WHEN COURTS GET IT WRONG:

JUDICIAL ERRORS AND COMMON LAW UNDERENFORCEMENT

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I. INTRODUCTION

> "If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished."[1]

The consequences of judicial error can be grave, potentially extending to wrongful loss of fortune, liberty, reputation or (in some jurisdictions) life. Such consequences are not always reversible. Thus the proper response to judicially occasioned injuries is of crucial importance. The statement quoted above offers a rational response to some failures of the justice system and captures rule of law concepts such as absence of arbitrary power and equality before the law,[2] but masks the controversies

[1] Baroness Hale JSC in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 A.C. 48, [116].

[2] Albert Venn Dicey, *The Law of the Constitution* (10th ed., Macmillan 1959), 188, 193. Dicey's conception is a recognised starting point for discussions on the rule of law, although it has been rightly

on how the consequences of judicial errors ought to be redressed. The ancient maxim *ubi ius ibi remedium*[3] (hereafter "*ubi ius*") makes this a key issue to resolve, and recent UK and Commonwealth cases on compensation for judicial errors bring it into sharp focus. Holt C.J. (dissenting) famously declared in *Ashby v White*;

> "If the plaintiff has a right, he must *of necessity* have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for ... want of right and want of remedy are reciprocal."[4]

Similarly, Marshall C.J. said in *Marbury v Madison*;

> "[I]t is *a general and indisputable rule* that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded … for it is a *settled and invariable principle* in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."[5]

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criticised. The rule of law is an elusive concept (see J. Laws, "The Constitution: Morals and Rights" [1996] P.L. 622, 630) and I do not propose to join the debates on it (but see generally, Trevor Allan, *Law, Liberty, and Justice* (Clarendon Press, 1993); P.P. Craig, "Formal and substantive conceptions of the rule of law: an analytical framework" [1997] P.L. 467-487; P.P. Craig, "Constitutional foundations, the rule of law and supremacy" [2003] P.L. 92-111; Lord Bingham, "The Rule of Law" (2007) C.L.J. 67-85). I however note here that the rule of law features strongly in the debates on the appropriate response to judicially inflicted injuries.

[3] Compare the maxims *lex semper dabit remedium* and *ubicunque est iniuria, ibi damnum sequitur*.

[4] (1703) 2 Ld. Raym. 938, 953; 92 ER 126, 136 (emphasis added).

[5] 5 US 137, 163 (1803) (citing Blackstone's Commentaries) (emphasis added).

The emphasised parts of the quoted excerpts indicate that *ubi ius* is a fundamental common law norm. Like the rule of law, it predates modern Western constitutions and rights bills. Both are foundational constitutional concepts. Marshall C.J. underlined the associated duty of the state, arguably intrinsic to the rule of law, which itself is perhaps *the* core common law value[6];

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[7]

The modern rights era stresses many important rights. It suffices for present purposes to refer to two closely interconnected rights long recognised by the common law; the right to liberty and security of the person, and the right not to be deprived wrongfully thereof.[8] Crucially, violations of these rights resulting from judicial error are not always redressed by common law courts, raising the question whether they remain "rights". On one view, whatever the courts will not redress is not a "right" at all, for a legal right only exists when courts will provide a remedy. On another view, a right does not cease to exist merely because the courts will not redress its violation. Restrictions on its enforcement do not extinguish it or even prescribe its conceptual limits. But the courts may, for some reason, choose to *underenforce* a right or norm.

In this article, I seek to establish that, in respect of irreparably injurious rights violations emanating from judicial action, the norm that "every man that is injured ought to have his recompense",[9] and, consequently, the rights whose violations trigger that norm, are being underenforced, inappropriately,

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[6] Lord Hope in *Jackson v AG* [2005] UKHL 56; [2006] 1 A.C. 262, [107].

[7] 5 US 137, 163.

[8] These trace as far back as the Magna Carta (clause 39) which is incorporated in the due process clause of the 14th Amendment to the US Constitution. See also Art.9 ICCPR, Art.5 ECHR.

[9] Holt C.J. in *Ashby v White* (1703) 2 Ld. Raym. 938, 953; 92 E.R. 126, 136.

by common law courts. This happens when the courts refuse to hold anyone liable for the violations. That position may be justified by the availability of adequate alternative remedies or by compelling policy/institutional considerations, but would be untenable where both fall short. The courts do not formally acknowledge their responses as underenforcement and do not therefore address the question whether the relevant norms are suited for underenforcement. But bringing the judicial responses within the framework of underenforcement theory should prompt a new approach, involving (*inter alia*) addressing directly the question whether the relevant norms or values are fit for underenforcement. Drawing upon Sager's underenforcement theory[10], it will be argued that, while the reasoning underpinning the rejections of state liability for irreparable judicially occasioned injuries can be interpreted and understood within the context of underenforcement theory, *ubi ius* is a norm that, absent clear, specific, and inescapable statutory impediments, ought to be enforced, even if constrainedly. Institutional concerns are tenable when courts face matters that ought to be determined by the legislature; but the question who should be liable for judicial wrongs is not such a question. Even if it were, legislatures can sometimes adopt minimalist approaches to meeting the state's obligations under human rights law; but courts should shun such approaches. Where the legislature has left the matter to the judiciary, institutional considerations should have no place.

This discussion will first examine briefly Sager's underenforcement theory, followed by an analysis of recent case law relating to the UK's statutory compensation scheme, which exemplifies insufficient legislative measures to address the consequences of irreparably injurious judicial errors. After this will follow an examination of approaches to primary state liability, which, given the personal immunity of

[10] See generally, L.G. Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.R. 1212-1264; Lawrence Gene Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (Yale University Press 2004). On the tensions between underenforcement theory and Dworkinian thought, see L.G. Sager, "Material Rights, Underenforcement, and the Adjudication Thesis" (2010) 90 B.U.L.Rev. 579; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 412-413.

judges and the deficiencies of ex gratia and statutory compensation schemes, will often be the injured party's remaining option for effective redress. Finally, I will examine the reasoning in some leading authorities against the background of underenforcement theory. This examination will test the proposition that the main judicial concerns often relate, not to the meanings or conceptual limits of the relevant norms, values, or rights, but, rather, to apprehended impacts on the judiciary of the provision of an effective remedy. It will be argued that underenforcement theory can perform a valuable interpretive role in relation to the decisions. However, it does not validate a position that is essentially defensive. The mischief to be resisted is the incidence of a "remedial shortfall". Where such a shortfall cannot otherwise be avoided, a constrained primary state liability would provide a solution.

II. UNDERENFORCEMENT THEORY

Sager, writing on federal US constitutional law, referred to a "gap between the Constitution proper and the *adjudicated constitution*."[11] He questioned the tendency to consider a judicial finding that a certain construct does not extend "to certain official behaviour because of institutional concerns rather than analytical perceptions" as a "statement about the meaning of the norm in question".[12] In his view, all that is decided "in such a case is that there are good reasons for stopping short of exhausting the content" of the norm that the court is dealing with. Thus, the "limited judicial construct" that the court has accepted derives from the court's determination, rather than "from a judgment about the scope" of the concept itself. According to Sager;

> "Constitutional norms should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm. By "legally valid," I mean that the unenforced margins of underenforced norms should have the full status

[11] Lawrence Gene Sager, *Justice in Plainclothes*, 86 (emphasis added).

[12] Sager, *Justice in Plainclothes*, 86-87.

> of positive law which we generally accord to the norms of our constitution, save only that the federal judiciary will not enforce these margins. Thus, the legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force."[13]

Sager saw the idea of a "constitutional division of labour" as essential to the underenforcement thesis. For him, this means that when institutional concerns constrain the judicial branch from fully enforcing a constitutional norm, the assistance of other governmental actors ought to be sought to realise "more fully the Constitution's aims".[14] He considered that "institutional" reasons for underenforcement of a concept relate to questions of "propriety and capacity", while reasoning "based upon an understanding of the concept itself" can be termed as "analytical".[15] In this context, it would be "perverse to constitutional values to transfer the institutional limitations of the judiciary onto Congress under circumstances where to do so would be to guarantee a remedial shortfall".[16] Sager also explored the notion of "deference" in the context of underenforcement, noting that judges "routinely" sanction legislation that they would otherwise regard as unconstitutional if they were not constrained by their role. Such deference, he said, is "largely if not exclusively driven by the Court's view of its own institutional limitations, not by its analysis of the substantive requirements of the Constitution".[17] In Sager's view, distinguishing between the adjudicated Constitution and the full Constitution enhances the ability to "make sense of our constitutional practices as a whole".[18]

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[13] Sager, *Justice in Plainclothes*, 88.

[14] Sager, *Justice in Plainclothes*, 102.

[15] Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.Rev., 1212, 1217-1218.

[16] Sager, *Justice in Plainclothes*, 107.

[17] Sager, *Justice in Plainclothes*, 116.

[18] Sager, *Justice in Plainclothes*, 127.

While writing primarily in the context of US constitution law, Sager proposed that observation of the distinction which he highlighted "is not unique to constitutional law but is applicable to normative systems or propositions in general".[19] This is important for the purposes of this article, for the distinction may equally be applied to the norms and rights at the core of the present discussion. According to Sager, the distinction "is based upon the difference between the meaning of a normative precept and the application of that precept through the modeling of a theory or structure of analysis, and is sometimes expressed by calling the statement of meaning a *concept* and the statement of application a *conception*."[20] Sager said that we can "explain *and justify* some forms of apparent 'slippage' between a constitutional norm and its enforcement" by the distinction that one can draw "between a conception and its parent concept", and that it is possible to "agree as to the abstract meaning **-** the concept **-** of a norm, yet disagree markedly over the conception which ought to be adopted to realize that concept."[21]

Underenforcement theory has been applied to different areas of law, including various aspects of US Federal constitutional law[22], the role of prosecutors[23], criminal justice[24], good faith in contracts,[25] and

[19] Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.Rev., 1212, 1213.

