
Rethinking Judicial Responsibility: The Case of Judicial Persecution

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*Il n'y a point de plus cruelle tyrannie que celle que l'on
exerce à l'ombre des lois et avec les couleurs de la justice.*

*There is no crueller tyranny than that which is perpetuated
under the shield of law and in the name of justice.*

Montesquieu
Considérations sur les causes de la grandeur des Romains (1734)

Abstract

This thesis endeavours to develop a model of judicial responsibility in cases where legal proceedings are instrumentalised in a manner or for purposes tantamount to persecution. The phenomenon of 'judicial persecution' is situated in the broader literature of judicial instrumentalisation, including political trials, the judicialisation of politics, and lawfare. The thesis suggests that persecutory proceedings are a particularly significant stress test for judges, one that forces them to confront the possibility of their complicity in profound injustice. The first Part of the thesis posits that certain types of abuse of process – apartheid South Africa, strategic lawsuits against public participation (SLAPPs), and the political trials revealed by the jurisprudence under Article 18 of the European Convention on Human Rights – represent paradigmatic instances of judicial persecution. While the role of judges in such proceedings has been generally underexplored, this thesis argues that those explanations that have been offered, such as judicial impotence in the face of legal obligation, have failed both to address the gravity of judicial persecution and the full scope of judicial function. The second Part uses detailed studies of judicial ethics and judicial doctrine to develop a model of judicial responsibility along three axes: the rule of law, the responsibility to the polity, and the protection of the judicial institution.

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Ce projet vise à développer un modèle de responsabilité pour les juges impliqués dans des abus de procédure relevant de la persécution. Le phénomène de la 'persécution judiciaire' est contextualisé au sein des débats plus vastes sur l'instrumentalisation des systèmes de justice. Cette thèse soutient que la persécution judiciaire confronte les juges à la possibilité de leur propre complicité dans des situations d'injustice profonde. Dans la première partie, plusieurs cas d'abus de droit et de procédure – l'Afrique du Sud à l'époque de l'apartheid, les poursuites-bâillons, et les procès politiques dans la jurisprudence de l'article 18 de la Convention européenne sur les droits de l'homme – sont présentés comme des cas paradigmatiques de persécution judiciaire. La complicité des juges dans cette persécution est une question généralement sous-

explorée, mais dans les cas où la question a été soulevée, les explications offertes à date, comme celles invoquant une impuissance face aux exigences de la loi, ne reflètent ni la gravité du phénomène ni la portée de la fonction judiciaire. Ainsi, dans la deuxième partie, la thèse s'efforce de développer un modèle de responsabilité judiciaire qui répond adéquatement au défi de la persécution judiciaire. En entreprenant une étude détaillée de la déontologie professionnelle des juges et la doctrine juridique, un modèle de responsabilité se révèle selon trois axes: la protection de la primauté du droit, la constitution politique, et la protection de l'institution judiciaire.

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Introduction: Judges and Judicial Persecution

On December 5th 2018, Chinese business executive Meng Wanzhou was arrested by Canadian authorities as she was changing planes at Vancouver International Airport.¹ Ms. Meng was arrested at the request of American prosecutors, who seek her extradition on a number of charges that have been filed against her and her company, technology giant Huawei.² Chinese authorities alleged that the charges against Ms. Meng are “unfair and immoral” and the result of “strong political motivation and political manipulation”.³

Within days of Ms. Meng being detained in Vancouver, two Canadians, Michael Kovrig and Michael Spavor, were arrested in China on suspicion of “endangering national security”,⁴ and would subsequently be charged with espionage.⁵ On January 14 2019, Canadian national Robert Schellenberg, who had appealed a 15-year sentence for drug trafficking, was swiftly re-tried and sentenced to death, in a move widely regarded as political retribution for Ms. Meng’s arrest, leading Canadian Prime Minister Justin Trudeau to express concern that China “had chosen to begin to arbitrarily apply the death penalty”.⁶ Within hours of the death sentence being pronounced, Canada issued a travel advisory for its nationals to “exercise a high degree of caution in China due to the

¹ Robert Fife and Steven Chase, “Canada arrests Huawei’s global chief financial officer in Vancouver”, *Globe & Mail* (5 December 2018), online: <https://www.theglobeandmail.com/canada/article-canada-has-arrested-huaweis-global-chief-financial-officer-in/>.

² “US files charges against China's Huawei and CFO Meng Wanzhou”, BBC News (29 January 2019), online: <https://www.bbc.com/news/world-us-canada-47036515>.

³ Jon Swaine and Justin McCurry, “Huawei: China calls US charges 'immoral' as markets slide”, *The Guardian* (29 January 2019), online: <https://www.theguardian.com/technology/2019/jan/28/huawei-china-telecoms-charged-us-trade-secrets-fraud>. See additional relevant comments by Chinese officials in Berlinger, *infra* note 4.

⁴ Joshua Berlinger, “Second Canadian detained in China as diplomatic spat intensifies”, *CNN* (13 December 2018), online: <https://www.cnn.com/2018/12/12/asia/canada-china-spavor-intl/index.html>.

⁵ Leyland Cecco, “Canadians detained in China accused of espionage”, *The Guardian* (16 May 2019), online: <https://www.theguardian.com/world/2019/may/16/canadians-detained-in-china-charged-with-espionage>.

⁶ Nathan Vanderklippe, “Trudeau says China acting ‘arbitrarily’ as Canadian sentenced to death on drug charges”, *Globe & Mail* (14 January 2019), online: <https://www.theglobeandmail.com/world/article-chinese-court-sentences-canadian-to-death-on-drug-charges/>.

risk of arbitrary enforcement of local laws.”⁷ On January 25, Canada’s ambassador to China John McCallum resigned, after suggesting that Ms. Meng might have a strong argument against extradition, including political interference by US President Donald Trump in the extradition process.⁸ In commenting on Ambassador McCallum’s departure, Foreign Affairs Minister Chrystia Freeland said that he had failed to accurately express the government’s position,⁹ namely that Canada is a country governed by the rule of law and, thus, Ms. Meng’s extradition would be entirely decided by an independent judicial process.¹⁰

There are many layers to this ongoing dispute between Canada, the United States, and China, and it is tremendously difficult to tease out the discrete legal issues from their diplomatic context. In a kind of performative legality, justice officials in all three countries take nominally legal steps, and insist that the outcomes of legal proceedings are dictated by legal considerations alone. In each state, relevant actors have behaved in ways that call that insistence into question, and there appears to be some disagreement between the three states as to the relative importance and meaning of the rule of law. Whether triggered by specific actions or comments, or a generalised lack of faith in the rule of law, there is widespread distrust, a sense that what are being portrayed as ordinary legal proceedings are, in fact, thinly disguised geopolitical machinations. Put

⁷ Government of Canada, “Travel Advice and Advisories – China”, online: <https://travel.gc.ca/destinations/china>.

⁸ John Paul Tasker, “Canada’s ambassador to China says Meng has strong defence to fight extradition”, *CBC News* (23 January 2019), online: <https://www.cbc.ca/news/politics/mccallum-meng-huawei-china-1.4989235>. McCallum was, presumably, referring to comments made by the US President that implied that Ms. Meng’s extradition could be used as a bargaining chip in US-China trade negotiations: Betsy Klein and Ben Westcott, “Trump expresses openness to using Huawei CFO as bargaining chip in China trade talks”, *CNN* (12 December 2018), online: <https://www.cnn.com/2018/12/11/politics/trump-china-huawei-cfo/index.html>.

⁹ Cillian O’Brien, “Freeland: McCallum’s comments ‘inconsistent with the Government of Canada’”, *CTV News* (28 January 2019), online: <https://www.ctvnews.ca/politics/freeland-mccallum-s-comments-inconsistent-with-the-government-of-canada-1.4272353>.

¹⁰ In a remarkable stroke of bad timing, questions would be raised about the independence of the Canadian judicial system by allegations of political interference in the decision to prosecute SNC-Lavalin: Robert Fife et al, “PMO pressed Wilson-Raybould to abandon prosecution of SNC-Lavalin; Trudeau denies his office ‘directed’ her”, *Globe & Mail* (7 February 2019), online: <https://www.theglobeandmail.com/politics/article-pmo-pressed-justice-minister-to-abandon-prosecution-of-snc-lavalin/>. Interestingly, however, it seems that any efforts to interfere were unsuccessful, given that the Director of Public Prosecutions had chosen to prosecute SNC-Lavalin, and neither the former nor the current Attorney-General has intervened to halt the prosecution.

another way, the Huawei affair has evoked suspicion that some or all of the legal proceedings at issue are being instrumentalised for ulterior or improper purposes.

This kind of suspicion is endemic in the world today. Barely a day goes by without a news item appearing about a legal case being threatened or brought against an economic or political competitor or critic, often as one dimension of a multi-faceted contest. In January 2019, at the same time that Canada was trying to navigate the Meng Wanzhou affair, two different men, Nicolás Maduro and Juan Guaidó, declared themselves to be the rightful president of Venezuela; amid the chaos, the Maduro-appointed Attorney-General ordered an investigation of Juan Guaidó for “crimes that threaten the constitutional order” and obtained judicial orders freezing his assets.¹¹ In November 2018, both Filipino news website Rappler and its editor, Maria Ressa, were charged with tax evasion, one of many recent actions taken against news organisations seen as critical of the regime.¹² In the same month, Spanish authorities confirmed that they intended to pursue charges of rebellion and misuse of public funds against the leaders of the Catalan independence movement.¹³ And in response to her arrest on February 13, 2019 on charges of “cyber-libel”, Maria Ressa said that the charges were about “abuse of power, and weaponization of the law.”¹⁴

¹¹ Joe Parkin Daniels and Patricia Torres, “Venezuela court freezes Juan Guaidó's bank accounts and imposes travel ban”, *The Guardian* (30 January 2019), online: <https://www.theguardian.com/world/2019/jan/29/venezuela-juan-guaido-tarek-saab-investigation>. On 28 March, the Maduro government announced that Guaidó was banned from holding office for 15 years due to “financial irregularities”: “Venezuelan government bars opposition leader Juan Guaido from public office for 15 years”, *CBC News* (28 March 2019), online: <https://www.cbc.ca/news/world/venezuela-guaido-ban-office-1.5075488>. This announcement came a week after Guaidó's chief of staff was arrested, purportedly for being involved with a terrorist plot against government officials: “Juan Guaido aide accused of being part of 'terrorist cell' by Venezuelan government”, *CBC News* (21 March 2019), online: <https://www.cbc.ca/news/world/guaido-marrero-arrest-venezuela-1.5065469>.

¹² Hannah Ellis-Petersen, “Philippines journalist Maria Ressa vows to challenge tax fraud charges after arrest”, *The Guardian* (3 December 2018), online: <https://www.theguardian.com/world/2018/dec/03/philippines-journalist-maria-ressa-turn-herself-in-police-warrant-rappler>. These echo charges levelled 15 years earlier against Russian opposition leader Mikhail Khodorkovskiy and his company, Yukos, which will be discussed in some detail in chapter 5.

¹³ Stephen Burgen, “Catalan politicians charged a year after independence vote”, *The Guardian* (2 November 2018), online: <https://www.theguardian.com/world/2018/nov/02/catalan-politicians-charged-a-year-after-independence-vote-referendum>.

¹⁴ Natashya Gutierrez and David Gilbert, “Duterte Just Escalated his Assault on Freedom of Speech in the Philippines” *Vice News* (14 February 2019), online:

These are but a few of the most high-profile cases reported just in early 2019. They differ from each other in significant respects, but this thesis will focus on what they have in common: the perceived instrumentalisation of legal and judicial processes for the purpose of harassing, marginalising, or otherwise ruining political or economic rivals. This thesis suggests that cases such as these could be usefully grouped together as possible instances of what it terms ‘judicial persecution’; a new term of art that can encompass a broad range of cases in which law and legal processes are coopted for unjust ends.

Defining Judicial Persecution

Judicial persecution can include participation in the legitimisation of an unjust system, such as the apartheid system created and brutally enforced in South Africa in the second half of the 20th century, typifying what David Dyzenhaus has called a “wicked legal system”.¹⁵ But judicial persecution can also be the misuse of a perfectly sound legal system, such as the proliferation of strategic lawsuits against public participation (SLAPPs) within some of the most respected civil court systems in the world. Or it may arise in systems in transition, or of uncertain quality, such as the allegations levelled by Yulia Tymoshenko, Mikhail Khodorkovskiy and others, particularly in Eastern Europe, that their prosecution and imprisonment are politically motivated.¹⁶ Persecution, like other crimes, can be committed in a variety of settings, for a variety of reasons, and in a variety of ways. Persecution, in both the ordinary and legal senses of the word, can be, and often is, committed through court processes and judicial persecution is no less

https://news.vice.com/en_us/article/9kpqbz/duterte-just-escalated-his-assault-on-freedom-of-speech-in-the-philippines.

¹⁵ See, for example, David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy*, *infra* note 29.

¹⁶ Indeed, very recently, Oyub Titiyev, a Chechen human rights activist known for documenting killings, disappearances, and torture, was sentenced to four years for drug possession, charges that were, in the views of one observer, deliberately chosen “to smear a devout Muslim man”. Oliver Carroll, “Oyub Titiyev: Chechen rights activist receives four-year jail term in ‘sham trial’”, *The Independent* (18 March 2019), online: <https://www.independent.co.uk/news/world/europe/oyub-titiyev-chechnya-rights-activist-russia-trial-jail-muslim-a8828691.html>. Similarly, a charge of attempted drug trafficking against a Russian investigative journalist, Ivan Golunov, has been criticised as false and persecutory: “Ivan Golunov: Russian anti-corruption journalist charged with drug dealing” *BBC News* (8 June 2019), online: <https://www.bbc.com/news/world-europe-48566028>.

pernicious than other forms of persecution.¹⁷ Indeed, there is a degree to which persecution is more problematic in the judicial arena, with potentially devastating impacts not only on the target, but also on the rule of law, the polity, and the judicial institution itself.

This thesis thus situates itself within the wider phenomena, and literature, of what might be called ‘judicial instrumentalisation’, in which judicial processes are understood to be a means to an end. Theorists have agonised about the degree to which law and legal processes are instrumental,¹⁸ but this thesis concerns itself only with a subset of cases in which the dynamics or consequences of a legal proceeding rise to the level of persecution. These are cases in which the legal, political, and institutional toll is such that questions of judicial ethics and judicial responsibility are rendered unavoidable. Such cases place judges in a context in which there is a clash of legal obligations: to apply a discriminatory law or preside over a suspect legal proceeding, on the one hand, and to avoid committing or being complicit in persecution, on the other. In short, judicial persecution is a sort of ‘stress test’ for judicial normativity.

Persecution is one of the least precisely defined concepts in law, despite being foundational to refugee law,¹⁹ as well as an enumerated type of crime against humanity

¹⁷ In condemning the Nazi judge Oswald Rothaug in the so-called “Justice Case”, a prosecution that focused on the legal activities of the Third Reich, the International Military Tribunal noted that “[Rothaug’s] acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found those institutions turned against them and a part of the program of terror and oppression.” International Military Tribunal, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume III: “The Justice Case”*, (Washington, DC: US Govt Print Off, 1949) at 1156 [Justice Case].

¹⁸ These debates will be canvassed in chapter 1, *infra* at section 1.1.

¹⁹ In the Refugee Convention, a refugee is defined, in part, as a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (Article 1.A(2)): *Convention and Protocol on the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [Refugee Convention]. There is no definition of “persecution” in the Refugee Convention, a fact acknowledged by the Handbook issued by the UN High Commissioner for Refugees (*Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, (Geneva, 1992):

51. There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a

in international criminal law.²⁰ In plain English, persecution is defined as “hostility and ill-treatment, especially because of race or political or religious beliefs” and in that sense, is synonymous with oppression.²¹ In a weaker sense, it is also equated with “persistent annoyance or harassment”.²² In law, there appears to be some consensus that persecution comprises (i) a deprivation of rights; (ii) of some severity and persistence; (iii) targeted on discriminatory grounds, usually perceived political, racial, or religious affiliation.²³

Whether under the ordinary or legal meaning of persecution, in instances of judicial persecution the legal proceeding itself is the vehicle through which the target is deprived of rights or harassed for reasons at least partially unrelated to the formal allegations, often grounded in racial or religious or political discrimination. As will become evident, the selected case studies in this thesis often possess a decidedly political orientation, in the sense that the proponents of the legal proceedings endeavour to consolidate or amplify socio-economic power; but the idea of persecution allows for the conceptual inclusion of cases in which political motives are less clear or where the antipathies of the proponent toward the target might be varied or plural. For example, in apartheid South Africa, persecution was initially grounded in racial discrimination, but came to include attacks on political opponents.

particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution. ...

²⁰ See, for example, Article 7(1)(h) of the *Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) [ICC Statute]. The elements of persecution as a crime against humanity include the severe deprivation of one or more fundamental rights “by reason of the identity of a group or collectivity” on political, racial, national, ethnic, cultural, religious, gender or other impermissible grounds: *Elements of Crimes*, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (United Nations publication), Part II.B, online at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/o/ElementsOfCrimesEng.pdf>.

²¹ According to www.oxforddictionaries.com.

²² *Ibid.*

²³ See, for example, Michael English, “Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law (Comment)” (2007) 60 Okla L Rev 109 at 119-122. This is consistent with the International Criminal Court’s definition of the crime against humanity of persecution, *supra* note 20. It is also consistent with customary international law: Robert Dubler & Matthew Kalyk, *Crimes against Humanity under Customary International Law and the ICC: The Underlying Crimes* (Leiden: Brill Nijhoff, 2018) at 884-885.

As for the qualifier ‘judicial’, it is admittedly ambiguous, implying that the persecution might be directed *at* judges, rather than perpetrated *by* judges, as it is intended here. Indeed, judicial persecution as it is described here might be understood to be persecution committed *through* judges and judicial mechanisms, in other words, ‘juridical’ or ‘judicative’, even though it is not unimaginable that judges might in turn be victims of the phenomenon. But while the primary and initial intent to persecute might lie elsewhere, this thesis refuses to perceive judges as mere vessels, and instead focuses specifically on the agency of judges in these situations. This agency implies an ongoing personal responsibility (which, in extreme circumstances, could translate into personal liability) that must be understood within a broader framework of judicial responsibility.

The phenomenon of judicial persecution, as defined here, bears a close conceptual relationship with political trials, and draws heavily on that literature. Some of the most poignant observations of leading early theorists of political trials, particularly Otto Kirchheimer and Judith Shklar, note the apparent wilful blindness of those operating within the legal system to the politics of the courtroom.²⁴ While it is important for courts to remain independent and grounded in the rule of law, an excess of what Shklar terms “legalism” can arguably have paradoxically damaging effects on the rule of law, the judicial institution, and the polity. In cases of judicial persecution, judges have an unavoidable obligation to be conscious of these effects and to take them into consideration in their adjudication. In this respect, ‘judicial persecution’ is an artifice, while still being descriptive of a real phenomenon.

This thesis does not propose a judicial theory of political trials, or other forms of politicisation of law, judicialisation of politics, or judicial instrumentalism writ large, although the existence and prevalence of these phenomena provide important context for this research. Chapter 1 serves to situate judicial persecution within this broader context, and canvasses the literature pertaining to these phenomena as a first source in defining the problem. By focusing on a subset of these phenomena, cases of

²⁴ Their master works on this subject, which remain highly influential, are Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961); and Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964).

instrumentalisation tantamount to persecution, circumstances are identified in which courts will bear a heightened degree of moral, political, and institutional responsibility. By defining and situating the problem of judicial persecution, this chapter sets the stage for a political theory of judicial actors that recognises the place of judges within the socio-legal system. This thesis uses the lens of judicial persecution to consider the position of the judge in cases of judicial persecution, situations in which judicial passivity or adherence to strict legalism can be tantamount to complicity.

Judges and Complicity

The question of how judges should respond to the problem of complicity with extralegal purposes has long fascinated legal and political theorists. The question of the approach that judges should have taken in the so-called Nazi informer case is the *cause célèbre* within the Hart-Fuller debate on the nature of law.²⁵ Ingo Müller has chronicled the activities and fate of judges of the Third Reich in *Hitler's Justice*.²⁶ Writing shortly after the end of World War II, Gustav Radbruch decried the utter failure of German judges and lawyers to offer any resistance to the Nazis purporting to implement their agenda, at least in part, through legal means.²⁷ In a similar vein, Robert Cover wrote about abolitionist judges enforcing fugitive slave statutes in the United States in *Justice Accused*.²⁸ David Dyzenhaus has written about the judges of apartheid South Africa both contemporaneously²⁹ and in the post-apartheid period.³⁰

²⁵ This famous debate, which continued into subsequent publications by these authors and others, has its origins in a pair of articles published in the Harvard Law Review in 1958: HLA Hart, "Positivism and the Separation of Law and Morals", (1958) 71(4) Harv L Rev 593 and Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", (1958) 71(4) Harv L Rev 630.

²⁶ Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, translated by Deborah Lucas Schneider, (Cambridge, MA: Harvard University Press, 1991).

²⁷ Gustav Radbruch, "Five Minutes of Legal Philosophy (1945)" and "Statutory Lawlessness and Supra-Statutory Law (1946)", both translated by Bonnie Litschewski Paulson and Stanley Paulson, (2006) 26(1) Oxf J of Leg Studies 13-15, 1-11.

²⁸ Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

²⁹ David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991) [*Hard Cases* (1991)].

³⁰ *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010) [*Hard Cases* (2010)].

These writings, and many more,³¹ offer rich descriptive accounts of how judges come to be complicit in the most serious violations of human dignity: systematic racial discrimination, persecution, crimes against humanity, genocide. Some of these accounts provide at least some justification for the actions of the judges in question – most notably Robert Cover’s defence of the abolitionist judges who privileged their perceived institutional duty to apply the law to their personal moral abhorrence – but most condemn them. A few, most notably Gustav Radbruch, Lon Fuller, and David Dyzenhaus, propose theories of law that, had they been preferred by the judges at the relevant time, might have prescribed a different, and better, set of moral choices.

Theories of what should be the proper judicial course in the face of attempts at instrumentalising the judiciary for persecutory ends can be broadly grouped into two categories. The first category includes those theories in which moral dilemmas are to be resolved either through law or within the definition of law; such theories tend to ascribe to the law some minimal necessary moral content. David Dyzenhaus, for example, proposes that common law presumptions of liberty and equality should have influenced South African judges to push back against the enforcement of many apartheid laws and the proliferation of arbitrary detention.³² Gustav Radbruch urged that there came a point of injustice at which a law, valid on its face, would cease to have the binding effect of law.³³ The second category differs from the first as it suggests that the morally correct course of action lies outside the law. HLA Hart, for example, rejects Radbruch’s approach; in his view, law can be boundlessly evil and still be law, and if there comes a point at which morality compels disobedience, Hart believed that such a choice is not a legal one, but a personal one.³⁴ Of course not all theories of judicial action are centred around law, but any actionable theory must account for the central role that law plays in

³¹ An excellent recent comparative volume is Hans Petter Graver, *Judges Against Justice: On Judges when the Rule of Law is Under Attack* (Heidelberg: Springer-Verlag, 2015).

³² Dyzenhaus, *Hard Cases* (1991) and *Hard Cases* (2010). See also Douglas E Edlin, *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: University of Michigan Press, 2008). Edlin too reframes the dilemma as one between competing legal obligations.

³³ This is the essence of the so-called “Radbruch Formula” set out in Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law”, *supra* note 27 at 7. Radbruch’s approach will be discussed in greater detail in chapter 5, section 5.6.

³⁴ Hart, *supra* note 25 at 626. Hart’s views will also be canvassed in greater detail in chapter 5, section 5.6.

defining and delimiting the scope of judicial action. Upholding the rule of law lies at the core of judicial responsibility.

Discerning the Judicial Perspective

While the literature in this area is theoretically rich, there remain significant gaps, the most glaring of which is the judicial perspective itself. For any number of reasons, there is a dearth of commentary from judges themselves on how to address 'judicial persecution'. Judges, in general, let their judgments speak for themselves unless they are somehow called to account and, in large measure, have avoided responsibility for their role in persecution. On the rare occasions when judges have stood accused of atrocity, most famously during the Justice Case at the International Military Tribunal at Nuremberg and at the Legal Hearing of the South African Truth and Reconciliation Commission, they have remained relatively silent or have suggested that their scope of action was limited.³⁵

This thesis challenges that proposition. The goal is to demonstrate that judges have both the capacity and responsibility to avoid complicity in persecution, at least to the extent that such persecution occurs in and through the courtroom. In doing so, this thesis focuses particularly, but not exclusively, on the pronouncements of judges themselves in defining judicial ethics and the judicial role. Briefly put, myths of judicial helplessness are confronted with the judiciary's own account of its duty and power. Drawing on judicial sources provides a crucial missing link in theories of the proper behaviour of judiciaries in such situations, one that is more clearly imputable to the judiciary as well as being more interested in the institutional rather than merely legal dimension of the relevant debates.

³⁵ These proceedings are detailed in International Military Tribunal, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume III: "The Justice Case", (Washington, DC: US Govt Print Off, 1949) [The Justice Case], which includes transcripts of Opening and Final Statements, documentary evidence of selected statutes, decrees and judgments issued under the Third Reich, extracts of other evidence, and the Opinion and Judgment of the Tribunal itself. Hereinafter, all references to The Justice Case will be to pages in this volume. The findings of the South African Truth and Reconciliation Commission on the responsibility of the legal profession, including the judiciary, can be found at *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission, 1999), Volume 4, Chapter 4: Institutional Hearing: The Legal Community, online at <http://www.justice.gov.za/trc/report/>.

This thesis is in two parts. The first Part, chapters 1 to 4, critically reflects on the judicial claim of a limited role in, and limited powers to resist, perpetrating and perpetuating persecution in the courtroom. Judicial persecution, which exists at the intersection between serious human rights violations and judicial action, is a more pervasive phenomenon than has been previously thought, intersecting with other more widely studied phenomena: political trials, the judicialisation of politics, and lawfare. Broadly defined, judicial persecution might be thought of as the instrumentalisation of court processes by powerful parties, whether public bodies or private entities, in order to oppress, marginalise or harass specific targets. The construct of judicial persecution is used because it gathers together a range of cases that are, it is argued, under the direct control – indeed the unavoidable jurisdiction – of judges. Three manifestations of judicial persecution are identified as presenting, at least potentially, such a point of crisis:

- apartheid South Africa as an exemplar of a fundamentally unjust system;
- the use of civil proceedings to intimidate political opponents (SLAPPs) in functioning and nominally just systems; and
- the use of criminal proceedings for ulterior purposes in violation of Article 18 of the European Convention on Human Rights.

At first blush, comparing the apartheid regime's total and decades-long capture of the South African legal system with, for example, the occasional misuse of courts in strategic lawsuits against public participation may seem like comparing apples to oranges. And yet, both instances, as well as the cases brought under Article 18 of the European Court of Human Rights, evince a common intention to use court processes to marginalise, distract, impoverish, silence, and otherwise constrain one's political or economic foes. In virtually all of the cases, the instigators of such proceedings enjoy a considerable advantage in terms of financial resources or political power. Crucially, each of those cases represents an effort at what might be termed the 'courtwashing' of human rights violations, to instrumentalise the institutional prestige of the court as a means of legitimising persecutory activities. Each of the case studies provides some description and analysis of the phenomenon, and occasionally reveals some degree of judicial consciousness.

These three studies are drawn from a range of judicial contexts: from courts that understand their role as executing state policy to those that proclaim their independence, from authoritarian systems to full-fledged democracies, from domestic courts to regional and international courts. Each provides some insight into the complicity of judges and courts in facilitating abuses of power, exposing particular failings of the judiciary. Taken together, they reveal a panoramic and multidimensional perspective on the problem of judicial persecution, one that neither exoticises nor minimises it.

In the second part of the thesis, chapters 5 to 7, the problem of judicial persecution is confronted from the perspective of judicial role morality. Given that judges have been slow to comment on their responsibility in fraught circumstances, a pluralist approach is adopted in which a variety of sources are used to reconstruct how judges understand their own role in situations where they might become complicit in judicial persecution. The idea is not to elaborate a legally binding model but to understand the sort of dilemmas that judges confront. The problem is approached laterally, identifying judicial pronouncements in other relevant areas, starting with the proliferation of international codes of judicial ethics, some of which have been drafted by judges. These codes, and particularly those areas in which there is substantial overlap between them, paint a consistent, transnational picture of what it means to be a judge ethically, legally, and institutionally. By teasing out these commonalities between the codes, a transnational model of the judicial role is revealed, one that both empowers judges and generates expectations for their conduct.

This portrait is further developed by examining numerous judicial pronouncements in which judges have expressed their inherent power to limit or dismiss unreasonable claims, a group of pronouncements described as expressions of judicial resistance. Judge-made doctrines such as those pertaining to abuse of process, prosecutorial misconduct, and good faith provide two insights. First, in examining improper or ulterior purposes, they serve to clarify the proper purposes of judicial process. Secondly, and more crucially, they suggest a broad scope of discretion, sometimes even described by judges themselves as a responsibility, to police the boundaries of court processes. As

such, they tend to disprove what Robert Cover called “the judicial can’t”,³⁶ suggesting a broader scope of agency in cases of judicial persecution than judges have tended to admit. At the very least, they are expressive acts, in counterpoint to the kind of judicial passivity and silence that might constitute complicity. Such acts remind us of the crucial role that judges, as legal interpreters and public reasoners, can play in framing the legal dimensions of public debates.

