follow a semblance of any tradition were cited as establishing a tradition. One such supposed tradition is that claimed by Solicitors General for appointment to the higher judiciary. In 2008, for the first time ever an additional solicitor general was appointed to the appellate court. Until then, only full time solicitors general were appointed directly to that Court.⁶³ The Attorney General, and his subordinates, as advisers to the government, regularly advise government ministers and officials with whom they come into regular contact.⁶⁴ The negative effect of the practice of appointing executive minded officers lacking in judicial experience from the Attorney

⁵⁹ See for example, Interview of Justice Vigneswaran by Ayesha Zubair in the Daily Mirror 15 December 2011.

⁶⁰ (1997) 1 Sri Lanka Law Report 92.

⁶¹ Wijenayake, *Independence of the Judiciary in Sri Lanka Since Independence* pp. 39-40.

⁶² Apparently, he was overlooked because he gave a dissenting judgement in the case challenging the Thirteenth Amendment Bill. See Sri Lanka's Judiciary: Politicised Courts, Compromised Rights, International Crisis Group Report 30 June 2009 at 9.

⁶³ Another Additional Solicitor who was appointed directly to the Court of Appeal as its President remarked on his subsequent elevation to the Supreme court that his appointment established a tradition which was observed in the case of another Additional Solicitor General who today occupies a seat in the Supreme Court". See Daily News, "Justices role pivotal in administering justice", 14 July 2011.

⁶⁴ It is reported that a judge has even hosted senior members in the Government at social occasions. See Uvindu Kurukulasuriya, "Whither independence when judges host parties for politicians?" The Sunday Leader of 17 July 2011.

Generals Department has been highlighted by a former Judge of the Supreme Court, himself a person with considerable judicial experience.⁶⁵

The phenomenon of the Executive seeking to influence the Court is not something unknown in Sri Lanka. One such incident, as reported by a former Judge of the Court, involved a former President who unsuccessfully tried to influence the then Chief Justice to constitute a bench consisting of named judges to obtain a favourable outcome for a litigant in whom he was interested.⁶⁶ Not all Chief justices have stood up to the Executive in this manner. Allegations have been made from within the Court itself that a subsequent Chief Justice sidelined senior judges when constituting benches to hear politically sensitive cases.⁶⁷

Traditionally, judges of the higher courts did not revert to practicing the law or take up employment or even give advice on the law. Exceptionally they might be called upon to chair commissions of enquiries or appointed as heads of institutions connected to the law such as the Law Commission or the Sri Lanka Law College. Judges are given handsome pensions upon retirement to compensate them from loss of office following retirement. Regrettably, retired Supreme Court judges have been appointed to positions within the Executive such as adviser to the President, as ambassadors to overseas missions and as Governor of a Provincial Council. Such appointments can be used as inducements by the Executive to influence judges when they are in office. While the integrity of those who took up these appointments is not being questioned, the perception might be created in the public mind that judges are given appointments by the government in consideration of judgments they have given in favour of the government.

The 17th Amendment to the Constitution provided for the creation of a Constitutional Council, and its approval was required before the President's nominees to fill vacancies, inter alia, to the post of Chief Justice and to any higher courts for such appointment to take effect. Unfortunately, this mechanism for screening appointments to the Court never

⁶⁵ See for example, Interview of Justice Vigneswaran by Ayesha Zubair in the Daily Mirror 15 December 2011.

⁶⁶ See interview of Justice Vigneswaran, "SRI LANKA: Justice on a razor's edge", Sunday Leader 31 October 2004. "It has been said that President J.R. Jayewardene had met Chief Justice Samarakoon at a party and mentioned to him that a particular bench should consist of so and so and so and so, since he was interested in the outcome of the case. Chief Justice Samarakoon had puffed at his pipe and said nothing. The next day he had constituted a different bench, which did not grant the relief the executive president expected."

⁶⁷ Justice Vigneswaran supra note 67: "And it was a fact that Justice Mark Fernando was kept out of important cases. Since I was more often accommodated with Justice Mark Fernando I was also spared the distinction of hearing socially or politically sensitive cases. Even if I was accommodated on a bench at the leave stage, once my views were known to be contrary to certain others, I would never be given that case thereafter"

functioned as contemplated as it was allowed to lapse, thereby allowing the President to continue to appoint as before.⁶⁸

Review of Bills under the Second Republican Constitution

A Bill for the amendment of any provision in the Constitution shall become law only if it is passed by not less than two thirds of the members of Parliament voting in favour.⁶⁹ A Bill that affects certain basic provisions of the Constitution require, in addition, approval by the people at a referendum.⁷⁰ An example of the latter would be a Bill seeking to extend the term of office of the President or the duration of Parliament to over six years.⁷¹

The Supreme Court has sole and exclusive jurisdiction to determine questions as to whether a Bill or any provision thereof is inconsistent with the Constitution.⁷² In this regard, the Constitution makes a distinction between the Courts jurisdiction to “ordinarily determine any such question”⁷³ and the “special exercise of constitutional jurisdiction”.⁷⁴ The distinction is really one between ordinary bills and urgent bills similar to that which existed under the previous constitution. The former may be referred to as the Court’s ordinary jurisdiction and the latter as its special jurisdiction. In the exercise of this jurisdiction the Court may declare that a Bill or any of its provisions may only be passed by the special majority or in addition approved by the people at a referendum.⁷⁵ Clearly, the Court’s decision on a Bill may affect Parliament’s ability to enact it on its own.

Ordinary Bills

The Court’s ordinary jurisdiction may be invoked either by the President or by any citizen.⁷⁶ The President may invoke the Court’s jurisdiction by a written reference to the Chief Justice. A citizen may invoke its jurisdiction by a petition in writing addressed to the Court. In either case, the Court’s jurisdiction shall be invoked within one week of the Bill being placed on Parliament’s Order Paper.

⁶⁸ See on this Kishali Pinto Jayawardene, “The Rule of Law in Decline”, Rehabilitation and Research for Torture Victims 2009, at 79.

⁶⁹ Article 82 (5) of the SRC.

⁷⁰ Article 83 of the SRC.

⁷¹ Ibid.

⁷² Art 120 of the SRC.

⁷³ Art 121 (1) of the SRC.

⁷⁴ Art 122 (1) of the SRC.

⁷⁵ Art 123 (2) of the SRC.

⁷⁶ A citizen is defined to include a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens. See Art 121 (1) of the SRC.