[20] Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.Rev. 1212, 1213.

[21] Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.Rev. 1212, 1213 (emphasis added).

[22] See eg, H.J. Powell, "Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law" (2011) 86 Wash L. Rev., 217, 234; E.A. Young, "Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law" (2012) 75 Law and Contemporary Problems, 157-201; G.B. Lee, "First Amendment Enforcement in Government Institutions and Programs" (2009) 56 U.C.L.A. L. Rev., 1691-1774; SF Ross, "Legislative Enforcement of Equal Protection" (1988) 72 Minn. L. Rev. 311-365.

transitional justice[26] but is yet to be engaged in respect of the appropriate response to the harmful consequences of judicial errors. For present purposes, its potential application emerges from the view that, while common law judges may generally agree as to the abstract meaning – the concept of the norm that every injury to rights ought to attract effective legal redress, and of core common law values such as *ubi ius* and the rule of law, they tend to "disagree markedly over the conception which ought to be adopted to realise" those concepts. Particularly, there exists a marked difference of opinion on the appropriateness of state liability as a remedy for injuries occasioned by judicial acts. Ultimately, it appears that the differences of opinion mainly rest on the weight accorded to institutional concerns.

These differences will be examined in detail later; but I will address what purpose underenforcement theory can serve here. The pertinent question is how common law decisions that go against current trends in international and regional courts can objectively be justified. It would not suffice simply to state that this is the approach which the courts have chosen. Possible justifications for the failure to hold *someone* legally liable for irreversible injuries arising from judicial action in circumstances wherein the judicial officers themselves enjoy immunity include alternative remedies such as appeals and compensation schemes. Where such alternatives are deficient (eg, because availability is too constrained or is subject to executive discretions or the damage already suffered cannot be undone) underenforcement theory, which postulates that it is sometimes right to not provide a judicial remedy may still provide justification. Sager has referred to a proposition that institutional concerns can justify

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[23] R.M. Gold, "Beyond the Judicial Fourth Amendment: The Prosecutor's Role" (2014) 47 U.C. Davis L. Rev., 1591-1665.

[24] See eg, A. Natapoff, "Underenforcement" (2006-2007) 75 Fordham L. Rev., 1715-1776; I.B. Capers, "Crime, Legitimacy, and Testilying" (2008) 83 Indiana L.J., 835-880.

[25] P. MacMahon, "Good Faith and Fair Dealing as an Underenforced Legal Norm" (2014-2015) 99 Minn L. Rev. 2051-2112.

[26] F.N. Aoláin and E. Rooney, "Underenforcement and Intersectionality: Gendered Aspects of Transition for Women" (2007) The International Journal of Transitional Justice, Vol. 1, 338–354.

the courts' retreat from enforcing certain rights.[27] This is acceptable in principle, but it cannot be that every incident of underenforcement is appropriate, or that every constitutional norm, value or right can appropriately be underenforced. Arguably, institutional concerns should not override core values/norms or fundamental rights. Therefore, whether underenforcement theory provides the necessary justification for judicial reticence will depend partly on whether the relevant norms are suitable for underenforcement in the particular (or under any) circumstances.

Sager's theory rejects a "remedial shortfall". In Sager's view, where federal courts choose to underenforce a norm, Congress and state courts must still be allowed to enforce it.[28] I construe this as indicating that, so long as there is a state actor that will enforce a constitutional norm to its conceptual limits, it does not matter that it is being underenforced by one part of the state apparatus. This is inherent in Sager's "constitutional division of labour", which I will call "*the state partnership theory*". It follows that there is a major problem where nobody is fully enforcing the norm. My contention here is that underenforcement theory will not provide the required justification where the relevant norm/right/value is not suited for underenforcement or where the outcome of its underenforcement is a remedial shortfall. Such a shortfall is not countenanced by Sager, who expects Congress and state courts (ie, other competent state actors) to fill in any shortfalls created by the federal judiciary's underenforcement of constitutional norms. Therefore, where there is no-one to fill in any shortfalls (ie, where the state partnership theory is unrealisable) the norm ought not to be underenforced.

The next section will examine the potential of a statutory compensation scheme to avoid remedial shortfalls.

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[27] Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.Rev., 1212, 1220, note 4.

[28] Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1977-1978) 91 Harvard L.Rev., 1212, 1239-1240, 1247-1248.

III. STATUTORY COMPENSATION IS INSUFFICIENT

Article 2(3)(a) of the International Covenant on Civil and Political Rights ("ICCPR") requires State parties to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is presented in similar terms. These represent global and regional articulations of *ubi ius*. Such clauses draw attention to the meaning of "effective remedy" for violations by persons acting in an "official capacity", particularly when the "official capacity" relates to an exercise of judicial power. The question "what happens when courts get it wrong?" has long beset the common law. Instinctively, one would consider the possibilities of appellate or other review.[29] These would often constitute effective redress – specifically, where no damage has yet occurred; but there are situations wherein damage has occurred which review cannot undo. Under the common law, there would almost always be no remedy against judges or jurors personally. This is the result of judicial immunity.[30] So who does the aggrieved party pursue for an effective remedy? By "effective" I mean that the consequences of the error are addressed practically.

In some situations, statutory compensation may be available. Article 14(6) of the ICCPR, mandating such compensation, provides;

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice,

[29] See eg, s.9(1) HRA 1998.

[30] See generally, Abimbola A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (Clarendon Press Oxford 1993).

the person who has suffered punishment as a result of such conviction shall be compensated according to law ..."

The ECHR has a similarly-worded provision.[31] The phrase "according to law" in this context relates to statutory[32] (or, less satisfactorily, ex gratia[33]) compensation schemes (which tend to attract low payouts[34]); but there is no reason why implementation cannot also come via judicial decision-making.

The restriction to criminal cases is significant. Omission of civil cases may arise from (false) assumptions, that judicial errors in civil cases can be corrected by appeal/review and will therefore not cause irreparable loss/injury, or, that miscarriages of justice do not occur in civil cases, or, that if they occur, their impacts are not devastating. The first assumption would ring false when dealing with decisions of apex courts. The second assumption may, depending on the definition of "miscarriage of justice", ring false, because denials of fair hearing and violations of due process can occur as much in civil cases as in criminal cases. With respect to the third, it can hardly be claimed that a person's life cannot be ruined, or future irreparably compromised, by a decision in a civil case.[35] Nevertheless, this remedy will be approached on its own terms. It is notable that the remedy is circumscribed, being restricted to punishments resulting from criminal convictions overturned because there was a

[31] Article 3 of Protocol 7 (which the UK has not ratified).

[32] See eg, Lord Steyn in *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18; [2005] 1 A.C. 1, [27]-[28]; Lord Hope in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [74];

[33] See eg, Lord Hope in *Adams* [2011] UKSC 18, [73].

[34] See eg, A. Hoel, "Compensation for Wrongful Conviction" (Trends and Issues in Crime and Criminal Justice Research Paper No.356, Australian Institute of Criminology, May 2008).

[35] See eg *Bush v Gore*, 531 US 98 (2000), where the US Presidency was lost before a Supreme Court bench with an allegedly disqualified judge. Generally, A. Olowofoyeku, "Bias in Collegiate Courts" (2016) I.C.L.Q. 65(4), 895-926.

"miscarriage of justice". While few would reject the notion of compensation for victims of a miscarriage of justice, as will be seen, the statutory compensation schemes intended to implement this remedy can be subject to exacting qualifying conditions and executive discretions.

Section 133 of the UK's Criminal Justice Act 1988 was enacted to implement Art.14(6) of the ICCPR.[36] The language of s.133(1) of the Act mirrors Art.14(6). Significantly, a 2014 amendment to the Act (s.133(1ZA)) narrowly defines "miscarriage of justice" as happening "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence". The impact of this amendment is that many who have "suffered punishment" due to wrongful convictions will not benefit from s.133. Even before s.133(1ZA), the Supreme Court had adopted in *Adams* a narrow definition of the term, accepting only two out of four categories that it could possibly cover. Lord Phillips PSC enumerated the four categories, and subsequently refined them.[37] Lord Dyson MR later thus described the four categories (of which only the first two qualified);

> "(1) where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted … (2) where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it; (3) where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and (4) where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."[38]

[36] Compare s.23 of the Australian Capital Territory ("ACT") Human Rights Act 2004.

[37] [2011] UKSC 18, [9] (citing Dyson L.J. in the Court of Appeal).

[38] Lord Dyson M.R. in *R (Nealon) v Secretary of State for Justice; R (Hallam) v Secretary of State for Justice* [2016] EWCA Civ 355; [2016] 3 W.L.R. 329, [3].

Clearly, some whose convictions are quashed would fall within the third or fourth scenarios. The subsequent definition in s.133(1ZA) rejects even the second scenario. This restricted definition is apparently not contrary to Art.6(2) of the ECHR because, according to *R (Adams) v Secretary of State for Justice*,[39] Art.6(2) does not apply to s.133, whatever definition of 'miscarriage of justice' is adopted.

Recent case law further demonstrates the difficulties with this kind of scheme. In *R v Nealon*[40] the Court of Appeal (Criminal Division), following a reference by the Criminal Cases Review Commission ("CCRC"), under s.9 of the Criminal Appeal Act 1995, quashed the conviction of the appellant, who had been convicted of attempted rape and sentenced to life imprisonment. Subsequent DNA evidence had, while not ruling out the possibility that the appellant had committed the offence, cast doubt on the safety of his conviction, "because it might reasonably have led the jury to reach a different verdict".[41] Mr Nealon had by this time spent 17 years in prison. In *R v Hallam*[42] the Court, under a similar reference, quashed the conviction of the appellant for murder, conspiracy to commit grievous bodily harm and violent disorder. The appellant had, throughout the trial, relied on an alibi. Subsequent fresh evidence cast doubt on the safety of the conviction, but the Court doubted whether the circumstances "could ever have established … positive evidence that the appellant was not at the scene".[43] Mr Hallam had been imprisoned at the age of 17, and had spent 7 years in prison.