Reading these ethical and operational doctrines together provides both insight into how judges understand their role and a more complete picture of the legal, political, and institutional stakes of judicial persecution. The judicial process confers significant socio-political legitimacy, by transforming disputes into judgments, and law into justice, a legitimacy largely derived from the presence and authority of the judge. As such, the judicial role comes with a significant measure of responsibility.

In order to effectively confront the problem of judicial persecution as it will have been revealed through the case studies, this thesis then suggests that judges must take seriously their responsibility in three specific respects. First, it is posited that a judge’s primary responsibility is to uphold the rule of law, and thus all judges need to have a working definition of the rule of law that safeguards independent and impartial judicial review, and ensures that courts are not instrumentalised to legitimise arbitrary and excessive power. Second, given that the rule of law is premised on political legitimacy, the judiciary, having the benefit of political independence, has a responsibility to the citizenry at large to maintain the underlying conditions of that legitimacy. Finally, in order to fulfill their guardianship of the rule of law, the independence, reputation, and powers of the judiciary must be protected and preserved. Ultimately, this thesis is directed at the articulation of a principled and panoramic model of judicial responsibility, more reflective of the plural dimensions of the judicial role, and better suited to confront, and thereby avoid complicity in, judicial persecution.

³⁶ As will be described in greater detail in chapter 7, Cover describes as “the judicial can’t” that particular form of judicial reasoning used by judges attempting to justify the outcomes of their own decisions with which they personally disagree: Cover, *supra* note 28 at 119.

Part I: Judicial Persecution

Chapter 1

Situating Judicial Persecution

In this first chapter, the analysis is situated in the larger field (and literature) of what might be termed ‘judicial instrumentalisation’ – the deliberate use of court processes as a means to a particular end. To some extent, of course, all judicial proceedings are instrumental, used to advance both salutary and pernicious ends. Judicial instrumentalisation is not a unitary phenomenon; although the idea of ulterior or improper purposes has been canvassed in various branches of socio-legal scholarship, instrumentalisation is the common concern that underlies legal literature on political trials, lawfare, and the politicisation of law.

As will be set out, judicial persecution, i.e. the instrumental use of legal processes to persecute, is a form of judicial instrumentalisation, and one that is not just damaging to the persecuted individual. Rather, being incompatible with the core of the judicial function – to deliver just processes and outcomes – it is also damaging to the judicial institution. As such, it is the unavoidable duty of the presiding judge to recognise and confront it.

1.1 *Judicial Instrumentalisation & Legal Instrumentalism*

In a sense, all recourse to the courts should be instrumental, which is to say that judicial proceedings should not be an end in themselves. The claims made in court proceedings – whether criminal or civil – will not, or at least ought not, be made with the sole goal of generating the court proceedings themselves; where they are, this evinces a perverse instrumentalism that is manifested as a recurring theme in this thesis. Rather, legal proceedings are generally brought as a means of, *inter alia*, reinforcing social norms, or vindicating rights, or recovering property. This kind of judicial instrumentalisation is not just innocuous, it is what the system is designed to do.

This claim is distinct from a claim that the law itself is instrumental, that the law is a means to an end, although there is a relationship between the two propositions. The

instrumental view of law sees law as a tool that can be freely adapted to suit a wide range of human objectives, but an empty vessel in itself.¹ Underlying such a content-neutral view on the nature of law is a values-free view of how law is created, such as that propounded by many advocates of legal positivism. The instrumental view of law lies in most stark contrast with natural law theories, which would suggest that neither the permutations of both rules-based ordering, nor the particular content of the rules, are boundless, that the law could not just be *n'importe quoi*, i.e. whatever someone (or the governing institutions of the state) wants it to be. Historically, law was understood to be derived from, and its content dictated by some form of natural authority often emanating from religious values. By contrast, in *The Morality of Law*, Lon Fuller suggested that law has an internal morality that logically dictates its basic structure, and that it derives its authority from its interaction with its social context.² Other theories abound about limits on the content and meaning of law, many of which will be canvassed in later chapters.

Similar in structure, if not in substance, to Fuller's argument, this thesis argues that, simply because legal proceedings are a means to an end, does not mean that either the means, or the end, can be anything at all. At the heart of this thesis are twin claims that (i) presiding judges should be actively attentive to the purposes for which judicial proceedings are brought, and that (ii) where found to be brought for persecutory purposes, judges must resist being transformed into mere instruments of that persecution. This thesis claims that both the responsibilities of vigilance and of resistance are grounded in a holistic understanding of the judicial role.

A significant impetus for this research is the unhelpful conflation of all forms of judicial instrumentalisation. The criticism of certain kinds of proceedings tends to rhetorically run in one of two directions. The first is in the sense that the perceived boundary

¹ Brian Tamanaha, in particular, takes a dim view of this theory of law. See, for example, Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (New York: Cambridge University Press, 2006).

² Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969). Due to his arguments against positivism, Fuller is often classified as a natural law theorist, whereas he describes his account of law as "interactional".

between what properly lies in the political arena and the legal arena has become permeable: this is often expressed as the judicialisation or legalisation of politics on the one hand, or the politicisation of law on the other.³ The second sense is where the judicial process, while perhaps functioning normally, is being used for ulterior or inappropriate ends, such as in cases of what some scholars term “lawfare”, and in certain kinds of political trials.⁴ Each of these areas raises particular, albeit often overlapping, concerns and many of those underlying concerns are relevant to this study.

In order to appreciate where judicial persecution lies in relation to each of these subjects, this chapter will briefly review the key literature in each area. There will be significant emphasis on the area with the most developed and theoretically-rich literature, political trials, in which concerns about the potential for a particular kind of targeted, persecutory instrumentalism has been most keenly expressed. Indeed, it will become apparent that the term ‘political trials’ has been used both as a catchall term for encounters between law and politics, and a lens through which to consider their interplay in the judicial arena.

As a starting point, judicial persecution can be thought of as a subset of each of these types of judicial instrumentalisation, one in which the aims of the particular instrumental form are persecutory, as follows:

³ Indeed, the 2019 BBC Reith Lectures, delivered by recently retired UK Supreme Court Justice Jonathan Sumption, is specifically critical of what he terms “law’s expanding empire”, in which matters more properly understood as political are reframed as legal issues. Transcripts and audio recordings online at: <https://www.bbc.co.uk/programmes/b00729d9>.

⁴ “Lawfare”, as will be discussed in section 1.11 *infra*, is a portmanteau of law and warfare, one that suggests that, increasingly, strategic objectives traditionally pursued through international armed conflicts are sought to be achieved through international adjudication.

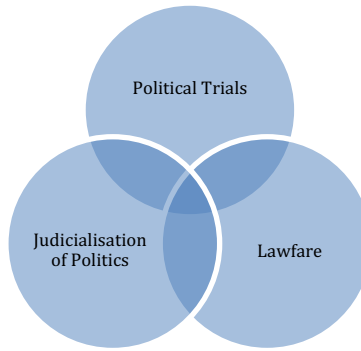


Figure 1.1 *Forms of Judicial Instrumentalisation*

As the figure above illustrates, judicial persecution is not a discrete category of judicial instrumentalisation, but rather a subset (the shaded areas) of multiple categories. Not all political trials, if broadly understood as trials with significant political implications,⁵ are examples of judicial persecution, for example, but some could be. Many war crimes trials, for example, have profound political implications, but, if properly brought and conducted, will not constitute judicial persecution. Thus, each category of judicial instrumentalism exists on a spectrum, of which only one extreme is persecution. For political trials, this would look something like this:

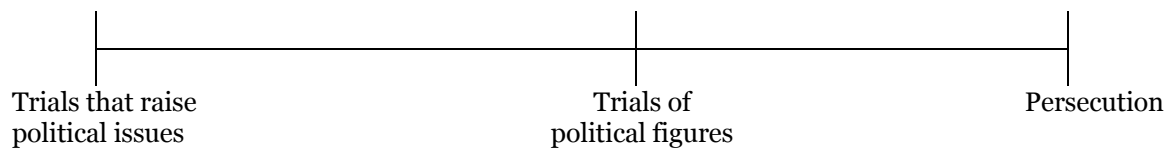


Figure 1.2 *Cross-section of political trials*

The point is not, at this juncture, to decisively sketch out the place of judicial persecution, but to (a) challenge the unhelpful notion that all instrumentalisation is malign and equally deserving of attention (or anxiety); and (b) carve out that particular portion of the field of judicial instrumentalisation that is deserving of attention. The generalisation that all instrumentalisation is malign engenders paralysis: judges, faced with a plainly untenable proposition, are discouraged from distinguishing between appropriate and inappropriate (persecutory) engagements of judicial process. The second, and corresponding, failure is neglect of the degree to which persecutory

⁵ The significant debates about the definition of what constitutes a political trial will be canvassed below, at section 1.10, *infra*.

instrumentalisation degrades the perception of all judicial proceedings, and the judicial institution itself. As will be explored in some detail, the legitimacy of the judicial institution and its ability to do its work effectively rests on a broad public perception that it dispenses justice. Justice is its imprimatur, its calling card, and the court's lending of its imprimatur to improper proceedings tarnishes that credibility. This has knock-on effects that go to the root of broader judicial responsibility.

This is not to say that only persecutory proceedings raise these issues, but they do engage them most profoundly. Indeed, so profoundly that the failure of judges to address persecution in the guise of legal proceedings might even raise questions of potential personal liability: judicial complicity in persecution may well be sufficient to pierce ordinary norms of judicial immunity, particularly as a matter of international legal normativity.⁶

As indicated in the Introduction, judicial persecution can target people on a range of grounds. In the most infamous cases of judicial persecution in Germany under the Third Reich, judicial proceedings were used to divest Jewish people of their property, to stigmatise and marginalise them, and to imprison them. In apartheid South Africa, significant numbers of the non-white majority were persecuted through legal proceedings, on racial and political grounds. Many notorious cases, and most of the far less notorious cases in this study, possess a political dimension, and because of the complex relationship between law and politics, and legal and political institutions, it is this dimension that tends to cause the greatest conceptual blindspot for a broader recognition of judicial persecution, and must be confronted first.

⁶This potential outcome will be explored in the next chapter, given that it arose (although was certainly not fully engaged) by the South African Truth and Reconciliation Commission. On the other hand, a judge was prosecuted at Nuremberg and the issue has arisen in some Canadian refugee cases, where former judges seeking asylum have been denied refugee status on the basis of the judiciary's complicity in international crimes. The question of judicial liability will be raised in more detail in chapter 7, *infra* (particularly in section 7.3).

1.2 *The Ideal of Law as Separate from Politics*

The idea of that law exists apart from politics is a fascinating and highly contested one. Much depends on one's definition of each of 'law' and 'politics', and competing arguments often fail to create a definitional common ground on which to fully engage each other. There are undoubtedly connections between the two: most law is born of political processes, in that codes, statutes, and regulations are usually created and validated in some way by political bodies. Law also enacts politics; setting aside the merit of any given policy, law is often used to operationalise policy projects. But despite these deep connections, at the heart of the legal system there lies an idea that law operates free of political influence; among legal scholars, this view is traditionally referred to as "formalism";⁷ many non-jurists prefer the term "legalism".⁸

Formalism, at its heart, is not so much a theory of law as a theory of legal process, the ideal that the law can (and should) renounce its political origins or its political context through the assiduous application of judicial rituals. In the quintessential recent defence of the idea, Schauer defined formalism as "the concept of decision making according to rule",⁹ i.e. the idea that reasoning and outcomes might be, to some extent, dictated by legal rules. As Schauer puts it "[f]ormalism is the way in which rules achieve their "ruleness" precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account."¹⁰ In other words, formalism supports the idea that law can be a closed system, with its own internal logic.

For much of the last century, many, if not most, legal scholars have found the formalist account of legal process unsatisfying, resulting most directly in the rise of both legal

⁷ Frederick Schauer, "Formalism" (1987) 97 Yale LJ 509.

⁸ Most notably Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964) [*Legalism*].

⁹ Schauer, *supra* note 7 at 510.

¹⁰ *Ibid.*

realism¹¹ and much later critical legal studies (CLS).¹² Each school seeks, in its own way, to reconnect law and legal process with its sociopolitical context: legal realism focuses particularly on the real-world consequences of legal activity; and CLS exposes the legal system's underlying power hierarchies and the significant *lacunae* in law's account of itself. In doing so, each denies the validity of insular, formalist legal reasoning. Whether through the influence of these schools of thought or otherwise, the 'formalist' label has become something of a pejorative; a symbol of, at best, naïveté, at worst, the cynical cover-up of the true reasons for legal action. Nonetheless, a sense of law separate from politics remains "the judiciary's 'official' theory of judicial behavior".¹³ Under the protective banner of formalism, judges can at least imagine themselves as operating free from worry about the political influences that might drive – or the political consequences resulting from – their judicial activity.

1.3 Formalism, Legalism, and Political Trials

For non-legal scholars, the insistence on the separation of law and its political context is bizarre. In 1961's *Political Justice*, Otto Kirchheimer displays utter equanimity about the reality and inevitability of political instrumentalism in court processes:

Throughout the modern era, whatever the dominant legal system, both governments and private groups have tried to enlist the support of the courts for upholding or shifting the balance of political power. With or without disguise, political issues are brought before

¹¹ Legal realism is a movement that arose primarily in the US in the 1920s and 1930s and challenged as demonstrably false the view that legal rules dictate legal outcomes. It is, at its heart, a theory of what actually occurs in the process of adjudication, one which the realists believe accords more closely with empirical evidence. For a history of legal realism and its central debates, see, for example, Brian Leiter, "Legal Realism and Legal Positivism Reconsidered", (2001) 111 *Ethics* 278.

¹² Critical legal studies, which was founded in the 1970s, highlights the historical, political, and ethical contingency of notions of law, offering a direct theoretical (rather than empirical) challenge to the authority of law. A particularly lively contemporaneous account of the CLS movement can be found in Allan C Hutchinson & Patrick J Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought", (1984) 36 *Stanford LJ* 199.

¹³ This particular turn of phrase is taken from Richard A Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008) at 41.

the courts; they must be faced and weighed on the scales of law, much though the judges may be inclined to evade them. Political trials are inescapable.¹⁴

Kirchheimer then turns to the approach taken by the legal profession:

A truism, is it not? And yet many a jurist is likely to deny that there is such a thing as a political trial; to say that the thing exists and often entails consequences of importance is, in the eyes of such men of Law Immaculate, equivalent to questioning the integrity of the courts, the morals of the legal profession.

...

The self-appointed defenders of the court's honor protest too much. Fascinated by the seemingly identical methods which allow the courts to arrive at judicial conclusions, they are inclined to disregard possible differences in objectives.¹⁵

To Kirchheimer, lawyers and judges are living in a state of denial, believing that all trials are equal, ignoring the "intercession of political motivations or aspirations", which they believe have been "ruled out by time-honored and generally recognized trial standards."¹⁶ Three years later, Judith Shklar made a similar point in her masterwork *Legalism*,¹⁷ her more charitable word for what Kirchheimer sneeringly termed "Law Immaculate". Shklar's book as a whole argues for the frank admission that legalism is as

¹⁴ Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961) at 47 [*Political Justice*].

¹⁵ *Ibid* at 47-48.

¹⁶ *Ibid* at 47. This is what has been called elsewhere the "pathology thesis", the view that, because "law should endeavour to keep politics out of the courtroom ... every political trial is a corruption of the rule of law": Leora Bilsky, "Political Trials" in James Wright, ed, *International Encyclopedia of the Social and Behavioral Sciences* (Amsterdam: Elsevier, 2015) at 499.

¹⁷ Shklar, *Legalism* at 145. Shklar does not specifically cite Kirchheimer in *Legalism*, she does note the significant debt that the second half of her book owes to *Political Justice*: "If I do not cite this book page by page it is only to avoid an excess of notes, and because my debt to it is too general." (*Ibid* at 149, note 45.) Other commentators have noted the clear influence of Kirchheimer on Shklar, noting however that they come to different positions on the value of political trials, particularly Nuremberg, with Kirchheimer seeing them as having legal value, and Shklar believing their value to be solely political: Frank Schale et al, "Otto Kirchheimer: Capitalist State, Political Parties and Political Justice" in Beverley Best et al, eds, *The SAGE Handbook of Frankfurt School Political Theory* (London: SAGE Publications, 2018), DOI: <http://dx.doi.org/10.4135/9781526436122.n7>.

much an ideology as any other.¹⁸ Both Kirchheimer and Shklar agree that law endeavours to isolate its processes from their social contexts, and both agree that such efforts are doomed to fail, with the goal of *Legalism* being to establish the radically obvious claim that law, morals, and politics are all inextricably intertwined. This is generally true but it is spectacularly illustrated on the occasion of political trials. For Shklar, “[p]olitical trials reveal the intellectual rigidities and realities of legalism as no other occasion can.”¹⁹

What Shklar calls legalism sounds very much like what some legal scholars refer to as the “internal point of view”. Broadly speaking, the internal point of view is the perspective on law and legal process possessed by those who operate within the system, most notably lawyers and judges; it can be contrasted from the often quite different perspective, the “external point of view”, of those external to the system.²⁰ Shapiro suggests that Hart, who coined the term, used it in a more particular sense, to denote a practical attitude of rule acceptance, grounded in a concept of law that is not limited to the law’s relationship to its power to sanction, but as obligation-imposing.²¹ Shklar’s legalism is, to some extent, a combination of both definitions, as her critique suggests that this attitude of rule acceptance is particularly endemic, and largely invisible to, legal system insiders.²²

One of the undercurrents of this thesis is the now rather orthodox scholarly claim that a blinkered formalism – a purely internal point of view – is an inappropriate approach to judicial process. But while this may be a fairly orthodox academic position, it is in tension with formalism not only as Posner’s “official” account of judicial behaviour, but often its true *modus operandi*. This is perhaps not surprising, given that judges are the ultimate legal ‘insiders’ and, by virtue of their office, often lead fairly cloistered lives.

¹⁸ Shklar defines legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.” Shklar, *Legalism* at 1.

¹⁹ *Ibid* at 112.

²⁰ See, for example, the description in Gerald J Postema, “Jurisprudence as Practical Philosophy”, (1998) 4 *Legal Theory* 329 at 332.

²¹ Scott J Shapiro, “What is the Internal Point of View?” (2006) 75 *Fordham L Rev* 1157 at 1159.

²² Shklar, *Legalism* at 11-12.

Thus, even as formalism is a theoretical weakness, it operates as a very real and current constraint on judicial behaviour, one that is deeply woven into judicial role morality in a myriad of ways, including understandings of the separation of powers and of judicial independence. Indeed, in the most common representations of justice, the Roman goddess Justitia is depicted with a blindfold, a symbol of her imperviousness to outside influence.

1.4 *Lifting Justitia's Blindfold*

Framed as a symbol of institutional independence, Justitia's blindfold is ennobling. But as Kirchheimer and Shklar suggest, Justitia's blindfold might be too indiscriminately opaque, at least in the circumstances raised in this thesis. Not recognising the reality of the interpenetration of political dynamics in court processes carries significant risks to the ability of judges to do their job, and even the reputation of administration of justice. First and most obviously, legal actors risk looking foolish, or disingenuous, or out of touch.²³ (These are not mutually exclusive: it is perfectly possible for all three to be true.) Leora Bilsky describes the refusal to acknowledge the reality of politics in political trials as a potential problem of alienation from political community:

The traditional solution of liberal theory to these puzzles is to maintain, as far as possible, the separation of powers or to succumb to the charge of a 'show trial'. This binary understanding of law is unsatisfactory because it fails to acknowledge the possibility that the court will be able to provide justice to the defendant in situations in which such separation is not feasible. In other words, it cannot distinguish between a show trial (in which the trial is just a sham) and a political trial (where politics cannot be completely separated from the trial but the court can retain relative autonomy). I would like to suggest a different course. In my view, only if we admit to the essential connection

²³Charles Goodell, commenting on the judge's stubborn refusal to see the Chicago Conspiracy Trial as anything other than an ordinary case, observed: "... Hoffman's conduct made the federal judiciary look ridiculous and brought the system of justice into far greater disrepute than the defendants could have hoped for from their antics alone. When a trial mixes legal and factual questions with political and moral issues which divide the society, it is dangerous as well as perverse to ignore it." Charles Goodell, *Political Prisoners in America* (New York: Random House, 1973) at 351-352.

between the political community and a court and postulate the proper relation between the two, can we begin to tackle the problem of the new political trial.²⁴

As implied by Bilsky, the failure of law to face up to the reality of political trials limits, if not entirely negates, the possibility of developing tools to account for and address the political dimensions of court proceedings. This in turn creates something of a catch-22: in the absence of any mechanism for forthrightly dealing with politics in the courtroom, there is little to be done but to deny its reality. This blinkered view of political trials in turn limits what arguments will be entertained (in pleadings or otherwise) by the court, affects what evidence will be considered relevant (and therefore admissible), and what lines of defence might be available. The upshot is the very real potential of a court doing injustice in the eyes of everyone save itself – of formal adjudication diverging sharply from any reasonable public notion of justice.

This compartmentalisation suits those who would misuse judicial processes to persecutory ends and who stand to benefit from judicial myopia. By moving the battleground to the courts, a social or political battle is translated into a legal one, and is significantly reframed in the process. This translation can have both intended and unintended consequences for all involved. But judges need to be conscious that all court cases fall under the protection, and gain the imprimatur, of the court's authority. To the extent that the process of adjudication ignores ulterior motives, it obscures and even launders them, what this thesis terms 'courtwashing'. Whether those motives are repression or liberation, they become repackaged as purportedly neutral 'cases' or 'judgments'. Thus, even as the court endeavours to eschew politics, indeed *because* it refuses to face up to them, it may play a role, often a decisive one, in the wider political power struggle.

²⁴ Leora Bilsky, "Territory, Community and Political Trials", a paper delivered on 13 September 2002, at the Legal Theory Workshop Series, Faculty of Law, University of Toronto, at 9-10. See also Steven Barkan, who argues that "[t]he connections between courts and the outside community are perhaps most romantically apparent in prosecutions of political dissenters. There, outside influences are at a maximum, affecting prosecutorial and defense strategy in shaping the verdict. The proceedings and outcomes usually have consequences for groups and policies far removed from the immediate courtroom setting." Steven E Barkan, *Protestors on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements* (New Brunswick, NJ: Rutgers University Press, 1985) at 6.

It is important not to confuse this claim – that there is danger in ignoring the political dimensions of court proceedings – from the more trenchantly critical claim that all trials are political. This is not to say that the latter critical claim is wrong (or right, for that matter), rather that the second claim is a theoretical and general one that nobody would reasonably expect a judge to address in the course of their day-to-day work. On the other hand, I contend that a more serious engagement with the obvious political dimensions of cases lies at the core of the effective exercise of the judicial function.

1.5 *Persecutory Outcomes, Persecutory Processes*

The courts do not exist to ruin people's lives, although undoubtedly, personal ruin may be, and often has been, a by-product of court processes. Those convicted of crimes may be sentenced to long periods of incarceration, a civil judgment can have a financially catastrophic effect on a party, and even the process of participating in a court proceeding can be immensely disruptive. However, these ruinous ends are not, or at least should not be, the point of the proceeding itself. The ordinary instrumentality of court proceedings is targeted elsewhere, to remedying a rupture in legal relations.

However, given that the potential for ruin is a *known* by-product, court proceedings are an attractive vehicle for targeted aggression, including persecution. Judicial process is a technique tailor-made for disguising ulterior motives: one can aim for the by-product while maintaining that one's use of the courts is in the ordinary course. In assessing judicial persecution, the motivation and objectives of launching a legal proceeding will matter. Much like money laundering 'washes' money by redirecting it through legitimate businesses, 'courtwashing' launders ulterior motive, in one or both of two ways. The goal of ruining, for example, a political opponent's life, can be aimed at a particular substantive outcome: a guilty verdict and attendant stigma, imprisonment, a significant award of damages, among others. In those cases in which a ruinous but systemically-consistent outcome is the objective, it will be particularly difficult to distinguish as persecutory, particularly when the accused is actually guilty of the crime. The Rivonia trial in South Africa (which will be discussed in greater detail in the next chapter) is the quintessence of this kind of trial: the defendants, including Nelson Mandela himself,

were almost certainly guilty of the crimes with which they were charged. This fact, however, was beside the point for both ANC supporters, who saw the accused as freedom fighters, and those who supported apartheid, who saw them as terrorists.²⁵ For those in the middle who might have been left with a lingering unease about the prosecution, the guilty verdicts could be rationalised – indeed, through the process of adjudication the verdicts were framed – as consistent with law and justice.

Increasingly, however, there is a recognition that persecutory objectives can be achieved not through a decision on the merits but rather in the slow grind of the judicial process itself: the expense, the delay, the inconvenience, the lingering reputational cloud. Where a decision on the merits is not even the goal of engaging in proceedings, including where a particular outcome appears to be unlikely, there is clearer evidence of naked judicial instrumentalisation, with barely a whiff of the law that is meant to cover and justify it. This is legality as illusory as the emperor's new clothes. Such cases, of which strategic lawsuits against public participation (SLAPPs, the subject matter of chapter 3) are an archetype, fit the mold of what most jurisdictions recognise as abuse of process, and so are, when identified, amenable to fairly conventional forms of judicial resistance.

In those cases where judicial processes facilitate persecution, there is a compelling case to be made that the willing participation of judges could be tantamount to complicity in the underlying attack. Surely the possibility of their own complicity should give judges cause to ask themselves whether they are doing justice or injustice as the proceedings unfold. These issues have been explored in greatest detail in the literature on political trials, and thus it is this body of literature that most powerfully informs the problem of judicial persecution. This includes the foundational issue of definition: distinguishing between those political trials that are persecutory, and those that are not.

²⁵ Martti Koskenniemi provides a thoughtful take on the limitations of individual criminal trials as a means of establishing a properly contextualized truth in the context of atrocity in Martti Koskenniemi, "Between Impunity and Show Trials", (2002) 6 UNYB of Int'l L 1.

1.6 *Judicial Persecution and Political Trials*

The term ‘political trial’ is most often used as a pejorative, evoking its most freakish and alarming instantiation, the show trial. Such trials combine the very worst offences against justice: vague or made-up charges or civil claims; cases brought against perceived enemies and critics; trials held not for the purpose of fair or even genuine adjudication but designed to publicly disgrace a political opponent, or terrorise protesters, or “educate” the population; outcomes guaranteed by unfair procedures, partisan judges or juries, and an inequality of arms.

This is not a mere caricature. Such trials have occurred in history, they occur with alarming frequency today, and they are perversions of justice. Many such trials would undoubtedly qualify as judicial persecution. But that kind of show trial, to the extent that it is properly described as a ‘trial’ at all,²⁶ is but one type of political trial. The category of ‘political trials’ is considerably broader than its most extreme version, and there are undoubtedly political trials that are not inherently catastrophic or unjust. This threshold rejection of the spectacular is important because to use ‘political trial’ synonymously with ‘show trial’ affords legal actors far too significant a *marge de manoeuvre* for ignoring the potentially persecutory dimensions of ordinary judicial proceedings, and reinforces the legalist orthodoxy.

For reasons that were obvious to Kirchheimer and Shklar, a narrow definition of political trials is fairly popular with legal scholars. For example, in a relatively recent treatment of the subject, legal scholar Eric Posner opens with this definition:

A political trial is a trial whose disposition – that is, usually, a finding of guilt or innocence, followed by punishment or acquittal, of an individual – depends on an evaluation of the defendant’s political attitudes and activities. In the typical political trial, a person is tried for engaging in political opposition or violating a law against political dissent or for violating a broad and generally applicable law that is not usually

²⁶ There may well be a vanishing point at which the complete absence of regard for law or judicial process – a situation of ‘all politics, no trial’ – may disqualify a sham proceeding from being considered a ‘judicial’ proceeding at all, at which point the ‘judges’ are not likely to be concerned with questions of institutional morality at all.

enforced, enforced strictly, or enforced with a strict punishment, except against political opponents of the state or the government.²⁷

This definition fits neatly with one proposed by another legal scholar, Leon Friedman: “cases which are politically *motivated*, those that are politically *determined*, and those which in turn have substantial political *consequences*.”²⁸ Posner’s definition delineates as political those trials that possess both of the first two of Friedman’s three characteristics: political trials are both politically determined and politically motivated. They are politically determined because the disposition of the case is not determined by normal legal means, but rather is grounded in the defendant’s political identity. The identification and targeting of the defendant on the basis of that identity is what makes the trial politically motivated. While Posner does not expressly include in his definition the third category of political trials proposed by Friedman, those that have political consequences, his definition does tend to lend itself to a view whether a particular proceeding is a political trial should be fairly obvious, and is obviously negative.

Other scholarly literature takes two approaches to delineating the issue of political trials: it proposes an overarching definition, or it endeavours to create typologies. Some scholars do one or the other, many do both. Virtually all rely on real-world examples to illustrate their points, and many start from those examples in developing their descriptions. The message sent by such examples, particularly in the *corpus* of American scholarship that emerged from the 1970s backdrop of the civil rights movement and anti-Vietnam War protest,²⁹ involves a tacit understanding that while it might be difficult to define the political trial as a genre, we know it when we see it.