A copy of the Reference or the petition shall at the same be delivered to the Speaker of Parliament. Where the jurisdiction of the Court has been invoked, Parliament is prohibited from having any proceedings in relation to the Bill until the Court has made a determination, or failing which until the expiration of three weeks from the date the reference was made or the petition lodged in Court.⁷⁷

Publicity is given to a measure to be introduced in Parliament by the requirement that every Bill shall be published in the Government gazette at least seven days before it is placed on the Order Paper.⁷⁸ The Court shall make and communicate its determination to the President and the Speaker within three weeks of the reference or the lodging of the petition.⁷⁹

Urgent Bills

The Court's special jurisdiction in relation to an urgent Bill may be invoked by the President alone.⁸⁰ There is no provision for a citizen to invoke the Court's jurisdiction. Advance publicity is not given to an urgent Bill as there is no requirement that it shall be published in the gazette.⁸¹

It is the Cabinet of Ministers which decides whether or not a Bill is urgent and where it is of the view that "it is urgent in the national interest", the Bill must bear an endorsement to that effect under the hand of the Secretary to the Cabinet.⁸² The reference of such a Bill to Court for its determination is not made by the Cabinet of Ministers but by the President. Under the 1972 Constitution it was the Speaker who as head of the legislature referred such measures to the Constitutional Court.

In reality it is the Executive and not the legislature that initiates legislative measures and Parliament examines and enacts them into law. The certification of a bill as urgent in the national interest is an executive decision taken by the Cabinet as the executive organ of the state and at this stage the Parliament would not have taken any decision or action on the Bill. A Bill that has been referred to the Supreme Court as urgent in the national interest shall

⁷⁷ Art 121 (2) of the SRC.

⁷⁸ Art 78 (1) of the SRC.

⁷⁹ Art 121 (3) of the SRC.

⁸⁰ Art 122 (1) of the SRC.

⁸¹ Art 122 (1) (a) of the SRC.

⁸² Art 122 (1)(b) of the SRC.

not be placed on the Order Paper until the Speaker has received from the Supreme Court its determination on the Bill.⁸³ An urgent Bill is neither gazetted nor placed on the Order Paper.

The Court has taken a narrow view of its powers under its constitutional review jurisdiction and has not sought to satisfy itself of the existence of the preconditions for declaring a Bill either as urgent or as urgent in the national interest. If it were to do so, it would not be challenging the supremacy of the legislature or its competence to make laws.

The citizens, by being given the right to petition the Court in relation to an ordinary Bill, are the guardians of the Constitution as well as their own interests. The urgent Bill procedure denies them an effective opportunity of participating in the pre-enactment process and challenging a Bill where appropriate. Only the Attorney General has a right to be heard in such proceedings⁸⁴ but the Court will not have the benefit of arguments other than those presented by the Attorney General.

When a Bill for the take over of certain named private institutions was referred to the Court, no material was placed by the Attorney General to justify the basis on which the named institutions were identified for differential treatment. Nor did the Bill provide a basis for such classification and the Attorney General failed to bring it to the attention of the Court.⁸⁵ The Attorney General represents and defends the interests of the Government. Therefore, he cannot be relied upon to represent the concerns of those who are affected by a Bill.⁸⁶

The Court is given insufficient time to consider the constitutionality of a Bill. It is normally required to give its determination within twenty four hours of the reference⁸⁷ being made to it unless a longer period not exceeding three days is specified by the President when he makes the reference. It is not fair on the Court to impose upon it such a heavy burden. In the normal course of litigation, the Court would rely on assistance from parties and their counsel to make fully informed judgments on the issues presented to it. This assistance is denied to the Court in the urgent Bill procedure.

The Court on its part has not resisted the improper use of this procedure nor devised any procedures to prevent the procedure being abused. It has failed to require proof from the

⁸³ Sri Lanka Parliament Standing Order 46.

⁸⁴ Art 134 of the SRC.

⁸⁵ See “Law regardless of the Law” Dr Jayampathy Wickramaratne in the Colombo Telegraph of 8 December 2011.

⁸⁶ It is indeed impractical, unworkable and unfair” to expect the Attorney General to do so, as has been stated by a former Attorney General. See “BASL president Shibly Aziz appeals for withdrawal of expropriation bill”, in the Daily Mirror 5 November 2011.

⁸⁷ The President may at his discretion specify a maximum of 72 hours for the Court to make its determination. See Art 122 (1) (c) of the SRC.

government as to whether a Bill is in fact urgent in the national interest. As it is the President who can refer a Bill to court, and no action would have been taken by Parliament in relation to it, the Court would not be intruding into the sphere of Parliament by probing into the question as to whether a Bill is really urgent in the national interest.

It should be evident that the urgent Bills procedure should be used sparingly and only when absolutely necessary, as when there is a need for the legislature to act to remedy a serious and irremediable harm to a public interest. However, successive governments have made frequent use of the procedure even where there had been no obvious urgency for the introduction of legislation, thereby undermining the very efficacy of the pre-enactment review procedure.

Under the 1972 constitution, which introduced the urgent Bill procedure, the government of the day introduced only five Bills using this procedure. By contrast, the government that introduced the 1978 constitution introduced fifteen such Bills within a period of fifteen months. During the period 1978 to 1986, thirty nine such Bills have been presented.⁸⁸ It is not what the framers would have intended. Nor is it desirable in a parliamentary democracy that legislation, especially those amending the constitution, is enacted in haste without giving the people an opportunity to comment on them.

The Court may in its discretion grant to any person or his legal representative such hearing as may appear to it necessary in the exercise of its jurisdiction. It is virtually impractical for the court to do so when considering a Bill under the urgent Bill procedure. However, it is unlikely that any one can make a satisfactory contribution about the constitutionality of a Bill which has not been given any publicity. The Court has not framed rules giving guidance to itself and the public as to how it would exercise its jurisdiction in this matter. It has not made any provision for the public to be given notice of a reference and the entire procedure is couched in virtual secrecy.

No provision has been made to give publicity to the Court's determination. The Court shall communicate its determination only to the President and the Speaker.⁸⁹ The citizens have no right to know the views expressed by their highest Court on an urgent Bill.

The conditions on which the constitution has permitted the involvement of the judiciary in the pre-enactment process have rendered the entire process illusory. It has even led to

⁸⁸ See Dr Jayampathy Wickramaratne, "Law regardless of the Law" in Colombo Telegraph of 8 December 2011.

⁸⁹ Art 122 (1) (c) of the SRC.

negative perceptions about the judiciary and about its ability to effectively police the other organs of government from violating the constitution of which it is the guardian.

Some of these deficiencies are of the Court's own making. The International Bar Association in 2009 reported on how the then Chief Justice used the case allocation procedure to allocate politically sensitive cases to himself and to the most junior Supreme Court Judges available at the time, sidelining senior Judges of the Court from hearing such matters that came before it. The next most senior judge after the Chief Justice resigned rather than retire from Court citing his exclusion in almost all important constitutional cases over a period of several years as the reason for his resignation.⁹⁰

A significant deficiency of the pre-enactment system of review as it obtains in Sri Lanka is that a Bill becomes review proof once it has been enacted or after the lapse of the time within which a challenge is permitted by the Constitution, even if the ultimate enactment is substantially different to the original Bill as gazetted and placed on the Order Paper of Parliament. The difficulties of monitoring or challenging a Bill for inconsistency with the constitution is demonstrated by the failed challenges to Monetary Law (amendment) Act 32 of 2002 and Inland Revenue (Special Provisions) Bill.⁹¹

The Monetary Law (amendment) Act was challenged on the basis that a clause in the Act that offended the Constitution had been introduced into the Bill at the committee stage of the proceedings in Parliament. The Inland Revenue Bill was challenged on the basis that the Bill was not available in print and that the petitioner was thereby deprived of the opportunity of challenging its constitutionality. A declaration of inconsistency with the constitution was sought in respect of both on the ground that there was no proper compliance with the legislative process.