[39] Lord Phillips, [2011] UKSC 18, [58].

[40] [2014] EWCA Crim 574.

[41] Fulford L.J. at [35].

[42] [2012] EWCA Crim 1158.

[43] Hallett L.J. at [80].

The Secretary of State refused the claims of these individuals for compensation. In *Nealon and Hallam*[44], the Divisional Court rejected a claim that this decision was incompatible with Art.6(2) ECHR, and an appeal against this decision to the Court of Appeal[45] failed. According to Lord Dyson M.R., s.133 is not incompatible with Art.6(2) because s.133 "does not require the applicant to prove his innocence *generally*".[46] In his view,

> "The focus on the effect of that new or newly discovered fact (rather than on whether the person can demonstrate innocence *generally*) is central to the operation of section 133. The fact that the Secretary of State is not persuaded beyond reasonable doubt by a new or newly discovered fact that an applicant is innocent does not entail that the Secretary of State casts doubt on his innocence generally. He is merely saying that the applicant's innocence has not been proved *by the new or newly discovered fact*."[47]

This is an unhappy focus on what is provable by new facts, especially given the view that 'in most cases, it is virtually impossible to pinpoint the "wrongly convicted innocent"'.[48] Furthermore, it is

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[44] *R (Nealon) v Secretary of State for Justice; R (Hallam) v Secretary of State for Justice* [2015] EWHC 1565 (Admin); [2015] All E.R. (D) 84; and this despite the decision of the ECtHR in *Allen v UK* (36 B.H.R.C. 1; (2016) 63 E.H.R.R. 10) that Art.6(2) is applicable to compensation decisions made under s.133 of the Criminal Justice Act contradicting the conclusion of the Supreme Court in *Adams* (see Burnett LJ, [56]).

[45] *R (Nealon) v Secretary of State for Justice; R (Hallam) v Secretary of State for Justice* [2016] EWCA Civ 355; [2016] 3 W.L.R. 329. Noted by P. Hungerford-Welch, "Compensation for miscarriage of justice" (2016) 10 Crim. L.R., 772-775.

[46] [2016] EWCA Civ 355, [48] (emphasis supplied).

[47] [2016] EWCA Civ 355, [50] (emphasis supplied).

[48] S. Poyser and R. Milne, "No grounds for complacency and plenty for continued vigilance: miscarriages of justice as drivers for research on reforming the investigative interviewing process"

unclear how one would prove a negative, much less to do so beyond reasonable doubt. Finally, it might be thought odd to require new facts to prove something that has long been presumed (ie, that an accused did not commit any offence, unless the state can prove otherwise). Thus, under the UK's statutory compensation scheme, those who had already served terms of imprisonment by virtue of convictions that were subsequently quashed for being unsafe had no redress for the terms of imprisonment already served. This results ultimately from a flawed statutory definition of "miscarriage of justice"[49]; but, even before that there was an equally problematic judicial definition. The *Nealon and Hallam* litigation exposes the difficulties arising when someone suffers irreparable damage due to judicial error. What was at issue was a statutory scheme to compensate *a selection* of such injured persons. The highly restrictive nature of the scheme reveals that the state (personified here by the executive and legislature) is not prepared to provide redress for many who have suffered loss when something has gone badly wrong in the judicial process. One possible deduction is that the executive and legislature cannot be trusted to serve as keen protectors, either of those injured by the judicial system, or of important common law norms and values. The state partnership theory begins to crumble in practice, and the state may well be failing in its performance of the duty referred to by Marshall C.J. in *Marbury v Madison*, and articulated by Art.2(3)(a) of the ICCPR and Art 13 of the ECHR. That claimants in most of the UK "are now dependent solely upon the scheme provided by the

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[2015] Police Journal, 265, 266 (internal citations omitted). Generally, L. Weathered, "The Growing Acknowledgement of Wrongful Conviction – The Australian Response Within an International Context" (2013) 3(1) Vic.U.L.J.J. 79; G. Edmond. "The 'Science' of Miscarriages of Justice" (2014) 37(1) U.N.S.W. L.J. 376; G. Hammond, "The New Miscarriages of Justice" (2006) 14 Waikato L.Rev. 1. On "legal innocence" versus "factual innocence", see H. Hamer, "Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission" (2014) 37(1) U.N.S.W. L.J. 270.

[49] On "substantive" versus "procedural" miscarriages of justice, see W. Young, "The role of the courts in correcting miscarriages of justice" (2010) 16 Canterbury L.Rev. 256, 258.

statute" has rightly been described by Lord Hope in *Adams* as "unfortunate".[50] Parliament's restrained approach to the UK's international obligations is as manifest here as it is in respect of remedies for judicial wrongs under s.9 of the HRA 1998. According to Taylor, ultimately, "the courts are in an unenviable position—that of seeking to provide clarity to a scheme that lacks a basis in principle and which, as a result, ensures many seemingly deserving cases fall out with its scope".[51]

In sum, the statutory scheme is too constrained. Being confined to criminal cases, and with a restrictive definition of "miscarriage of justice", it redresses no remedial shortfall in civil cases, while leaving much scope for remedial shortfalls in criminal cases. This flawed implementation of the ICCPR/ECHR largely renders nugatory the intended remedy. The situation would be much improved were "miscarriage of justice" construed to include all breaches of natural justice (including violations of "fair hearing" clauses such as under Art.6 ECHR or Art.14 ICCPR). But it may be that those who complain of denials of fair hearing should simply ignore the common law and invoke the ECHR.

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[50] *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [74]. Lord Hope (at [75]) quoted data showing a "substantial drop" in the applications approved under s.133 since the abolition of the ex gratia scheme in 2006. Claimants relying on the Australian Capital Territory's statutory scheme may not fare much better (see eg, *Strano v ACT* [2016] ACTSC 4 (S.C., ACT); contrast *Morro v ACT* [2009] ACTSC 118 (S.C., ACT)).

[51] N. Taylor, "R. (on the application of Ali) v Secretary of State for Justice: compensation - guidance on the application of the Supreme Court decision in R. (on the application of Adams) v Secretary of State for Justice" (2013) 7 Crim. L.R. 587, 592. See also M. Requa, 'Compensation for "miscarriage of justice"' (2011), 75(5), J. Crim. L., 361; H. Quirk and M. Requa, "The Supreme Court on compensation for miscarriages of justice: is it better that ten innocents are denied compensation than one guilty person receives it?" (2012) 75(3), M.L.R. 387; A. Bailin and E. Craven, "Compensation for miscarriages of justice - who now qualifies?" (2014) 7 Crim. L.R. 511.

One commentator has said in respect of the s.133 definition and the *Nealon and Hallam* litigation: "It is hard to think of a more vindictive piece of legislation and, if the challenge [against the decision of the Secretary of State] fails, it will close off the possibility for compensation for nearly all victims of miscarriages of justice."[52] Whether or not one agrees with the view that the legislation is "vindictive", the challenge indeed failed, and the question is whether "the possibility for compensation" has been closed off "for nearly all victims of miscarriages of justice". Clearly, the requirement for an effective remedy under Art.2(3) of the ICCPR and Art.13 of the ECHR must still apply when the statutory remedy is unavailable. There remains one possibility for such a remedy – one provided by the courts.

IV. STATE LIABILITY – A JUDICIAL REMEDY?

It may be fortuitous that fundamental rights instruments tend to entrust the protection of those whose rights have been violated to judicial bodies. Typical is Art.6 of the ECHR. There has been talk of "the strong sense shared by [some Irish] judges that the courts should be proactive in protecting rights against the legislature and the executive".[53] While the presence of such strong judicially shared sense in the UK is debateable in the context of the legislature, UK courts can be robust in their protections against executive action. But what happens when the defender of rights becomes the (unwitting) violator or the authoriser of the violation of rights? I have examined briefly the strictness of the UK's statutory compensation scheme as an engine for redressing irreparable injuries from judicial errors. Because the scheme is subject to executive discretion, the applicant is not entitled as of right to a legal remedy.[54] Additionally, such schemes do not extend to civil cases, with all that this implies. For the

[52] J. Robins, "Friend or foe?" 165 N.L.J. 7652, p.6 (15 May 2015).

[53] W. Binchy, "Meskell, the Constitution and tort law" (2011) 33 Dublin University Law Journal 339-368, 340.

[54] See eg, Lord Phillips in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [36], [46]; Lord Hope, [2011] UKSC 18, [101]. Note however that, where the court considers that the requirements of

injured party seeking an effective remedy through the courts, the only viable defendant is "the state" or (in the UK and parts of the Commonwealth) "the Crown".[55] For the purposes of potential liability, I will use the term "the state" to include the Crown. The state is an obvious candidate to be pursued because the judiciary is a branch of the state, exercising the state's judicial power. In some jurisdictions, this is explicit in the constitution.[56] Explicit or not, it is a settled constitutional principle. It has been pointed out that "State liability for judicial decisions in European Union (EU) and international law has its origin in the perception of the state as a single entity or unity", and that "in both legal systems, the conduct of all state branches is therefore attributed to the state in an undifferentiated manner".[57] So, on one view, judicially mandated wrongs are wrongs committed by the state. This is controversial[58], and common law jurisdictions have responded variously thereto. A recent example is the landmark decision of the Supreme Court of New Zealand in *Attorney-General v Chapman*[59], about which much will be said later. While the idea of state liability for the injurious exercise of the judicial power is strongly contested among common law judges, such liability is not new. It is well established in civil law countries,[60] in international law[61], in the jurisprudence of the

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the statute have been satisfied, there may be a legal right to compensation (Lord Phillips in *Adams*, [2011] UKSC 18, [65]).

[55] See eg, s.9(4) HRA 1998.