Non-legal scholars acknowledge that ‘political trial’ is a loaded term for jurists. However, since they don’t believe that limiting the number of proceedings described as political trials will, in fact, limit the number of political trials, they tend to adopt a broad

²⁷ Eric A Posner, “Political Trials in Domestic and International Law”, (2005) 55 Duke LJ 75 at 76.

²⁸ Leon Friedman, “Political Power and Legal Legitimacy: A Short History of Political Trials”, (Summer 1970) The Antioch Review 157 at 158. Friedman acknowledges that these characteristics can occur discretely or in combination.

²⁹ See, for example, Barkan *supra* note 24; Nathan Hakman, “Political Trials in the Legal Order: a Political Scientist’s Perspective”, (1972) 21 J Pub L 73 and works cited therein.

and descriptive approach to defining them. Kirchheimer, for example, associates political trials with a variety of political objectives, suggesting that “cases aimed at affecting power relations in one way or another denote the essence of a political trial”.³⁰ Considerable form is given to this essence through his description of three categories of political trial:

- A. The trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from a successful prosecution;
- B. The classic political trial: a regime’s attempt to incriminate its foe’s public behaviour with a view to evicting him from the political scene; and
- C. The derivative political trial, where the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe.³¹

These three categories cover significantly more territory than might be immediately apparent. Because they suggest connections between prosecutorial motive and the particular allegations that are not inherently necessary, each category yields several variations on its theme. For example, trials “involving a common crime” could include selective prosecutions on petty charges, common crimes that were in fact committed for political purposes, and charges specifically designed to minimise the political stature of the defendant. Similarly, the “political benefits” of the first category could range from broad pedagogical goals, to besmirching the particular accused, to prosecutions brought simply to “tie up” the accused in legal proceedings. While this latter motivation seems to fit more neatly into Kirchheimer’s second category, here too, there is too much mixed together. Although where one draws the line is perhaps a matter of personal impression, there is nothing less “classical” about a political trial in which a regime opts not to focus on an accused’s public activity, but opts instead to cast a political figure as a common criminal; or indeed, a political trial where the goal is not a quick “eviction” but rather a slow tarnishing that manages to also tar those around the primary target, whether a

³⁰ Kirchheimer, *Political Justice* at 49.

³¹ *Ibid* at 46.

political party or protest movement. Nor, surely, is the epitome of the political trial – the show trial – less classical even if the purpose is not merely to evict the foe from the scene but instead achieving a more general deterrence of the accused’s political behaviour by making an example of them.

A close reading of Kirchheimer suggests that he likely developed his categories from the specific examples he had in mind (which he details in *Political Justice*). Kirchheimer, too, ‘knew’ a political trial when he saw one, and theorised from there. But where his examples combined political features, he seems to have made the logical error of unnecessarily co-locating and therefore correlating them. Decoupling charge and motive from the first two categories suggests that there is a greater range of possible combinations of what might be thought of a ‘column A’ and ‘column B’:

Allegations (A)	Prosecutorial Motive (B)
Common Crimes	Render Physically Unavailable
Political Crimes	Discredit
Impugned Official Acts	Criminalise
	Public Pedagogy

But even this more detailed rubric is incomplete. Among other things, it assumes that political trials can only be initiated by some kind of public prosecutor. This neglects, for example, the possibility that it might be the accused who has laid the groundwork for a political trial, perhaps by publicly committing (or publicly confessing to) a common crime for the purposes of making a political statement.³² While under such circumstances a prosecutor might initiate the ‘trial’, it will clearly be the accused who will have made it ‘political’. The possibility of political trials being deliberately provoked by political outgroups is one explicitly contemplated by some theorists.³³

A second assumption implicit in the first two categories is that political trials must occur in the criminal courts. Both Kirchheimer himself, and recent legal history, have

³² Hakman, for example, includes trials where “a defendant’s acts invite prosecution” as a specific type of political trial: Hakman, *supra* note 29 at 100.

³³ See, for example, Theodore Becker, *infra* note 68 at xii, and Leora Bilsky, *supra* note 16 at 498. Indeed, Steven Barkan limits his categories of political trial to two: those initiated by state officials, and those initiated by those who deliberately break the law for political reasons, often in an effort to “continue in court the educational effect of the illegal act itself” or to initiate a test case. Barkan, *supra* note 24 at 3-5.

demonstrated the fallacy of that assumed characteristic. Indeed Kirchheimer showed great insight in including the third category of “derivative” political trials. What Kirchheimer describes under this heading is an ingenious strategy of provoking one’s political foes into suing for defamation, noting that this curious practice was rather common in the Weimar Republic. Kirchheimer focuses particularly on the notorious example of the defamation suit filed by Reich President Friedrich Ebert, who sued a newspaper after it reprinted an account of him being called a traitor. As is normal, the defence to the libel claim was the truth of the impugned statement and so, Ebert, by suing for libel, effectively put himself on trial for treason. This category will resonate SLAPPs are described in chapter 3.

1.6.1 *Decisive Trials and the Judicialisation of Politics*

A far more recent effort at defining political trials comes from Jens Meierhenrich and Devin Pendas, who have recently created a capacious and non-normative typology. Like Friedman, Meierhenrich and Pendas suggest that political trials are of three, potentially intersecting, types: decisive, didactic, and destructive.³⁴ These do not directly correspond to Friedman’s types, although each of the three types likely meet one or more of Friedman’s criteria of being politically motivated, politically determined, or having political consequences, albeit at different levels of intensity.

As described by Meierhenrich and Pendas, decisive trials put a “contentious legal question of political significance”³⁵ to the courts for resolution. In systems in which advisory opinions are permitted, such questions can be put to the courts directly by one of the other branches of government.³⁶ More commonly, such questions arise in the course of an adversarial proceeding, criminal or civil, such as the example given by Meierhenrich and Pendas, *Brown v Board of Education*, in which the politically

³⁴ Jens Meierhenrich and Devin O Pendas, “The Justice of My Cause is Clear, but There’s Politics to Fear’: Political Trials in Theory and History” in Jens Meierhenrich and Devin O Pendas, eds, *Political Trials in Theory and History* (Cambridge: Cambridge University Press, 2017). Their framework for analysis is set out at 49ff.

³⁵ *Ibid* at 51.

³⁶ In Canada, for example, this would take the form of a “reference” to an apex court, either provincially or federally.

sensitive issue of school segregation was framed as a legal question and taken to court for resolution. In whatever form that such questions come before the courts, decisive trials overlap with what is described in Figure 1.1 above as the judicialisation of politics.

Ran Hirschl broadly defines the judicialisation of politics as “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies”.³⁷ For Hirschl, the judicialisation of politics includes not only the expanding role of courts and tribunals in determining public policy outcomes (through both constitutional and procedural review), but the proliferation of legal discourse and jargon in the policy-making arena. In short, Hirschl takes the view that politics is becoming drenched in legalese.³⁸

In the courts, the judicialisation of politics challenges the archetype of judicial decision-making, namely the resolution of a dispute between two parties, whose relationship – or at least that portion in dispute – is wholly governed by a particular legal regime, and where the decision to be made affects only the parties at hand. In common law jurisdictions, a judge might be more sensitive to the place of their decision in the preceding line of cases, and may even look ahead to see what kind of precedent their decision may set, but on the whole, as long as the applicable law is clear and properly applied to a live dispute, there will be little question that what they have done lies at the core of the judicial role.

With the rise of constitutionalism in the second half of the 20th century, and concurrent increase in powers of judicial review, the role played by judges in policymaking has seemed to expand.³⁹ This has occurred both due to the net increase in written

³⁷ Ran Hirschl, “The Judicialization of Politics”, in Gregory A Caldeira et al, eds, *The Oxford Handbook of Law and Politics* (2008), Oxford Handbooks Online: <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425-e-8?print=pdf>.

³⁸ Other authors are less alarmed by the trend towards judicialisation; see for example, Alex Stone Sweet, “Judicialization and the Construction of Governance” (1999) 32(2) *Comp Pol Studies* 147; John Ferejohn, “Judicializing Politics, Politicizing Law” (2002) 65(3) *Law & Contemp Probs* 41.

³⁹ These trends are canvassed in the works cited at *supra* notes 37 and 38, and in Sumption’s critique of the increase role of law and engagement of judges in political decision-making in his Reith Lectures, *supra* note 3.

constitutions worldwide, and the far more frequent inclusion of bills of rights in those constitutions, leading to an increase in the judicialisation of politics. Hirschl is deeply concerned about the judicialisation of politics, as are many other scholars,⁴⁰ legal and non-legal alike (although not all use the same language to describe the problem). Among non-jurists, there are concerns about the locus, and thus the inclusiveness of decision-making about key sociopolitical issues. Among jurists, judicialisation challenges formalist assumptions, including the separation of powers and the proper role of the courts.

The role of courts with respect to public policy is typically portrayed as indirect, passive, and negative: courts do not propose policy, they merely assess the constitutionality (or other form of validity) of policies enacted elsewhere. This judicial power is not universal, existing only in systems that permit the judicial review of legislation (although more and more systems now do). Even where the power exists, courts do not exercise it *proprio motu*: the challenge must be brought before them as an issue in a live dispute, or the subject of a specific challenge, or, much more rarely and only in systems that allow for it, as a request for an advisory opinion directed from another branch of government. And, generally speaking, the options available to courts are limited: invalidation of the legislation, in whole or in part, or the refusal to apply it in a particular circumstance. This is not to imply that these options are benign, but to distinguish them from the much wider range of options available to other branches.

It is hard to imagine that there can be a large subset of decisive trials that will qualify as judicial persecution. As a general rule, the ‘collateral’ purpose of such trials is the adjudication of the particular political question, as opposed to something more sinister, and it is rarely concealed. In *Brown v Board of Education*, the plaintiff was suing to allow his daughter to be admitted to a local school, with the collateral purpose of challenging racial segregation. Nonetheless, it is conceivable that a decisive trial may

⁴⁰ Of these, the most prominent is undoubtedly Jeremy Waldron, who fundamentally does not believe that judges are well-placed to decide vexing political issues. See, *inter alia*, Jeremy Waldron, “The Core of the Case against Judicial Review” (2006) 115(6) Yale LJ 1346 and Jeremy Waldron, “Judges as Moral Reasoners” (2009) 7(1) Int’l J of Con L 2.

have a persecutory dimension. The infamous *Dred Scott* decision in the United States,⁴¹ in which a slave sought, and was denied, a declaration that he and his family were free, raises issues of historical judicial persecution, as might any number of the other cases prosecuted by abolitionists and slave-owners, to the extent that the outcome might have maintained a situation that was itself persecutory.⁴² Similarly, as will be canvassed in later chapters, at least some of the cases in apartheid South Africa will qualify as decisive. The case of *Rossouw v Sachs*, for example, which challenged the conditions of detention of political prisoners held under the notorious 90-day rule, led the Appellate Division to assert that the solitary confinement and ill-treatment of such prisoners was consistent with an implicit statutory purpose of getting them to talk.⁴³ As such, decisive trials may constitute judicial persecution when they are tantamount to the maintenance and enforcement of an overall context of collective persecution.

1.6.2 Didactic Trials and Political (Re) Education

Didactic trials act primarily as a vehicle for political communication. In such trials, the case to be made against the particular person is largely (but not always entirely) secondary to the expressive, pedagogical value of the trial. This type calls to mind some of the most notorious show trials of the 20th century, including the Moscow Show Trials and the People's Courts (*Volksgerichtshof*) of the Third Reich, which tended to be as long on speeches from the bench as they were short on procedural fairness. In such cases, the particular proceedings merely set the stage for the political lesson, whether a diatribe or, more modestly, a message of political deterrence. And yet this kind of normative pedagogy, in the form of an attempt at ideological re-education, has also been

⁴¹ *Dred Scott v Sandford*, (1857) 60 US 393.

⁴² Robert Cover has analysed the judicial reasoning of abolitionist judges who enforced the Fugitive Slave Acts in the antebellum United States: Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975). *Justice Accused* will be discussed in greater detail in chapter 7, *infra*.

⁴³ 1964 (2) SA 551 (A). This case is discussed in more detail, *infra*, in chapter 2, section 2.2.2. This kind of targeted deprivation of rights, without trial and conviction, would likely meet the definition of persecution, and the infliction of physical and psychological harm for the purpose of eliciting information would meet the generally accepted definition of torture.

seen as one of the great virtues of, among others, the Nuremberg trials.⁴⁴ Indeed, it stands at the heart of some justifications of entire justice systems, most notably the criminal justice system, which has been described by Durkheim and a whole series of criminologists as much more about promoting “social solidarity” than actually punishing particular individuals.⁴⁵

Thus the didactic form of political trial lends itself more easily to being used for persecutory purposes, even as their pedagogical goal is never far from the broader justification of what justice systems do. However, they also have the potential to liberate: as will be discussed in chapter 3, Nelson Mandela used the Rivonia trial as a platform to set out his (and the ANC’s) alternative vision for the future of South Africa. Ordinary trials might become didactic political trials absent any conscious intention on the part of the instigator of the process; once in the ring, all parties have an opportunity to instrumentalise the judicial process in this way. This suggests that although trials may be launched for the wrong political reasons, they may not end up being persecutory, allowing, in at least some cases, for the process itself to undermine what some may have intended to be their purpose. In that respect, one of the crucial parameters of whether a trial is destined to be persecutory is the degree of uncertainty about outcome made by possible by the trial itself, which will be contingent on the degree of cooptation or independence of the judicial process and the actors involved.

⁴⁴ As Shklar notes in *Legalism*, *supra* note 8 at 147: “To think of either the immediate political needs or the ideological impact of the Trial on Germany would have been to descend to mere politics. Nevertheless, it was these and these alone that justified the Trial.” In a similar vein, Mark Osiel analyses and defends the theatrics of the Nuremberg trials as maximising the pedagogical impact of their moral and political messages: Mark J Osiel, “In Defence of Liberal Show Trials – Nuremberg and Beyond” in Guénaél Mettraux, ed, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008). Koskenniemi, among others, is dubious about this function of the Nuremberg trials and others, particularly those conducted by the “international community”: Koskenniemi, *supra* note 25 at 9-11.

⁴⁵ Emile Durkheim, *The Division of Labor in Society* (New York: Free Press, 1933) at Chapter 2, generally. An excellent summary of Durkheim’s theory of punishment as a means of social solidarity and its influence on later penology can also be found in David Garland, “Punishment and social solidarity” in Jonathan Simon & Richard Sparks, *The SAGE Handbook of Punishment and Society* (London: SAGE Publications, 2013) at 23-39.

1.6.3 *Destructive Trials, Motivation, and Persecution*

It is cases of the third type, what Meierhenrich and Pendas call “destructive trials” and describe as primarily seeking “to eliminate a real or imagined political enemy”,⁴⁶ that are most likely to yield instances of judicial persecution. This is both because of the intended outcome of the proceeding – “destruction” or “elimination” – and the identification of the target on the basis of their perceived oppositional political identity. Such proceedings are intensely politically motivated, and the combination of targeting and intended outcome most closely mirrors the structure that one would usually associate with persecution.

This idea of political motivation provides a connecting thread between political trials generally and judicial persecution. Motivation here operates in two ways. First the fact that proceedings are targeted is a crucial element in any finding of persecution in the criminal sense: persecution is an act committed against members of an identifiable group, on the basis of their membership in that group. This necessarily fuses the questions of ‘who’ and ‘why’ in the targeting of the proceedings in question. While all judicial proceedings are targeted – responding parties are named, whether by the state or a claimant – not all of them are targeted on persecutory grounds. One may well sue their political opponent (or a member of a racialised or religious minority, for example), but to qualify as potentially persecutory, one needs to sue one’s political opponent *because* they are their political opponent.

Secondly, as a crime, persecution requires that the perpetrator have a criminal intent, that they be acting in pursuit of a criminal purpose. It is not enough to sue one’s political opponent as such, but one must do so for, as Meierhenrich and Pendas might describe it, a destructive purpose. Persecution is an act committed in order to deprive the target of fundamental rights and judicial proceedings can be a highly effective vehicle for such ambitions: criminal prosecution may result in the deprivation of liberty, or even, in some contexts, the imposition of corporal or capital punishment. SLAPPs are understood to be aimed at constraining freedom of speech, freedom of association,

⁴⁶ Meierhenrich & Pendas, *supra* note 34 at 56.

freedom of assembly, and the rights of political participation of the particular target. Even the shadow of suspicion cast by some kinds of criminal allegations can interfere with dignity and human rights.⁴⁷

1.7 Judges, Intention, and the “Hidden Engine” of Political Trials

Of course, given judicial proceedings are not generally triggered by the courts themselves, an obvious threshold question arises: how can judges be held responsible for the persecutory intentions of one or more of the litigants? Surely responsibility for judicial persecution should be laid at the feet of the actor that actually possesses persecutory intent and institutes proceedings to pursue that purpose, whether a prosecutor or plaintiff, or perhaps a powerful actor directing from the wings. Without minimising the responsibility of such actors, this thesis focuses on the judges because they possess what ultimately motivates all political trials, the judicial imprimatur of legitimacy; by their very participation they provide the means of persecution. While it may be difficult to distinguish political trials from other forms of legal action, Bilsky persuasively suggests that that it is much easier to identify *the factor* that distinguishes political trials from other forms of political action: “their legitimizing function, that is, their ability to turn a political adversary into a criminal defendant and thereby reinforce the legitimacy of those in power.”⁴⁸ This legitimising function is what Bilsky calls the “hidden engine” of political trials.⁴⁹

⁴⁷ The case of Anwar Ibrahim is a case in point. Ibrahim, an ascendant political figure in Malaysia, was between 1998 and 2014 charged and tried twice for sodomy, charges that seemed tailor-made for scandalising the public in a conservative Muslim country. These proceedings were condemned by human rights groups: see, for example, Amnesty International, “Malaysia: End persecution of Anwar Ibrahim and other government critics” (27 October 2014), online: <https://www.amnesty.org/en/latest/news/2014/10/malaysia-end-persecution-anwar-ibrahim-and-other-government-critics/?linkId=10214212>. Ibrahim was ultimately pardoned by the king of Malaysia in 2018 on the basis that the cases against him had been a “miscarriage of justice”: Tara Francis Chan, “Malaysia’s jailed leader-in-waiting has been released from custody and given a full royal pardon”, *Business Insider Malaysia* (16 May 2018), online: <https://www.businessinsider.my/malaysias-anwar-ibrahim-pardoned-and-released-from-jail-2018-5/?r=US&IR=T>.

⁴⁸ Bilsky, *supra* note 16 at 498.

⁴⁹ *Ibid.*

What Bilsky calls the legitimising function is closely tied to what Kirchheimer referred to as “authentication”, the recasting of political action into law.⁵⁰ Applied to Shklar’s deliberately crude binary of politics as expediency and law as justice, authentication, if not transforms, at least reupholsters expediency with justice. To ruin an opponent in the courts is seen as being much ‘cleaner’ than a victory in another arena; indeed, the point of the exercise is to strip the opponent of their political identity and recast them as a criminal or tortfeasor, and have the court legitimise this recasting. This is the ‘courtwashing’ function of judicial persecution.

Authentication has a number of effects. First and foremost, according to Kirchheimer:

Judicial practices serve to authenticate and thus to limit political action. ... Authentication removes the fear of reprisals or liquidation from multitudes of possible victims, and encourages a friendly and understanding disposition toward the security needs of the power holders on the part of their subjects.⁵¹

Authentication thus soothes political anxiety, by identifying specific targets, pursuing them through judicial action rather than arbitrary violence, and reframing the regime’s political needs as a broader need for social order. Kirchheimer refers to authentication as the authentication of official action: the court is where the rubber meets the road, where a regime’s political agenda and preferences are legally operationalised and normalised.

Moreover, authentication can have a pedagogical effect “[i]n proceedings to which the public has some access, authentication, the regularizing of the extraordinary, may under favourable circumstances be transformed into a deeper popular understanding and political participation.”⁵² These latter benefits are by no means limited to those in power, and Kirchheimer contemplates the use of the courts as a forum by both political regimes

⁵⁰ Once again, Kirchheimer talks around a definition, without providing one: Kirchheimer, *Political Justice* at 6-7.

⁵¹ *Ibid* at 6.

⁵² *Ibid* at 6-7.

and their opposition “to affirm their policies and integrate the population into their political goals”.⁵³

1.8 Authentication and Contingency

Why do political trials, particularly destructive ones, have perennial appeal? After all, as a technique for eliminating one’s political enemies, the political trial is among the least efficient.⁵⁴ It is lengthy, cumbersome, and where staffed with an independent and impartial judiciary, largely unpredictable.

Of course, in democracies where political pluralism is constitutionally protected, it may be the only palatable means available for repressing one’s opposition. But political trials have often been included in the persecutory arsenal of even the most ruthless and despotic regimes. Under such circumstances, why bother with the courts? As Kirchheimer asks: “Is the prestige advantage it draws from the validation of its claims by such agency worth the corresponding lack of discretion in dealing with its foes?”⁵⁵

In short, yes, due to the courts’ unique ability to transform political opposition into illegality and thereby legally elevate a regime’s position above the political fray, a process that will be described later in this thesis as a kind of alchemy. In this way, the judicial imprimatur amplifies the power of the successful party, with success being a function of narrative control more than substantive outcome. This opportunity for judicial amplification and legitimation of their position is appealing to democrats and authoritarians alike.

However, as Bilsky puts it, the initiator can only accrue the benefits of the legitimising function “if the public perceives the trial is providing the defendant with a ‘fighting chance.’”⁵⁶ While absolute equality of arms is likely not necessary (and is increasingly rare, even in ordinary proceedings), basic fairness guarantees should be met: due

⁵³ *Ibid* at 17.

⁵⁴ *Ibid* at 6.

⁵⁵ *Ibid* at 5.

⁵⁶ Bilsky, *supra* note 16 at 498.

process norms, an independent and impartial bench, the right to counsel. Posner suggests that, since the government's credibility is at stake in political trials, assiduous efforts should be made for the appearance of fairness: "certain steps should be taken to enhance the government's credibility, and in the process to reduce the risk that the trial is being used for partisan purposes. These steps include involving judges and jurors from opposition parties and allowing defendants to mount political defenses."⁵⁷

1.9 Authentication and International Law

A second reason why a regime might seek to refer political opponents to the courts is in order to avoid individualised international criminal responsibility.⁵⁸ A regime might, at least potentially, be held accountable for other modes of persecution, such as extrajudicial killings or torture, largely because such actions are more easily traced back to specific members of the regime. The annals of international criminal law are littered with charges against political leaders whose police officers or soldiers have committed atrocities, whether or not these subordinates have been themselves charged, or even identified. Indeed, the focus of the International Criminal Court's prosecutorial strategy is on the "most responsible", which are often those in a position of command and thus best positioned to prevent atrocity, as encompassed in the theory of "command responsibility".⁵⁹

The notion of command responsibility on which this form of criminal liability rests grafts far less comfortably on persecution committed through court processes than on the activities of a state's armed forces. If a regime maintains even a veneer of judicial

⁵⁷ Eric Posner, *supra* note 27 at 80.

⁵⁸ An analogous type of "substitution" behaviour is described in Caroline L Payne & M Rodwan Abouharb, "The International Covenant on Civil and Political Rights and the strategic shift to forced disappearance" (2016) 15(2) J Hum Rts 163. This type of responsibility is to be distinguished from state responsibility, which is collective in nature, and operates regardless of which branch of the government is responsible.

⁵⁹ Office of the Prosecutor, International Criminal Court, *Policy paper on case selection and prioritisation* (15 September 2016) at para 44: "...For example, the Office considers that the responsibility of commanders and other superiors under article 28 of the Statute ['Responsibility of commanders and other superiors'] is a key form of liability, as it offers a critical tool to ensure the principle of responsible command and thereby end impunity for crimes and contribute towards their prevention." Online: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

independence, this should suffice to provide at least an arguable claim that the conditions of command responsibility do not exist, because the ‘commander’ could not have interfered with the court’s notional exercise of independent judgment. In this way, a regime can ‘courtwash’ its persecution by using judicial processes. Of course, this rupture will not always be effective: the degree to which courts are in fact independent is highly context-specific; there are many contemporary examples of “telephone justice” in which members of the executive appear to have dictated a particular judicial outcome, and many others where the courts merely sign off on executive action without independent inquiry. Moreover, as a general principle of international law, the state will always bear ultimate responsibility for the acts of the judiciary, which is, after all, an organ of the state.

State responsibility, however, does not absolve judges of individual accountability for persecution. Such was the case with Judge Rothaug, convicted in the “Justice Case” before the Control Council Military Tribunal at Nuremberg in 1948⁶⁰ for being “the knowing and willing instrument in that program of persecution and extermination”.⁶¹ Indeed, the IMT held that:

[Rothaug’s] court, in spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination.⁶²

The Justice Case is one of two prominent instances in which there has been an *ex post facto* examination of the role of the legal system, including judicial actors, in a persecutory regime; the second is the so-called “Legal Hearing” of the South African

⁶⁰ These proceedings are detailed in International Military Tribunal, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume III: “The Justice Case”, (Washington, DC: US Govt Print Off, 1949) [The Justice Case], which includes transcripts of Opening and Final Statements, documentary evidence of selected statutes, decrees and judgments issued under the Third Reich, extracts of other evidence, and the Opinion and Judgment of the Tribunal itself. Hereinafter, all references to The Justice Case will be to pages in this volume. This case was dramatised in the 1961 film, *Judgment at Nuremberg*.

⁶¹ *Ibid* at 1155.

⁶² *Ibid*.

Truth and Reconciliation Commission (TRC) in 1997.⁶³ Both explored the degree to which legal actors, and judges in particular, were responsible for the crimes of the regime under which they served. The indictment against the accused⁶⁴ in the Nuremberg case read as follows:

“... [T]he defendants are charged with judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then using the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale.”⁶⁵

Similarly, the South African TRC found that:

... the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice. ... There were ... many parts of the profession that actively contributed to the defence of apartheid through the courts. ...⁶⁶

These excerpts evince somewhat different theories of liability. In the Justice Case, the accused are portrayed, if not as independent actors, then as deploying their particular

⁶³ A transcript of proceedings can be found online on the website of the TRC at <http://www.justice.gov.za/trc/special/legal/legal.htm> [Legal Hearing Transcript], and the results of the Commission's deliberations can be found in Volume 4, Chapter 4 of the TRC's final report, also available online at <http://www.justice.gov.za/trc/report/> [Legal Hearing Report]. The first day of proceedings was focused on the judiciary. Further details and analysis are available in David Dyzenhaus' excellent *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) [*Judging the Judges*]. There have been other criminal cases brought against judges and legal actors in which the larger question of the role of judges in a repressive regime has arisen, and these are well canvassed in Hans Petter Graver, *Judges Against Justice: On Judges when the Rule of Law is Under Attack* (Heidelberg: Springer-Verlag, 2015) Part II generally. However, the Justice Case and the Legal Hearing were the most probing examinations of sector-specific responsibility of which I am aware. There will be further discussion of the liability of judges in chapter 7, section 7.3.

⁶⁴ The fifteen defendants in the Justice Case had all played lead roles in the administration of justice in Nazi Germany, whether in the Reich Ministry of Justice, the Academy of Law, or as prosecutors and judges in the special courts. The substance of the charges against the defendants was that they had “seized control of Germany's judicial machinery and turned it into a fearsome weapon for the commission of the crimes charged in the indictment”: Opening Statement for the Prosecution, The Justice Case at 40. All defendants were charged with a common design or conspiracy to commit and the commission of, war crimes and crimes against humanity. Some were also charged with membership in a criminal organization (the Nazi Party and/or the SS).

⁶⁵ The Justice Case at 13-14.

⁶⁶ Legal Hearing Report at 105.

expertise and portfolio to deliberately perpetrate atrocity. In South Africa, on the other hand, there is a feeling of complicity with injustice concocted elsewhere. Whatever the factual basis for these accounts, both provide examples of judicial persecution, albeit with somewhat different *modus operandi*. Regardless of the particular modality, in both cases judges were vulnerable to charges of persecution. To the extent that regime actors can successfully argue that the suffering in question is a direct result of the independent action of the courts, liability for judicial persecution may be shifted to the judges themselves. To the extent that the courts are not effectively independent, there is perhaps little to distinguish judges from foot soldiers, and both they, and their effective “superiors”, can be held liable for their acts. However, given that in virtually all instances judges possess greater liberty and agency (and face a less immediate threat of direct violence) than most soldiers, they likely bear a correspondingly greater responsibility.

1.10 Political Trials, Persecution, and the Role of Power

Many scholars have specifically emphasised the power dynamics of political trials, including Kirchheimer, who described the use of political trials for “upholding or shifting the balance of power”,⁶⁷ and Theodore Becker, who identified the “perception of a direct threat to established political power” as the “major difference between political trials and other trials”.⁶⁸ Political trials, Becker specifies, are those that result from criminal processes being activated by ruling élites against a person or group perceived to be hostile to the “prevailing pattern of value distribution”, or intending to “alter the way in which the government distributes those values” by reason of those perceptions.⁶⁹ Nonetheless, both Kirchheimer and Becker, and indeed many others, have posited that political trials often arise from the activity of political outgroups. Indeed, Kirchheimer believed it was inevitable, and Becker’s definition includes any trial that “involves the calculated use of the court-forum by any party to a political struggle in order to damage

⁶⁷ Kirchheimer, *supra* note 14 at 47.

⁶⁸ Theodore L Becker, “Introduction” in Theodore L Becker, ed, *Political Trials* (Indianapolis: The Bobbs-Merrill Company, 1971) at xi.