The Court declined the relief prayed for and held that Parliament was free to proceed with the Bill on the assumption that no challenge to its constitutionality has been made within the time specified in the constitution for making such challenge. The argument that it was impossible for the petitioner to have invoked the jurisdiction of the court within the time specified and that such failure was beyond his control did not find favour with the Court. It was said that "impossibility of performance is no ground to dispense with the due compliance with requirements that operate as conditions precedent to the exercise of

⁹⁰ See International Bar Association, "Justice in Retreat: A report on the independence of the legal profession and the rule of law in Sri Lanka", May 2009.

⁹¹ SC (SD) Nos 8 to 11/2003 decided on 4/8/2003.

jurisdiction.” The Court also declared itself powerless to inquire into any aspect of the legislative process on any ground whatsoever.

In *Wijewickreme v Attorney General*⁹², the Court had declined to go behind the constitutional bar preventing it from inquiring into the legislative process when a challenge was made to the enactment of the Fourth Amendment to the Constitution on the alleged ground that it was purportedly passed by 144 members of Parliament who had signed and delivered undated letters of resignation to the President and thus they were incapable of voting.

It is unrealistic to prevent Parliament of its power to make amendments to a Bill but the ability of Parliament to amend a Bill long after it has been through the review process or where it has not been reviewed at all but changes are made to it during its passage through Parliament renders the review process of limited effectiveness.

Conclusion

The pre-enactment review process has failed as an effective mechanism to ensure that legislative measures enacted by Parliament comply with the Constitution. Successive governments have in various degrees either abused the pre-enactment review process or subverted it to prevent the Court exercising effective supervision of legislative measures. The urgent Bill procedure ought to be discarded and changes introduced to ensure that measures proposed for enactment are considered fully and effectively before they are enacted.

The process of reviewing legislation in its pre-enactment phase suffers from serious shortcomings and has failed to achieve the purpose for which it was introduced. Structural and jurisdictional shortcomings of the review process have contributed to this failure. Important questions arise particularly as to whether pre-enactment review should continue as it is or in an amended form, or whether post enactment should be re-introduced.

The judiciary is the watchdog of the constitution and an independent and impartial judiciary is a must if the review process- whether it be pre or post-enactment- is to work satisfactorily. The Court has failed to take an assertive position when Bills affecting fundamental rights have been introduced. The failure of the judiciary to act as an effective deterrent to the legislature overreaching itself may lead to the erosion of constitutional

⁹² (1982) 2 Sri L R 775

government in Sri Lanka. Ultimately issues affecting appointments to the highest courts become relevant to this process.

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TIME BARRED!

TIME THRESHOLD IN COMMERCIAL CLAIMS UNDER ISLAMIC LAW

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Islamic law is an evenhanded and conscionable law in the sense that it provides justice to the parties involved. Commercial dealings are prone to litigation; parties often have problems which end up in the courts of justice. The crucial question here is whether the parties are free to bring an action to the court at any time they desire or do they have a time frame to take action? In Common Law, there is a limitation period for the claims. If the claims are not brought forth to the court within this stipulated time, the claimant is barred forever, from bringing that specific claim to the court. The position of this in Islamic law is often left untold. The objective of this research is to prove that it is not only under the English law of equity in which the claimant is barred from bringing action to the court if the limitation period lapse, but the same principle can be found in the Islamic law.

Keywords: lapse of time, limitation period, Islamic law, common law, Malaysian law

Introduction

“Delay defeats equity” is a well known maxim under the law of equity. This basically means that the law aids only to people who are vigilant and watchful. The law would boldly refuse the people who sleep on their rights. In the case of *Smith v Clay*¹ Lord Camden said that “the Court of equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time”.²

Justice compels that the operation of contract and/or obligations shall be limited to time. A contractual term which sets a period within which the rights in terms of the contract must be exercised or within which certain formal prerequisites for their enforcement must be met, is subject to the ordinary principles of the law of contract. The parties may provide that time will end their obligations, e.g. that a guarantee is valid for four months, that the contract is to run for two years, or that a claim for short delivery should be made within six days, etc. However, if the contract does not prescribe the period during which the obligation

¹ (1967) 3 Bro. C. 639n at 640n, cited in Snell, p.34

² See Rashid, S. K.. and Hingun, M. *Equity and Trust in Malaysia, Cases and Materials*, Volume 1, p.102

is to run, the matters will be subject to the law on limitation period. The parties cannot contract for more than a specific time of limitation, depending on the law on limitation period, the nature and the circumstances of the contract, as well as the subject matter involved.

Shari'ah or Islamic law as the most merciful and just law for the mankind also provides limitation period to matters. It acknowledges the principle of Lapse of Time by assuring that "a person should be protected against claims being made against him after the lapse of a long period during which no claim has been made with regard to that right".³ This principle is known as *at Taqadum*⁴ or *murur al-zaman*⁵ or *mada al-muddah al-mani' mim sima' al-da'wa 'inda al-inkar*⁶ which refers to lapse of time which prevents the hearing of actions or a certain period of limitation after which no action can be initiated against that right. Upon expiration of the period of limitation, no claim can be made against the right or property and the judge impedes from hearing or entertaining such claim.⁷

Al-Taquadum or Lapse of Time is a general principle that governs the issues on claim of ownership right of an individual. It provides the debtor in particular with a convenient all-round protection against the claims of a creditor who has shown little interest in pursuing the debt he had loaned to the debtor.

Mozley and Whitley's Law Dictionary explains that "a statute of limitations is one which provides that no court shall entertain proceedings for the enforcement of certain rights if such proceedings were set on foot after a lapse of a definite period of time reckoned as a rule from the violation of the right." The law of limitations therefore places a limit in terms of the time frame within which a person who wishes to commence a legal action against another must act. If action is not so instituted, the right to sue is forever lost. Limitation Act 1953 (Act 254) is the law with regard to limitation period in Malaysia. For example, section 6 of the Act stipulated that in Contract matters, limitation period is 6 years from the date on which the cause of action accrued. This paper explores the concept of *al taqadum* in Islamic law.

³ Mahmassani, *Nazariyyah al-Ammah*, Vol. 2, p. 568

⁴ Al-Razi, *Mukhtar al-Sahah*, p. 133; *al-Mawsuah al-Fiqhiyyah*, Vol. 13, p. 118.