[56] See eg, Art.III of the US constitution; compare Art.121(1) of the Malaysian constitution.

[57] A. Davies, "State liability for judicial decisions in European Union and international law" (2012) 61(3) I.C.L.Q. 585, 586.

[58] Contrast McMahon J. in *Kemmy v Ireland* [2009] IEHC 178; [2009] 4 I.R. 74, [58], [76].

[59] [2011] NZSC 110.

[60] See eg, Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989), 87-88; R. Errera, "Liability of the state for defective functioning of justice - excessive length of proceedings before administrative courts" [2002] P.L. 807.

[61] See generally, A. Davies, "State liability for judicial decisions in European Union and international law" (2012) 61(3) I.C.L.Q. 585.

ECJ/Court of Justice of the European Union,[62] (CJEU) and in the jurisprudence of the ECtHR.[63] The relevant jurisprudence of the CJEU has been embraced by the Caribbean Court of Justice.[64] Yet, many domestic common law courts continue to resist it. For example, it is not available in the USA,[65] New Zealand[66] or the Republic of Ireland.[67] Its availability in the UK is severely restricted.[68] In the latter two jurisdictions, injured parties will often have to seek relief from the ECtHR.

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[62] See eg, *Köbler v Austria* (C-224/01) [2004] Q.B. 848; *Traghetti del Mediterraneo SpA v Italy* [2006] 3 C.M.L.R. 19; *McFarlane v Ireland*, (31333/06) (2011) 52 E.H.R.R. 20; *Târşia v Statul român and Serviciul Public Comunitar Regim Permise de Conducere şi Înmatriculare a Autovehiculelor (European Commission and Poland, intervening)* [2016] 1 C.M.L.R. 47. Generally, X. Groussot and T. Minssen, "Res judicata in the Court of Justice case-law: balancing legal certainty with legality?" (2007) 3(3) E.C.L.Rev., 385; D. Nassimpian "...And we keep on meeting: (de)fragmenting state liability" (2007) 32(6) E.L.Rev. 819; J.E. Pfander, "Köbler v. Austria: Expositional Supremacy and Member State Liability" (2006) 17 E.B.L.Rev .275; M. Breuer, "State Liability for Judicial Wrongs and Community Law: the Case of Gerhard Kobler v Austria" (2004) 2 E.L.Rev. 243.

[63] See eg, *Steck-Risch v Liechtenstein*, (63151/00) (2006) 42 E.H.R.R. 18; *Chmelír v Czech Republic,* (64935/01) (2007) 44 E.H.R.R. 20.

[64] See generally J. Haynes, 'The Transplantation of the European Principle of "State Liability" In Caribbean Community (CARICOM) Law: A Normative Assessment' (2014) 14(1) O.U.C.L.J. 73.

[65] See eg, *Cromelin v US*, 177 F. 2d. 275 (5th Cir. 1949); *Haslam v State*, 4 NYS 2d. 59, 62-63 (NY, 1938); *Evangelical United Brethren Church v State*, 407 P. 2d. 440 (Washington, 1965).

[66] *Attorney-General v Chapman* [2011] NZSC 110.

[67] *Kemmy v Ireland* [2009] IEHC 178 (disapproved of by the ECtHR in *McFarlane v Ireland* (2011) 52 E.H.R.R. 20).

[68] S.2(5) of the Crown Proceedings Act 1947; s.9(3) HRA 1998; *Begraj v Secretary of State for Justice* [2015] EWHC 250 (QB), [2015] All E.R. (D) 303 (Feb); *R (MA) v Independent Adjudicator* [2014] EWHC 3886 (Admin); [2014] All E.R. (D) 359 (Oct).

The general common law approach is to preserve the common law sovereign/state immunities.[69] Since some of the main common law immunities themselves stand on contestable foundations,[70] this default position is unfortunate, and it is questionable whether it remains appropriate, if it ever was. Common law immunities, when waived by statute,[71] tend to be subject to exceptions or restrictions relating to judicial acts.[72] Such legislative endeavours may, as has been mooted earlier, simply present governments as unreliable protectors/enforcers of important common law values; or they may represent executive/legislative deference to the judiciary on account of the judiciary's constitutional role. Such deference would evince the state partnership theory.

New rights bills sometimes trigger debates about state liability for violations of those bills.[73] The discussion that follows will first examine common law decisions showing a positive attitude toward

[69] See eg, S. Sedley, "The sound of silence: constitutional law without a constitution" [1994] 110 L.Q.R. 270, 288.

[70] See generally, J. Murphy, "Rethinking tortious immunity for judicial acts" (2013) Legal Studies 455.

[71] See eg, Crown Proceedings Act 1947 (UK); 28 USC § 1356(b) (USA); Proceedings Against the Crown Act 1990 (Canada).

[72] See eg, s.2(5) of the Crown Proceedings Act 1947; s.9(3), HRA 1998; *R (MA) v Independent Adjudicator* [2014] EWHC 3886 (Admin); [2014] All E.R. (D) 359 (Oct); s.5(6), Proceedings Against the Crown Act 1990 (Canada); s.6(5) of the New Zealand Crown Proceedings Act 1950; 28 USC § 2680(a).

[73] See eg, M.L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" [1984] 62 Can. Bar Rev. 517-576; D.M. McAllister, "Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)" (2004) 25 Supreme Court Law Review (2d), 1-76; R. Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" [2010] 27 National Journal of Constitutional Law, 159-177.

state liability, followed by the decision of the New Zealand Supreme Court in *Chapman*.[74] The main object of this examination is to evaluate the impact of institutional concerns on the outcomes. Here, rather than focusing primarily on the judiciary's perceptions of its own limitations, I bring within Sager's concept of "institutional concerns" situations in which courts seem as concerned about the impact of a decision on the judiciary as an institution as they are about the conceptual meanings and scopes of the legal norms at issue. References hereafter to "institutional concerns" should be so construed. I also note and rely on the proposition, supported at the highest judicial levels, that principles of fundamental rights protection are embedded within the common law[75], such that rights declarations such as the ECHR have added little thereto, other than perhaps to protect them from legislative encroachment. My point here is that rights bills are mainly declaratory and protective rather than originative of the relevant fundamental rights.

The decision of the Privy Council in *Maharaj v Attorney-General of Trinidad and Tobago (No.2)*[76] ("*Maharaj*") exemplifies common law support for primary state liability. The appellant had been committed to (and had served a term of) 7 days imprisonment for contempt of court, in circumstances

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[74] [2011] NZSC 110.

[75] See eg, Lord Hoffmann in *R v Secretary of State for the Home Department* [2000] 2 A.C. 115, 131; Laws J in *R v Lord Chancellor, Ex parte Witham* [1998] Q.B. 575, 585; Laws L.J. in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] Q.B. 151, [62]; Lord Reed JSC in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] A.C. 1115, [56]-[57]; J. Laws, "Is the High Court the Guardian of Fundamental Constitutional Rights?" [1993] P.L. 59; J. Laws, "Law and Democracy" [1995] P.L. 72; John Laws, *The Common Law Constitution* (Cambridge University Press 2013), 60, 72-73, 77, 83; Lord Reed, "The Common Law and the ECHR", The Inner Temple, 11 November 2013 (available at; https://www.innertemple.org.uk/downloads/members/lectures_2013/lecture_reed_2013.pdf, accessed 31 March 2017).

[76] [1979] A.C. 385.

deemed by the Privy Council to constitute a failure of fundamental justice. The Privy Council (Lord Hailsham dissenting) held that he had been deprived of his liberty without due process of law and was therefore entitled to redress from the state under s.6 of the Constitution of Trinidad and Tobago. Lord Diplock, delivering the majority opinion, focused on the need to provide an effective remedy. He observed that the s.6 remedy, described as "redress", bore its ordinary meaning, ie, reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting therefrom.[77] Since the appellant had already served his sentence by the time the case reached the Court of Appeal in Trinidad, his right not to be deprived of his liberty without due process had already been violated, and the only practicable way of redressing it was by monetary compensation. The state was an appropriate defendant because the claim for redress under s.6(1) in respect of judicial action was "a claim against the state for what has been done in the exercise of the judicial power of the state".[78] This was a primary liability of the state.

Lord Diplock did also address some institutional concerns, emphasising that there was no change in the principles of judicial immunity. The issue of potential floodgates was disposed of by the view that no constitutionally guaranteed right or freedom is contravened by a judgment or order that is wrong and liable to be set aside on appeal, or by an error of fact or substantive law, even where the error has resulted in a person serving a sentence of imprisonment. The remedy for these kinds of error is to appeal.[79] It is noteworthy for the purposes of the coming analysis that this view reveals the constrained nature of the remedy being provided – ie, it did not provide a *carte blanche* of state liability. According to Lord Diplock, the types of judicial error that would amount to a contravention of the right to due process are *procedural errors* that amount to a failure to observe one of the fundamental rules of natural justice.[80] In his view, such cases would be rare, and even in such rare cases, s.6 of the

[77] [1979] A.C. 385, 398.

[78] [1979] A.C. 385, 399.

[79] [1979] A.C. 385, 399.

[80] [1979] A.C. 385, 399 (emphasis added).

constitution would not be engaged unless the situation has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person, *or enjoyment of property*.[81] According to Lord Diplock, it is "only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court".[82] While the last statement is appropriate in the context of *Maharaj* itself, as will presently appear, it is an over-simplification as a general statement, since (*inter alia*) "enjoyment of property" should be included.