⁶⁹ *Ibid* at xi-xii.

or destroy the other party's potential or actual power position.”⁷⁰ Presumably, this can occur whether or not the particular party actually initiated the legal proceedings in question: what might have started out as an ordinary proceeding can become political because of the strategic or rhetorical choices of the accused (Mandela's approach to the Rivonia Trial, for example).

Others have been more emphatic about powerful parties being the drivers of political trials. Michal Belknap offers a definition of political trials that includes any trial that

is intended to affect the structure, personnel, or policies of government, that is the product of or has its outcome determined by political controversy, or that results from the efforts of a group within society having control of the machinery of government to use the courts to disadvantage its rivals in a power struggle which is not itself immediately political or to preserve its own economic or social position.⁷¹

Similarly, Posner (who otherwise dismisses Belknap's definition as too broad) emphasises the primary role of the government in his own definition of political trials:

... [B]ecause “political trial” is an epithet, it has been applied to a broad range of questionable judicial practices and controversies that have little in common, And, as a result, the term is hard to define. However the core meaning is relatively clear. On this definition, a political trial occurs when the government uses the judicial process against its opponents (including foreign enemies and internal dissidents) who have not violated formal, generally enforced laws or who have violated only formal laws against political dissent.⁷²

It is doubtful that the “core meaning” is as clear as Posner asserts. If he is suggesting that only the government can “do” political trials,⁷³ this is likely bound up in the

⁷⁰ *Ibid* at xii (emphasis in original).

⁷¹ Michael R Belknap, “Introduction: Political Trials in the American Past” in Michael R Belknap, ed, *American Political Trials* (Westport, CT: Greenwood Press, 1994) at xvi.

⁷² Eric Posner, *supra* note 27 at 87.

⁷³ And it seems that he is, given his clarifying remarks in the relevant footnote, in which he specifically excludes cases with political resonance, and situations of jury nullification, concluding “[h]owever objectionable, this is not a problem of the government trying to maintain its power by eliminating its political opponents...”: *Ibid* at 87 (footnote 17). Indeed, this footnote implies that perhaps the proffered

assumption that all political trials are forms of state repression, which is at odds with both history and much of the relevant literature. But while the salience of power dynamics may be contested in the designation of a judicial proceeding as a political trial, it is integral to defining the subset of cases that can be characterised as judicial persecution. It is inherent in the definition of persecution that the perpetrator be more powerful than the target. An outgroup may make a trial political, but they cannot make it persecutory.

1.11 Lawfare: Law, Geopolitics, and War by Another Name

The third category of judicial instrumentalisation included in Figure 1.1 is “lawfare”, and like the other categories identified, its definition is somewhat indeterminate.⁷⁴ As a portmanteau for law and warfare, it is used to refer to the strategic use of law as a “substitute for traditional military means to achieve an operational objective”,⁷⁵ primarily in military and critical humanitarian law contexts. As such, it is at least capable of being understood as a neutral term, although like other forms of judicial instrumentalisation, it has tended to be used as a pejorative.⁷⁶ Indeed, in 2010, a conference was held at Case Western Reserve School of Law primarily on the definition of lawfare and whether it could be salvaged as a useful term of art.⁷⁷ These discussions echoed the debates over the definition of political trials, with a central, lingering question being whether securing a military (and political) advantage through judicial proceedings was a legitimate use of the courts. Reminiscent of Shklar’s notion of

definition might be intended only to define the subject matter of this particular paper, rather than propose an all-purpose definition.

⁷⁴ It is not by accident that they overlap in the Venn diagram. For example, and as elaborated above, if Meierhenrich and Pendas’ typology of political trials is adopted, there is considerable overlap between decisive political trials and the judicialisation of politics.

⁷⁵ This definition comes from Charles J Dunlap Jr, as cited in “Is Lawfare Worth Defining? Report of the Cleveland Experts Meeting: September 11, 2010”, (2010) 43 Case Western Reserve J of Int’l Law 11, at note 2. Dunlap is credited with popularising the term, as a result of a speech that he gave at Harvard University in 2001: “Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts” (*sic*) (29 November 2001), online at: <http://people.duke.edu/~pfeaver/dunlap.pdf>.

⁷⁶ For example, the “Lawfare Project” is a non-governmental organisation dedicated to exposing “the abuse of Western laws and judicial systems to achieve strategic military or political ends”, describing lawfare as “inherently negative”: <https://thelawfareproject.org/lawfare/what-is-lawfare-1/>.

⁷⁷ Reproduced in (2010) 43 Case Western Reserve J of Int’l Law (special issue).

legalism was the concern expressed by one of the scholars that peace mediators and parties might be “seduced by the notion that law and legal mechanisms are a neutral force”.⁷⁸

A more charitable reading of lawfare sees it as representing a vindication of humanitarian law through judicial enforcement. Accusing an adversary of war crimes is not improper if, in fact, there is a reasonable case to be made that they have committed war crimes. Lawfare is the charge that might have been levelled by Serbian General Ratko Mladić and President of the Republika Srpska Radovan Karadžić, indicted for war crimes and crimes against humanity by the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1995, during the Yugoslav wars, or by President of Serbia Slobodan Milošević, indicted for war crimes and crimes against humanity in 1999, at the height of the Kosovo conflict, or by Charles Taylor, who resigned the Presidency of Liberia after being charged with war crimes and crimes against humanity by the Special Court for Sierra Leone (SCSL).⁷⁹ Indeed, marginalising bad actors is one of the explicit justifications of international criminal justice.⁸⁰ Critics of lawfare contend that such indictments risk being a misuse of the courts to neutralise the nominally legal activities of political or military actors, and to the extent that this is true, it is potentially fertile ground for judicial persecution. On the other hand, if lawfare represents war by (other) non-violent means, it may well be a marked improvement over those mainstream military activities, including those justified as retributive, that cause so much bloodshed.

The question of timing can be tricky here, as it often is in cases of judicial persecution. If lawfare is understood as constituting some sort of interference with ordinary military

⁷⁸ Dr Paul R Williams, “Lawfare: A War Worth Fighting”, (2010) 43 Case Western Reserve J of Int’l Law 143 at 146. Williams also described the actions of the Myanmar military junta against Aung San Suu Kyi as engaging in “constant lawfare operations”, proceedings that could just as easily be characterised as political trials: *ibid* at 147.

⁷⁹ While Milošević famously died before the end of his trial, Mladić, Karadžić, and Taylor were all convicted of virtually all of the atrocity crimes with which they had been charged, and are currently serving life sentences.

⁸⁰ For a discussion of this objective and the extent to which international criminal law can deliver on it, see Kenneth A Rodman, “When Justice Leads, Does Politics Follow? The Realist Limits of Prosecutorial Agency in Marginalizing War Criminals”, (2019) 17 J of Int’l Crim Just, published online: <https://doi.org/10.1093/jicj/mqz002>.

operations, then is it lawfare if the trials occur only at the end of hostilities, as they did at the conclusion of World War II? Or, on the other hand, does the mere fact that any indictments or arrest warrants are issued during ongoing combat, as they were during the Yugoslav conflict for example, constitute *prima facie* lawfare? How is the relative legitimacy of lawfare and military operations established, in the heat of battle? Lawfare raises fascinating questions of how, when, and by and against whom the laws of war are prosecuted that merit a far more detailed treatment than the scope of this thesis permits. As such, it is raised here only to recognise it as a possible instantiation of judicial persecution, and it will arise only in passing in the remainder of the thesis.

1.12 Judicial Persecution in Three Legal Contexts

This thesis explores questions of judicial instrumentalisation generally, and judicial persecution specifically, in three problem contexts. The selection of these three case studies is by no means intended to be exhaustive, but rather to provide three perspectives on the problem. First, apartheid South Africa, canvassed in chapter 2, has been selected as the case study of an unjust legal system, in which the law itself is suffused with illiberal values. Given that it institutionalised and actively promoted racial discrimination, it is uncontroversial that the apartheid legal regime was, in fact, unjust. It pursued its goals in the face of overwhelming public opposition both inside and beyond South Africa's borders. Modern apartheid came at a point in history in which international legal opinion actively condemned racial discrimination in general, through United Nations resolutions and international treaties, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Racial Discrimination (CERD) and Article 55(c) of the UN Charter. Each of these instruments was specifically directed at countering the sovereign right of states to make and enforce discriminatory legal norms. As evidenced by the 1973 adoption of the International Convention for the Suppression of the Crime of Apartheid,⁸¹ and the range of economic and other sanctions levelled by a broad swath of countries against South Africa in the 1970s and 1980s, the apartheid state was

⁸¹ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243 (entered into force 18 July 1976) [Apartheid Convention].

considered to be an outlaw regime. However, this example is also useful because after South Africa transitioned to a multiracial democracy in 1994, both apartheid law and the complicity of judges in enforcing it was scrutinised by the South African Truth and Reconciliation Commission (TRC) in the course of the Legal Hearing. This is a rare instance in which judges were called to account for their actions during an unjust regime and some explanation was provided. As such, this case study provides a road map for how judges perceive, and justify, their role in an unjust legal order.

If judicial persecution's first problem type is that of an authoritarian state imposing discriminatory laws against its own people – persecution along a clearly vertical axis – the second problem type is of an altogether different orientation. Strategic lawsuits against public participation (SLAPPs) are a litigation device in which a private party files a civil claim against another private party in order to discourage or enjoin their opposition or objection to the claimant's activities. SLAPPs (to be discussed in chapter 3) are, in essence, a private prosecution of political opponents, and possess the potential to constitute persecution along a horizontal axis, thereby introducing a new dimension to the study of a judicial phenomenon. But just as revealing, for this study at least, is the legal backlash against SLAPPs in a variety of jurisdictions, both in legislative articulations of the harms of SLAPPs and a range of juridical mechanisms for identifying and defusing them. As such, this case study not only explores a type of judicial persecution, it offers a template for thinking about solutions.

The third case study (the subject matter of chapter 4) is the one most closely aligned with the question of political trials as explored in this chapter. When the European Convention on Human Rights (ECHR) was drafted in 1950, it included a fairly obtusely worded article (Article 18) that was directed at the infringement of rights for unarticulated collateral purposes. From the *travaux préparatoires*, it is clear that the potential mischief that Article 18 was intended to address was the prospect of destructive political trials. This article lay largely dormant in the early jurisprudence of the ECHR, but has, in the last 15 years, seen a flurry of cases in which political opponents, particularly in eastern Europe, allege that criminal proceedings have been brought against them for ulterior motives. As such, the body of judicial opinions under

Article 18 is a rare example of an explicit jurisprudence of political trials and, where those trials have been of the destructive type, an emerging jurisprudence of judicial persecution.

In each of these case studies, the judicial system has been instrumentalised in ways that not only exceed the scope of ordinary legal adjudication, but do so in ways tantamount to persecution. As such, each will serve to bring us closer to an understanding of judicial persecution's different dynamics and different harms. In revealing those harms, each case also brings to light the plural dimensions of the judicial responsibility, to the rule of law and justice, to the polity, and to the judicial institution.

Chapter 2

Systemic Judicial Persecution in Apartheid South Africa

The first case study of judicial persecution is the systemic racial discrimination, enforced through legal processes, of South Africa during the apartheid era. It is now largely uncontroversial to say that the apartheid system constituted racial persecution. Apartheid being a system constituted through law, it was inevitable that it would be enforced, at least in some measure, through court processes; indeed, the South African Truth and Reconciliation Commission (TRC) found that apartheid was prolonged by its “superficial adherence to ‘rule by law’” and legitimisation by the courts.¹

Systemic injustice presents unique challenges to a reflection on judicial responsibility, given that the ordinary duty to apply and enforce the law will undoubtedly influence the bearing of a judge’s ethical compass. A persecutory legal system will often possess an internal logic to which legal actors adapt and assimilate. Moreover, if the overall context is persecutory, it can be hard to distinguish particular cases or one’s particular role. Nonetheless, persecutory environments are well worth studying, being replete with judicial instrumentalisation across the spectrum, including clear-cut cases of persecution. In a subject-area that tends to question how judges should assess whether a law is just or unjust, cases drawn from a context widely accepted to have been legally unjust can, briefly, postpone that threshold issue. This in turn, permits a more focused examination of what judges should do once injustice is beyond question, particularly in a system insisting it adheres to certain nominally liberal ideals, such as the rule of law and the independence of the judiciary.

¹ Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Truth and Reconciliation Commission, 1999) [TRC Report], available online at <http://www.justice.gov.za/trc/report/>, and specifically Volume 4, Chapter 4: Institutional Hearing: The Legal Community [Legal Hearing Report] at 101 (paras 32-33) and 106 (para 43).

2.1 A Brief History of the Apartheid Legal System²

The late 19th century saw a series of battles for overall rule between the British and earlier Afrikaner settlers, leading to the establishment of modern South Africa by the passage of the *South Africa Act* (“SOA”) by the British Parliament in 1909. The SOA largely gave South Africa its independence, albeit with a British sovereign.³ However, despite formal British rule, the Afrikaner history of denying non-whites the franchise persisted in much of the country, and the SOA entrenched some of these barriers, not the least of which was that only whites were eligible for election to Parliament. In 1936, Parliament formally disenfranchised the black people of the Cape Province, the last black people in South Africa to have retained a nominal right to vote.⁴

With the non-white majority disenfranchised, in 1948, the National Party was elected on a platform of apartheid and quickly began to institute policies and laws to completely segregate the races, with non-whites being relegated to a vastly subordinate status in all respects. Deprived of the vote and having long been restricted in their right to own property, non-whites were also dislocated, and subject to discrimination in everything from what work they could do, to what schooling (and of what quality) they could receive, to where they could be present without a “pass”. This administrative system of segregation was commonly referred to as “petty” apartheid. The combined effect of the application of all apartheid laws was the systematic persecution of the non-white majority of South Africans.

² This history is largely based on information contained in Chapter 1 of John Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978) [*Human Rights*], Chapter 2 of Stacia L Haynie, *Judging in Black & White: Decision Making in the South African Appellate Division, 1950-1990* (New York: Peter Lang Publishing, 2003), and the TRC Report, *supra* note 1. The TRC Report at Vol 1, Ch 13, at 448-477 provides a detailed chronology of what it terms “apartheid” legislation that stretches back to the mid-19th century, including restrictions on black land ownership and joining a labour union, interracial sexual relationships, and forced relocation of groups of and individual black people. Like many scholars, in interacting and quoting from contemporary texts, I will occasionally adopt apartheid-era racial descriptions for the purpose of legal specificity. Under apartheid, ‘white’ referred to the enfranchised settler population; the indigenous African population of the region was referred to as ‘African’, ‘black’, or ‘native’; and ‘coloured’ refers to people of mixed race, mainly of the Cape region, who were classified separately under the *Population Registration Act 1950*. Obviously, I use these terms without endorsement.

³ In 1961, the South African Parliament converted the state into a republic: *South African Constitution Act*, No 32 of 1961.

⁴ *Representation of Natives Act*, No 12 of 1936.

The implementation of apartheid led to mass protest and uprising by the majority non-white population, which in turn resulted in efforts by the apparatus of the state to suppress these movements in order to maintain apartheid and some measure of civil order (as defined within the regime's own logic). The government grew increasingly authoritarian and criminalised political opposition by banning political parties,⁵ passing a series of anti-terrorism laws,⁶ and arresting (not to mention covertly assassinating⁷) anti-apartheid activists. The combined effect of these laws (and extralegal activities) was the systematic persecution of the regime's political opponents.

The final enforcement of the law was ultimately left to the courts.⁸ As such, apartheid law was repeatedly sanctioned through the courts by way of legal proceedings, and in this way acquired and maintained what the South African Truth and Reconciliation Commission (TRC) termed the "aura of legitimacy".⁹ This is an illustration of what Bilsky calls the "legitimising function" of the courts, and what Kirchheimer termed "authentication".¹⁰ As noted earlier, the TRC found that this "aura of legitimacy" was part of the reason for the longevity of the apartheid regime.

⁵ For example, the two main (non-white) opposition parties, the Pan-African Congress and the African National Congress, were banned by the *Unlawful Organisations Act*, No 34 of 1960. This occurred in the aftermath of the Sharpeville Massacre in which about 250 unarmed demonstrators were shot (69 fatally) by authorities during a march on a police station.

⁶ *General Law Amendment Act (Sabotage Act)*, No 76 of 1962, prohibiting "sabotage"; *Terrorism Act*, No 83 of 1967; and *Internal Security Act*, No 74 of 1982, among others.

⁷ For a history of the apartheid regime's policy of targeting political opponents for assassination see, for example, Kevin A O'Brien, "The Use of Assassination as a Tool of State Policy: South Africa's Counter-Revolutionary Strategy 1979-92 (Part II)", (2001) 13(2) *Terrorism and Political Violence* 107. For a list of apartheid-era assassinations, see "Political Assassinations 1974-1994", *South African History Online*, online: <https://www.sahistory.org.za/article/political-assassinations-1974-1994>.

⁸ The everyday adjudication of petty apartheid tended to fall to local magistrates, which may or may not be considered "courts", in the sense that their structural independence from the executive was questionable.

⁹ Legal Hearing Report at para 32. The Report goes on, at para 38, to find that:

"In a sense, those both inside the country and abroad who might have been embarrassed by the gross racism and exploitation of apartheid could seek some comfort in the semblance of an independent legal system. This 'justification' would not have been possible had even a strong minority of the legal profession united to strip the emperor of his clothes."

¹⁰ See discussion at pages 38-40 of chapter 1.

Nonetheless, the historical timing of apartheid is striking, not least because it coincides almost precisely with the rise of an international human rights system that specifically condemned racial discrimination.¹¹ Thus, not only did the regime meet with considerable and continuous opposition domestically, it came to be an international pariah. Apartheid itself was the subject of increasing moral, political, and legal condemnation, culminating in the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid (Apartheid Convention) in 1973, and a wave of economic and other sanctions in the 1980s.¹² Eventually, the domestic insurrection – undoubtedly buoyed by widespread international support – overwhelmed the government’s ability to maintain any semblance of order. In 1989, the newly-elected President, FW de Klerk, finally began to dismantle apartheid.

2.2 The TRC Legal Hearing and Judicial Complicity

When the Truth and Reconciliation Commission first convened in South Africa, an examination of the role of the judiciary in promoting and supporting apartheid was not on the agenda. But a hearing was convened after Krish Govender, a human rights lawyer, submitted a standard form at a Victim Hearing in 1996, listing under “Victim” “The South African People”, and under “Nature of Violation” “Injustice under the Apartheid Judiciary”.¹³ A hearing was convened to specifically examine the role of the judiciary and the legal profession under apartheid.¹⁴ As a result of submissions made at

¹¹ Article 7 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948 (GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71), specifically prohibits discrimination, and was followed by specific prohibitions in the *Convention on the Elimination of Racial Discrimination* (21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [CERD]) and the *International Covenant on Civil and Political Rights* (16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]).

¹² *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, GA Res 3068 (XXVIII), 1015 UNTS 243 (entered into force 18 July 1976) [Apartheid Convention]. I provide a detailed background and analysis of international condemnation in “Classifying Law as Criminal in apartheid South Africa”, Chapter 6 in Stephen Skinner, ed, *Ideology and Criminal Law under Fascist, National Socialist and Authoritarian Regimes* (London: Hart Publishing, 2019).

¹³ David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) at 36 [*Judging the Judges*].

¹⁴ A transcript of proceedings of the Legal Hearing can be found online on the website of the TRC at <http://www.justice.gov.za/trc/special/legal/legal.htm> [Legal Hearing Transcript], and the results of the Commission’s deliberations can be found in the Legal Hearing Report, *supra* note 1. The first day of

the three-day hearing in 1997, the TRC found that “... the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice” and that they “actively contributed to the defence of *apartheid* through the courts”.¹⁵

And specifically with respect to the judiciary, the TRC found that

The judiciary,

- [had] unthinkingly allowed judicial policy to be influenced by executive dictate or white male prejudice;
- [had been] intent on maintaining the status quo;

and

- [had] willingly participated in producing the highest capital punishment rate in the ‘Western’ world by the mid-1980s and an execution-rate that impacted overwhelmingly on poor black male accused. ...¹⁶

Thus, there is little doubt that the courts were instrumental in supporting the apartheid regime and, by extension, the injustices that it perpetrated. Indeed, this was the source of their utility within the South African political landscape. The need to maintain a sufficient appearance of independence, and thus the courts’ ability to provide an “aura of legitimacy” (Bilsky’s idea of the “fighting chance”, as discussed in chapter 1), protected them from total corruption by the governing party. However, the constitutional framework, particularly after 1961, enshrined the doctrine of parliamentary supremacy and ensured that the courts had no constitutional authority to enquire into the validity of an enactment.¹⁷ Thus, whatever independence the courts appeared to possess remained, functionally and statutorily, subordinate to the will of Parliament. Richard Goldstone, a liberal judge appointed to the South African judiciary

proceedings was focused on the judiciary. Further details and analysis are available in David Dyzenhaus’ excellent account of the proceedings in *Judging the Judges*.

¹⁵ Legal Hearing Report at 101 (para 33).

¹⁶ Legal Hearing Report at 105 (para 34(i)).

¹⁷ While Parliamentary supremacy had been long-recognised, both the supremacy of Parliament and the incompetence of the courts to pronounce on the validity of legislative enactments was explicitly entrenched in section 59(2) of the 1961 constitution establishing South Africa as a republic: *Constitution Act*, No 32 of 1961.

during apartheid, describes a national bench that zealously, and successfully, guarded its formal independence, noting that the apartheid regime

... could afford to have an independent judiciary for two principal reasons. The first was that without a written constitution, Parliament was supreme and the courts had no power of judicial review. Parliament could literally undo on Tuesday what the judges ordered on Monday. Secondly, the overwhelming majority of the judges enthusiastically supported Apartheid and did not need, and would have been intolerant of, any government interference. It followed also, that the government could afford to appoint the bench a few liberal anti-Apartheid lawyers, like myself.¹⁸

This veneer of legality allowed for the perpetuation of one of the dominant myths among the apartheid-era judiciary in South Africa, namely that the courts of South Africa maintained considerable international respectability during the apartheid years.¹⁹ But to the extent that such a reputation was maintained – and there is certainly serious doubt that it survived the full duration of the apartheid regime²⁰ – it was in part the result of the careful strategic choices by the government that concealed the erosion of the independence and impartiality of South African courts, paired with a set of familiar justificatory narratives for why the courts behaved as they did: that they “declare what the law is, they do not make it” and that they have no choice.²¹ But as it turns out, this was merely the end point of an evolution in judicial behaviour during apartheid, one

¹⁸ Justice Richard J Goldstone, “Foreword: The Challenges of Judicial Independence” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) at ix-x. Dugard makes the same point in *Human Rights* at 285.

¹⁹ This view was attributed by the TRC to “many of the submissions we have received from the judges”: Legal Hearing Transcript at 18. Even noted South African human rights barrister Sydney Kentridge QC said as much in a 1987 speech, reproduced in Sydney Kentridge QC, *Free Country: Selected Lectures and Talks* (Oxford: Hart Publishing, 2012) at 49, although he goes on to say that the status of the courts had been in decline since the 1950s. When the internationally favourable reputation of the courts was put as a proposition to Professor Lennox Hinds at the TRC Legal Hearing, he quickly dismissed it as “wholly unsubstantiated”.

²⁰ In 1988, the International Commission of Jurists issued a scathing critique of the lack of *de facto* independence demonstrated by the South African judiciary: Geoffrey Bindman, ed, *South Africa and the Rule of Law* (London: Pinter Publishers, 1988), Chapter 13. This Report indicated that reservations about the independence of the South African judiciary had been expressed “since the 1950s”, at 109.

²¹ *Ibid* at 109, citing interviews with sitting judges.

that can be traced across three phases: early judicial resistance, deference, and active repression.

2.2.1 From Judicial Resistance to Passivity to Repressive Activism

As the National Party began to roll out its policies after its election in 1948, it did encounter some initial judicial resistance. In a series of cases in the early 1950s, the Appellate Division, the highest court in South Africa at that time, and which was still predominantly composed of more liberal English judges, relied on British common law doctrine to strike down certain discriminatory measures in the provision of public services. It did so on the basis that the government lacked explicit statutory authority to discriminate, and common law presumed equality.²² The government reacted by passing the *Separate Amenities Act* in 1953, providing the missing statutory authority.²³

Far more dramatically, when the Appellate Division challenged the government's passage of legislation to disenfranchise the coloured people of the Cape Province in the *Harris* case,²⁴ Parliament passed legislation that instituted a "High Court" consisting of members of Parliament to review any judgment of the Appellate Division that declared legislation invalid.²⁵ The new parliamentary court immediately reversed the Appellate Division's decision in *Harris*.²⁶ When the parliamentary court's decision was challenged, the Appellate Division, not surprisingly, held that the new "High Court" violated the separation of powers between the legislative and judicial branches set out in the Constitution.²⁷ This stand-off was settled when Parliament delivered the *coup de grâce*: it eliminated the "High Court" and instead increased the size of the Appellate Division from five to eleven, filled the empty seats with Afrikaner judges loyal to the governing

²² Haynie, *supra* note 2 at 34.

²³ *Separate Amenities Act*, No 49 of 1953.

²⁴ *Harris and ors v Minister of the Interior*, 1952 (2) SA 428 (A). "Coloured" people in South Africa refers to a specific group of racially mixed people in the Cape Province.

²⁵ *High Court of Parliament Act*, No 35 of 1952.

²⁶ Haynie, *supra* note 2 at 35.

²⁷ *Minister of the Interior v Harris*, 1952 (4) SA 769 (A).

party,²⁸ and required a full quorum for any hearings on the validity of legislation.²⁹ This effectively struck a death knell to most curial resistance to apartheid policies at the highest level.

Once it had enlarged and restocked the Appellate Division, the National Party – perhaps as a peace offering – did not otherwise change the structure of the court system in any substantial way during apartheid, and judges did enjoy a measure of formal independence. Appointments were for life, and no judge was ever removed for political reasons.³⁰ But of course in substance a serious blow had been struck to the ability, and even the will, of the judiciary to behave independently. Specifically, the likelihood that a court would cast a critical eye on legislation had been significantly diminished. Even if one's politics did not imperil one's existing seat on the Bench, they were certainly a factor on one's way onto the Bench and upwards. By 1978, at least half of all judges serving on South Africa's superior courts could be described as supporters of apartheid.³¹

This led to a period of judicial deference, where the courts intoned the doctrine of parliamentary supremacy in the face of any plea for judicial imagination. This position was amplified by the dominant legal philosophy in apartheid South Africa, which was not just legal positivism, but old-school Austinian command theory positivism.³² This

²⁸ While their exact political credentials are not known, the new judges' "qualification for promotion could not be detected by the legal profession." Kentridge, *supra* note 19 at 50.

²⁹ *Appellate Division Quorum Act*, No 27 of 1955. Other types of appeals only required a quorum of five judges, and, criminal appeals, only three. Dugard, *Human Rights* at 10.

³⁰ Although there is some evidence that judges may have resigned voluntarily on the basis of political incompatibility. Two such cases are noted in Edwin Cameron, "Nude Monarchy: The Case of South Africa's Judges" (1987) 3 S Afr J on Hum Rts 338 at 339-340.

³¹ Dugard, *Human Rights* at 11.

³² For a deft account of the (non-)evolution of South African legal theory, see Dugard, *Human Rights* at 393-397. The characterisation of the prevailing orthodoxy as "Austinian" can also be found in Christopher Forsyth, "The Judges and Judicial Choice: Some Thoughts on the Appellate Division of the Supreme Court of South Africa since 1950", (1985) 12(1) J of S Afr Studies 102 at 102. However, Van Blerk argues that Dugard's account of positivism explains judicial neutrality, while Forsyth's simply serves to conceal "the choice [made by the judge] from the reader of the judgment": Adrienne Van Blerk, *Judge and Be Judged* (Cape Town: Juta & Co, 1988).

was the approach drilled into law students,³³ and the approach which led John Dugard to remark in 1978: “South African lawyers are peculiarly prepared to accept as law anything that calls itself by that name or is printed at government expense in the *Government Gazette*.”³⁴

As for the persistence of this jurisprudential approach during apartheid, this may have been more relic than deliberate choice, resulting from a general lack of interest in legal theory. As jurisprudence was not studied or debated in the universities,³⁵ it likely never came up in the law office or the judges’ chambers. And without a critical mass of legal philosophers within South Africa, the South African academy would have been isolated from the academic debates occurring in the rest of the world: HLA Hart’s restatement of legal positivism and the subsequent critiques by Fuller and Dworkin, among others, all occurred during the apartheid era. (Ironically, such debates often even explicitly addressed the problem of unjust systems, citing apartheid as an example.³⁶) However, accepting positivism as the prevailing legal philosophy risks functioning as an excuse.³⁷ There is a distinction to be made between the prevalence of positivism as a legal theory and interpretive approach, which may have been largely unchallenged, and the underlying apartheid law itself, which was consistently challenged. Countervailing and competing legal frameworks were frequently discussed and debated in South Africa. Critics noted the irony of the apartheid regime promoting itself as a Western counterweight to the perceived communist threat while utterly failing to implement

³³ See Dugard, *Human Rights* at 394: “Positivism dominated legal education: lawyers were trained to concern themselves with rules of law alone and their mechanical application and to avoid any speculation about the law as it ought to be.” (footnote omitted)

³⁴ *Ibid* at 393.