⁵ Art 1663 of *The Mejelle*.

⁶ Hamid Zaki, *al-Taquadumfi al-Qanun wa Mada al-Muddah Min Sima al-Da'wa ft al-Shariah*, Majallah al-Qanun wa al-Iqtisad, Jan 1934, No. 1, Year 4, p. 87

⁷ Mahmassani, *al-Nazariyyah al-Ammah*, Vol. 2, p. 565.

Importance of Lapse of Time

The most important, with regard to the Limitation statutes is to know that the law of limitations does not limit the time within which a case must be dealt with and disposed off but it refers to the time within which the required papers must be filed in court. Generally the law of limitations is relevant to civil disputes. As such, an aggrieved person can seek to be compensated by the other party, and where appropriate, prevent the continuation of a wrongdoing. The right where the wrongdoing has ceased does not exist or last forever. The right must be exercised by going to the court and seeking the required remedy and relief within a specified period.

Lapse of time preserves the stability and constancy of a situation where when there is no conflict, disagreement or claim made against a certain thing, it would be reasonable that such a situation is preserved without any interruption.⁸ The claimants should be encouraged not to sleep on their rights, but to institute proceedings without unreasonable delay. His silence for an extended period of time to make a claim against the debtor, even though he is able to do so is regarded as acquiescence to the debtor's right.⁹ To allow claim and petition in such cases would tempt fraudulent action to be made against the *bona fide* owner or possessor of the property or right, and cause difficulty to him (to defend himself).¹⁰ This is particularly applicable in cases of long over-due debt where the trustee is unable to trace the true owner of the debt or that the defendant/debtor is no longer able to produce any documents or receipts to prove his right, for it is impossible for him to keep all the documents or receipts indefinitely. Furthermore, it is very rare that a person abandons or walks out on his right without any claim for a long period of time unless he wants to give it out, or forgetfulness or negligence, which cannot be a good defence for his claim.

It seems to be unjust to a debtor if the law gives unlimited time to the creditor to make his claim against the debtor, as the debtor would not be able to prove his case or to provide evidence of payments such as receipts or other relevant documents, after the lapse of a long period of time. It is impractical for him to keep all the documents forever. It becomes more difficult when the original debtor has passed away leaving the property to his legal heirs who might not even know of what took place before his death. Therefore, the Islamic principle of

⁸ Mabmassani, *al-Nazariyyah al-A mmah*, p. 565.

⁹ This is the preferred opinion of the Maliki and Hanafi scholars based on the principle of *istihsan* (juristic preference) and *daruriyyah amah* (practical necessity of the case). Ibn Abidin, *Hashiyyah*, Vol. 11, p. 619; al-Hummam, *Fath al-Qadir*, Vol. 4, pp. 162-164; al-Dusuqi, *Hashiyyah*, Vol. 4, p. 207, Sahnun, *Mudawwanah al-Kubra*, Vol. 4, pp. 89-90; Ilyas Nasif, *Mawsuah al-Uqud al-Mudaniyyah wa al-Tijariyyah*, Vol. 6, p. 99.

¹⁰ Mahmassani, *Nazariyyah al-A mmah*, Vol. 2, pp. 565-566.

al-Taqadum has put a limit to the creditor's right of claim, to ensure the inevitability of human affairs, particularly in business and commercial transactions. Again, this principle is able to promote speedy enforcement of claims whereby a creditor is expected to claim his right within a reasonable period of time, and to act as a shield for a debtor against fraudulent claims. However, the interests of creditors must also be taken into account.

Limitation Period Under Malaysian Law

The law of limitations in Malaysia is incorporated in the Limitation Act 1953 (Act 254) which provide for limitation of actions and arbitrations. This Act does not apply to any proceedings by the government for the recovery of any tax, duty or interest thereon or to any forfeiture proceedings under any written law in force in Malaysia relating to customs duties or excise, or to any proceedings in respect of the forfeiture of a ship. This Act is also not applicable to Sabah and Sarawak or East Malaysia. Sabah has its own Limitation Ordinance [Chapter 72] and Sarawak, the Limitation Ordinance (Chapter 49). The Sabah and Sarawak Ordinances are similar to that of West Malaysian statute, except for minor differences.

Table 1: Limitation Period under Malaysian Law in a Nutshell

Legislation	Section	Subject Matter	Duration
Limitations Act 1953	6 (1) (a)	Tort/Contract	6 years from the time cause of action accrued.
Limitations Act 1953	6 (3)	Judgment	Valid for 12 years after which no action may be brought.
Limitations Act 1953	9 (1)	Land	12 years from the time in which the action accrued.
Limitations Act 1953	21 (1)	Recover principal secured by charge	12 years from the date when the right to receive the money accrued
Limitations Act 1953	21 (2)	Foreclosure action	12 years from the time the right of foreclosure accrued.
Limitations Act 1953	22 (1)	Fraudulent breach of trust or recovery of trust property	No Limitation Period.
Limitations Act 1953	22 (2)	Other breaches of trust	6 year from the date on which the right of action accrued.
Limitations Act 1953	24 (1)	Extension of limitation period in case of disability	Anytime before the expiration of 6 years when such person ceased to be under such disability or died, whichever event first occurred, notwithstanding the period of limitation has expired.
Limitations Act 1953	26 (1)	Acknowledgement	Where the right of action to recover land or to enforce a mortgage or charge in respect of land or personal property and the person in possession of the land or personal property acknowledges the title of the person to whom the right of action accrued.
Limitations Act 1953	27 (1)	Acknowledgement- in writing	Every acknowledgement in S26 shall be in writing and signed by the person making the acknowledgement.
Limitations Act 1953	27 (2)	Acknowledgement- by agent	Every acknowledgement in S 26 may be made by the agent of the person by whom the acknowledgement is required to be made.

Legislation	Section	Subject Matter	Duration
Limitations Act 1953	28 (1)	Effect of acknowledgement	An acknowledgement of the title to any land, or mortgaged or charged property by any person in possession shall bind all other persons in possession during the ensuing period of limitation.
Limitations Act 1953	28 (4)	Effect of acknowledgement-debt	An acknowledgement of any debt or other liquidated pecuniary claim shall bind the acknowledger and his successors.
Limitations Act 1953	29 (a)	Postponement -fraud	Where the action is based on fraud, the period of limitation does not run until the plaintiff has discovered fraud.
Limitations Act 1953	29 (b)	Postponement -Fraud	Where the right of action is concealed by the fraud of any person the period of limitation does not run until the plaintiff has discovered the fraud.
Limitations Act 1953	29 (c)	Postponement -mistake	Where the action is for relief from the result of a mistake, the period of limitation shall not run until the mistake has been discovered.
Public Authorities Protection Act 1948	2	Action against public bodies	Where any is brought against the public bodies it must be brought within 36 months after the negligent act.
Civil Law Act 1956	7 (5)	Dependency Claim	Action must be brought within 3 years from the death of the deceased.
Civil Law Act 1956	8 (3)	Estate Claim	Tort Action must be brought against the estate of the deceased person within 6 months from the date the grant of personal representation taken out by the personal representative

Source: Nekoo. R, (2002), 'Practical Guide to Civil Procedure in Malaysia', International Lawbook Service, pp.2-3.