Maharaj provides a practicable model and a clear juristic basis for state liability, ie, that it is a primary public law liability of the state for the wrongful exercise of its own judicial power. It may be argued that this decision simply effectuates a specific constitutional provision (s.6 of the Constitution of Trinidad and Tobago), and therefore could not be of wider application.[83] The weakness of such a contention lies in the argument that s.6 did not create a new norm, but simply articulated *ubi ius*. The same can be said for similar clauses in the ICCPR, ECHR, and other rights instruments expressly providing redress for rights violations. And where there is no expression provision, it should be considered implicit in the rights declarations that their violations must be remedied effectively. Therefore, in the absence of clear statutory provisions to the contrary, there is no reason why *Maharaj* should not be embraced. It clearly undermines the case for underenforcement in cases of irreparably injurious judicial errors. Lord Hailsham (dissenting) likewise focused mainly on analytical concerns - the nature of the rights at issue, and whether the legislature had, by s.6, improved on the rights guaranteed by the constitution to provide a remedy where none existed before, but took the view that s.6 had not provided such a right.[84] It is however noteworthy that he also alluded to the floodgates

[81] [1979] A.C. 385, 399 (emphasis added).

[82] [1979] A.C. 385, 399.

[83] See eg, *Deighan v Ireland* [1995] 2 I.R. 56, 63.

[84] [1979] A.C. 385, 410.

argument.[85] The floodgates argument has long been discredited[86] and presents no convincing basis for underenforcement. But even if any floodgates were likely to be opened, the statement of Holt CJ in *Ashby v White* that "it is no objection to say, that it will occasion multiplicity of action; for if men will multiply injuries, actions must be multiplied too"[87] provides a full response.

In *R v Germain*[88] the Alberta Queen's Bench court supported the *Maharaj* type of state liability in cases of infringements of the Canadian Charter of Rights and Freedoms. McDonald J accepted the views of Lord Diplock in *Maharaj* concerning the public law liability of the state "as being an apt description of the juristic nature of the liability that may be imposed upon the state under s.24(1) [of the Charter] in the form of an order of monetary compensation".[89] *R v Germain* has (often along with *Maharaj*) been cited with approval in Canada.[90] For example, the court in *R v Rudko*[91] agreed in principle that "an order for compensation could be issued against the Crown"[92], but did not consider

85 [1979] A.C. 385, 406.

86 It has been described as an "expression of alarm", that cannot "withstand any reasoned scrutiny" - see eg, R. Anand, "Damages for Unconstitutional Actions: A Rule in Search of a Rationale" (2010) National Journal of Constitutional Law 159, 170. See also H. Watchirs and G. McKinnon, "Five Years' Experience of the Human Rights Act 2004 (ACT): Insights for Human Rights Protection in Australia" (2010) 33 (1) U.N.S.W. L.J. 136, 145-147, 155.

87 2 Ld. Raym. 938, 955; 92 E.R. 126, 136.

88 (1984) 53 A.R. 2d. 264 (Q.B., Alberta).

89 (1984) 53 A.R. 2d. 264, 275.

90 See eg, *Oag v R* (1985) 22 C.R.R. 171 (Federal Court, Trial Division); *Royer v Mignault* (1988) 50 D.L.R. (4th) 345; 32 C.R.R. 1 (C.A., Quebec); *Prefontaine v Gosman* [2000] 6 W.W.R. 530; 270 A.R. 97 (Q.B., Alberta); *R v Rudko* (1999) 252 A.R. 142; 68 C.R.R. (2d) 98 (Q.B., Alberta).

91 (1999) 252 A.R. 142.

92 Johnstone J at [38].

such an order appropriate in the particular case. Nevertheless, it appears that the matter of state liability is not yet fully settled in Canada.[93]

In *Baigent's Case*[94] the New Zealand Court of Appeal held that the Crown was a proper defendant in cases of violations of the Bill of rights Act 1990 ("BORA"), and that this was a direct, rather than vicarious, cause of action against the Crown. An award of damages would be an available remedy. It was held that it was implicit in the legislation that there was a public law cause of action against the Crown, which was untouched by the immunities for vicarious liability in tort. This decision came up for discussion in *Attorney-General v Chapman*.[95] Mr Chapman was convicted and sentenced to a term of imprisonment for sexual offences against a child. His claim for legal aid to prosecute his appeal was refused and his appeal was dismissed without an oral hearing. The procedures applied in his appeal were subsequently declared by the Privy Council unlawful and in violation of the BORA. He was granted a new appeal, which, with the benefit of legal aid, resulted in his convictions being quashed and a retrial being ordered. Pending the retrial, he was released on bail. The retrial was ultimately abandoned, because the original complainant, now 16 years old, was unwilling to endure another trial and give evidence in person. Mr Chapman was thereupon discharged under s.347 of the Crimes Act 1961. He subsequently instituted a claim against the Attorney-General for public law compensation for breach of his rights to an appeal and to natural justice under s.25 and s.27 of the BORA.

The New Zealand Supreme Court (Elias C.J. and Anderson J. dissenting) rejected the claim. The majority judgment was delivered by McGrath and William Young JJ. (hereafter referred to as "the Court"), with Gault J. delivering a brief concurring judgment. The Court accepted that the dismissal of Mr Chapman's appeal by the Court of Appeal via the ex parte procedure was in breach of his rights to

[93] See Cameron J. in *Koita v Toronto (Police Services Board)* (2000) 79 C.R.R. (2d) 28, [49] (Ontario Superior Court).

[94] *Simpson v Attorney General* [1994] 3 NZLR 667; [1994] 3 L.R.C. 202.

[95] [2011] NZSC 110.

an appeal and to natural justice, and noted that the issue now was whether his claim "is precluded by the same principles which would exclude a direct claim by Mr Chapman against the judges who dealt with his case".[96] The Court did not consider that *Baigent's Case* and other New Zealand cases established "that public law compensation can be sought from the Attorney-General for judicial breaches" of the BORA, but recognised that *Maharaj* supported Mr Chapman's legal arguments. Nevertheless the Court did not consider this "as being of controlling significance", because "the reality is that the case also turns on a policy judgment", because there was an issue of judicial immunity, which "gives effect to systemic public interest considerations, the most important of which is judicial independence".[97]

V. UNDERENFORCEMENT AND DENIALS OF A JUDICIAL REMEDY

The reasoning of the majority in *Attorney-General v Chapman* is characteristic of those underlying judicial denials of a remedy against the state, and this discussion approaches it as such. The Irish High Court's decision in *Kemmy v Ireland*[98] is also notable in this respect – but, *Chapman*, as an apex court decision, will be the focus of this section, which will seek to demonstrate that the arguments against state liability typically focus less on the analytical case for effective redress, and more on institutional concerns.

The Court noted in *Chapman*[99] that the Court of Appeal had rejected submissions by the Solicitor General "that the proper remedy for judicial error in the criminal process is judicial correction within the criminal process itself and that there can be no further review by way of civil proceedings for compensation", and had "proceeded on the basis that the judiciary were as much subject to the Bill of

[96] [2011] NZSC 110, [94].

[97] [2011] NZSC 110, [97].

[98] [2009] IEHC 178.

[99] [2011] NZSC 110, [105].

Rights Act as the Executive and that there was no exception for judicial acts". Also noted was the Court of Appeal's reliance on *Baigent's Case* and subsequent New Zealand cases, *Maharaj*, Art.2(3) of the ICCPR, and "the international law principle under which a state is responsible for the actions of all branches of government including the judiciary".[100] The Court also noted[101] that the Court of Appeal had accepted the argument that the compensation remedy, as outlined in *Baigent's case*, is properly characterised as a direct public law remedy available against the state, that it is "not a remedy against the Crown narrowly defined as constituting only the Executive branch of government", and that, as "the first law officer of the Crown, the Attorney-General is the obvious defendant". The conceptual/analytical issues were thus clearly before the Court. Predictably, so were the institutional concerns. The Court of Appeal had also taken the view that there was no threat to judicial independence, and that the claim was not barred by judicial immunity principles.[102]

On the Court of Appeal's reliance on *Baigent's Case*, the Supreme Court adopted the narrow approach that *Baigent's Case* "only involved breaches of rights by the police", and that "the general language used by the other three judges would not be taken as having wider application than to breaches by the executive branch".[103] Thus, the wide principle claimed to have been established by *Baigent's Case* was "obiter on the point and the view of a single judge".[104] It was not necessary for the court in *Baigent's Case* to address breaches of rights resulting from judicial acts, and judicial breaches "raise particular constitutional questions relating to judicial independence which did not arise in the context of the police actions being considered in *Baigent's Case*".[105] However, it should be noted that the Court of Appeal was concerned with the issue of redress for wrongs committed by state actors, which include

[100] [2011] NZSC 110, [106]-[108].

[101] [2011] NZSC 110, [111].

[102] [2011] NZSC 110, [111]-[112].

[103] [2011] NZSC 110, [127]-[128].

[104] [2011] NZSC 110, [129].

[105] [2011] NZSC 110, [145].

the judicial branch. Its focus was therefore rightly on the substantive questions relating to provision of effective redress against state violations of the BORA.

The Supreme Court's assault on *Maharaj v Attorney-General of Trinidad and Tobago (No.2)* were, with respect, equally unconvincing. On *Maharaj*, the Court noted[106] the differences between the human rights provisions of the Constitution of Trinidad and Tobago and those of the BORA, but rightly did not see those differences as a basis for distinguishing *Maharaj*. The Court accepted that *Maharaj* provides some support for Mr Chapman's arguments, but said that there were "issues as to how substantial that support is".[107] Following a detailed analysis of the factual circumstances of *Maharaj*, the Court said that the majority in *Maharaj* had distinguished 'between correctable errors of fact, law and even jurisdiction for which public law compensation could not be sought and breaches of "fundamental rules of natural justice" for which a claim could be made against the state'.[108] It however felt that there was no obvious rational basis for determining how a particular error should be classified. But it has been seen earlier that *Maharaj* clearly provided such a basis; and the rules of natural justice are not alien to common law courts. Additionally, Mr Maharaj was seeking to enforce his right not to be deprived of liberty without due process. It was therefore appropriate for the Privy Council to focus on the question whether there had been (and what constitutes) a failure of due process, even if described as a "failure of fundamental justice".