³⁵ *Ibid* at 395.

³⁶ See, for example, Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co, 1977) at 342.

³⁷ In her review of Dyzenhaus’ *Judging the Judges*, Vivian Grosswald Curran concludes that Dyzenhaus “blames positivism excessively”, noting the parallels with the tendency of Nazi-era judges “to exculpate their own previous behaviour by claiming that a legal culture of strict obedience to law was really the blameworthy party”: Vivian Grossman Curran, “Law’s Mimicry of Law”, (2000) 38 *Alta L Rev* 935 at para 11.

Western notions of liberty and due process.³⁸ Others, particularly Dugard, appealed to the emergent law of international human rights.³⁹ Eventually, the global community would condemn apartheid in the language of international criminal law, culminating in the adoption of the Apartheid Convention by the General Assembly in 1973. But if such international frameworks could be rejected as alien to the domestic legal sphere, those theories that framed judicial choice within the South African legal order were harder to avoid, and were actively urged by counsel in South African courts during apartheid.⁴⁰

The most notable of these theories was the “common law” approach advocated by, among others, John Dugard and David Dyzenhaus.⁴¹ Dyzenhaus argued that South African judges had been misguided in adopting a “plain fact” approach to interpreting statutes, one that was generally positivist in orientation but which used facts on the public record to discern and apply a conception of the intention of Parliament.⁴² Dyzenhaus instead promoted an approach to adjudication that required the interpretation “in accordance with the rule and reason of the common law”⁴³ and that incorporated interpretive principles that he claimed were part of the common law of South Africa, including equality before the law, liberty, and general standards of reasonableness.⁴⁴ In doing so, Dyzenhaus endeavoured to establish that apartheid-era judges had liberal choices available to them within the law of South Africa.⁴⁵

³⁸ This was the thrust of the political and scholarly work of Barend van Niekerk. See for example, Barend van Niekerk, *The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World* (New York: Praeger Publishers, 1987). Fascinatingly, Van Niekerk, twice tried for contempt of court for criticising the South African legal order, often wrote scathing but oblique critiques, describing the failings of other Western states with obvious parallels to the apartheid regime.

³⁹ Dugard, *Human Rights* at 397-399.

⁴⁰ See, for example, the case of *Rossouw v Sachs*, 1964 (2) SA 551 (A), discussed in the next section, in which the applicant relied on common law presumptions of liberty.

⁴¹ Dyzenhaus first develops this argument in *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Clarendon Press, 1991) [*Hard Cases* (1991)] and refines it in his 2010 revision: *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Oxford University Press, 2010) [*Hard Cases* (2010)].

⁴² Dyzenhaus, *Hard Cases* (2010) at 48. Dyzenhaus notes that positivists might seek to distance themselves from this approach by distinguishing positivism from a conservative doctrine of judicial responsibility, at 49.

⁴³ *Ibid* at 53, citing Coke.

⁴⁴ While Dyzenhaus contended that the plain fact approach had become dominant, he was also able to find support for common law principles within contemporaneous judgments of South African courts, and

2.2.2 Interpretation and Judicial Choice

In 1961, in *Political Justice*, Otto Kirchheimer suggested that positivism could play a potentially useful role in South Africa: judges could, while maintaining that their interpretive approach was strictly legal, ignore the plainly unjust purpose of a law and find for the “victims of the system”.⁴⁶ In other words, textual ambiguities might be resolved in a non-purposive way, favouring the aims of justice over governmental objectives. But even Kirchheimer had to admit that this would only work “in the admittedly diminishing number of cases where there are ambiguities” in the statute in question.⁴⁷ And the South African government, as has been demonstrated, was particularly adept at swiftly filling any loopholes identified by the courts.

But if the mood of the Appellate Division in the late 1950s might have been described as “passive” or perhaps even “resigned”, it would not remain so for long. By 1961, the newly expanded Appellate Division had started saving the legislature time and effort by filling loopholes itself. In overturning a decision that had challenged the discriminatory effect of a statute without express authorisation, the Court accepted that the power to discriminate was clearly implied by the statute in question.⁴⁸ This was the beginning of an interpretative trend of filling gaps in statutory language in accordance with apartheid ideology. And these preferences came to be manifest in all areas of judicial choice: David Dyzenhaus has laid out a strong case that, around this time, when called upon to exercise discretion, the courts began to almost invariably choose the most repressive interpretation, as this would more likely accord with the intent of the legislature.⁴⁹

much of *Hard Cases* (both editions) is devoted to canvassing the competing approaches across a range of case-types.

⁴⁵ Dyzenhaus makes this argument most forcefully in *Judging the Judges* at Chapter 2 “Judicial Dilemmas: Tales of (Dis)empowerment”.

⁴⁶ Otto Kirchheimer, *Political Justice* (Princeton: Princeton University Press, 1961) at 210-211.

⁴⁷ *Ibid* at 210.

⁴⁸ *Minister of the Interior v Lockhat*, 1961 (2) SA 587 (A). For Forsyth, this is the clearest rebuttal to claims that the judiciary’s hands were entirely tied by the legislature: Forsyth, *supra* note 32, at 105.

⁴⁹ This is what Dyzenhaus, using a term coined by Dworkin, calls the “plain fact approach”, that is, ascertaining the intent of the legislator in resolving any ambiguity in the text of the statute. Dyzenhaus, *Judging the Judges*, *supra* note 13 at 16. He makes the same point in *Hard Cases* (1991) at 57.

An example of this latter phenomenon is the case of *Rossouw v Sachs*,⁵⁰ in which Albie Sachs (who would go on, post-apartheid, to be named to be a judge of the Constitutional Court) challenged the conditions of his detention under the notorious 90-day law.⁵¹ Specifically, Sachs sought a declaratory order that he be permitted reading and writing materials and allowed out of his cell for some exercise, rights routinely granted to other non-convicted persons in custody. The statute in question was silent on the conditions of detention.

At first instance, the order was granted reflecting the “common law approach” urged as a liberal alternative to more restrictive interpretation. The Cape Provincial Division held that to deprive a detainee of the right to the basic privileges sought would be tantamount to punishment, and that it would be “surprising to find that the Legislature intended punishment to be meted out to an unconvicted prisoner.”⁵² This was the same approach that had been deployed by the Appellate Division in the early days of the apartheid regime, and was based on the idea that South African common law contained certain presumptions – such as the presumption in favour of individual liberty – that should inform judicial interpretation.⁵³ But the Appellate Division overturned the Provincial Court, concluding that the purpose of the detention provision was to allow the state to pressure the detainee to speak, and that where state security was at issue, this would trump the more restrictive common law rule of interpretation. As such, it was the Appellate Division itself that ‘filled the gap’ for Rossouw through an expansive reading of the discretion afforded by the statute that favoured the regime’s repressive and arbitrary approach to security.

⁵⁰ 1964 (2) SA 551 (A). This case is discussed at length in Dyzenhaus, *Hard Cases 2010* at 90ff. Rossouw was the Captain of the Cape Town Security Police and Sachs brought an application for judicial review of his decision.

⁵¹ The 90-day law, s 17(1) of the *General Laws Amendment Act 37 of 1963*, allowed for the detention of suspected members of banned political organisations or suspected saboteurs to be held for interrogation for up to 90 days without the need for an arrest warrant, nor the possibility of judicial intervention (s 17(3)).

⁵² Unreported judgment. Quoted in Dyzenhaus, *Judging the Judges* at 68. As such, the discretion exercised by Rossouw to deny Sachs these privileges was not authorised by law and subject to correction by the court.

⁵³ See, for example, Dyzenhaus, *Judging the Judges* at 15.

2.2.3 *Distortions in the Lens*

This is but one example of many that cast doubt on the degree to which the judiciary were truly powerless in the face of legislative will or were instead willing partners in the resulting persecution. Indeed, it is not clear how the judiciary itself reconciled these two perceptions of itself: on the one hand, as an independent Bench of the highest calibre and, on the other, as utterly constrained by Parliamentary supremacy. But there is little question that it has, indeed, tried to play both angles at once: after the end of apartheid, even judges appointed under the “new dispensation” refused to appear at the Legal Hearing, arguing that the TRC’s apparent purpose, to promote accountability, was contrary to the principle of judicial independence. While that claim is debatable, it was somewhat undermined when the Chief Justice, Michael Corbett, rather than remaining silent, succumbed to the temptation and filed a memorandum with the TRC to respond to allegations made at the Legal Hearing with respect to the trial and execution of Andrew Zondo.

Zondo was raised as an archetypal case of apartheid-era injustice in both the initial submission of Krish Govender that triggered the Legal Hearing, and then again by human rights activist Paula McBride in her testimony at the Legal Hearing. In between those two submissions, the Chief Justice filed a memorandum arguing against the convening of the Legal Hearing,⁵⁴ as well as choosing to comment on Govender’s condemnation of the trial judge in *Zondo*. As such, this memorandum provides us with some insight into the justifications, if not of the trial judge himself, of a senior judge of the same era. While it is not clear why Corbett chose to come to the defence of Justice Leon, the presiding judge in the *Zondo* case, it is interesting to note that they were both considered to be “liberal” judges. Like the abolitionist judges studied by Robert Cover, justification was perhaps most meaningful for those judges who genuinely felt conflicted about their role during apartheid.⁵⁵

⁵⁴ The content of this memorandum is discussed at length in Dyzenhaus, *Judging the Judges* at 37-52.

⁵⁵ Robert Cover, *Justice Accused* (New Haven: Yale University Press, 1975) at, *inter alia*, 119.

The basic facts are these: in 1985, when Andrew Zondo was 19 and part of the armed wing of the ANC, Umkhonto we Sizwe, he planted a mine in a shopping centre, killing five people. He was convicted of murder and sentenced to death. He was ably represented by counsel of his choice. At that time, a death sentence was mandatory for murder, absent extenuating circumstances. The trial judge found none. While he did recognise that Zondo was young when the crime was committed, he did not find this sufficiently compelling to warrant a different sentence. When Zondo sought leave to appeal on that issue, it was denied, first by the trial judge himself, and then by the Appellate Division. Zondo was hanged shortly thereafter, at the age of 20.

Govender had two main complaints about the case at the Legal Hearing: the apparent “steamrolling” of the accused through trial to execution “at an unusually rapid pace”,⁵⁶ and the failure of the judge to find extenuating circumstances. It is Corbett’s defence on this second issue that is particularly illuminating:

At the time when this case was decided (1986) the law imposed a mandatory death sentence upon a person eighteen years of age or older convicted of murder where no extenuating circumstances were found to be present. *The Court had no choice in the matter.* The onus of establishing extenuating circumstances rested on the accused. In deciding the issue of extenuating circumstances the Court ... had to assess the accused’s moral blameworthiness taking into account *all* the circumstances, including the personality of the accused and the nature of the murder and the manner of its commission.⁵⁷

In this passage, Corbett pinballs from denying the existence of judicial choice, to admitting that mercy would be available in extenuating circumstances, to assigning responsibility for establishing such circumstances to the accused, to setting out the criteria that the court would take into account in assessing the circumstances: ultimately, it seems that not even Corbett is convinced that Judge Leon had no choice. Govender took particular issue with the trial judge’s failure to consider Zondo’s age as a sufficient extenuating circumstance to spare him, and that may well be right. More

⁵⁶ Govender Submission, quoted in Dyzenhaus, *Judging the Judges* at 42.

⁵⁷ Quoted in Dyzenhaus, *ibid* at 42 (emphasis in original).

compelling, perhaps, is the total failure of both judges to take note of the larger political struggle in determining sentence. Zondo acted as part of an organisation representing the majority of the population seeking emancipation from an oppressive regime, and organisation that, by the time that Zondo committed his crime, had been outlawed. If the judge had been genuinely interested in sparing the life of the accused, he might have considered the deliberate daily degradations of apartheid itself when determining whether any extenuating circumstances existed. In this respect, one might note that, as skeptical as he was of the defendants' motivations, Justice de Wet spared the life of the defendants at the Rivonia trial.⁵⁸ Even if the judicial imagination of Judge Leon was constrained in 1986, one could hope that Chief Justice Corbett might have been more willing to contemplate this possibility, if only to rebut it, when filing a memorandum three years *after* multiracial democratic elections that saw the leader of the ANC elected President.

The claim that the trial court in Zondo's case "had no choice" also lies ill in the mouth of a judiciary that had no trouble imposing relatively lenient sentences on whites for brutal crimes.⁵⁹ It does, however, sit very comfortably as part of a larger narrative of a judiciary excusing its role in the apartheid regime's crimes on the basis of parliamentary supremacy. A judiciary that repeated over and over that they were bound by their oath of office to enforce the laws duly passed by the legislature. This was a judiciary that overlooked its own power, if not to deliver justice, then at least to limit injustice.

But beyond the *Zondo* case, Chief Justice Corbett's response to the holding of a Legal Hearing demonstrated a failure to appreciate the level of mistrust toward the judiciary that had resulted from almost half a century of apartheid rule. By the time that apartheid ended, the judiciary was an institution entirely alien and alienated from the

⁵⁸ The so-called "Rivonia Trial" is the 1964 case that saw Nelson Mandela and 9 other members of the African National Congress tried for sabotage, and which resulted in Mandela's lengthy imprisonment. It will be discussed in greater detail at pages 72-74, *infra*. Justice de Wet's sentencing statement is available online at: <https://www.famous-trials.com/nelsonmandela/696-mandelasentence>.

⁵⁹ Some cogent examples of the latter phenomenon are found in Kentridge, *supra* note 19 at 55-56. For a general critique of the discriminatory application of the death penalty against non-white defendants during apartheid, see Barend van Niekerk, "Hanged by the Neck Until You are Dead", (1969) 86 S Afr LJ 457.

majority of the people of South Africa, primarily down racial lines. This alienation certainly played itself out in the courtroom, as exemplified by the following two statements:

- (1) A former judge once told me that one of the things that he learned on the Bench was that he had no knowledge of the lives of black people, of their feelings, their loyalties, or the pressures on them.⁶⁰
- (2) I listened to the Prosecutor and I saw that he did not have any ideas about us. He was ignorant of our ways and feelings. I looked at the Judge and the prosecutor and the thought came to me that they were ants and in engaging with them we were dwarfing ourselves.⁶¹

The racial hierarchies and systematic segregation of the apartheid system meant that neither a judge nor the black people who routinely appeared before him could recognise the humanity of the other, precluding a meaningful engagement in the process on either part. For reasons that are less clear, judges seem to have made few efforts to overcome this barrier. Whether due to a greater allegiance to law than to justice, or perhaps as a basic coping mechanism, this fundamental alienation, this systematic failure of empathy or even recognition, was the stock-in-trade of the judge in apartheid South Africa.

2.3 *The Defence of Independence*

As noted above, the South African judiciary maintained a high opinion of itself, even after the end of apartheid.⁶² Therefore, it should come as no surprise that the judiciary recoiled at the prospect of being subjected to TRC proceedings. The best objection was the clash of the TRC's apparent purpose, to promote accountability, as being contrary to the principle of judicial independence:

... [T]here is a more important, a more fundamental, objection to the suggestion. This has to do with the principle of judicial independence, an important facet of the constitutional separation of powers. In order to be true to his judicial oath and to administer justice to all persons alike "without fear, favour, or prejudice" a judge must

⁶⁰ Kentridge, *supra* note 19 at 56.

⁶¹ A quote attributed to Andrew Zondo after he was sentenced to death, from Paula McBride's Submission to the Legal Hearing. Quote in Dyzenhaus, *Judging the Judges* at 1.

⁶² See *supra* note 19.

enjoy independence from the legislature, from the executive, from any body or authority which could be tempted to influence his decisions. ... This does not mean that a judge is not accountable or above the law. He is accountable to a superior court of appeal; he performs his duties openly and in public and is thus subject to daily scrutiny and criticism; and in the last resort there is impeachment. Outside of these parameters, however, a judge may not be called to account for his or her judgments or to debate and justify before, for instance, governmental bodies or commissions.⁶³

First of all, Corbett's principled position that a judge should not debate his judgments was somewhat undermined by his decision, in the same memorandum, to do precisely that with respect to the *Zondo* case. More generally, however, while it is true that judges should not be called to account for their decisions except by higher judicial authorities so that they may remain uninfluenced by forces extraneous to the case before them, there is a reasonable case to be made that the assertion of independence on behalf of apartheid-era judges and allegations of systemic injustice is an argument that rests on certain rather questionable assumptions.

The first is that judicial independence is absolute, that it cannot be balanced against other social values, such as the need for a society in transition to fully confront and understand the failings of the past. This is bound to be a sore point where the court's primary defence for past acts is the doctrine of parliamentary supremacy: that the court was, by law, subordinate to the will of the legislature.⁶⁴ That it would now assert its independence in refusing to subordinate itself to the summons of an inquiry duly constituted by a new, democratic legislature risked accusations of opportunism, at best. Indeed, one critic implied that the judiciary exempting itself was inconsistent with the rule of law.⁶⁵

⁶³ Corbett Memorandum, quoted in Dyzenhaus, *Judging the Judges* at 37-38.

⁶⁴ And that is, of course, ignoring the notorious fact that the Bench was largely appointed on the basis of political allegiance: Dyzenhaus, *Judging the Judges* at 38.

⁶⁵ In her submission to the TRC on this point, the Dean of the Law Faculty of the University of Witwatersrand, Carole Lewis, noted that Parliament had not exempted the judiciary from the moral and legal duty to testify at the TRC. "By taking the stance that they have no such duty," Dean Lewis continued, "judges place themselves, however unintentionally, above the law." Dyzenhaus, *Judging the Judges* at 47.

Moreover, the claim also assumed that judicial independence is monolithic, and that any assault on the principle would be a fatal blow. There is a great deal of difference between calling an individual judge to account for her decision in a particular case, and the hearing and questioning of judges on their view of the operation of the judicial institution in a now-dismantled legal system, which was the true subject-matter of the Legal Hearing.⁶⁶ Judges, even those acting as witnesses, would be particularly attuned to this kind of distinction and well-placed to be able to thread that kind of needle. To do so, however, would be to confront the myth that the courts of South Africa retained considerable international respectability during the apartheid years. The maintenance of this myth was, to some extent, more important to more liberal judges than the apartheid true believers. After all, if one believed in apartheid, one experienced little cognitive dissonance in applying the regime's laws. If, on the other hand, one was aware of the injustice inherent in the application of the law, it was important to believe that one was doing a good and important job. A belief in international validation would have served this purpose.

To have confronted the myth that the judiciary was well-respected would have involved admitting that there was no single, continuous, South African bench, unbound by legal or constitutional context. It would have involved admitting that, just as the Republic itself needed to break with and cast a critical eye upon the *ancien regime*, so did the Bench. Such a project was made significantly more complicated by the fact that there was a considerable carryover of judges. The retention of many apartheid-era judges was justified as consistent with the security of tenure dimension of structural judicial independence, as well as being part of a pragmatic effort to reassure whites in the post-apartheid era that they were not being purged from institutions. This continuity was not uncommon in post-apartheid institutions, and so judicial self-reflection, albeit within defined boundaries, should have been no more complicated than the process of assessment in other institutions. The sting of the judiciary's refusal to appear at the TRC might also have been mitigated had the judiciary conducted some kind of collective internal self-reflection.

⁶⁶ A point made by the TRC itself in the Legal Hearing Report at 106 (para 44a).

There is an inherent relationship between institutional independence and trust. Independence is not a privilege bestowed by divine right, but rather an investment of public confidence at the constitutive moment that the institution is established or the particular judge is sworn in. But there is nothing inherent in the grant that suggests that it is permanent or unconditional; indeed when the South African state was reconstituted in the early 1990s, and a fresh grant of judicial independence made, it was quite clearly on new terms. Indeed, the TRC would conclude that the post-1994 judiciary was, in essence, an entirely new institution; in response to the judges' independence excuse, the TRC noted that: "[a]n exploration of judicial conduct [from 1960 to 1994] could hardly be said to impact on the current judiciary operating in such markedly different constitutional circumstances."⁶⁷

2.3.1 The Purpose of Judicial Independence

The judges' defence of independence ignores that the principle of judicial independence does not exist solely to shield judges from public scrutiny. It was inevitable that judges would be perceived as arrogant for invoking independence, particularly without a clear justification, as a form of privilege. Being accountable to the public is an integral part of being a judge, and that accountability is ensured through publicity – holding hearings in public – and transparency – providing reasons for judgment. A fundamental part of the truth and reconciliation process was the conditional maintenance of one's standing (most formally, in the form of amnesty) in return for a transparent account of one's actions during apartheid.

The TRC was a means of reckoning with the past, a past in which, the TRC found, "the courts and the organised legal profession generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice."⁶⁸ In other words, the TRC found that the apartheid era Bench was not independent, but rather complicit in apartheid persecution. While this may have come as a shock to judges, ensconced as they were in their mythology, it highlights the missed opportunity to probe the reasons

⁶⁷ *Ibid.*

⁶⁸ See note 9, *supra*.

for, and manifestations of, this complicity. One would hope that such an inquiry would be of particular interest to a judiciary that purports to value independence.

2.4 Judicial Persecution in Apartheid South Africa

As a system of racial hierarchy enforced against a civilian population, apartheid met the basic definition of a persecutory system. As it increasingly came to be enforced through legal repression and physical violence, it was condemned as a crime against humanity in a series of resolutions of the United Nations General Assembly⁶⁹ and, ultimately, the adoption of the Apartheid Convention in 1973.⁷⁰ While not uncontroversial at the time, the characterisation of apartheid as a crime against humanity stuck because it fit the circumstances: a crime against humanity is defined as one or more of various acts, such as imprisonment or other severe deprivations of physical liberty,⁷¹ torture,⁷² and the persecution of any identifiable group on, among others, political, racial, national, or ethnic grounds⁷³ committed as part of “a systematic attack against a civilian population”.⁷⁴ It is now largely uncontroversial that the apartheid regime viciously and systematically persecuted the non-white majority of South Africa, and by the time that

⁶⁹ In my contribution to the Skinner collection, *supra* n 12, I canvass in detail the diplomatic process leading to the drafting and adoption of the Apartheid Convention. The first explicit characterisation of apartheid as a crime against humanity came in 1965, in GA Res 2071 (XX), GA Res 2074 (XX), UNGAOR, 20th Sess, Supp No 14, UN Doc A/RES.2074 (1965) 60 (17 December 1965), expressing concern about South Africa’s influence in South West Africa (present day Namibia). The ‘crime against humanity’ language became standard form in resolutions passed thereafter.

⁷⁰ While the passage of the Apartheid Convention was not without controversy, and was seen by some as “Soviet agitprop”, including by FW de Klerk (who had negotiated the end of apartheid and, for his efforts, shared the Nobel Peace Prize with Nelson Mandela) as recently as 2015: FW de Klerk, ‘Afrikaans identity under huge pressure’, speech to the Bondsraad, Voortrekker Monument, Pretoria, 29 May 2015. Text online on Politicsweb at: <http://www.politicsweb.co.za/news-and-analysis/afrikaans-identity-under-huge-pressure-fw-de-klerk>. This framing was perhaps inevitable, given the Cold War historical context of the Convention and the fact that the USSR was a significant proponent. Moreover, it was passed over the objection of the US and the UK, and to date, no ‘Western’ nation has signed on: Carola Lingaas, “The Crime Against Humanity of Apartheid in a Post-Apartheid World”, (2015) 2 Oslo L Rev 86. Notably, however, a review of the available *travaux préparatoires*, does not reveal any strong objection in principle to the criminalisation of apartheid by Western states.

⁷¹ Article 7(1)(e) of the *Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) [ICC Statute].

⁷² ICC Statute, Art 7(1)(f).

⁷³ ICC Statute, Art 7(1)(h).

⁷⁴ See the definition from the Nuremberg Charter, as well as the definition in Article 7 of ICC Statute, which is considered to be reflective of customary international law.

the Statute of the International Criminal Court was drafted in 1998, “the crime of apartheid” was listed as one of the constitutive acts of crimes against humanity.⁷⁵

Given the judiciary’s complicity in apartheid, a number of judicial proceedings in apartheid South Africa would be *prima facie* cases of judicial persecution. Indeed, judicial persecution was inevitable in South Africa, as the regime sought to enforce its manifestly persecutory laws through the courts, a process in which one observer described “[a]n exclusively white judiciary applies the essentially unjust laws of an exclusively white legislature to an unconsenting majority.”⁷⁶ As such, ‘the law’ was indistinguishable from the apartheid programme of racial segregation and stratification, which was amplified by the legislative subordination of the courts to the will of the apartheid government. The courts of South Africa not only implemented manifestly unjust law, they were specifically precluded from reviewing that legislation, and were subject to frequent legislative efforts to oust their jurisdiction to review executive action.⁷⁷

This kind of generalised judicial persecution, in which court processes occur in an inescapably persecutory context, can be distinguished from the more targeted approach commonly associated with political trials. While it is certainly true that the apartheid legal system specifically disadvantaged people of colour, for example convicting black

⁷⁵ ICC Statute, Art 7(1)(j). For a detailed account of how apartheid qualifies as a crime against humanity, see Ronald C Slye, “Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission”, (1999) 20(2) Mich J of Int’l L 267.

⁷⁶ Raymond Wacks, “Judges and Injustice”, (1984) 101 S Afr LJ 266 at 281.

⁷⁷ Starting in 1961, provision was made for the Attorney-General to issue an order requiring anyone arrested for ‘any offence’ to be held without bail or otherwise, initially for 12 days (*General Law Amendment Act*, No 39 of 1961, s 4), explicitly displacing the courts’ jurisdiction to grant bail, a power considered to lie at the core of *habeas corpus* jurisdiction. Within two years, the 12-day detention rule was expanded to 90 days for anyone suspected of a political crime or of having “any information relating to the commission of an offence or the intention to commit any such offence”; this detention was “for interrogation”, initiated on the sole authority of a commissioned police officer without a warrant, and prohibited access to counsel or visitors of any kind”: *General Law Amendment Act*, No 37 of 1963, s 17 (commonly known as the “90-day detention law”). This statute specifically provided that “no court shall have jurisdiction to order the release from custody of any person so detained...”: s 17(3). By 1965, detention was extended to 180 days, with the possibility of renewal (*Criminal Procedure Amendment Act*, No 96 of 1965, s 6), although the detainee was, at least, able to apply for bail after 90 days. Solitary confinement, extensive interrogation, and physical abuse were common during these detentions, as were re-arrests immediately following release.

South Africans more frequently and sentencing them more harshly than whites for the same crime,⁷⁸ it is the overall legal context that establishes the fact of judicial persecution, rather than specific proceedings against specific targets.

This context plays havoc with the normal calculus of whether a particular proceeding might constitute persecution. In assessing whether an accused has been targeted for persecutory purposes, it will undoubtedly be relevant whether the person is, in fact, guilty of the crime alleged, as well as whether the crime is one of general application and reasonably serious. Thus, even in heightened political circumstances, it is more difficult to make the case that the trial of the actual perpetrator of multiple murders – Andrew Zondo, for example – is a case of judicial persecution.⁷⁹ In South Africa, many of those targeted by authorities for prosecution were charged with ordinary crimes, and many were in fact guilty. This did not mean that the trials of these individuals were not political trials (depending, perhaps, on which definition of political trial one chooses) and, where they were political trials of the type that Pendas and Meierhenreich describe as “destructive”, might amount to judicial persecution.

The Rivonia trial, the 1964 trial in which Nelson Mandela and nine others were tried for sabotage and planning a campaign of guerilla warfare for the purpose of violent revolution was the epitome of a political trial, fitting comfortably into any definition. For the South African government and the prosecution, it was clearly intended to be destructive, to stamp out – by imprisonment or execution – the ANC leadership, and particularly to disrupt the operations of its armed wing. But the intriguing thing about political trials is that all of the participants are able to instrumentalise the process; in the Rivonia trial, Nelson Mandela, in particular, seized the opportunity to address the political context in which it was taking place. While he did not formally plead guilty, he made little effort to suggest his factual innocence. Instead, he focused his statement from the dock on the legal choice faced by “the African people”:

⁷⁸ See note 59, *supra*.

⁷⁹ Indeed, the argument with respect to the Zondo case is not that he was wrongfully convicted, or somehow improperly targeted; it was that given his youth and the political context, he should not have been executed.

All lawful modes of expressing opposition to this principle had been closed by legislation, and we were placed in a position in which we had either to accept a permanent state of inferiority, or to defy the Government. We chose to defy the law. We first broke the law in a way which avoided any recourse to violence; when this form was legislated against, and then the Government resorted to a show of force to crush opposition to its policies, only then did we decide to answer violence with violence.⁸⁰

With no realistic prospect of acquittal, Mandela used the trial as an opportunity for what one author has called “epistemic resistance”,⁸¹ exploiting his presence within the inner sanctum of the criminal justice system to question the authority of that system and the government that it served, and to contest the values that it was meant to vindicate. If, as Schervish describes, “[a] political trial is an explicit occasion in which adversarial parties contend over the normative legitimacy of the legal order as a whole rather than just the distribution of outcomes within the existing dispensation”,⁸² the Rivonia trial was a political trial *par excellence*. But does the fact that it was politicised by both sides affect the assessment that it was also an instance of judicial persecution?