For example, the limitation period is the same for both west and east Malaysia in recovery of rent; that is, six years. However, a considerable instance of the situation being very contrasting arises in the case of libel and slander. The limitation period for libel and slander in Sabah and Sarawak is only one year compared to Peninsular Malaysia, where the aggrieved person has a six-year period to file an action.

Where a claim is based on contract or tort, it must be brought before the expiration of six years from the date on which the cause of action accrued.¹¹ It is necessary to establish when the cause of action accrues. This is the powerful point from which the time for purposes of limitations is computed or time begins to run. And when the point is reached when the time allowed to file an action comes to an end, the right to file an action is lost and then the claim is time-barred.

It is imperative to know when the clock begins to tick, when a cause of action accrues. A simple example is when money is lent and borrowed. When does time begin to run and when does limitation set in? This depends on the basis and the manner in which the money is borrowed and lent.

Where money is borrowed from a friend without anything else being discussed and no time frame is set for repayment, time begins to run immediately. This would mean that at the end of six years from the date on which the money is lent, the right to sue for recovery would be

¹¹ See Section 6 (1) of the Limitation Act 1953

lost. On the other hand, where money is borrowed on the basis of an agreement to repay at the end of five years, then it is only at this point of time that the obligation to repay arises and time begins to run and the lender would have six years after that to sue.

While in Peninsular Malaysia the limitation period in such circumstances is six years, the limitation period in Sabah and Sarawak is different and varies depending on whether the claim is for money lent under an agreement that it shall be payable on demand – in which case the limitation period is three years from the date of the loan, or six years if the claim is based on a claim for compensation for breach of contract in writing. However, there are longer periods allowed in relation to certain transactions. Section 9, for example, provides that “no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him.”

It must, however, be noted that limitations do not function in a totally unlimited comportment. There are situations where the limitation period is extended because there is fraud or a mistake.¹² In other cases, there may be a revival of the limitation period on account of a written acknowledgement.¹³ Furthermore, limitation period may be extended due to disability and where debtor administrates estate of his creditor.¹⁴

Is there a Concept of Lapse of Time (*al-Taqadum*) Under Islamic Law?

Islamic law recognize lapse of time in taking cause of actions to the court. This should be distinguished from the general rights of people. It is being said that the application of *al-Taqadum* is contrary to the general principle of Islamic law as Islamic law entirely recognizes the eternal and absolute right of an individual. This claim is further substantiated by the *hadith* of the Prophet (SAW) that “*the right of a Muslim is not terminated even though after a long period of time*”¹⁵ and the legal maxim that “*a right is not destroyed by the lapse of time.*”¹⁶

The above *hadith* and the maxim is not a proof to prove that Shari’ah does not recognize lapse of time, but it is rather an evidence to prove that the *Shariah* recognises the owner’s right over a property which is not lapsed even though after a long period of time and that the *Shariah* protects them against claims being made on them after a long period during

¹² Section 29 of the Limitation Act 1953

¹³ Section 28 of the Limitation Act 1953

¹⁴ Section 24 and 25 of the Limitation Act 1953

¹⁵ This *hadith* is quoted by Al-Hattab in *Mawahib al-Jalil*, Vol. 6, p.224.

¹⁶ Art. 1674 of *The Mejelle*.

which they may have lost the evidence available to them to rebut those claims.¹⁷ If a person acquires or keeps a property for a long period of time, and there is no claim made against him regarding that property, the law recognises him as a true owner of the property. Subsequently, a corroborative *hadith* of the Prophet (SAW) says that “*Whoever possesses a property for ten years it becomes his property.*”¹⁸ This *hadith* generally rules that a long and uninterrupted possession of property or rights by a person is a conclusive evidence for the ownership of the possessor and there should be no claim made against him.

The reality is that *Shariah* upholds the notion of lapse of time or limitation period must not be exercised unreasonably to the detriment of the creditor. Therefore it may not be exercised in the case where the creditor is ignorant of his right or when the debtor, by way of fraud, has prevented the creditor from becoming aware of the debt. The prescription would run only when the creditor had knowledge of the identity of the debtor and the facts from which the debt arose.¹⁹

Time-span of *al-Taquadum* in Commercial Dealings

There is no standard ruling provided by the *Shariah*, but it is left for the *ijtihad* (interpretation) of the ruler of the states who are given full discretion to decide the duration for limitation period. In deciding the time for limitation, consideration should be given to the relevant factors affecting the extinction of the limitation period such as the circumstances of the case, time of occurrence, parties involved and other factors that may affect the application of the principle. Where the state authority or the judge prescribes the time limit for limitation period, it is binding on all citizens of the state. Thus the limitation period could be fifteen years, ten years or even shorter than that, subject to the *maslahah* (interest) of the society.²⁰

¹⁷ In Western law, the reason for prescription lies, as somewhat “romantically” described as “in the obfuscating of time, and as the years pass by, it becomes more and more difficult for the debtor (defendant) to defend himself. He may no longer be able to remember and to prove those circumstances which thwart the plaintiffs claim. More particularly, he can hardly be required to keep all his receipts indefinitely; yet, without them it may be impossible for him to establish that he has already satisfied the claim” (by the creditor). Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Juta & Co. Ltd, Cape Town, 1990, p. 768.

¹⁸ Abu Dawud, *AI-Marasil*, p. 286. The *hadith* is also quoted by al-Hattab in *Mawahib al-Jalil*, Vol. 6, p. 210.

¹⁹ Muhammad ibn Saad al-Shuwayir (ed), *Majallah al-Buhuth al-Islamiyah*, Vol. 29, p. 29.

²⁰ Art. 58 of *The Mejelle* provides that: “The exercise of control over *raiyyah*, that is to say, over subjects, depends on what is right to be done.”