The Court proceeded to review the considerations for and against state liability for judicial breaches of the Bill of Rights Act. It considered the principle of judicial immunity and the policy considerations underlying it, and observed that the New Zealand Law Commission had recommended that the same absolute immunity rule be applied to district court judges as the higher courts.[109] Parliament had

[106] [2011] NZSC 110, [146].

[107] [2011] NZSC 110, [146].

[108] [2011] NZSC 110, [153].

[109] [2011] NZSC 110, [173].

implemented this recommendation, but "did not adopt the further recommendation that legislation explicitly provide that a remedy for breach of rights not be available in respect of judicial conduct" – which simply meant that "*Parliament has left it to the courts to decide whether the remedy is available for those breaches*".[110] The emphasised part of this statement is crucial. The New Zealand Law Commission's reasons were mainly institutional,[111] although, interestingly, the relevant recommendation was not extended to errors of some inferior courts. The New Zealand Parliament deliberately chose to defer to the judiciary on this issue. Presumably, it did not consider the institutional concerns raised on behalf of the judiciary by the Law Commission so crucial that it should legislate to block all avenues of redress. And, presumably, this deference to the judiciary constitutes recognition that the courts are the ultimate protectors of individual rights. Sager's view that it would be "perverse to constitutional values to transfer the institutional limitations of the judiciary onto Congress under circumstances where to do so would be to guarantee a remedial shortfall"[112] has been referred to earlier. Similarly, it may be that capitulation to the judiciary's institutional concerns, where to do so would "guarantee a remedial shortfall" would be "perverse to constitutional values". The New Zealand Parliament must be commended for not accepting such transfer of the judiciary's institutional concerns to itself. Parliament's rejection of the Law Commission's proposal presented the courts with an opportunity, free of legislative shackles, for effective enforcement of the BORA tights and the norms requiring an effective remedy. The *Chapman* court however squandered the opportunity.

The Court noted that the Crown is not vicariously liable for the actions of judges.[113] It accepted that judicial immunity is not itself fatal to the claim against the state for breaches of the BORA, since *Baigent's Case* decided that "the liability of the Crown being direct, statutory immunities applying to

[110] [2011] NZSC 110, [174] (emphasis added).

[111] See New Zealand Law Commission, "Crown Liability and Judicial Immunity: A response to Baigent's case and Harvey v Derrick", Report 37 (May 1997), [154]-[159].

[112] Sager, *Justice in Plainclothes*, 107.

[113] [2011] NZSC 110, [175]. Compare *Kemmy v Ireland* [2009] IEHC 178, [59].

the individuals involved were not an answer to the claim".[114] But it regarded as fundamental the issue of whether the BORA, and the courts' duty to fashion remedies identified in *Baigent's Case* enable such a direct action to be brought for breaches of protected rights by judges.[115] The Court also evaluated the policy justifications for judicial immunity alongside the considerations in *Baigent's Case*,[116] including finality in litigation, judicial independence, the existence within the justice system of adequate rights of appeal, rehearing and review, the establishment of the Supreme Court, New Zealand's reservation to Art.14(6) of the ICCPR, and the institution of a compensation scheme to deal with exceptional cases.[117] It concluded that "the public policy reasons which support personal judicial immunity also justify confining the scope of Crown liability for governmental breaches of the BORA to actions of the executive branch".[118]

There is much to criticise in the Court's reasoning, and not just because of its undue focus on institutional concerns; but it will suffice to refer to Elias CJ's dissent, which highlights some of the criticisms. Significantly, the arguments of the majority did not persuade the Elias C.J., who could be expected to be adequately informed about the potential practical and political ramifications of the institutional concerns expressed. Elias C.J. started by noting that "A right without a remedy 'is a vain thing to imagine"'[119] and noted that the fact "that rights are vindicated through remedy for breach is fundamental to the rule of law." For her, the issue in the case was "whether New Zealand domestic law prevents damages being awarded, when they would afford effective remedy, if the breach of rights is caused by judicial action".[120] After referring to the direct public law liability of the state established

[114] [2011] NZSC 110, [176].

[115] [2011] NZSC 110, [178].

[116] [2011] NZSC 110, [178]-[179].

[117] [2011] NZSC 110, [193]-[200].

[118] [2011] NZSC 110, [204]. Compare *Kemmy v Ireland* [2009] IEHC 178, [74].

[119] [2011] NZSC 110, [1], referring to Holt C.J. in *Ashby v White* (1703) 2 Ld. Raym. 938, 953.

[120] [2011] NZSC 110, [1].

in *Baigent's Case*, Elias C.J. said that this "direct public law remedy does not substitute the state for the public officials who would, in the absence of some form of immunity, otherwise be responsible in tort. It is distinct from private law remedies … and is available for denial of rights rather than error in result or procedure which can be adequately corrected within the process in which it occurs".[121] In her view, "The number of cases in which public law damages have been sought from the state since 1994 is small, suggesting that early predictions of a flood of claims to vex the administration of justice are well astray, as such predictions usually are".[122] According to her;

> "[I]t would be contrary to the scheme and purpose of the New Zealand Bill of Rights Act if those deprived of rights through judicial action are denied the opportunity to obtain damages from the state, where an award of damages is necessary to provide effective remedy. ... A gap in remedy for judicial breach is contrary to the obligation of the state to provide effective remedy in domestic law. Excluding remedy for judicial breaches would leave a large remedial hole because many of the rights affirmed in the Act are afforded principally within judicial process through discharge of judicial function."[123]

Elias C.J. is addressing here the spectre of Sager's "remedial shortfall". She felt that *Maharaj* should continue to apply in New Zealand because "the approach is consistent with the obligations imposed under the New Zealand Bill of Rights Act and is supported by international and comparative case law". According to her, "the reasoning adopted by the majority in *Baigent's Case* … applies equally to acts of the judiciary. Attempts to distinguish *Baigent's Case* according to the ratio of the case are unconvincing and, in any event, arid".[124] She also considered that it had not "been found necessary in other comparable jurisdictions where the point has arisen to except judicial breaches from the remedy

[121] [2011] NZSC 110, [4].

[122] [2011] NZSC 110, [5].

[123] [2011] NZSC 110, [8].

[124] [2011] NZSC 110, [34].

of damages available against the state".[125] On the issue of judicial immunity, Elias C.J. emphasised that it is not engaged in the public law liability of the state for breaches of rights.[126] In her view, while it may be that the public interest in judicial immunity outweighs the public interest in effective remedy for breach of rights where the two conflict, there was no conflict here. Rather, what was being suggested was "a new immunity for the state, fashioned by reference to judicial immunity."[127]

Elias C.J. noted the conflicts of immunities with other important rule of law values, which causes immunities to be regarded with suspicion.[128] She felt that the "immunity" for the state which was being suggested in the present case is "in principle inconsistent with the rule of law", and she did not consider that such extension is necessary in the interests of the administration of justice. In her view, if "exemption from liability is unnecessary, then given the adverse impact on rule of law values in the vindication of rights, [it would not] conform with the Bill of Rights Act for such exemption to be created by act of the judicial branch of government…"[129] The logical conclusion of this is evident. Parliament refused to create an exemption; the judiciary ought not to create an exemption; therefore, an exemption is unwarranted.

Elias C.J. rejected arguments about the alleged negative impacts of state liability on judicial independence on account of the reality or perception of executive encroachment on the judicial function and a reluctance by judges to risk responsibility for public liability.[130] She took the view that the availability of a *Baigent* damages remedy against the state is not inconsistent with New Zealand's reservation to Art.14(6) of the ICCPR; a direct public law claim will not "ordinarily offer an

[125] [2011] NZSC 110, [37].

[126] [2011] NZSC 110, [55].

[127] [2011] NZSC 110, [56].

[128] [2011] NZSC 110, [57].

[129] [2011] NZSC 110, [58].

[130] [2011] NZSC 110, [64].

alternative means of challenging a conviction or a judicial decision", and the reservation to Art.14(6) "does not therefore inhibit the public law damages remedy recognised in *Baigent's Case*".[131] Objections based on the need to avoid collateral challenges of judicial determinations were dismissed as being "overblown", especially seeing that "the policy behind judicial immunity is seen, internationally at least, to be satisfied by the narrower objective of protecting judges from personal liability".[132] Furthermore, "A blanket exclusion for breach attributable to judicial action also overreaches because it prevents a claim for public law damages even if there is no collateral challenge to an existing determination."[133]

VI. UNDERENFORCEMENT AND CONSTRAINED ENFORCEMENT

Judicial attempts to restrict *Maharaj v Attorney-General of Trinidad and Tobago (No.2)* are not new, whether on the basis that it was based on a specific provision of the Constitution of Trinidad and Tobago, with no corresponding local provision,[134] or on the basis of institutional concerns similar to those relied upon by the majority in *Attorney-General v Chapman*.[135] *Maharaj* and *Chapman* represent respectively the high and low water marks of common law endorsement and rejection of state liability. The *Maharaj* court focused largely on analytical questions. In *Chapman*, only the dissents focused on such questions. The disagreement between the *Chapman* majority and dissenting opinions centres on the weight to be accorded to institutional concerns. This tension is not unusual when rights and remedies are being balanced against immunities, and the question for common law judges therefore is the proper location of its focus, ie, on the analytical/conceptual or on the institutional. *Maharaj* provides a narrow avenue of judicial redress, while *Chapman* guarantees a remedial shortfall.

[131] [2011] NZSC 110, [69].

[132] [2011] NZSC 110, [70].

[133] [2011] NZSC 110, [71].

[134] *Deighan v Ireland* [1995] 2 I.R. 56, 63.

[135] *Kemmy v Ireland* [2009] IEHC 178.