There are many ways to see the Rivonia trial, and one’s perspective will be intimately connected to one’s view of the legitimacy of the apartheid regime. Within the system’s internal logic, and perhaps even the logic of legalism, Rivonia was a simple case of the perpetrators of an ordinary crime (sabotage and conspiracy) being held to account under existing laws of general application, analogues of which can be found in many other domestic legal contexts. For the opponents of the regime, “[t]he trial was essentially a mechanism through which the apartheid government could hurt or mute

⁸⁰ Mandela’s speech is reproduced in full as part of Professor Douglas Linder’s Famous Trials project at <http://www.famous-trials.com/nelsonmandela/709-preparedtodie>.

⁸¹ Awol K Allo, “The Courtroom as Site of Epistemic Resistance: Mandela at Rivonia”, (2016) Law, Culture and the Humanities 1, online: <https://doi.org/10.1177/1743872116643274>.

⁸² Paul G Schervish, “Political Trials and the Social Construction of Deviance”, (1984) 7(3) Qual Soc 195, at 195 (citing Kirchheimer and Becker).

the ANC.”⁸³ For the international community, the Rivonia trial and the resulting imprisonment of high-profile ANC leaders like Mandela, Walter Sisulu, and Govan Mbeki was widely seen as an act of naked political domination, attracting widespread condemnation. Over the following decades, the imprisonment of Nelson Mandela would become synonymous with apartheid injustice, and negotiations for a peaceful democratic transition from apartheid were only made possible only upon his release from prison in 1990. In hindsight, it is difficult not to see the targeted prosecution of the Rivonia defendants as judicial persecution.

2.5 The Problem of Judicial Responsibility

If it is true that the Rivonia trial was judicial persecution, what could one have expected the presiding judge, Quartus de Wet, to have done differently? In what way did he fulfill, or fail to fulfill, his judicial function?

The first thing to note is that there is little indication that Justice de Wet felt any particular moral conflict. In his sentencing statement in the Rivonia case, he acknowledged the expressed motivations of the accused to improve the situation of non-whites in South Africa but was “by no means convinced that the motives of the accused are as altruistic as they wish the Court to believe”.⁸⁴ Indeed, he suspected that the proposed revolution might be motivated, at least in part, by “personal ambition”.⁸⁵

At the heart of the issue, however, lies his statement of the court’s duty: “the function of this court, as is the function of a court in any country, is to enforce law and order and to enforce the laws of the state within which it functions.”⁸⁶ Given that conceptual framework (and ample evidence), de Wet had little doubt that many of the accused were guilty as charged. Interestingly, de Wet opted not to condemn those convicted to death,

⁸³ This description is taken from the website of the June and Andrew Mlangeni Foundation at <https://mlangenifoundation.org/rivonia-trail/>; Andrew Mlangeni was one of the co-defendants in the Rivonia Trial.

⁸⁴ de Wet Sentencing Statement, *supra* note 58.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

as had been widely expected, and instead sentenced them to life imprisonment, noting that “consistent with my duty, that is the only leniency which I can show.”⁸⁷ The uncomfortable truth is that Justice de Wet probably did as much as he could have done under the circumstances, and a more “liberal” judge, operating under the same statutory constraints, likely would have had to come to the same result. While the content of the *obiter* may well have differed – a liberal judge likely would not have suspected the defendants of being motivated by personal ambition – there was no legal room for acquittal, nor for a light sentence for a group avowedly plotting armed revolution.

It is easy to feel that judicial resistance to systematic judicial persecution in South Africa would have been futile, even with the benefit of hindsight. The heart of the critique of the apartheid-era South African judiciary does not lie in the details of individual cases, but rather the view that the judiciary was unduly aligned with, and deferential to, the objectives of the executive. This is a problem that presents itself in a variety of systems in which there is seen to be an insufficiently clear separation of powers and judicial independence is lacking. But it takes on a particular urgency when the objectives of the executive, like those of the apartheid regime, are fundamentally unjust. In such circumstances, courts become enlisted in not only in the perpetrating injustice, but in sustaining the unjust system. As one South African jurist observed:

A government that can point to an apparently independent judiciary which, though it may occasionally utter its disquiet in respect of certain enactments, acquiesces in the promulgation of blatantly unjust laws and Draconian assaults upon some of the most sacred principles of justice, is readily able to legitimize itself.⁸⁸

In such situations, a particular conflict arises between a judge’s duty of loyalty to the law, and her duty to do justice in the larger sense. *Per jus ad justitiam* simply doesn’t work; either the law or justice must yield, or a judge must engage in some creative redefinition of what law means, or as Ronald Dworkin once put it more bluntly, “he

⁸⁷ *Ibid.*

⁸⁸ Wacks, *supra* note 76, at 280.

must lie”.⁸⁹ Those jurists most attentive to the dilemma presented in these circumstances have endeavoured to propose a theory of law that permits reconciliation, such as Dyzenhaus’ common law approach to legal problems, in which one draws on the deepest traditions of the law in the face of injustice.⁹⁰ John Dugard, seeking an alternative to the strict legal positivism that he considered to be so destructive, and looking for a way in which to import human rights, proposed an approach that fused legal realism (process) and natural law (theory).⁹¹ And in 1973, Barend van Niekerk published an article in the South African Law Journal that, while barely mentioning the context in which he was writing, described the natural law theory of Gustav Radbruch, one which suggests that particular forms of severe injustice create a breaking point for law, a point at which law ceases to possess the binding quality of law.⁹² “Radbruch’s Formula” as this theory is commonly known, will be discussed in further detail in upcoming chapters.

While each is compelling in its way, all of these approaches will struggle to compete with clearly articulated and applicable black letter law, particular in constitutional contexts that explicitly seek to exclude judicial review of legislation or executive action. In such a regime, the law is simply an instrument of power, not justice, and the “rule of law” is seen as a responsibility not to liberate, nor to hold the government to account, but as a counterpoint to an anarchy that was the inevitable outcome of a fundamentally unjust political design. Given this history, it is perhaps no surprise that South Africa’s post-apartheid constitution sought to create social peace by guaranteeing equality, and entrenching a bill of rights, sweeping powers of constitutional review, and instituting a new apex court.

⁸⁹ Dworkin, Ronald, *Taking Rights Seriously* (London: Gerald Duckworth & Co, 1977) at 326-327.

⁹⁰ Dyzenhaus, *Hard Cases*, *supra* note 49.

⁹¹ Dugard, *Human Rights* at 397-399.

⁹² Barend van Niekerk, “The Warning Voice from Heidelberg – the Life and Thought of Gustav Radbruch” (1973) 90 S Afr LJ 234. Having recently been convicted of contempt of court for his criticism of the judiciary, van Niekerk’s article is somewhat cryptic, barely hinting that Radbruch’s Formula might be applied in the South African context.

And at the point where no theory of law provides a judge with a path to a clear conscience, a particular debate arises: should the judge resign? This debate has been played out in a number of contexts, both hypothetical and real, and perhaps never more eloquently than in a 1984 debate in the South African Law Journal between Professors Raymond Wacks and John Dugard. After carefully considering many of the alternatives canvassed here, Professor Wacks concluded that “[i]f the judge is to square his conscience with his calling, there would appear to be no choice open to him but to resign.”⁹³ Dugard resists this claim, on the basis that it is premised on judges having less discretion than they, in Dugard’s view, actually possess under the Roman-Dutch common law.⁹⁴ As such, “it is necessary to consider whether lawyers and judges do more for justice in South Africa by actively participating in the system than by withdrawing from it ...”.⁹⁵ (It is not clear whether Dugard’s position would be equally tenable if his interpretive theory does not hold.) Edwin Cameron, a prominent human rights lawyer during apartheid later appointed to the Constitutional Court, believes that Dugard has been vindicated on the question of resignation: “[a]s an advocate I fought cases in the apartheid courts. And I am glad that moral judges remained on the bench.”⁹⁶ Cameron cites the pointed observations of another apartheid era advocate, Etienne Mureinik: “[i]f there is no point in being a conscientious judge, there is no point in being a conscientious advocate, because the arguments of conscientious advocates are calculated to persuade only conscientious judges.”⁹⁷ In the same year (1988) that Mureinik’s observations were published, the International Commission of Jurists waded into the debate, writing that, while they expressed no conclusions on the moral question

⁹³ Wacks, *supra* note 76 at 282.

⁹⁴ John Dugard, “Should Judges Resign? A Reply to Professor Wacks”, (1984) 101 S Afr LJ 286-294 at 287.

⁹⁵ *Ibid* at 293. In support of liberal judges remaining on the Bench, Dugard cites (at 294) Etienne Mureinik: “if we argue. . . that moral judges should resign, we can no longer pray, when we go into court as defence counsel, or even as the accused, that we find a moral judge on the bench.”

⁹⁶ Edwin Cameron, “Dugard’s Moral Critique of Apartheid Judges: Lessons for Today”, (2010) S Afr J Hum Rts 310 at 318, citing a specific example of a case in which he and Dugard used apartheid ideology itself to provide the Appellate Division with a path to setting aside a Presidential proclamation: *Mathebe v Government of South Africa*, 1988 (3) SA 667 (A).

⁹⁷ *Ibid*, citing Etienne Mureinik, “Dworkin and Apartheid” in Hugh Corder, *Law and Social Practice* (Cape Town: Juta & Co, 1988) at 183.

of whether a judge should continue to hold office in the apartheid regime, “[i]f a judge remains on the Bench in such a repressive regime, there can be no excuse for failing to exercise his choice in favor of individual liberty...”⁹⁸

Ultimately, the questions raised in the Wacks-Dugard debate about apartheid South Africa were not susceptible to clear, decisive answers. But they are crucial ones, particularly the extent to which judges enjoy discretion to do justice but choose not to exercise it. This phenomenon, in which judges justify unpalatable moral choices as being the product of legal constraint – to justify their act of judgment as opposed to the outcome – is the “judicial ‘can’t” of Robert Cover’s account of abolitionist judges enforcing fugitive slave legislation in the United States.⁹⁹ David Dyzenhaus, referring to a similar judicial phenomenon in South Africa, characterised such narratives as “tales of judicial disempowerment”.¹⁰⁰

While the scope of discretion might not be objectively assessable, this thesis contends that it is the duty of every judge in an unjust legal system to accurately ascertain its boundaries for herself, based on her own view of the content of the law, and to maximise the amount of justice that she can deliver within that *marge de manoeuvre*. In other words, judges need to develop, consonant with the ethical standards of their profession and the full range of their judicial responsibilities, a working theory of the rule of law that integrates a concept of justice. What that theory might look like will be canvassed in more detail in chapter 7.

⁹⁸ Bindman, *supra* note 20 at 113.

⁹⁹ Cover, *Justice Accused* *supra* note 28, especially chapter 7.

¹⁰⁰ Dyzenhaus, *Judging the Judges*, especially chapter 2.

Chapter 3

Private Judicial Persecution: the Case of SLAPPs

To this point, this thesis has been largely focused on judicial persecution as an act perpetrated by the state, usually through the mechanism of criminal justice. However, any sphere of judicial work is susceptible to being instrumentalised for persecutory ends. One can easily imagine how family law might be misused to apply pressure or ruin lives, particularly through some kind of state intervention into family life.¹ Similarly, administrative law would be just as amenable to being deployed to target dissidents.² In all cases where it is the government that initiates judicial proceedings against a target, where public power is being brought to bear against the individual (or group), one might describe the nature of the proceedings as being *vertical*.

But this is not the only axis along which judicial persecution can proceed. Judicial persecution might also occur horizontally, between private parties, where civil litigation is used to entangle, exhaust, and perhaps even bankrupt one's perceived enemies. Whether such lawsuits are persecutory will depend on the nature of the underlying *animus* between the parties, as well as the particular power dynamic. This chapter will discuss a particular kind of lawsuit, which in many jurisdictions has been termed "strategic lawsuit against public participation" (SLAPP) as judicial persecution along the horizontal axis. The particular dynamics of SLAPPs will reveal how many SLAPPs comfortably, almost archetypically, fit within the definition of judicial persecution.

¹ The forced removal of Indigenous children from their families to residential schools in Canada for over a century was described as "cultural genocide" by the Truth and Reconciliation Commission of Canada: *A Knock on the Door: the Essential History of Residential Schools* (Winnipeg: University of Manitoba Press, 2016), at 3. The same label has been applied to the phenomenon known as the "Sixties Scoop", in which Indigenous children were taken from their families and placed for adoption by non-Indigenous parents.

² I have suggested elsewhere that much of the persecution perpetrated under apartheid was delivered through administrative law: "Classifying Law as Criminal in apartheid South Africa", in Stephen Skinner, ed, *Ideology and Criminal Law under Fascist, National Socialist and Authoritarian Regimes* (London: Hart Publishing, 2019). In the same vein, tax law is becoming an increasingly popular tool in the repression of political opposition: see, for example, "Tax authorities are the latest tools of repression in Africa" *The Economist* (30 September 2017), online: <https://www.economist.com/node/21729778/feed>. Dissident journalist Maria Ressa and news outlet Rappler are being pursued in the Philippines on charges of tax fraud (see Introduction, *supra* at 3), and one of Putin's most significant adversaries, Mikhail Khodorkovskiy, was detained on, among other things, tax charges (chapter 4, *infra*, at 124).

While not all SLAPPs are necessarily persecutory, the parallels between SLAPPs and judicial persecution are compelling and obvious. In both cases, parties are identified and targeted for reasons extraneous to a genuine legal claim. Moreover, it is the complexity and expense of court proceedings – in time, money, and reputation, among other things – rather than any particular outcome, that make SLAPPs an appealing vehicle for persecution. SLAPPs rely on the general public right of access to judicial relief, and play on the presumption of good faith that underpins a passive model of adjudication, both of which tend to limit a court's appetite to dismiss cases at an early stage.

SLAPPs, like the political trials described in the next chapter, can be particularly difficult to differentiate from ordinary legal claims. There is much about SLAPPs that mirrors the normal judicialisation of any dispute. Framing the issues in specific legal terms is the hallmark of any properly drafted originating document. The threat of litigation to influence behaviour is not unusual, nor nefarious in itself: lawyers send demand letters on behalf of their clients all the time, and many, if not most, of those clients are injured people, dismissed employees, and retail consumers; by no means the Goliaths of the world. By contrast, like other forms of judicial persecution, SLAPPs aim to camouflage persecution in the guise of law and legal process. The primary distinction between SLAPPs and regular lawsuits is that, in SLAPPs, defendants are targeted not based on a genuine belief that they have committed a civil wrong, but as political or social antagonists; similarly, the purpose of the proceedings is not *per se* to recover damages, but rather to intimidate or silence the defendant(s). Thus SLAPPs are persecutory both in terms of who they target and the persecutory ends that they pursue.

Examining the horizontal axis of judicial persecution allows us to strip away some of the questions of the separation of powers and misuse of public authority that are the hallmark of government-initiated political trials, permitting a clearer focus on the other specific harms that arise from judicial persecution. Like all forms of persecution, there are obvious harms to the victim, but, as will be seen, SLAPPs also have impacts on the broader political sphere, by restricting political participation and expression. The distinction between judicial persecution in the public and private spheres is therefore less sharp than one may expect; some 'horizontal' suits can be the result of 'vertical'

pressure, just as vertical persecution may result from the political influence of powerful private actors. By using court processes to express and amplify unequal economic power, SLAPPs encourage a belief that court processes are not only unjust, but oppressive. In addition to whatever chilling effect they may have in public participation, therefore, they also specifically discredit the judicial system, at least to the extent that the judicial system fails to see them for what they are and is thereby ‘coopted’ into horizontal persecution.

Nonetheless, powerful actors are just as entitled to the resolution of their legitimate disputes in court as any other party, and thus a certain caution is warranted before too quickly characterising a suit as a SLAPP. Access to relief through court processes is, of course, a fundamental aspect of the rule of law, particularly as contrasted with extralegal contests of will and force. Moreover, to the extent that it can provide an effective remedy for the violation of rights, access to the courts has been recognised as a human right.³ Given the plurality of rights and interests involved, effort and attention must be, and as will be seen has been, dedicated to carefully delineating SLAPPs and finding the appropriate means to address them. To the extent that effective counterstrategies have been employed in a variety of jurisdictions, using SLAPPs as a case study provides an opportunity not only to examine the phenomenon of judicial persecution itself, but points to potential ways of framing and addressing it.

3.1 *The Origin of the Concept*

SLAPP, as a term of art, is of relatively recent vintage. It was coined by two professors at the University of Denver – Penelope Canan, a sociologist, and George Pring, a legal scholar – in a 1988 paper in which they describe SLAPPs as “attempts to use civil tort

³ For a summary, see Francesco Francioni, “The Rights of Access to Justice under Customary International Law” in Francesco Francioni, ed, *Access to Justice as a Human Right* (Oxford: Oxford University Press, 2007). It is also arguable that a motion to strike in a defamation claim could be subject to review under Article 17(2) of the *International Covenant on Civil and Political Rights* (16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR]), in which “[e]veryone has the right to the protection of the law against such interference or attacks” including, *inter alia*, protection against “unlawful attacks on honour and reputation”.

action to stifle political expression”.⁴ It is this specifically political purpose that distinguishes SLAPPs from other forms of retaliatory litigation,⁵ and it is the broader political implications of SLAPPs that have attracted a critical gaze.

As will be seen in the cases canvassed in this chapter, a typical SLAPP is a civil suit brought by a corporation against an individual or individual members of a group, usually alleging liability in tort, and often seeking extremely large damage awards.⁶ Across jurisdictions, these cases have frequently, but not always, arisen in the land development or resource sector, where return on investment is often contingent on a successful application to local authorities, and where the underlying activity is susceptible to public criticism on environmental grounds or on the basis of Indigenous land claims. This is a pattern that has been replicated in, among other places, the US, Canada, Australia, and South Africa. In such cases, the investor has a lot to lose if protesters throw a spanner in the works, and so there is a considerable incentive to sideline and silence project opponents, including by judicial means. In such circumstances, a SLAPP might be seen as a business cost like any other, which is why many of the countermeasures adopted seek to simultaneously reduce the efficacy of SLAPPs and significantly increase that cost.

Where deployed successfully, the effect of these lawsuits is to intimidate and distract their targets into silence, depriving the public sphere of free and fulsome (or often any) debate on the subject matter of the protest. This is done by redirecting the targets’ attention and resources to defending the claim, and when such costs become too much

⁴ Penelope Canan & George W Pring, “Strategic Lawsuits against Public Participation” (1988) 35 Soc Probs 506 at 506. Other definitions have emerged, and will be canvassed below, but this one remains foundational.

⁵ *Ibid.* Civil litigation can often be ‘retaliatory’, resulting from disappointed expectations and ruptured relationships, but these motivations are not persecutory *per se*.

⁶ A variation of this model is the proposal by recently elected Premier of Alberta, Jason Kenney, who promised to “[s]eek out and support Alberta energy companies that are willing to challenge the campaign of defamation by anti-Alberta special interests, similar to Resolute Forest Products’ defamation suit against Greenpeace for \$300 million in damages.” Kenney also promised to establish a “war room” to respond to the “lies and myths told about Alberta’s energy industry”, and to target opponents of the energy industry in a variety of ways, including by challenging their charitable status and holding a public inquiry into “foreign funding”: United Conservative Party, *Alberta Strong & Free* [2019 provincial campaign party platform] at 96-97. Online: <https://www.albertastrongandfree.ca/wp-content/uploads/2019/04/Alberta-Strong-and-Free-Platform-1.pdf>.

to bear, as they often do, by proposing settlement agreements in exchange for the targets' silence. Indeed, the French language term of art for a SLAPP, developed in Québec, is particularly apt: "poursuite-bâillon", which literally translates as "gag suit".⁷ If a company or industry establishes a practice of instituting SLAPPs in a particular sector, the threat of SLAPPs can also operate *in terrorem*, creating a preemptive 'chill' on protest activities and other forms of political opposition.

The single most important distinction between SLAPPs and ordinary lawsuits is that SLAPPs are not primarily filed in order for a plaintiff to recover damages for a legal injury. As a result, SLAPP plaintiffs are impervious to the normal disincentives to filing suit: ordinarily, litigants don't file largely unmeritorious claims against impecunious defendants as it is usually a waste of time and money to seek a judgment (even by default) on which one cannot hope to collect. Where the disparity in economic power and access to legal advice is extreme, the plaintiff's litigation risk is not assessed, even in part, on the basis of the merit of the claim, but on the significant likelihood that the targets will be forced to capitulate.

Thus, SLAPPs represent an obvious potential threat to both the right to the free expression of one's political opinion, whether individually or in association with others, and full participation in the political sphere, rights that have long been understood to be fundamental and provide both personal and collective benefit. Indeed, Canan and Pring's work, SLAPPs were identified as infringing the right to political advocacy protected by the Petition Clause of the First Amendment to the US Constitution, which in protecting "the right to petition the government for redress of grievances" provides, among other things, a broad protection for speech intended to influence the government.⁸ Indeed, Canan and Pring used the invocation of the Petition Clause by the defendant as one way to identify and select the 100 cases studied in their initial research

⁷ Roderick A Macdonald et al, *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP): Rapport du comité au ministre de la Justice*, (Montréal, 15 mars 2007).

⁸ As Canan & Pring explain, the Petition Clause has been interpreted broadly to include a range of activities intended to influence the government, such as demonstrations and boycotts not directly targeted at the government: *supra* note 4.

on SLAPPs.⁹ As such, their research was wholly focused on the US context. Given that it is also the Petition Clause that provides the constitutional right of access to the courts, the difficulty inherent in regulating SLAPPs is brought into sharp relief: a single constitutional provision requires both the dismissal and deterrence of abusive proceedings and the preservation of an unfettered right of access to justice for non-abusive claims.

By carefully delineating the kind of case that qualified as a SLAPP, and explaining why that categorisation was compelling – ‘naming and shaming’ SLAPPs – Canan and Pring not only demonstrated that these cases were able to be considered as an identifiable group, but shifted the discourse from debating whether this tactic really exists to what should be done about it. Having defined SLAPPs as a constitutional violation, it is perhaps no surprise that by the time Canan and Pring published their book on the subject in 1996,¹⁰ eight years after their original article, nine US states had passed anti-SLAPP legislation. Twenty-two more, and the District of Columbia, would follow between 1996 and 2016, and federal bills have been introduced in – although never passed by – the US House of Representatives, in 2009 and 2015.¹¹

⁹ This was not the only means: *infra* note 12.

¹⁰ George W Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* (Philadelphia: Temple University Press, 1996).

¹¹ It seems that efforts to enact this legislation federally have been somewhat half-hearted. The first federal bill, the *Citizen Participation Act of 2009*, HR 4364 (111th Congress) never made it past being introduced. The second bill, the *Securing Participation, Engagement, and Knowledge Freedom Act of 2015* (short title: the SPEAK FREE Act), HR 2304 (114th Congress) held more promise, having been introduced with bipartisan support. It was referred to the House Committee on the Judiciary, which referred it on to a sub-committee. The bill did not make it back to the floor of the House for a vote before the session ended following the 2016 election. A state-by-state listing of anti-SLAPP laws are available through the Public Participation Project, online at: <http://www.anti-slapp.org/your-states-free-speech-protection/>.

As will be canvassed in more detail below, legislation has since been passed in the Australian Capital Territory (2008), and three Canadian provinces: Québec (2009), Ontario (2015), and British Columbia (2001 and 2019). In British Columbia, the 2001 anti-SLAPP legislation was repealed within a few months of its passage when the provincial government changed, but new legislation was introduced in May 2018, receiving Royal Assent in March 2019.

3.2 The Emergence and Experience of SLAPPs in the United States

Identifying SLAPPs in a pre-SLAPP era and, indeed, to this day is no small feat.¹² But even before SLAPPs became a term of art, courts in the United States expressed concern about the underlying phenomenon. One of the earliest proto-SLAPPs was a counterclaim filed in the 1970s in *Sierra Club v Butz*,¹³ in which a logging company sued the Sierra Club and four individuals for “tortious interference with advantageous relationship”, claiming an injunction and damages, including \$1 million in punitive damages. The defendants successfully brought a motion to dismiss on the basis that the counterclaim infringed their petitionary rights. Finding it particularly telling that the counterclaim sought to enjoin the defendants from seeking, through the Forest Service, the preservation of a wilderness area from logging, the Court held that “it is difficult to conceive of a more direct abridgment of ‘the right of the people . . . to petition the Government for a redress of grievances’”.¹⁴

If the defendant’s goal in the *Sierra Club* case was what First Amendment jurists might term “prior restraint”, in other cases the goal was clearly punitive. In 1978, Protect our Mountain Environment, Inc. (POME) challenged the decision of a local zoning board to allow development of a tract of land in Jefferson County, Colorado. Despite POME being unsuccessful, the developer, Gayno Inc., sued POME and several individual defendants for \$40 million, alleging that the defendants had conspired to bring a groundless lawsuit. POME unsuccessfully brought a motion to dismiss, on the basis that its challenge was protected activity under the Petition Clause. In directing the lower court to reconsider, the Colorado Supreme Court noted that “[i]t cannot be denied that suits

¹² Canan & Pring acknowledged that the cases studied were “not easy to locate”, and they had to cobble together their 100 case studies from a variety of sources: see Canan & Pring, *supra* note 4 at 508 for precise methodology. Given that this was not a random sampling of cases tried over a period of time but rather a list of ‘suspect’ cases, there is a danger that the method drove the conclusion. For example, it is not clear if any of the cases studied were ultimately considered excluded from categorisation as SLAPPs. *Ibid* at 511.

¹³ (1972) 349 F Supp 934 (ND Cal). Some scholars have described much earlier cases as SLAPPs, including suits against civil rights activists in the 1960 and even a Vermont case in 1802, in which citizens were sued for comments made in the course of opposing the reappointment of a local justice of the peace: Barbara Arco, “When Rights Collide: Reconciling the First Amendment Rights of Opposing Parties in Civil Litigation”, (1998) 52 U Miami L Rev 587 at 590-591.

¹⁴ *Sierra Club v Butz*, *ibid* at 939.

filed against citizens for prior administrative or judicial activities can have a significant chilling effect on the exercise of their First Amendment right to petition the courts for redress of grievances.”¹⁵ As a result, the Court proposed that such plaintiffs be required to “make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment”, and set out specific criteria.¹⁶ In other words, given the importance of a relatively unfettered right to petition, the normal onus on a motion to dismiss should be shifted to the plaintiff to establish why their case should be allowed to continue. This approach would presage many of the legislative anti-SLAPP measures that would follow.

In response to the specific dynamics and harms of SLAPPs, anti-SLAPP legislation in the US has often been framed as addressing abuse of the judicial process and expressed through measures designed to halt SLAPP proceedings at an early stage. This is accomplished through special, often expedited, motions to dismiss, in which the plaintiff bears a special burden to prove that the claim has substantial merit, or was not brought for an improper purpose.¹⁷ Some states have also created a specific right of action (often referred to as a “SLAPPback”) for SLAPP defendants to recover costs, attorney’s fees, and damages, including, in some cases punitive damages.¹⁸ In many jurisdictions, fees and costs are automatically awarded to a defendant who is successful in having a claim struck out.¹⁹

In passing anti-SLAPP statutes, some US states have defined legislative objectives or SLAPP-related harms that go beyond the explicit wording of the Petition Clause to describe an even broader protection of public participation.²⁰ For example, the District

¹⁵ *POME v District Court*, (1984) 677 P 2d 1361, at 1368. Notably, George Pring acted as counsel for the American Civil Liberties Union in this case, which appeared as *amicus curiae*.

¹⁶ *Ibid*.

¹⁷ See for example, Del Code Ann tit 10, §8137 (Delaware, enacted 1992).

¹⁸ See for example, Del Code Ann tit 10, §8138; Minn Stat. ch 554.04(2)(b) (Minnesota, enacted 1994).

¹⁹ See for example, Cal Civ Proc Code Part 2, tit 6, s 425.16(c) (California, enacted 1992); Mass Gen Laws, Part III, tit II, ch 231, §59H (Massachusetts, enacted 1994); Minn Stat. ch 554.04(1).

²⁰ Some simply refer to, or hew closely to, protecting the defendant’s existing First Amendment rights to free speech and to petition. For example, Maine and Massachusetts both protect “statements made before a government body or proceeding; or in connection with an issue under review by a government body; or

of Columbia’s Anti-SLAPP Act protects “any act in furtherance of the right of advocacy on issues of public interest”²¹; Indiana’s Code protects “any conduct in furtherance of free speech or petition in connection a public issue or issue of public interest”²² and in California, “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest”²³ is protected. The Florida Code bundles together a number of rights: “the rights of free speech in connection with public issues, and the rights to peacefully assemble, instruct representatives, and petition for redress...”²⁴. Other states have preambular language that appeals to the common good: “[i]t is in the public interest to encourage continued participation ... in matters of public significance...”²⁵

These provisions address both the procedural and normative harms of SLAPPs, balancing the right of access to the courts with the right to unimpeded public participation in the political sphere, and leaning heavily in the favour of the latter. Whether the expressive activity is characterised as a form of privilege, immunity from suit, or public good, these statutes set a high procedural bar for those who would interfere with it by instituting court proceedings.

reasonably likely to encourage review by government; or reasonably likely to enlist public participation to effect consideration; or any other statement within constitutional rights of petition, are protected.” Me Rev Stat tit 14, ch 203, § 556 (Maine, enacted 1995); Mass Gen Laws, Part III, tit II, ch 231, §59H. On the other hand, some states have what seem to be narrower definitions, perhaps intending to limit the cases in which the specific protection of the anti-SLAPP statute (which usually involve additional procedural rights) will apply. Hawai’i ,for example, defines “public participation” as limited to “any oral or written testimony submitted or provided to a governmental body during the course of a governmental proceeding” Haw Rev Stat tit 34, § 634F-1 (enacted 2002). Similarly Missouri’s protections are limited to “speech or conduct undertaken at, or made in connection with, a public hearing or public meeting, or in a quasi-judicial proceeding before a tribunal or decision making body”: Mo Rev Stat tit XXXVI, ch 537, §537.528 (enacted 2004). Pennsylvania’s anti-SLAPP law is limited by subject-matter, providing immunity from suit only with respect to “communication to a government agency relating to enforcement or implementation of an environmental law or regulation”: Pa Cons Stat tit 27, §8301.