As a matter of general guideline, the Hanafi scholars stipulated a period of 15 years for *al-Taquadum* in any commercial matters.²¹ The limitation period is extended to 36 years when the dealings involve *waqf* property; and in cases of public property such as a roads, rivers etc. there should be no limitation period prescribed.²²

The Malikis, on the other hand, have adopted the *hadith* of the Prophet which prescribes the period of 10 years as a basis to determine the duration for *al-Taquadum*. The limitation period of 10 years is applicable in commercial dealings involving the immovable property. In cases where the possessor and the claimant (who claims to be the true owner) are family relatives, the limitation period is 60 years.²³ When the dealings involve movable property, the limitation period is different depending on the nature of the property. In cases of house furniture and the like, the limitation period is for 3 years and for clothes and animals the period is 2 years.²⁴ In cases where the owner of the property is unknown, the uninterrupted usurpation for 10 months is sufficient to eliminate any claim against that property regardless of whether the property is movable or immovable. The limitation period for transactions involving debt is within 20 to 30 years depending on the nature and circumstances of the case.²⁵

The above are few examples of the limitation period adopted by Muslim scholars. However, it is imperative to note that since the matters of Lapse of Time or *al-Taquadum* is *ijtihadi* in nature, the state authority or the judge, may change, repeal or amend the policy relating to it to suit the need and interest of the Muslim society in general. As time passes by, the period of limitation may change to suit the circumstances and interest of the people at a particular point in time.²⁶ This exercise is possible due to the flexible nature of the *Shariah*,

²¹ This view is supported by Ibn Abidin in *Hashiyyah* that “when a person puts his hand (*wad’ al-yad*) on a property, either movable or immovable property, and he has usurped the property for fifteen years without any interruption, no claim can be heard with regard to that property, as he is considered as the owner of the property, except in the case of inheritance and *waqf*”. Ibn Abidin, *Hashiyyah*, Vol. 4, p. 378. See also Art. 1801 of *The Mejelle*

²² Art 1675 of *The Mejelle* which states: “No attention is paid to the lapse of time in actions about lands (property), the benefit from which concerns the public, like public road, a river and a common pasture land.”

²³ AI-Hattab, *Mawahib al-Jaill*, Vol. 6, P. 221.

²⁴ Ibn Farhun, *Tabsirah al-Hukicam*, Vol. 2, p. 86.

²⁵ *Al-Mawsu'ah al-Fiqhiyyah*, Vol. 16, p. 122.

²⁶ This practice of changing or amending the law or policy on limitation period was taken place during Ottoman period where the Hanafi scholars has shortened the limitation period in cases involving debt to 15 years from the original period of 36 years (Art. 1660 & 1669 of *The Mejelle*). This was due to the growth of economic and commercial activities where it has led to conflicts and disputes between businessman and traders. Thus, to avoid arguments and fraudulent claims, the state authority has shortened the period during which the parties may have rights to institute their claim against the debt in the court of law. AI-Hattab,

as illustrated in the maxim that “*It cannot be denied that with a change of times, the requirements (ahkam) of the law change*”.²⁷

Commencement of *al-Taquadum*

A man is not allowed to take the property of another person against his will, unless in exceptional circumstances and reasons approved by the *Shariah*²⁸ such as in the case of a trespasser; where the legal owner has the right to take the property back even though against the consent of the former. Significantly, the principle of *al-Taquadum* speaks of this basic right, whereby the ownership of a man over a property, which is proven by undisputable possession over the property, will not be undoubted unless when there is evidence to the contrary.

To establish the right of ownership over the property, the possessor must prove that he has actually possessed the property in a reasonable way as an owner; no one has disputed his possession; and that the duration of his possession has exceeded the prescribed limitation period.²⁹ The possessor must also prove that he does not know that the property belonged to another person; and that he does not acquire the property by way of fraud or any other prohibited means.³⁰ In the absence of the above conditions, the ownership right of a person is not proven and the claim can be made against him even though the limitation period has lapsed. It should be noted that the *Shariah* presumes that, unless if there is any contrary evidence, the defendant/possessor is the true owner of the property. This fact is proven by his long and uninterrupted possession of the property. However, when there is proof that the property belongs to another, and the possessor admits to the facts, the property will be duly returned to the owner even though the limitation period has lapsed.

Mawahib al-Jalil, Vol. 6, p. 229; *Majallah al-Buhuth al-Islamiyyah*, Vol. 29, p. 23 & Vol. 30, p. 26; *al-Mawsuah al-Fiqhiyyah*, Vol. 13, pp. 119 & 122.

²⁷ Art. 39 of *The Mejelle*.

²⁸ The Islamic legal maxim says that: “*Without legal cause it is not allowed for anyone to take the property of another*” (Art 97 of *The Mejelle*).

²⁹ The modern Muslim jurists have agreed that the general limitation period in property or commercial matters is 10 years following the *hadith* of the Prophet and the views of Maliki scholars. Therefore, time for possession of the property should not be less than 10 years for immovable property and not less than 10 months for movable property. However, this is subject to different opinion of Muslim jurists or *ijtihad* of the ruler of a state or a judge, as the case may be. *Al-Mawsuah al-Fiqhiyyah*, Vol. 16, pp. 122-123.

³⁰ *Ibid*.

Naturally, the Muslim jurists have provided that the calculation of the period of limitation period is made according to the Islamic calendar year using the calendar day as the unit of calculation. The day upon which the debt falls due is included, and the last day of the period is excluded, since it is regarded as having been completed upon its inception. This practice was in conformity with the general practice (*urf*) of the people at that time as the Islamic state was using the Islamic calendar as a standard calculation in all state affairs, including *al-Taquadum*.³¹ However, since *al-Taquadum* is an *ijtihad* matter, it is immaterial as to which mode is adopted for the calculation of the limitation period. What is more important is that the parties know how the calculation is made and that they have agreed to such a mode being adopted for the calculation. The ruler of the state, the jurists or judge may initiate the appropriate policy relating to *al-Taquadum* according to the circumstances and the needs of the people at the time. The policy may be different from that of the previous one, but it is acceptable as long as it is held for the interest (*maslahah*) of the people and does not contravene the basic principles of the *Shariah*. In cases where there is no clear or definite provision in the *Shariah*, the reference could be made to the customary practice of the people. Accordingly, the maxim states: “Anything which is not determined by the *Shariah* should be referred to *urf*”.³²

The limitation period runs only from the day upon which the debt becomes due.³³ When the debt is due the debtor is bound to perform immediately and the creditor has the right to institute action immediately for the recovery of the performance. Various factors may postpone the exigibility of a debt and hence the commencement of limitation period. In this respect, the nature of an obligation may be relevant, and the terms of contracts may also affect the operation of the obligations which they create. In respect of contingent contract which is suspended on certain conditions or performance of another person, the limitation period is postponed until the condition is fulfilled or the other parties have performed fully.³⁴

The running of the period of *al-Taquadum* may be affected by the creditor’s ignorance of his right against the debtor. Where the debtor wilfully prevents the creditor from becoming aware of the debt, the period of *al-Taquadum* commences only when such knowledge is obtained. Ignorance of the facts from which the debt arises, or of the identity of the debtor, will therefore postpone the commencement of *al-Taquadum* until such knowledge is obtained

³¹ Mabmassani, *Nazariyyah al-Ammah*, Vol. 2, p.576; al-Sanhuri, *al-Wasit*, Vol. 3, pp. 1008 & 1056-1058.

³² AI-Suyuti, *al-Ashbah*, p. 196.