According to Woods, the *Chapman* majority used "a narrow approach to the interpretation of past precedent … to set up a blank slate upon which a fairly 'activist' case for the imposition of judicial immunity is made out".[136] In the context of protection of fundamental rights, increasingly recognised as rooted in the common law, this is problematic. There were references in *Chapman* to "the ex gratia scheme"[137] but even the Court recognised that such schemes do "not fill gaps left in the criminal justice system by the limits of available remedies".[138] Both ex gratia and statutory compensation schemes are problematic. While not generally providing legally enforceable rights, they exclude civil cases and are subject to executive discretions that may be exercised against the injured party. It has rightly been noted that is no good telling the victim "Well, you're out now. You should just be happy".[139] But in the absence of an effective remedy, this is precisely what the common law would be "telling the victim". When fundamental rights are at stake, any outcome that guarantees a remedial shortfall is objectionable.

Woods accepts the *Chapman* majority's approach as representing "a technically correct application of precedent" but says that "it remains unsatisfying because it leaves no room for deeper consideration of the principles upon which these cases rest".[140] According to her, "A more searching consideration of the underpinning of the *Baigent* understanding of public law compensation could have illuminated the policy and principles that should underlie the approach to infringements by the judicial branch of government too".[141] This may just be another way of saying that the majority did not focus sufficiently

[136] S. Woods, "Judicial immunity: State immunity?" [2012] N.Z.L.J. 6, 7.

[137] See eg, [2011] NZSC 110, [154], [158], [201].

[138] [2011] NZSC 110, [201]. See generally, R. Dioso-Villa, "'Out of Grace': Inequity in Post-exoneration Remedies for Wrongful Conviction" (2014) 37(1) U.N.S.W. L.J. 349.

[139] J. Robins, "Failed Justice" (2015) 179 J.P.N. 357, 358.

[140] Woods, "Judicial immunity: State immunity?" [2012] N.Z.L.J. 6, 7.

[141] Woods, "Judicial immunity: State immunity?" [2012] N.Z.L.J. 6, 7.

on analytical and conceptual questions. Sager spoke of the "indicia of underenforcement"[142], which include *inter alia* "a disparity between the scope of a federal judicial construct and that of plausible understandings of the constitutional concept from which it derives", and the use by judges of "frankly institutional explanations" for limiting a judicial construct. The *Chapman* decision is neither a statement about the meaning or conceptual limits of fundamental rights under the BORA, nor about the meaning and scope of core common law norms and values such as the rule of law or *ubi ius*. In short, it is a classic underenforcement approach.

It has already been suggested that the majority's approach in *Chapman* reflects the typical reasoning underlying rejection of state liability for judicial wrongs. To that extent, the criticisms here are not as much about *Chapman* as they are about patterns of judicial underenforcement in this area, for which *Chapman* is a proxy. The question whether these norms, principles or values are appropriate candidates for judicial underenforcement is not being addressed directly by the courts, which can hardly be blamed when the matter is not presented to them in such terms. Here, I do so present it. Perhaps the question posed when considering the irretrievably injurious consequences of judicial errors is wrong. The question arguably ought to be whether it is ever (and in what circumstances it is) appropriate to underenforce important common law norms and values such as protection of fundamental rights, the rule of law, and redress for injuries. I would submit that, while they may be appropriately constrained in certain circumstances, they are ill-suited for judicial underenforcement, not least because they are foundational to the common law.

The institutional considerations upon which *Chapman* and similar decisions are based are, with respect, laced with conjecture, and are comparable to the justifications for judicial immunity (which itself features among the proffered rationales for non-liability of the state) that have been thus described;

[142] Sager, "Fair Measure", (1977-1978) 91 Harvard L.R. 1212, 1218-1219.

> "… virtually all of the reasons that have been invoked in order to justify [judicial immunity] – at least in its near-absolute form – are either couched in obviously exaggerated terms (and therefore bogus), empirically ungrounded (and therefore dubious) or entirely spurious."[143]

There is no suggestion that there are inherent weaknesses in the common law that render common law systems especially vulnerable to floodgates or the like, or that common law jurisdictions are particularly litigious, or that common law judges are of diminished personal fortitude in comparison with civil law judges. Although *Maharaj* has been cited with approval, for example, in Canada, and in New Zealand before the Supreme Court's decision in *Chapman*, there is no indication that any common law jurisdiction has experienced floodgates of actions against the state in respect of judicial errors. Given that state liability is well established in civil law systems, in international law, in European Union law, and in European human rights jurisprudence, it is reasonable to expect that the fears of those rejecting state liability would have by now become observable in these systems.[144]

Institutional concerns cannot however simply be dismissed as irrelevant. They feature strongly in the *Köbler* jurisprudence on EU member state liability, supporting an exceptional liability with a high threshold. Institutional concerns have been used to support constraints on liability by applying the sufficiently serious breach test "in an especially strict manner in respect of judicial decisions".[145] According to Davies, "this means that the conditions for *Köbler* liability permit the theory of state unity to be balanced against other considerations", whereas "[t]his exercise does not occur in

[143] J. Murphy, "Rethinking tortious immunity for judicial acts" [2013] Legal Studies 455, 457.

[144] Wattel's feared "avalanche" of *Köbler* claims (P.J. Wattel, "Köbler, CILFIT and Welthgrove: We can't go on meeting like this" (2004) 41 C.M.L.Rev. 177, 180) does not appear to have materialised.

[145] A. Davies, "State liability for judicial decisions in European Union and international law" (2012) 61(3) I.C.L.Q., 585, 600.

international law where the conditions for state responsibility are the same for all state organs."[146] The ECtHR also accepted in *Ernst v Belgium*[147] that judicial immunity pursues a legitimate aim[148], and that immunities are not in themselves necessarily a "disproportionate limitation on the right of access to a court as enshrined in Art.6(1)" of the ECHR.[149] But it also emphasised that it has to judge the compatibility of immunities with the Convention by examining whether the affected parties had "reasonable alternative remedies available to protect their rights under the Convention effectively."[150] Significantly, the ECtHR held that a person whose claim arising from official action is barred by immunities does not suffer discrimination in violation of Art 14 ECHR (coupled with Art 6), as long as the right to bring a civil action against the state is retained.[151] Despite its recognition of judicial immunity as pursuing a legitimate aim, the ECtHR still came to the view that searches consequent upon judicially authorised search warrants were not proportionate to the legitimate aims pursued; thus there had been a violation of Article 10[152] and Article 8[153] of the ECHR, and awarded damages against Belgium. The ECtHR rejected in *McFarlane v Ireland*[154] some of the institutional concerns raised by common law courts;

> "[T]he Court considers, contrary to the High Court in the Kemmy case, that there is a relevant distinction to be drawn between the personal immunity from suit of judges and the liability of

[146] Davies, "State liability for judicial decisions in European Union and international law" (2012) 61(3) I.C.L.Q., 585, 600.

[147] (2004) 39 E.H.R.R. 35.

[148] (2004) 39 E.H.R.R. 35, [50].

[149] (2004) 39 E.H.R.R. 35, [52].

[150] (2004) 39 E.H.R.R. 35, [53]; *Waite and Kennedy v Germany* (2000) 30 E.H.R.R. 261, [68].

[151] *Ernst v Belgium* (2004) 39 E.H.R.R. 35, [85].

[152] (2004) 39 E.H.R.R. 35, [104]-[105].

[153] (2004) 39 E.H.R.R. 35, [116]-[117].

[154] (2011) 52 E.H.R.R. 20, [121].

> the state to compensate an individual for blameworthy [injurious conduct] attributable in whole or in part to judges."

It was held that there had been a breach of Art.6 of the ECHR due to the excessive length of the criminal proceedings against the applicant, partly caused by the failure of a judge to deliver judgment within a reasonable time, that (because of judicial immunity) Irish law did not provide "effective remedies available to the applicant in theory and in practice at the relevant time"[155], and that there was therefore also a breach of Art.13 of the ECHR. These findings resulted in damages being awarded against Ireland.

The foregoing reveals that the norms that mandate redress for violations of rights, including judicially occasioned violations, are enforced in international law, and under the ECHR, with the state as the responsible party. Institutional concerns led the CJEU to accept constraints on state liability, but not to deny it. A similar observation can be made in respect of *Maharaj* decision, the ECtHR, and the *Chapman* minority. Thus institutional concerns are not necessarily fatal to state liability, and should not be accorded undue weight. But the reasoning underlying the *Chapman* majority approach appears to give the institutional concerns an almost decisive effect. Sager spoke of a partnership between the judiciary and the other branches of government, and, of judicial "deference". But the other branches seem to defer to the judiciary here. When government (or legislature) has deferred to the judiciary (the ultimate protector of individual rights) it is unsatisfactory for the judiciary to focus on its own institutional concerns, especially where a less defensive response will neither bring it into conflict with the other branches, nor take it beyond its proper institutional role.

The approach of the Supreme Court of Canada to the provision of remedies for violations of the Canadian Charter are of significant interest. In *R v 974649 Ontario Inc*., McLachlin C.J. pointed out that "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its

[155] (2011) 52 E.H.R.R. 20, [128]-[129].

breach".[156] Iacobucci and Arbour JJ. explained in *Doucet-Boudreau v Nova Scotia (Minister of Education)* that;

> "A purposive approach to remedies in a Charter context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft *responsive* remedies. Second, the purpose of the remedies provision must be promoted: courts must craft *effective* remedies."[157]

This, with respect, is a laudable approach which other courts could properly follow, even when the rights violations come from the judicial branch. This is not judicial activism. Rather, it simply represents appropriate recognition of core common law values and norms.

It has rightly been noted that "[c]itizens do not expect to suffer harm as a consequence of unlawful action by the courts"[158], and that injustice "undoubtedly brings about a number of social harms."[159] The question whether anyone should pay for judicial wrongs partly engages what has been described as "the age old question: who judges the judges?"[160] Denials of remedies for injurious violations of rights resulting from judicial action has been described as frustrating community and societal

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[156] [2001] 3 S.C.R. 575; 2001 S.C.C. 81, [20].