²¹ DC Code tit 16, §5501 (enacted 2011).

²² Ind Code tit 34, ch 7, §34-7-7-1 (enacted 1998). A similarly broad provision exists in Louisiana: La Code Civ Proc, art. 971.A(1) (enacted 1999).

²³ Cal Civ Proc Code Part 2, tit 6, s 425.17(e). See also Or Rev Stat, vol 1, sec 3, §31.150 (Oregon, enacted 2009).

²⁴ Fla Stat tit XLV, §768.295(1) (enacted 2000).

²⁵ See, for example, Ark Code tit 16(5), ch 6(5), §§16-53-502(1) (Arkansas, enacted 2005). Similar language is found in Cal Civ Proc Code Part 2, tit 6, s. 425.17(a) and Ga Code tit 9, ch 11, art 3, §9-11-11.1 (Georgia, enacted 2016).

3.2.1 *The Marks of a SLAPP in the United States*

The distinctive character of a SLAPP among civil claims is its particular purpose – to intimidate and silence political opponents – but that purpose will evidently not appear in any statement of claim (just as, on the vertical axis, it will not appear in any criminal indictment). This is, in large measure, inherent in the form of the pleadings: in the United States, where notice pleadings are prevalent, a statement of claim is merely an allegation of a breach of some private right and of damages incurred. In other common law jurisdictions, and in most civil law jurisdictions, the statement of claim will also plead the facts in support of the allegations. Whatever the form of pleading, proceedings in most judicial systems are passively triggered by the filing of a claim by the complaining party in a local court registry, with the court operating on the presumption that a civil claim is filed in good faith for the predominant purpose of seeking a remedy for the legal injury that is alleged. The disguise offered by the trappings of an ordinary civil suit presents a significant problem when it comes to establishing SLAPPs as a separate (and problematic) form of claim. Moreover, whether one believes that these particular claims should be singled out for special attention – in the form of special procedures to discourage and dismiss them (such as those canvassed below) – will depend on whether one accepts that SLAPPs are exceptional and distinguishable in some way.

Ultimately, Canan and Pring's research identified the following as the features that marks a suit as a SLAPP:

- (i) a civil complaint (or counterclaim)²⁶ brought against
- (ii) an individual or nongovernmental organisation (NGO) complaining of
- (iii) communications made to
- (iv) influence a government
- (v) “on a substantive issue of some public interest or social significance”.²⁷

²⁶ Canan and Pring identified a few particularly common causes of action, including defamation (27% of claims), nuisance, business torts (in which the loss alleged to have been caused can be purely economic, including claims for intentional interference with contractual relationships, or unlawful interference with economic interest), and conspiracy: Canan & Pring, *supra* note 4 at 511. Claims are frequently combined, with plaintiffs alleging a number of legal wrongs in a single suit.

Notably, there is no explicit mention of a right(s)-violating purpose; under their model, it does not matter whether the suit was motivated by a desire to limit or chill political expression, it is sufficient that it targets a person who is exercising their petitionary rights. This is the luxury afforded by the Petition Clause: one doesn't need to define or establish specific harms when one's constitutionally protected right to petition acts as a form of immunity from suit.²⁸ The constitutional violation is sufficient to stigmatise the suit in question as wrongful. However, in jurisdictions without an analogous right, the problem with SLAPPs would have to be framed differently. Nonetheless, most jurisdictions would avoid or abandon a definition based on motive in favour of one that emphasised the effect of the lawsuit in question.

3.3 *SLAPPs outside the United States*

While SLAPPs originated in the United States, it was not long before observers in other parts of the world began noticing suspiciously similar tactics. This is perhaps unsurprising given the rise of transnational corporations and the concomitant rise of global law firms. Indeed, by 1996, Pring and Canan themselves were warning that the “world is getting SLAPP-happy”, reporting that the SLAPP strategy had spread to the UK, Canada, Pakistan, South Korea, Taiwan, Singapore and Australia.²⁹ In addition, there have been recent allegations of SLAPPs proliferating in South Africa,³⁰ as well as

²⁷ Pring & Canan, *supra* note 10 at 8-9.

²⁸ A point made in the Macdonald Report, *supra* note 7 at 30. As Pring & Canan put it “[o]ur definition focuses on that key factor: whether the defendants were engaged in activity covered by the Petition Clause, which is both the cause and the effect that should concern us. Our definition thus avoids subjective judgments about “motives” or “intent,” “good or bad faith,” “truth or falsity,” “rightness or wrongness.” *Supra*, note 10 at 8.

²⁹ George W Pring and Penelope Canan, “The World is Getting SLAPP-Happy”, *The National Law Journal* (May 20, 1996), A19. However, what Pring & Canan characterized as SLAPPs in Pakistan, South Korea and Taiwan run along what I consider to be a vertical axis: in each case it was the government that filed or threatened a libel suit against an opposition leader. Similarly in Singapore it was the government that sued the *International Herald Tribune* newspaper.

³⁰ See Tumai Murombo & Heinrich Valentine, “SLAPP Suits: an Emerging Obstacle to Public Interest Environmental Litigation in South Africa”, (2011) 27 *S Afr J Hum Rts* 82, and particularly the cases cited at 97-103.

Ecuador, India, and the Philippines,³¹ and, in the last couple of years, Malta³² and France.³³ The instinct to use SLAPP terminology to condemn such behaviour outside the United States suggests, unsurprisingly, that the broad values underlying the Petition Clause are far from peculiar to the United States, and that the values undermined by SLAPPs are transnational. The country studies that follow are those in which there a body of legal materials has been developed, whether statute or case law or both. While, as will be apparent, it does not represent a comprehensive list of all of the countries in which the phenomenon has been detected, it does represent a cross-section of emerging legal responses beyond an outcry by activists and, as such, is able to provide a potentially useful framework for action in the context of this thesis.

3.3.1 Canada

Outside the US, SLAPPs have been most prevalent in Canada, particularly in environmental controversies stemming from land and resource development. Canada, like the US, has a constitutionally-entrenched *Charter of Rights and Freedoms*,³⁴ which includes, among others, the same democratic civil and political rights that undergird the US First Amendment. However, as the *Charter*'s effect is limited to protecting citizens from governmental infringement, it is not generally possible to plead an infringement

³¹ Annalisa Ciampi, "SLAPPs and FoAA rights – by the United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association" (2017), online at: www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx.

³² International Press Institute, "Malta journalists face SLAPP threat even as criminal libel repeal proceeds" *IFEX.org* (30 January 2018), online: <https://ifex.org/malta-journalists-face-slapp-threat-even-as-criminal-libel-repeal-proceeds/>.

³³ In October 2018, the French Ministry of Culture published a response to concerns about "les procédures-baillons", particularly those directed against journalists: <https://www.senat.fr/questions/base/2018/qSEQ180203114.html>. Similar concerns have been raised about NGOs ("Des journalistes et des ONG dénoncent des « poursuites bâillons » de la part du groupe Bolloré", *Le Monde* (24 janvier 2018), online: https://www.lemonde.fr/idees/article/2018/01/24/des-journalistes-et-des-ong-denoncent-des-poursuites-baillons-de-la-part-du-groupe-bollor%C3%A9_5246496_3232.html) and academic researchers: Denis Mazeaud et al, *Rapport sur les procédures bâillons* (Rapport rédigé à la demande de M Thierry Mandon, secrétaire d'Etat chargé de l'Enseignement supérieur et de la Recherche, 20 avril 2017), online: <http://www.enseignementsup-recherche.gouv.fr/cid115784/rapport-de-la-commission-mazeaud-sur-les-procedures-baillons.html>.

³⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

of, for example, the right to free expression as a defence in a civil claim.³⁵ Nonetheless, both scholarly and judicial identification of the SLAPP phenomenon in Canada have been based on the jurisprudential foundation laid in the United States.

In-depth academic work in Canada has been led by Professor Chris Tollefson of the University of Victoria, who pinpoints the first identification of a potential SLAPP by a judge in Canada, Tysoe J. of the British Columbia Supreme Court, in a 1992 civil claim filed by logging company MacMillan Bloedel (colloquially referred to as “MacBlo”) against the Galiano Conservancy Association.³⁶ The Conservancy Association was a community organisation that lobbied the local government for a change in by-laws that prevented MacBlo from building a large-scale residential development on its land. As is typical of a case of this kind, MacBlo had, in addition to suing the Association, also sued specific named individuals. While the pronouncement in question is not reported, Tollefson notes that “in ordering these claims dismissed, Tysoe J. made specific reference to the SLAPP phenomenon.”³⁷

The MacBlo case was followed by two more notorious SLAPPs in Canada. A few years later, in *Daishowa v Friends of the Lubicon*, a logging company sued protesters (both the named organisation and individual members) in Ontario who had organised a

³⁵ It is worth noting that in defamation cases brought against media companies, the Supreme Court of Canada has held that, even though the *Charter* is not directly applicable, the common law of defamation is to be informed and guided by “Charter values”: *WIC Radio v Simpson*, 2008 SCC 40 and as such, should provide significant protection for matters of public interest: *Grant v Torstar* 2009 SCC 61. An interesting *Charter* question will arise, however, if the Alberta government launches or financially supports civil claims targeted at the opponents of the oil and gas industry and that have the effect of stifling their expressive political activities.

³⁶ Chris Tollefson, “Strategic Lawsuits Against Public Participation: Developing a Canadian Response”, (1994) 73 *Cdn Bar Rev* 201-33 at 219-220. More recently, Professor Byron Sheldrick, a political scientist from the University of Guelph, has published a detailed analysis of the phenomenon in Canada: Byron Sheldrick, *Blocking Public Participation: the Use of Strategic Litigation to Silence Political Expression* (Waterloo: Wilfrid Laurier University Press, 2014).

³⁷ *Ibid* at 220. Actually, the issue before the Court was whether MacMillan Bloedel could discontinue its case within a few weeks of trial, and what the costs consequences should be given that the defence alleged that the suit was brought in bad faith, and a SLAPP. (While Tysoe J’s judgment is unreported, it is excerpted in a decision of the Court of Appeal: *MacMillan Bloedel Ltd v Galiano Conservancy Association* (1994), 2 BCLR (3d) 99 (CA) at para 4.) Interestingly, due to its limited resources, the Conservancy had relied on the Sierra Legal Defence Fund for legal assistance, which had been involved in defending a number of US SLAPPs, indicating that defence strategy is equally susceptible to transnational migration.

successful boycott, claiming unlawful interference with contractual and economic relations. The company had been logging on territory subject to an ongoing land claim by an Indigenous community. Unusually, Daishowa did pursue the matter to trial, largely unsuccessfully, being denied the permanent injunction that it sought against picketing.³⁸ While *Daishowa* was not explicitly identified as a SLAPP by the court(s),³⁹ it has certainly been seen as one by most commentators.⁴⁰ In *Fraser v Saanich*,⁴¹ on the other hand, the court did not hold back in identifying the case as a SLAPP. Fraser, a property developer, sued a local municipality and eight individual local residents who had petitioned for a rezoning that prevented redevelopment. In summarily dismissing the action against the individual defendants, Singh J explicitly held that the lawsuit “has been used as an attempt to stifle the democratic activities of the defendants, the neighbourhood residents” and made an award of special (punitive) costs against the plaintiff.⁴²

As a result of public pressure arising from cases such as these, in 2001 the British Columbia government passed the *Protection of Public Participation Act*, Canada’s first anti-SLAPP statute, with the purpose “to encourage public participation, and dissuade persons from bringing or maintaining proceedings or claims for an improper purpose”.⁴³ This statute protected (subject to a number of exceptions) “communication or conduct aimed at influencing public opinion, or promoting or furthering lawful action by the

³⁸ *Daishowa v Friends of the Lubicon*, [1998] OJ No 1429 (Gen Div). Indeed, MacPherson J (at para 84) held that “the manner in which the Friends have performed their picketing and boycott activities is a model of how such activities should be conducted in a democratic society.” However, the judge did impose two minor restrictions on what the defendants could say during picketing.

³⁹ The trial judge did not suggest that the case was a SLAPP; however, in an earlier decision denying an interim injunction, Kiteley J had clearly been particularly concerned that the targeted activity was a form of political expression: [1995] OJ No 1536, para 355, overturned in part by the Divisional Court, (1996), 27 OR (3d) 215.

⁴⁰ Most notably, Chris Tollefson, “Strategic lawsuits and environmental politics: *Daishowa Inc. v. Friends of the Lubicon*”, (1996) 31(1) J of Cdn Studies 119-132, and in a 2012 report issued by the government of the Australian Capital Territory: Justice and Community Safety Directorate, Review of the Protection of Public Participation Act 2008 (Canberra: Legislative Assembly for the ACT, 2012) at 6.

⁴¹ *Fraser v Saanich (District)*, [1999] BCJ 3100 (SC).

⁴² *Ibid* at para 52.

⁴³ *Protection of Public Participation Act*, SBC 2001, c 19, s 2(a).

public or by any government body, in relation to an issue of public interest”.⁴⁴ However, this Act was short-lived: a change in government led to a repeal of the Act on the basis that other tools existed to address abuse of process, and that the phenomenon was not widespread.⁴⁵ There is perhaps some merit to at least the first of these contentions, as at least two cases in British Columbia have been explicitly found to be SLAPPs in the absence of any specific anti-SLAPP statute: *Fraser v Saanich* in 1999, and *Scory v Krannitz* in 2011,⁴⁶ with both being dismissed at an early stage of proceedings (through a motion to strike the statement of claim) with an award of special (punitive) costs. Of course, it is also possible that fewer defendants have alleged that proceedings were SLAPPs in the absence of such a statute,⁴⁷ and there is at least one example of a case in which a judge declined, in the course of deciding appropriate costs, to make a finding that the lawsuit in question was a SLAPP absent specific legislation to that effect.⁴⁸

After the failed British Columbia experiment, other Canadian jurisdictions proceeded cautiously, commissioning studies prior to the proposal of any legislation.⁴⁹ In 2007, a

⁴⁴ *Ibid*, s 1.

⁴⁵ See note 119. For a legislative history of the Act, see also Michaelin Scott and Chris Tollefson, ‘Strategic Lawsuits Against Public Participation: The British Columbia Experience’, (2010) 19(1) RECIEL 45 at 49ff.

⁴⁶ *Scory v Krannitz*, 2011 BCSC 936. See also the judgment on costs, at paras 30-35: *Scory v Krannitz*, 2011 BCSC 1344.

⁴⁷ Compare, for example, the 3-year period immediately following the passage of Québec’s anti-SLAPP legislation (detailed below), from 2009-2012, in which Québec courts first recognised five civil proceedings as « poursuites-bâillons » : Gouvernement du Québec, *Rapport sur la mise en oeuvre de la Loi modifiant le Code de procédure civile pour prévenir l’utilisation abusive des tribunaux et favoriser le respect de la liberté d’expression et la participation des citoyens aux débats publiques*, *infra* note 57, at 48-50. There is no obvious reason why SLAPPs would be more prevalent in Québec in this period, although the nomenclature would obviously have been more pertinent.

⁴⁸ *Taseko Mines Limited v Western Canada Wilderness Committee*, 2016 BCSC 109 at paras 178-182. The Court did, however, award special costs on the basis that, after a certain point, the plaintiff’s claim for punitive damages became an economic threat, and that “[i]n the context of a defamation action, seeking punitive damages may serve to silence critics”: paras 195-201. This award of special costs was overturned on appeal: *Taseko Mines Limited v Western Canada Wilderness Committee*, 2017 BCCA 431.

⁴⁹ Most notably the Macdonald Report in Québec (*supra* note 7), and the Report of the Anti-SLAPP Advisory Panel to the Attorney-General of Ontario (October 28, 2010), available online at: https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html. The Uniform Law Conference of Canada also issued a report in 2008, resulting in the publication of a proposed Uniform Prevention of Abuse of Process Act in 2010 (online: <http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/641-abuse-of-process-prevention/1403-uniform-prevention-of-abuse-of-process-act>), and more recently, a Uniform Protection of Public Participation Act (2017), online: http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0031.pdf. In addition, commentators and

study group led by Professor Roderick Macdonald in the province of Québec issued a detailed report that concluded that SLAPPs were a worrisome practice that merited a proactive approach, and defined SLAPPs as:

- (i) legal proceedings against
- (ii) organisations or individuals who are
- (iii) engaged in public issue debates in the public sphere
- (iv) where such proceedings are intended to limit the freedom of expression and neutralise those individuals or organisations
- (v) through the use of court proceedings to intimidate, impoverish and redirect them.⁵⁰

In generating their recommendations, the Macdonald Report's authors carefully canvassed existing legislation and proposals from other jurisdictions. Notably, the Province of Québec has a human rights code, *la Charte des droits et libertés de la personne* (Charter of Human Rights and Freedoms), that protects its citizens from infringements by both public bodies and private entities and individuals. As such, in a civil suit in Québec, it is possible to plead a violation of one's right to free expression.⁵¹ Nonetheless, the Report recommended that SLAPPs be specifically regulated, with any legislation meeting the following objectives:

- The protection of the right to freedom of expression and public opinion;
- The rapid interruption of SLAPPs in the course of proceedings;
- Deterring potential SLAPP claimants;
- The maintenance of the justice system's integrity and purposes; and

advocacy organisations have published a number of reports, studies, and position papers on the subject of SLAPPs, most notably the Public Interest Advocacy Centre (PIAC) in 2004, and the British Columbia Civil Liberties Association in 2011. Two more provinces have had anti-SLAPP bills tabled, New Brunswick (1997) and Nova Scotia (2003), but both were private member's bills that never got past First Reading.

⁵⁰ This is my translation of the following text from the Macdonald Report, *supra* note 7 at 7:

Abordée dans une perspective plus large et en phase avec l'internationalisation du phénomène, la notion de *poursuite stratégique* ou *poursuite-bailon* présente des caractéristiques plus générales. Il s'agit, pour l'essentiel, 1) de poursuites judiciaires 2) entreprises contre des organisations ou individus 3) engagés dans l'espace public dans le cadre de débats mettant en cause des enjeux collectifs, 4) et visant à limiter l'étendue de la liberté d'expression de ces organisations ou individus et à neutraliser leur action 5) par le recours aux tribunaux pour les intimider, les appauvrir et les détourner de leur action. ...

⁵¹ Section 3, *Charte des droits et libertés de la personne*, CQLR c C-12.

- Access to justice.⁵²

The Macdonald Report identifies and engages the full range of potential harms: to individual rights, to the public sphere, to the protection of the integrity of the judicial institution, to access to justice.⁵³ The alarm having been sounded by the Macdonald Report, legislation amending Quebec’s Code of Civil Procedure swiftly ensued.⁵⁴ As the Report had placed significant emphasis on the “détournement des fins de la justice”,⁵⁵ the anti-SLAPP measures were incorporated into a larger overhaul of the Code’s rules on improper use of procedure. In this first iteration, and in keeping with the Macdonald Report’s definition of SLAPPs, the motive or bad faith of the plaintiff in bringing the suit was a factor in determining whether it would be characterised as a SLAPP.⁵⁶ This requirement of blameworthiness would later be dropped.⁵⁷

Shifting the focus away from intent was reflective of the approach taken in a number of other jurisdictions. It was also the approach advocated in a 2010 article cautioning against a focus on intent, for several reasons: (i) such an approach distracts from the communication to be protected; (ii) there are significant pragmatic difficulties for a defendant to successfully establish the plaintiff’s intent; thus (iii) “[i]f the standard for

⁵² Macdonald Report, *supra* note 7 at 76. Author’s translation of original French text.

⁵³ In this context, the authors referred to access to justice in terms of the establishing an equality of arms between SLAPP targets and those who initiate the suits (at 15), including a proposal to provide funding to enable targets to bring motions to dismiss (at 81).

⁵⁴ Bill 9, *An Act to Amend the Code of Civil Procedure to prevent improper use of the courts*, 1st Sess, 39th Leg, Québec, 2009 (assented to 4 June 2009), SQ 2009, c 12.

⁵⁵ Literally translated as the “hijack” of judicial purposes, but the term “détournement” echoes the civil law doctrine of “détournement de pouvoir” – abuse of power.

⁵⁶ The relevant language of the section was as follows: “... a use of procedure ... in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate” (old *Code of Civil Procedure*, CQLR c C-25, art 54.1). That the plaintiff had to be blameworthy was confirmed in *Acadia Subaru c Michaud*, 2011 QCCA 1037, para 76. “Improper purpose” had also been the focus of the repealed British Columbia Act.

⁵⁷ This amendment was explained in a review of the operations of Bill 9, issued in 2013: Gouvernement du Québec, *Rapport sur la mise en oeuvre de la Loi modifiant le Code de procédure civile pour prévenir l’utilisation abusive des tribunaux et favoriser le respect de la liberté d’expression et la participation des citoyens aux débats publiques* (septembre 2013) at 64. This Report suggested that it would suffice that it had the effect of restricting another person’s freedom of expression in public debate, and is largely understood to have resulted from the difficulty of adducing, at an early stage, evidence of bad faith or improper motive. As a result, the new codal language added ‘Regardless of intent’ to the beginning of the relevant article (art 51, new *Code of Civil Procedure*, CQLR c C-25.01).

engaging anti-SLAPP provisions is set as either malicious intent or complete lack of foundation for the case, all but the most blatantly malicious or ill-founded lawsuits are likely to proceed to trial”.⁵⁸ Since SLAPP plaintiffs are most interested in entangling defendants in lengthy legal processes, making early identification – and therefore early dismissal – of SLAPPs too difficult renders anti-SLAPP legislation largely toothless. Instead, it was recommended that the focus be on the “public interest” content of the communications in question.⁵⁹

A similar approach is reflected in the 2010 Report of the Ontario Anti-SLAPP Advisory Panel, which recommended against using the acronym “SLAPP” in any resulting legislation, given that, in the Panel’s view, “the key evaluation should be the effect, and not the purpose, of the legal action under review.”⁶⁰ The Panel found that “judging the motive of a plaintiff is likely to be difficult, and often impossible, in an expedited proceeding.”⁶¹ Instead, the Panel proposed that the threshold test for dismissing a claim should be whether “the action is likely to have an adverse effect on the ability of the defendant or others to participate in matters of public interest.”⁶² This would not be determinative in itself, but would shift the onus to the plaintiff to demonstrate that the claim had substantial merit. If the plaintiff succeeded on that basis, then a further balancing should be done between the relative harm to be suffered by the plaintiff and the defendant.

Ultimately, in enacting the *Protection of Public Participation Act* in 2015,⁶³ the Government of Ontario was less focused on the rights of the individual than on the public interest more broadly. Thus, the test for dismissal of a claim is whether “the

⁵⁸ Pamela Shapiro, “SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International”, (2010) 19 RECIEL 14, 24-25. Indeed, Shapiro suggests, at 16, that the “catchy acronym” might have entrenched an unfortunate standard, and that it would have been better had these suits been termed LAPPs, “Lawsuit[s] Affecting Public Participation” (italics in original).

⁵⁹ *Ibid* at 25-26.

⁶⁰ *Anti-SLAPP Advisory Panel, Report to the Attorney-General* (October 28, 2010), *supra* note 49 at para 22.

⁶¹ *Ibid*, para 34.

⁶² *Ibid*, para 35.

⁶³ *Protection of Public Participation Act*, SO 2015, c 23.

proceeding arises from an expression made by the person on a matter of public interest”,⁶⁴ with a balance to be struck between whether “the harm likely to be or have been suffered by the [plaintiff] as a result of the [defendant’s] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.”⁶⁵ This final balancing is a significant innovation, although it will have been familiar to Ontario courts, who are often called upon to use a “balance of convenience” test in applications for interim injunctions.⁶⁶

Since the adoption of the Act, the number of cases in which defendants have alleged that a case is a SLAPP in Ontario increased substantially: in the 19 years from 1996-2015, parties were accused of instituting a SLAPP in only 7 cases.⁶⁷ From January 2016 to December 2017, a two-year period, a SLAPP allegation was pursued in at least 13 cases, with 5 of those cases being dismissed at an early stage under the anti-SLAPP provisions.⁶⁸ This offers some evidence that anti-SLAPP measures expose such tactics and create an opportunity to debate the impact of lawsuits on free expression of parties in the public interest, as well as being effective in actually regulating the use of SLAPPs.

After this initial series of cases made their way through courts of first instance, the Ontario Court of Appeal decided to provide a definitive interpretation of the Act based

⁶⁴ Section 137.1(3) of the *Courts of Justice Act*, RSO 1990, c C43.

⁶⁵ *Ibid*, s 137.1(4)(b).

⁶⁶ This type of balancing is also familiar to constitutional litigation in Canada: all rights protected under the *Canadian Charter of Rights and Freedoms* are subject to a “reasonable limits” test, pursuant to s 1, which reads: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

⁶⁷ A reference to “SLAPP” came up in a handful more cases, but such references appeared to be in passing and not seriously pursued. In truth, the Act covers any claim filed as of the First Reading of the Act, on 1 December 2014: *McQueen v Reid*, 2018 ONSC 1662 at para 3. This claim was dismissed under the Act, despite having been filed prior to the Act coming into force.

⁶⁸ Motions to dismiss were allowed in *Able Translations Ltd v Express International Translations Ltd*, 2016 ONSC 6785 (affirmed on appeal, see note 69 *infra*); *Platnick v Bent*, 2016 ONSC 7340 (reversed on appeal, see note 69 *infra*); *United Soils Management Ltd v Mohammed*, 2017 ONSC 904; *Rizvee v Newman*, 2017 ONSC 4024; and *Progressive Conservative Party v Karahlios*, 2017 ONSC 7696. Motions to dismiss were initially denied in *1704604 Ontario Ltd v Pointes Protection Association*, 2016 ONSC 2884 and *Armstrong v Corus* (unreported) but these were reversed on appeal (see note 69 *infra*).

on the appellate review of six cases (the “SLAPP Sextet”).⁶⁹ These cases were argued together before the Court, which opened the 2018 lead judgment of the SLAPP Sextet with the following remarks:

[1] Freedom of expression is a constitutionally-protected right in Canada. The free and open expression of divergent, competing, and strong viewpoints on matters of public interest is essential to personal liberty, self-fulfillment, the search for the truth, and the maintenance of a vibrant democracy.

[2] From time to time, those who are the target of criticism resort to litigation, not to vindicate any genuine wrong done to them, but to silence, intimidate, and punish those who have spoken out. Litigation can be a potent weapon in the hands of the rich and powerful. The financial and personal costs associated with defending a lawsuit, particularly one brought by a deep-pocketed plaintiff determined to maximize the costs associated in defending the litigation, can deter even the most committed and outspoken critic.⁷⁰

With these words, the Court set out the basic challenge of a SLAPP to the fundamental right to free expression. Of course, the Court does not, and cannot, rely on the constitutional protection of free expression in deciding the case(s) brought by private parties who are not subject to the *Charter*.⁷¹ Nonetheless, the Court clearly expresses the importance of free expression in a democracy, and noted that this was the purpose expressed by the Attorney General in proposing the Act.⁷² In other words, the Act does

⁶⁹ The cases in the SLAPP Sextet are as follows: *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685 (breach of settlement agreement); *Able Translations Ltd v Express International Translations Inc*, 2018 ONCA 690 (defamation in a commercial context); *Armstrong v Corus Entertainment Inc*, 2018 ONCA 689 (defamation in a political context); *Fortress Real Developments Inc v Rabidoux*, 2018 ONCA 686 (defamation and breach of settlement agreement); *Platnick v Bent*, 2018 ONCA 687 (defamation of expert witness); *Veneruzzo v Storey*, 2018 ONCA 688 (libel).

⁷⁰ *1704604 Ontario Ltd v Pointes Protection Association*, *ibid* [Pointes].

⁷¹ The question of whether anti-SLAPP legislation (as an act of state) itself violates the *Charter* was decided in another of the SLAPP Sextet cases, *Platnick v Bent*, *supra* note 69, with the Court finding that it does not.

⁷² Remarks of the Attorney General at the Second Reading of the Bill are quoted at para 33 of *Pointes*, including the following: “I do not believe that a mere technical case – without any actual harm – should be able to suppress the kind of democratic expression that is crucial for our democracy.”

not operate to condemn or punish a particular violation of rights, but rather to promote a salutary public good.⁷³ As the Court notes:

[45] The purpose of [the Act] is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. ...