³³ Art 1667 of *The Mejelle*.

³⁴ *Al-Mawsuah al-Fiqhiyyah*, Vol. 13, p. 120; al-Sanhuri, *al-Wasit*, Vol. 3, pp. 1063-1067; Hamid Zaki, *al-Taquadum fi al-Qanun*, Majallah al-Qanun wa al-Iqtisad, 1934, No. 1, p. 88.

by the creditor, provided that the lack of knowledge is not due to the unreasonable conduct of the creditor.

Stoppage of *al-Ta qadum*

Stoppage of *al-Ta qadum* refers to circumstances which, by its existence, postpone or extend the period for which an obligation exists according to the law. Consequently it puts an end to the limitation period and the obligation and/or right is revived. The interruption of *al-Ta qadum* can be effected when the debtor acknowledges his liability.³⁵ To postpone the period of *al-Ta qadum*, an acknowledgement of liability must contain an admission not only that the debt exists but also that the debtor is liable for it. Conversely, an admission that the debtor has incurred the liability but coupled with an assertion that the obligation has been extinguished will not interrupt the running of the period of *al-Ta qadum*.

The limitation period is also interrupted when the plaintiff makes a claim against the defendant/debtor with regard to the property before the expiry of the limitation period. In the case of immovable property for example, the plaintiff should initiate the claim before the completion of fifteen years.

Thus, when he made a claim one day before the expiry of fifteen years, his claim will be heard as it stops the running of limitation period. However, *The Mejelle* provides that the claim must be made before the court of law. A claim made outside court does not interrupt the period of *al-Ta qadum* unless it is made in writing.³⁶ The documentation of the claim is important to the court as it is considered as evidence which is essential for the trial to proceed. Without evidence the trial may not be possible.

The running of limitation period is also interrupted when it is proven that the parties lack of capacity (*ghayr ahliyah*), missing,³⁷ bankrupt and when it is proven that they do not initiate an action to claim for the right due to fear of severe state policy.³⁸ The running of limitation period starts when the minor becomes of age, when the insane or prodigal becomes of sound mind; and the bankrupt become solvent. Apart from these, fraud, duress and mistake

³⁵ Ibn Abidin, *Hashiyyah*, Vol. 4, p. 476; Muhammad Kamal Mursi Bek, "Qat' al-Ta qadum", *Majallah Qanun wa al-Iqtisad*, 1939, No. 5, p. 497.

³⁶ Arts. 1666, 1673 & 1674 of *The Mejelle*.

³⁷ The running of limitation period is also interrupted when the defendant is missing or absent in another state where the distance is more than *muddah al-safar* (i.e. a distance from place to place of three days at moderate rate of travelling or eighteen hours). Art. 1664 & 1665 of *The Mejelle*.

³⁸ Al-Sanhuri, *al-Wasit*, Vol. 3, p. 1076; Mahmassani, *Nazariyyah al-Ammah*, Vol. 2, p. 578. See also Art. 1668 of *The Mejelle*.

also postpone the running of the limitation period and extend the period during which the right or obligation exists. These impediments however, do not invalidate the principle of *al-Taqadum*, but delays the completion of the period. The calculation for the period of *al-Taqadum* begins on the day that the impediment ceases.³⁹

Practical Appliance of *al-Taqadum* in Islamic Commercial Dealings

In this part the issues of *al-Taqadum* or limitation period in a few Islamic commercial dealings practiced by the people or Islamic banking and financial institutions in Malaysia, will be discussed. The Islamic commercial dealings in Malaysia received a tremendous boost with the passing of the Islamic Banking Act, 1983 and the Banking and Financial Institution Act 1989.

The Islamic commercial sector has been progressively expanding well into other commercial activities such as Islamic capital market, Islamic bonds etc. However, as far as rules and regulations on the commercial dealings are concerned, there is no provision in the relevant statutes or acts on the limitation period. The matters on limitation period or lapse of time in commercial dealings, is therefore governed by the Malaysian Limitation Act 1953 (Act 254); which provides general limitation period of 6 years for any cases involving contractual obligations.⁴⁰

In cases of commercial dealings between a customer and a bank i.e. when a customer deposits some money with the bank, their relationship is one of creditor and debtor. The bank is liable to pay the money back when requested by the customer. However, the customer's right to be repaid only arose after the customer had made a demand to the bank for the repayment of his money.⁴¹ The customer (creditor) has no right to bring an action against the bank for the return of money deposited with the bank until a demand has been duly made by the customer and the bank has refused to repay the customer. The legal

³⁹ Al-Sanhuri, *al-Wasit*, Vol. 3, PP. 1081-1087; Mahmassani, *Nazariyyah al-Ammah*, Vol. 2, p. 580; Mursi Bek, *Qat' al-Taqadum*, p.447. See also the application of the principle in Art. 1672 of The *Mejelle* and Art. 1663 of *Durar al-Hukkam*.

⁴⁰ The Act generally provides the limitation period of 6 years for actions on contracts and torts (sec 6); 12 years for the recovery of land (sec 9) or debt due under a charge of land (sec 21); and 1 years limitation in cases involving revenues (sec 8). It is interesting to note that the Act also provides an exception in cases involving trust where there should be no limitation period prescribed (sec 22) in which this principle is also applicable in Islamic law.

⁴¹ This principle is well established in the Common Law of England by virtue of the case of *Foley v Hill* (1848) 2 H.L.Cas. 28 and was well accepted in Malaysia by virtue of Sec 3 & 5 of the Civil Law Act.

implication of this is that time does not run against the funds deposited by the customer until after the refusal of the bank to repay the customer.⁴²

In the case of money placed in a deposit account, it may be made payable after a fixed term varying from a month to several years depending on the agreement between the bank and the client. The deposit is normally repayable at the end of the fixed period or term. If a deposit is subject to special term, then the sum deposited becomes payable only when the condition stipulated in the contract is duly met by the depositor.⁴³

Similarly, when a loan is provided by a bank to a customer for a fixed term, it becomes payable at the end of the fixed term. Time runs against the fixed term loan from the expiration of the term period. When it is expressly provided in a loan agreement that the loan is repayable by the customer when demanded by the bank, the requirement for a demand to be made by the bank will be construed as a condition precedent to the bank's right to bring an action against the customer to recover the loan. In the presence of such a provision, time will not run against the bank until after a demand for repayment of the loan has been duly made by the bank.

In *Bank Pertanian Malaysia v Mohd. Gazzali bin Mohd Ismail*⁴⁴ it was decided *inter alia*, that when a loan provided by a bank was stated to be repayable on demand by the bank, time did not run against the bank until after a demand for the repayment of the loan had been accordingly made by the bank. The case also decided on the period of limitation pertaining to the recovery of debt due under a charge of land was 12 years as provided in section 21 of Malaysian Limitation Act 1953.