[157] [2003] 3 S.C.R. 3; 2003 S.C.C. 62, [25] (emphasis supplied).

[158] B.V. Harris, "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier?" (2008) N.Z.L.Rev. 483, 485.

[159] S. Poyser and R. Milne, "No grounds for complacency and plenty for continued vigilance: miscarriages of justice as drivers for research on reforming the investigative interviewing process" [2015] Police Journal, 265.

[160] G. Illingworth, "The Judicial Conduct Commissioner" [2011] N.Z.L.J. 35, 37.

expectations,[161] and as undermining the rule of law and the principle of equality before the law.[162] Whether or not one agrees with the former, the latter is arguably correct. The idea of state unity is established in international law and increasingly in regional courts. States cannot hide behind their individual branches such that they can escape liability for the injurious exercise of their sovereign power. For example, in *Rudisa Beverages & Juices NV and another v State of Guyana*, an attempt by Guyana to escape liability by pointing to the alleged failures of the legislature to implement the executive's will to comply with treaty obligations was rightly rejected by the Caribbean Court of Justice because "[w]hile democratic power is housed in the different arms of the State, the State itself is indivisible … a breach committed by any of the branches of the State engages the responsibility of the State as a whole".[163]

VII. CONTROL MECHANISMS

I accept that state liability cannot be at large, and that some control mechanisms are required. First, the injurious judicial error must first have been overturned on appeal/review. Next for consideration is the kinds of judicial error that may be suitable candidates for state liability. Are all errors the same? The answer is obviously "no". A judicial error may consist of a court answering a question of fact or law wrongly. A jury may wrongfully convict a defendant. Judges may exceed their jurisdiction either in hearing a case or in its disposition. There may be a violation of a constitutional right. Is it appropriate to treat a simple error of fact or law in the same way as a violation of a constitutional right? Intuitively, the answer to this question may appear to be "no", especially seeing that *Maharaj v Attorney-General of Trinidad and Tobago (No.2)* itself is concerned with constitutional rights.

[161] B.V. Harris, "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier?" (2008) N.Z.L.Rev. 483, 483-485.

[162] B.V. Harris, "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier?" (2008) N.Z.L.Rev. 483, 501-502.

[163] [2014] C.C.J. 1 (OJ); (2014) 84 W.I.R. 217, [17].

However, simple errors of fact or law, if not caught and corrected in time, have as much potential to cause irreparable damage as violations of constitutional rights. Therefore, the answer to the question "which kinds of error are the focus?" is that any error that has not yet caused *irreparable* loss, damage or injury is excluded. Thus, any error that can be and has been cured by appellate or other review before any loss or damage has occurred is excluded. Lord Hailsham (dissenting) noted in *Maharaj*[164] that "judicial error is not a tort". If by this he meant that a judicial error should not, *by itself*, provide a valid cause of action for compensation, then I would respectfully adopt that view. In the context of state liability as a residual remedy for judicial errors, it might even be extended to constitutional violations and denials of fair hearing (although it is arguable in other contexts that these ought to be actionable *per se*) because a successful appeal or application for judicial review might well constitute an appropriate and "effective" remedy.

Clearly, a remedy need not be compensatory/financial to be "effective". Reputations, for example, can be salvaged or restored by quashing of convictions, extraditions can be halted by vacation of decisions tainted by bias, etc. The real focus is on situations wherein the error concerned *has already* caused loss, damage or injury *that cannot be undone*. This was the situation in *Maharaj*, wherein Lord Diplock stated that it is "only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the *consequences of the judgment or order* cannot be put right on appeal to an appellate court".[165] This is one of the two constraints imposed in *Maharaj*, the second being that the *types of judicial error* that would amount to a contravention of the right to due process are procedural errors that amount to a failure to observe one of the fundamental rules of natural justice.[166] The first constraint relates to *consequences*, while the second relates to the *category* of error. Both constraints were probably appropriate for *Maharaj* given the constitutional right at issue; but the first needs to be moderated as a general principle. For example, a litigant in a civil case can lose much

[164] [1979] A.C. 385, 405.

[165] [1979] A.C. 385, 399 (emphasis added).

[166] [1979] A.C. 385, 399 (emphasis added).

from the judgment of a biased court. If the disqualifying factor emerges after passage of time, it may have become impossible to recover the situation. Property may already have been demolished. Commercial deals may already have been lost. Businesses may already have been bankrupted. A deportee may already have met his doom. An aspirant to political office who lost an election petition in an apex court that sat with disqualified judges may have suffered irreparable loss from what would have been at best, an unfair hearing, and, at worst, a miscarriage of justice. Subsequent vacations of the tainted judgments would not, by themselves, constitute adequate or effective redress, because they would not have addressed the *consequences* of the judicial error. In view of the typical inapplicability of statutory compensation schemes to civil suits, and of the principles of judicial immunity, the responses of some domestic common law courts would result in a remedial shortfall. Thus, the appropriate focus for the control mechanisms, it is submitted, lies in the consequences of judicial error. This argument applies equally to civil and criminal cases.

The proposition that, for the purposes of common law state liability, the judicial act must have caused irreparable damage, loss, or injury is hard to fault. The difficulty lies in the second *Maharaj* constraint – the *types of judicial error*. If it is accepted that all kinds of error have the potential to cause irreparable injury, then it must also be that the emphasis should not be on the category of error. Therefore, if irreparable injury results from judicial error, it should not matter what kind of error caused that injury. For this purpose, the second constraint of *Maharaj* may also need to be moderated as a general principle. The category of judicial error should arguably play only a secondary role (if at all), because the requirement of irreparable loss/injury/damage already suffered may itself be a sufficient constraint and control factor. While this takes matters beyond *Maharaj*, it is still considerably constrained. It is doubtful that this approach would result in more cases than *Maharaj* has generated, meaning that it would not open any floodgates. At the same time, it would address the problem of remedial shortfalls, thereby appropriately enforcing *ubi ius*.

A related question concerns the *category of rights*. Is liberty more important than, say, property rights, financial fortune, reputation, privacy, or fair hearing? Is it appropriate to treat common law rights in

the same way as rights under the ECHR, the BORA, or the Canadian (or any other) Charter of Rights? Should these be treated the same way as rights under the Constitution of Trinidad and Tobago? Again, the intuitive answer may appear to be "no". However, it cannot seriously be argued that common law rights are not "constitutional" rights, seeing that many of the rights declared in rights bills pre-existed and had their origins in the common law. Without prejudice to this or other relevant arguments I would contend that, again, the pertinent question relates to the consequences of the judicial error. If the proposition is accepted that the appropriate focus for control factors lies in the consequences of judicial error, then the issue is not the *specie* or *source* of the contravened right or even the civil/criminal nature of the proceedings.

Legislatures may sometimes wish to impose control mechanisms in specific situations. Where legislation which is valid under the applicable hierarchy of norms covers a specific field, it may be that the courts ought to defer to the legislature. That would certainly be the case in the UK now; but the day may come when common law constitutionalism prevails and the most important common law norms and values will take precedence. Where the source of the right is constitutional legislation of some sort, there is a stronger case to adhere to any control mechanism clearly embedded in that legislation, and there may be no need to rely on wider common law values, although it is arguable that such strict adherence ought only to apply to rights that are created (not just declared) by that legislation. Where the legislation imposes no control mechanism, courts should consider the rights against the background of the core common law values. In such cases there is no compelling reason to not accord top priority to *ubi ius* and the rule of law.

VIII. CONCLUSION

The maxim *ubi ius ibi remedium* represents an ancient common law norm, rightly described as "fundamental" to the rule of law,[167] itself arguably *the* core common law value. Both are threatened

[167] Elias C.J. (dissenting) in *Attorney-General v Chapman* [2011] NZSC 110, [1].

when rights violations emanate from the judicial branch. Statutory compensation schemes are severely limited in scope, are (like ex gratia schemes) subject to executive discretions, and leave significant scope for a "remedial shortfall". For injured parties to be solely dependent upon such schemes is "unfortunate".[168] Such schemes would best be treated as minima, rather than the apex of the redress process. Given the principles of judicial immunity, state liability perhaps represents the last legal remedy. *Maharaj v Attorney-General of Trinidad and Tobago (No.2)*, among others, provides a viable model for such liability. *Maharaj* imposed two constraints. Both were justified in the context of the case itself. But here I would modify *Maharaj* by eliding the second constraint. My focus is on the consequences of judicial error rather than the nature or source of the rights at issue, or the category of judicial error. The targeted mischief is a "remedial shortfall" in cases of irretrievably injurious judicial error. Such a modified *Maharaj* liability is, it is submitted, a suitable antidote. This liability should be available in both civil and criminal cases.

Common law rejections of state liability can be illuminated though not justified by underenforcement theory. When there exists any feasible model for providing effective redress, it is wrong to accord the state an unnecessary immunity, such that injured parties bear their own loss. In jurisdictions that do not have an entrenched bill of rights and/or that subscribe to the idea of legislative supremacy, it may well be that clear legislation could provide the necessary justification for judicial underenforcement of core common law values and norms, thereby preventing the courts from holding the state (and hence anyone) legally accountable for judicial wrongs. This is contestable.[169] But when there is no clear, specific, and inescapable statutory impediment, the underenforcement propensities discussed above are indefensible, and should be abandoned. At the very least, a modified *Maharaj*-style primary state liability, transcending ex gratia or statutory schemes targeted at narrowly-defined notions of "miscarriage of justice", ought to be embraced. This would go some way towards better compliance with rule of law values and would represent appropriate recognition of important common law norms.

[168] Lord Hope in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [74].

[169] See eg, Baroness Hale in *Jackson v AG* [2005] UKHL 56, [159].

Such a step could serve as a launch pad for subsequent developments in the common law; and such developments are essential. Sir John Laws has referred to "the common law's process of continued self-correction".[170] Such a process would be welcome in this area.

[170] John Laws, *The Common Law Constitution*, 9, 12.