A customer who operates a current account with a bank may apply to the bank for the overdraft facility. The overdraft allows the customer to draw money beyond the credit balance in his account subject to the maximum limit set by the bank in the overdraft agreement. As collateral, the bank normally requires that the customer provide an acceptable security to the bank to cover indebtedness of the customer on the overdraft. When a customer draws on an overdraft account, the time for limitation period begins to run against the bank from the moment the overdraft is incurred by the customer; unless a

⁴² *Proven Development Sdn. Bhd. v Hongkong and Shanghai Banking Corp* [1998] 6 MU 150.

⁴³ For instance, when the deposit is subject to special term such as the customer has to produce his deposit receipt to the bank before the sum deposited is payable, then the sum deposited only becomes payable when the condition stipulated in the contract is duly met by the depositor. See *Voo Foot Yiu v Oversea Chinese Banking Corp. Ltd* [1936] 1 MLJ 169.

⁴⁴ [1996] 5 MU 692. See also the case of *Perwira Affin Bank Bhd v Lim Weow* [1998] 13 MU 56).

demand for the repayment of the overdraft is made a condition precedent to the liability of the customer. If the account is active, the running of time will not normally causes any problem to the bank; as every payment made by the customer into his account constitutes an acknowledgement of the debt by the customer. However, problems may arise when the account is dormant and no payment or transaction has been traced to the account for a period of 6 years or more. In such a case, the debt becomes time-barred as against the bank.

The issues of limitation period also arise in cases of wrongful debit by the bank. Where a customer's account is wrongfully debited by the bank, the bank is considered as acting in breach of contract with the customer. This may give rise to two possible causes of action. The customer may claim for damages arising from the breach of contract. Applying section 6 of the Limitation Act, the claim for breach of contract becomes time-barred after 6 years, similar to other contractual claims. On the other hand, the customer also has the right to make a demand upon the bank for repayment of his money. This claim arises from the banker customer relationship. The right of a customer to bring an action against a bank for the repayment of his money does not arise until after a demand for the repayment of the money has been made by the customer and the payment is refused by the bank. Time will run against this claim only after the bank refuses to repay the customer.⁴⁵

A debt which has become time-barred may be revived when the debtor or his authorized agent acknowledges the debt or makes part payment of the debt.⁴⁶ An acknowledgement of a time-barred debt may be made either expressly or impliedly. If a debtor admits the existence of a debt to a creditor, this acknowledgement is sufficient to revive the debt even though it is time-barred. The acknowledgement of a debt may also in certain situations be implied from the conduct of a debtor, for instance, when a debtor makes repayment or part payment of a time-barred debt.⁴⁷

⁴⁵ In *National Bank of Commerce v National Westminster Bank Plc* [1990] 2 Lyods Rep. 514, it was decided by Webster J. that when a customer whose account had been wrongfully debited by bank was making a claim against the bank for the repayment of the money wrongfully debited by the bank, the customers cause of action against the bank arose at the time when the demand for the repayment of the money was refused by the bank and not at the time when the bank wrongfully debited the account. Time ran against the customer only when payment was refused by the bank.

⁴⁶ The existence of a debt may also be acknowledged by a debtor or his authorized agent. In the case of *Bank of America National Trust Savings Association v Cheong Hoon Chong* [1983] 1 MU 285 the Singaporean Court of Appeal decided that an acknowledgement which came from a duly authorized agent of a debtor revived a debt which had become time-barred.

⁴⁷ 41 It is a well established principle of law that a time-barred may be revived by an acknowledgement of the debtor. Thus in *Bian Chiang Bank Bhd v Kwong Hing Cheong* [1978] 1 MU 193, it was decided by the Federal Court in Malaysia that a statute-barred debt was revived when the debtor made a payment into his account. The similar principle is also applied in the case of *Oversea-Chinese Banking Corpn Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1.

From the observation of a few of the practical application of the limitation period in the banking and commercial transactions, it is evident that the present system of limitation period or Lapse of Time does not contravene any general principles of the Islamic principle of *al-Taqqadum* as provided by the Muslim jurists. Since *al-Taqqadum* is an *ijtihadi* matters, it provides rooms for the practitioners, bankers and Muslim in general to apply, adopt, set-up rules and regulations pertaining to the procedures of *al-Taqqadum* in the modern commercial system looking into their need and interest of the whole society.

It is a fact that most of commercial or business dealings are based on credit or debt transactions. Credit or debt plays an important role in the economic activities, not only for consumption purposes but for mercantile and commercial purposes as well. In fact, credit is used extensively in commercial transactions and it forms a fundamental part of the existing economic system, on all levels, from producer, to merchant, to consumer.⁴⁸ For practical purposes and efficiency of business dealings, the transactions are normally made, not in monetary terms, but using an instrument of credit such as *suftajah* (letter of credit), cheque (*sakk*) or promissory note (*ruq'ah*).⁴⁹ As such, the question of lapse of time or *al-Taqqadum* is very much relevant. Time runs from when the payee (who is normally a creditor or his authorised agent) disregards the order to pay, which is made by the debtor through *suftajah*, cheque or promissory note, until the validity period of the documents expire. When the *suftajah* or cheque allows a validity period for six months or a year, the time is barred when the payee takes no notice of it until the lapse of the stated period. In such a case the payee has no right to recover the amount from the payor. His claim to get the money back or to ask the payor to issue another payment will not be entertained by the judge, as his right is prescribed under the principle of *al-Taqqadum*.⁵⁰ The *Shariah* rules that a creditor who, without any reasonable excuse, fails to bring an action to claim his debt from the debtor for an unreasonably long period of time, is presumed to release the debt to the debtor.⁵¹

Conclusion

In Islamic commercial dealings, *al-Taqqadum* is considered as a vital device for the defense of the interest of people in business and trade. It also helps ensure definiteness and sureness in business and financial affairs; promoting efficiency and efficacy by providing a motivation for

⁴⁸ Nicholas Dylan Ray, 93*The Medieval Islamic System of Credit and Banking: Legal and Historical Considerations, Arab Law Quarterly*, 1997, Vol. 12, pp. 43-44.

⁴⁹ Al-Umran, *al-A wraq al-Tijariyyah fi Nizam al-Saudi*, p. 29.

⁵⁰ Ibid. pp. 29 & 236.

⁵¹ Mabmassani, *Nazariyyah al-A mmah*, Vol. 2, p. 573.

the prompt enforcement of claims; and protecting a debtor against fraudulent claims. Parallel with other principles of law, *al-Ta'adum* is a workable system to be adopted in the modern Islamic financial practices. What is needed is the understanding of the basic principles of *al-Ta'adum* followed by an effort to apply them to the modern system practiced by the banks and financial institutions. If the modern procedures are contrary to the Islamic principles, it would be indispensable to inspect some changes and modifications that may render these procedures to be *Shariah* compliant. This is to facilitate the Islamic financial system to function competently in the modern world.

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