The key to the Act, in the Court's view, is the balance struck not just between the rights of the parties, to free expression on the one hand and the vindication of a private right on the other, but the *public interest* in each.⁷⁴ The Court noted that, under the Ontario Act, the plaintiff's motive is not at issue (save on the question of "SLAPPback" damages), but rather the focus is on the "potential merits of the claim and the effects of permitting the claim to proceed" vis-à-vis the public interest. As noted above, Québec would, in amendments the following year, similarly abandon the requirement of blameworthiness in favour of a focus on the effects of the lawsuit in question. Given their potential liability for cost indemnification and even damages for initiating a SLAPP,⁷⁵ Ontario's anti-SLAPP scheme put plaintiffs on notice that they needed to consider the potential effects of a lawsuit prior to launching it.⁷⁶

The Ontario Act appears to have set a new standard in the Canadian context, having been adopted almost verbatim by the Uniform Law Conference of Canada (ULCC) in drafting its *Uniform Protection of Public Participation Act*.⁷⁷ In 2019, British Columbia

⁷³ At least not under Canadian law, although it is worth noting that, under international human rights law, the state is responsible for protecting individuals against any violation of fundamental rights: see, for example, art 2 of the ICCPR.

⁷⁴ *Pointes*, para 45.

⁷⁵ A modest damages award was made to the defendant in *United Soils Management Ltd v Mohammed*, 2017 ONSC 4450, as well as an award of full indemnity costs. A more substantial damages award was later made against the same plaintiff in *United Soils Management Ltd v Barclay*, 2018 ONSC 1372 at paras 119-137.

⁷⁶ *Pointes* at para 45: "... Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression."

⁷⁷ Available online at: http://www.ulcc.ca/images/stories/2016_pdf_en/2016ulcc0031.pdf (adopted May 1, 2017).

recently became the third jurisdiction in Canada to have anti-SLAPP legislation in force, basing its new *Protection of Public Participation Act* on the Uniform Act.⁷⁸

3.3.2 Australia: Addressing SLAPPs in the Absence of a Written Bill of Rights

To a lesser extent, Australia has also seen a recent proliferation of SLAPPs, again, particularly in the land development and resource sectors. Australia, however, operates in a significantly different rights context, having no constitutional bill of rights, and with rights protection being developed at common law. Thus, it was not until 1994 that the High Court found that a limited right to free speech was implied by the nature of the Australian Constitution, in that a system of representative government necessitated a wide ambit of speech on political matters.⁷⁹ Starting in the 1990s, the absence of explicit, affirmative rights protection and the emergence of the first apparent SLAPPs cases created pressure in Australia to see rights of political expression and public participation articulated and affirmed in anti-SLAPP legislation.⁸⁰ Model bills were drafted, and approaches discussed, but no action was taken until the notorious “Gunns 20” case was filed in 2004.

In *Gunns*, the Wilderness Society and 19 other defendants were sued for \$6.9 million based on their protesting the logging of old growth forests in Tasmania. Seventeen of the defendants were individuals, two of whom were sitting members of a legislature, and the allegations included conspiracy and interference with contractual relations, targeting both expressive activity and any coordinated action among the defendants. While *Gunns* was by no means the only case that saw industry pitted against environmentalists in Australia, it was the biggest in many senses: its ambitious quantum, the length of its pleadings (216 pages when first filed), and the media coverage that it attracted. *Gunns*’

⁷⁸ SBC 2019, c 3. The tabling of the underlying bill appears to have been motivated by the *Taseko Mines* case (*supra* note 48) and calls by prominent jurists: Jason Proctor, “Judicial heavyweights call for B.C. to introduce anti-SLAPP legislation”, CBC News (7 February 2018), online at <https://www.cbc.ca/news/canada/british-columbia/justice-slapp-lawsuits-defamation-courts-1.4525129>. It received Royal Assent on 25 March 2019.

⁷⁹ This jurisprudential history is explained in greater detail in Greg Ogle, “Anti-SLAPP Law Reform in Australia”, (2010) 19 RECIEL 35 at 36.

⁸⁰ Early Australian SLAPPs and tactical evolution are canvassed in Thalia Anthony, “Quantum of strategic litigation – quashing public participation”, (2009) 14(2) Austral J of Hum Rts 1 at 4-7.

claims were struck out on several occasions, but it would take 5 years for the case to finally end in a settlement in which Gunns paid the costs of the remaining defendants.⁸¹

The *Gunns* case generated significant pressure for anti-SLAPP law reform, and while bills were introduced in Tasmania, South Australia, and the Australian Capital Territory (ACT), only the ACT has enacted legislation, the *Protection of Public Participation Act 2008*.⁸² The ACT statute is quite different from any of the other anti-SLAPP legislation canvassed here, and has been criticised as relatively weak.⁸³ In order for the Act to apply, the proceeding must have been started or maintained: (i) with respect to conduct that would, as defined in the Act, be considered public participation and (ii) for an improper purpose, with all of the evidentiary difficulties that proving the latter entails.⁸⁴ On the other hand, any concerns that such evidence will not be available at an early stage of the proceedings are attenuated by the absence in the Act of any provision for the early identification and summary dismissal of such improper proceedings: to successfully invoke the Act, one would have to see a suit through to final judgment. Finally, should the claim be found to meet the criteria, the penalty is a fine, payable to the Territory (not the defendant); there is no provision for the defendant to recover any costs or damages. In short, the Act creates little or no disincentive for motivated SLAPP filers, nor any particular incentive for SLAPP targets to raise it. Not surprisingly, it seems that it has never been invoked.

3.3.3 South Africa: Beyond Civil and Political Rights

Just as SLAPPs have first arisen in conflicts over land use and the environment in other jurisdictions, so too has it been in South Africa. South Africa provides a particularly interesting context for SLAPPs: as a developing country, the tension between

⁸¹ This narrative of the case is drawn from Ogle, *supra* note 79, at 38-39. Greg Ogle was the Legal Coordinator for the Wilderness Society, one of the defendants in the *Gunns* case.

⁸² *Protection of Public Participation Act 2008*, A2008-48 (Australian Capital Territory) [ACT Act].

⁸³ See, for example, Ogle, *supra* note 79 at 41-42.

⁸⁴ ACT Act, s 9(1)(b). An improper purpose is defined in s 6 of the Act as being “to discourage the defendant (or anyone else) from engaging in public participation”; “to divert the defendant’s resources away from engagement in public participation”; or “to punish or disadvantage the defendant for engaging in public participation”.

environmental conservation and land development and use is perhaps particularly fraught. The legal stakes are raised by the broad range of rights protected by the post-apartheid South African Constitution, which includes not just a particularly expansive list of civil and political rights,⁸⁵ but also socio-economic,⁸⁶ and environmental rights,⁸⁷ as well as the right to property.⁸⁸ Thus the ordinary binary constitutional tensions between a right of access to the courts and political expression become multi-dimensional in the South African context. Under the South African model, both public and private actors can be held liable for the violation of Constitutional rights.

It is perhaps not surprising that South Africa provides fertile ground for public interest litigation on the application of, and tension between, these constitutional values. In analysing the South African context, specific emphasis has been placed on the extent to which SLAPPs potentially thwart public interest environmental litigation specifically, and public engagement in environmental decision making more generally.⁸⁹ This “right” of political participation is particularly poignant in a country in which the wounds from historical disenfranchisement and the repression of political participation are still healing.

Using the template developed in the United States, South African scholars have identified a series of cases that appear to fit the SLAPPs mold,⁹⁰ such as the 2006

⁸⁵ Particularly ss 16-19 of the Bill of Rights, Chapter 2 of the *Constitution of the Republic of South Africa, 1996*, No 108 of 1996.

⁸⁶ *Ibid*, ss 22-23, 26-29.

⁸⁷ *Ibid*, s 24, which reads as follows:

24. Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁸⁸ *Ibid*, s 25.

⁸⁹ See Murombo and Valentine, *supra* note 30.

⁹⁰ *Ibid* at 97-101, in which the authors identify six likely SLAPPs.

decision in *Petro Props (Pty) Ltd v Barlow*,⁹¹ in which an activist and a local conservation organisation were sued for opposing the construction of a petrol station near a wetlands area. In denying the plaintiff's application for an injunction, the Court held that the individual defendant's right to express her concerns did not violate the plaintiff's property rights. In weighing these rights, the Court was particularly protective of the rights of the defendants to "speak out, ... champion their cause, ... seek to persuade" either the government or the petroleum company with whom the plaintiff had contracted.⁹² Note here the more capacious vision of political persuasion; not just the possibility of influencing government, but corporate actors as well.

The most high-profile recent SLAPP in South Africa is the *Wrappex* case, in which a property development company (Wrappex) sued four individuals for opposing the construction of a luxury real estate development and golf course adjacent to a nature reserve. The plaintiff claimed what the presiding judge would describe as "prodigious damages" of R40million for, among other things, defamation.⁹³ Given the particular structure of the South African Bill of Rights, the defendants were able to specifically plead that the suit violated their right to free expression, and alleged that the action was brought "to intimidate and/or silence the defendants during the currency of the action, and not to vindicate its reputation". In balancing the rights of the parties, the Court in *Wrappex* held that "[t]he defendants were entitled to place before the authorities their fears and concerns and to oppose the applications made by the Plaintiff as strenuously as they did. In doing so, no rights of the Plaintiff were violated."⁹⁴ In later awarding costs on an attorney and client (elevated) basis, the Court held that "the Defendants should not have been called upon to contest the Plaintiffs [*sic*] claims especially not in the High

⁹¹ 2006 (5) SA 160 (W).

⁹² *Ibid* at para 56.

⁹³ *Wrappex (Pty) Ltd v Barnes and others* (unreported), judgment 6 Dec 2010, Gauteng North High Court, per Sapire J.

⁹⁴ *Ibid*.

Court.”⁹⁵ The Court also accepted the defendants’ argument that the claims had been vexatious, and drew an analogy between SLAPPs and vexatious litigation.⁹⁶

To date, South Africa has not felt the need to enact specific anti-SLAPP measures, and courts have not hesitated to act in the absence of specific statutory authority. Nonetheless, there have been calls for it to do so, and in June 2019, a campaign was launched to draw attention to the phenomenon.⁹⁷ While South African courts have the inherent jurisdiction to stay or dismiss vexatious proceedings at an early stage, there has been a historical reluctance to do so, the same general reluctance that has been experienced in other jurisdictions and that has led to the enactment of remedial anti-SLAPP mechanisms. In a case expected to be heard soon, Mineral Commodities Limited has sued three individuals, including two lawyers for the Centre for Environmental Rights, for defamation, and the Centre for Applied Legal Studies has joined the case as an *amicus curiae* to advise on the SLAPPs issue.⁹⁸ Should the court ‘call a SLAPP a SLAPP’ in this instance, or should SLAPPs continue to proliferate in South Africa, the push for affirmative anti-SLAPP legislation may well gain ground.⁹⁹

3.3.4 United Kingdom: David (Morris), Goliath, and the European Court of Human Rights

One of the most infamous SLAPPs is the so-called McLibel case (*McDonald’s Restaurants Ltd v Steel & Morris*),¹⁰⁰ which occurred in a jurisdiction in which SLAPPs have never been explicitly recognised.¹⁰¹ In this case, McDonald’s sued members of

⁹⁵ *Wrapex (Pty) Ltd v Barnes and others*, 2011 (3) SA 205 (GNP, 11 February 2011).

⁹⁶ *Ibid.* The Court did not specifically call the case a SLAPP as such, noting that “no instances of cases so described are found in local law reports”.

⁹⁷ Center for Environmental Rights, “South African Advocacy Organizations Launch Anti-SLAPP Campaign: Asina Loyiko” (28 June 2019), online: <https://www.protecttheprotest.org/2019/06/28/south-african-advocacy-organizations-launch-anti-slapp-campaign-asina-loyiko/>.

⁹⁸ For more details see Centre for Environmental Rights, “CER attorneys raise Constitutional defence in SLAPP suit, and experts join as friends of the court” (20 November 2017), online at: <https://cer.org.za/news/cer-attorneys-raise-constitutional-defence-in-slapp-suit-and-experts-join-as-friends-of-the-court>. This case has yet to go to trial,

⁹⁹ Indeed, Murombo & Valentine, *supra* note 30, argue for this at 105-06.

¹⁰⁰ *McDonald’s Restaurants Ltd v Steel & Morris*, [1997] EWHCQB 366, affirmed [1999] EWCA Civ 1144.

¹⁰¹ Fiona Donson describes this case as the quintessence of a SLAPP in *Legal Intimidation: A SLAPP in the Face of Democracy* (London: Free Association Books, 2000). However, neither the case nor Donson’s

London Greenpeace in libel for producing and distributing a pamphlet titled *What's Wrong with McDonald's? Everything They Don't Want You to Know*, which criticised McDonald's on a range of topics from false nutritional claims to animal cruelty. The suit named six individual defendants, and initially seemed to go according to plan: four of the defendants named in the suit immediately agreed to cease their public criticism of McDonald's in return for the case against them being withdrawn. However, two of the protesters, Helen Steel, a gardener, and David Morris, an unemployed postman and single parent, refused to desist and settle, and so were forced to defend the case on its merits.

The suit was, by all accounts, a public relations disaster for McDonald's. The defendants were without funds to hire counsel and were denied legal aid, thus maximising the inequality of arms. The libel law in effect in England at the time, notoriously advantageous to claimants, placed the burden on the two self-represented defendants to prove the truth of the claims in the pamphlet, which they set about to do over the course of 300 court days over three years, the longest libel case in UK history.¹⁰² Without funds to hire experts, Steel and Morris availed themselves of the discovery process to uncover evidence from McDonald's itself in support of the allegations in the pamphlet, information that would never have been publicly available otherwise. Moreover, the pamphlet continued to be distributed and, since the case attracted a significant amount of publicity, it was distributed in far greater numbers, thereby extending the reach of the alleged defamation.¹⁰³ In the end, McDonald's spent an estimated £10 million prosecuting the case, won on some of the allegations, lost on several others, and were

book seems to have generated a significant academic conversation, and the jurisprudential reaction to this case was focused on the reform of liberal libel laws of the UK, rather than the particular dynamics of SLAPPs.

¹⁰² Settlement talks were fruitless, as McDonald's persisted in requiring the defendants to agree not to publicly criticise the chain, and the defendants would only agree to these terms if McDonald's agreed not to publicly advertise itself: *McLibel* (Spanner Films, 2005), available online at <https://www.youtube.com/watch?v=V58kK4r26yk>.

¹⁰³ Indeed, it was during the life of this case that the internet really took off, further extending the reach of the case, promoting discussion of and activism around the underlying issues, and facilitating the raising of funds in support of the defence. The website launched by the defendants, McSpotlight, is still up and running today: www.mcspotlight.org.

awarded £60,000 (later reduced on appeal to £40,000). The defendants being impecunious, McDonald's has never sought to collect the award.

The *McLibel* case, even as it was epic, possesses many of the features of a typical SLAPP: the suit was filed against the defendants in their personal capacity; with a damage claim out of all proportion with any actual harm suffered by the plaintiff;¹⁰⁴ the parties operated with a massive imbalance in legal resources; and Steel and Morris' energies and resources were entirely redirected toward the judicial forum, with their day-to-day lives dictated by its rules and demands. In interviews filmed for a 2005 documentary made about the case, Steel and Morris detailed the legal case's profound impact on their health and family life.¹⁰⁵

By any objective measure, McDonald's clearly chose both the wrong people and the wrong cause of action to pursue. Steel and Morris were remarkably effective at not only keeping the focus on the issues around which they had been agitating, but using the proceedings themselves to gather evidence and further embarrass McDonald's. They refused, even at great personal cost, to be silenced.¹⁰⁶ However, despite being largely vindicated by the courts, it is clear that the defendants felt betrayed by the process. One of the defendants, David Morris, concluded that: "[e]ffectively the courts have given the green light to companies to abuse the legal system without any risk of paying consequences".¹⁰⁷

¹⁰⁴ Indeed, under UK libel law as it then was, McDonald's was not required to prove actual damage, and did not.

¹⁰⁵ The impacts of the litigation are well explored in interviews with the two defendants, Helen Steel and David Morris in *McLibel*, *supra* note 102. Dave Morris, "McLibel: Do-It-Yourself Justice", (1999) 24 *Alternative LJ* 269 at 270, pithily summarises the experience: "It was a nightmare being litigants in person ...". Neither Steel nor Morris could afford counsel and were provided with only two hours of Legal Aid at the outset of the case (although they did benefit from pro bono support behind the scenes).

¹⁰⁶ Indeed, three of the ex-defendants would later issue a statement of support for Morris and Steel, explaining that they had consented to the statement of apology solely to avoid potential liability for legal costs and damages and that in the two hours of free legal advice that they had been provided under Legal Aid, they had been advised that they would likely lose the case. This statement of support is available online at: <http://www.mcspotlight.org/case/pretrial/support.html>.

¹⁰⁷ Morris, *supra* note 105 at 272.

Indeed, the case continued after the UK courts had ruled. As a result of what they saw as a systemic failure of the courts to protect them from what they clearly perceived to be judicial persecution, Steel and Morris went on to bring a successful complaint against the UK in the European Court of Human Rights (ECtHR).¹⁰⁸ It is important to appreciate the significance of this change in antagonist: no longer were Steel and Morris arguing about the behaviour of McDonald's; at the ECtHR, their complaint was about what they perceived as the failure of the United Kingdom itself to protect their rights under the European Convention on Human Rights (ECHR). They claimed, first, that the legal proceedings had been unfair, primarily because they had been denied legal aid. Secondly, they claimed that the proceedings themselves constituted "a disproportionate interference with [their] right to freedom of expression".¹⁰⁹

The ECtHR agreed that the applicants' rights had been violated. First, in denying them legal aid, the UK had violated their right to a fair trial, "given the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's".¹¹⁰ Secondly, the Court explicitly affirmed the right of the applicants to public participation, holding that:

... in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.¹¹¹

The Court emphasised that "political expression" requires a high level of protection under ECHR Article 10, implicitly criticising the "truth" standard imposed under UK

¹⁰⁸ *Steel & Morris v United Kingdom*, no 68416/01, [2005] ECHR 103 (15 February 2005) [*Steel & Morris*]. There is a good discussion of the case at the ECtHR in Fiona Donson, "Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs", (2010) 19(1) *RECIEL* 83.

¹⁰⁹ *Steel & Morris*, para 47.

¹¹⁰ *Ibid*, para 69.

¹¹¹ *Ibid*, para 89.

libel law.¹¹² Ultimately however (and somewhat oddly), the Court's finding of a violation of Article 10 by the UK was grounded in the denial of procedural fairness in the adjudication of the defamation claim,¹¹³ and what it believed to be a disproportionate award of damages, given both the applicants' low incomes and the failure of McDonald's to prove any actual financial loss.¹¹⁴ Recognising the impact of the suit on the "health, personal and family lives" of the applicants, the ECtHR ordered the UK to pay EUR35,000 in damages to them, as well as the costs and expenses associated with the ECtHR case.

Thus, as much as the McLibel saga had been expensive and embarrassing for McDonald's, so too had it proved costly and embarrassing for the UK, in both the ECtHR and the court of public opinion, even without factoring in what must have been the astronomical costs incurred by the domestic judicial system in 'hosting' the original proceedings. There is little doubt that McLibel was on the minds of legislators when the *Defamation Act 2013* was introduced and passed, which established a threshold requirement of "serious harm" (s 1(1)) and which made it difficult for "a body that trades for profit" to establish such harm absent "serious financial loss" (s 1(2)).¹¹⁵ Indeed, one might detect a tacit recognition of the SLAPPs phenomenon in the drafting of the Act, for which an explanatory note on the threshold question of serious harm suggested that there would be "potential for trivial cases to be struck out on the basis that they are an abuse of process".¹¹⁶ This echoes the procedural technique found in many of the anti-SLAPP statutes in other jurisdictions, although the Act itself did not explicitly call for a change in civil procedure. Nonetheless, one hopes that a UK court confronted with the next McLibel case might be more proactive in applying the doctrine of abuse of process. In the spirit of the ECtHR ruling, a UK court might also be concerned about the fair trial implications of a David and Goliath scenario, in which self-represented litigants are

¹¹² *Ibid*, para 90.

¹¹³ *Ibid*, para 95.

¹¹⁴ *Ibid*, para 96-97.

¹¹⁵ *Defamation Act 2013*, c 26.

¹¹⁶ Explanatory Notes to *Defamation Act 2013*, c. 26, Commentary on Sections, Section 1 at para 11; online at <http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/1>.

pitted against an extremely well-resourced opponent, particularly in a case deemed “too prolonged and too complicated for a jury”.¹¹⁷

3.4 The Problem with SLAPPs

In the original conception of SLAPPs, the right to petition played two roles in Canan and Pring’s research: it operated as a fairly uncontroversial case selection criterion¹¹⁸ and it acted as shorthand for a broad set of rights (or at least animating concerns) encompassed by the term “public participation”. The lack of such a marker has arisen in debates about SLAPPs in other jurisdictions, with persistent questions about whether they exist as a specific type of abusive claim, or at least to an extent that merits a specific regulatory scheme, as they did in the 2001 debates in the British Columbia legislature about whether SLAPPs were pervasive enough to warrant specific intervention.¹¹⁹ This is, of course, something of a chicken-and-egg problem: until SLAPPs are identified as SLAPPs, their ubiquity and impact are very hard to gauge.¹²⁰

¹¹⁷ Monique C Lillard, “McGoliath v David: The European Court of Human Rights Recent ‘Equality of Arms’ Decision”, (2005) 6(5) *German LJ* 895 at 896.

¹¹⁸ A number of the 100 cases studied were identified because the Petition Clause had been argued as an affirmative defence (in the nature of constitutional privilege) to the suit in question.

¹¹⁹ See, for example, British Columbia, Legislative Assembly, Bill 10, Protection of Public Participation Act, 2nd reading, *Official Report of the Legislative Assembly*, 36-5, Vol 22, No 18 (3 April 2001) at 17637 (Geoff Plant). This first British Columbia *Protection of Public Participation Act* was enacted in 2000, but repealed only 5 months later with the election of a new provincial government: *Miscellaneous Statutes Amendment Act*, SBC 2001, c 32, s 28, with the Minister of Justice (Geoff Plant) arguing that existing mechanisms and court powers were sufficient to address any SLAPP-style proceedings: see British Columbia, Legislative Assembly, Bill 11, Miscellaneous Statutes Amendment Act, 2nd reading, *Official Report of the Legislative Assembly*, 37-2, Vol 2, No 14 (9 August 2001) at 414-415 (Geoff Plant). In introducing the 2019 *Protection of Public Participation Act* bill, British Columbia Attorney-General David Eby revisited these debates: British Columbia, Legislative Assembly, Bill 32, Protection of Public Participation Act, 2nd reading, *Official Report of the Legislative Assembly*, 41-4, Issue No 199 (14 February 2019), at 7029-7030 (Afternoon Sitting) (David Eby), available online: <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/4th-session/20190214pm-Hansard-n199#billo2-2R>.

¹²⁰ Indeed, for the purpose of debating the merits of proposed anti-SLAPP legislation, one would hope that the costs and benefits of such legislation would be weighed against the costs and benefits of a status quo that permits SLAPPs. But assessing the full social cost of the latter is further complicated by the fact that many prospective plaintiffs are able to silence opposition without a claim ever being filed. Protesters are almost always sent a cease-and-desist letter before legal action is commenced, and one suspects that the threat of litigation is often sufficient to discourage and silence all but the most intrepid targets. Of course, proving this suspicion would be nigh on impossible, given that such an exchange of correspondence rarely leaves a public (or at least an official) trace.

From the law and policy canvassed to this point, it seems that SLAPPs are offensive to public order for two reasons. First, they are a misuse of judicial process: they misdirect judicial resources not towards the end for which they are intended – the vindication of private rights – but to an improper purpose, such as the distraction, intimidation, or punishment of one’s political opponents. In appropriate contexts, SLAPPs can be considered a subset of the common law doctrine of abuse of process, in which the court exercises inherent jurisdiction to prevent the misuse of its process.¹²¹ Since it is the exploitation of those features inherent to the judicial process itself – time, expense, complexity, and uncertainty – that accomplishes this goal, a particular set of procedural solutions is required.

Secondly, where the result of this misdirection is intimidation, aimed at excluding inconvenient actors from the political sphere, this can have a “chilling effect”¹²² not only on the particular target but on others who might hesitate to take up a cause for fear of being sued. It is this concern that animates, for example, the Ontario and British Columbia anti-SLAPP statutes, which seek to encourage public participation and protect the public interest in broad and fulsome engagement and debate. In speaking to the proposed British Columbia legislation, Attorney-General David Eby expressed concern not just about freedom of expression, but what he termed “the right to hear”, i.e. the corollary right of the general public to be exposed to expression, emphasising the importance of reducing the potential threat to journalists.¹²³ Indeed, the Supreme Court of Canada has emphasised democratic discourse as the first of three core rationales for

¹²¹ See for example, *Toronto (City) v CUPE Local 79*, 2003 SCC 63. Abuse of process, which will be discussed in greater detail in chapter 6, *infra* is both the name of a judicial doctrine and a distinct common law tort. Indeed, in some cases, the doctrine has been argued in the alternative to an allegation that a particular suit is a SLAPP: see, for example, *Goldhar v Haaretz.com*, 2016 ONSC 515.

¹²² For an introduction to the notion of libel chill, see Frederick Schauer, “Fear, Risk and the First Amendment: Unraveling the Chilling Effect” (1978) 58 Boston U L Rev 685. The chilling effect of the then-law of defamation was a primary concern of the Supreme Court of Canada in *Grant v Torstar*, *supra* note 35 at paras 39-41 and 53.

¹²³ British Columbia, Legislative Assembly, Bill 32, Protection of Public Participation Act, 2nd reading, *Official Report of the Legislative Assembly*, 41-4, Issue No 198 (14 February 2019), at 7020-7023 (Morning Sitting) (David Eby), online: <https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/4th-session/20190214am>.

the right to free expression, noting that “[fi]rst and foremost, free expression is essential to the proper functioning of democratic governance.”¹²⁴

These public implications of SLAPPs need to be foremost in the minds of a judge endeavouring to push back against a SLAPP. However, this thesis suggests that, judges must be just as concerned about the impact of SLAPPS on the judicial institution and its credibility.

3.5 *SLAPPs as Judicial Persecution*

SLAPPs have much in common with other forms of judicial persecution. Masquerading as ordinary legal claims, they play on presumptions of good faith and thereby take advantage of the open doors of courthouses. There are undoubtedly SLAPP-style cases occurring in courtrooms around the world, but to which the label has not been applied. The economically powerful parties who file SLAPPs recruit judges to transform political struggles into legal ones, and to allow the court processes themselves to delay and often defeat citizen activism or journalistic inquiry, both directly and indirectly. In this respect, SLAPPs are what might be termed a ‘suspect class’ of possible judicial persecution, operating along a horizontal axis. Like political trials, many SLAPPs will not constitute judicial persecution, but where a SLAPP has a severe impact on the fundamental human rights of the target, by depriving them of their rights to free expression and public participation, by vilifying and marginalising them, by deliberately depriving them of their property, and by depriving the polity as a whole of their political perspective or voice, it may well rise to that level.

SLAPPs demonstrate that judicial persecution is not an act that can only be committed by governments, and this is to be recognized in a world in which multinational corporations are increasingly identified as having committed significant human rights violations, even atrocities.¹²⁵ SLAPPs may not be violations of this kind, but if these

¹²⁴ *Grant v Torstar*, *supra* note 35 at para 48.

¹²⁵ See discussion of the facts underlying the Barrick Gold case, *infra*, note 126. Nor should it be assumed that persecution would operate, at any one time, solely along a vertical or horizontal axis, as the potential exists for cooperation between the private sphere and the state. Recent reporting has revealed, for

violations are to be brought to light, a significant measure of protection is needed for the free expression and political participation of journalists and civil society actors who expose them.¹²⁶

However, judicial persecution requires intent, and so in those jurisdictions that have adopted a “LAPP” approach to SLAPPs, i.e. those in which the strategic motives of plaintiffs are not at issue, particular care must be taken to distinguish between the careless or misguided plaintiff and one motivated by a persecutory intent to exclude and marginalise the defendant, either personally, or as part of a class of people that the plaintiff hopes to intimidate.¹²⁷ Certainly, a careful look should be taken at those plaintiffs who have been subject to “SLAPPback” damage awards, as this is an indication that courts have affirmatively found them to be acting in bad faith.

In addition to identifying a broader range of potential actors in judicial persecution, SLAPPs jurisprudence is useful for three reasons. Firstly, SLAPPs present a challenge to presumptions of good faith and the judicial passivity that such presumptions enable. The rise of the phenomenon has forced judges and courts to articulate proper and improper uses of court processes. Whether in the absence of anti-SLAPP legislation, or as they have grappled with new statutory schemes, courts have sought to situate SLAPPs within a now expanded understanding of abuse of process. The recognition of SLAPPs is the creation of a vocabulary to make that which had been invisible visible, and once perceptible, to provide a mechanism to deny those who would seek authentication of intimidation, deprivation of property, oppression, and marginalisation through civil

example, that undercover police officers had infiltrated London Greenpeace (the group with which the McLibel defendants Helen Steel and Dave Morris were affiliated) and the subsequent McLibel Support Campaign: Rob Evans, “UK Groups Spied On By Undercover Police”, *The Guardian* (15 October 2018), online: <https://www.theguardian.com/uk-news/ng-interactive/2018/oct/15/uk-political-groups-spied-on-undercover-police-list>.

¹²⁶ One of the most famous SLAPP decisions in Canada is the decision in *Barrick Gold Corporation c Éditions Écosociété inc*, 2011 QCCS 4232, in which a mining company sued the publisher and authors of a book, *Noir Canada : pillage, corruption et criminalité en Afrique*, which documented numerous atrocities committed in Africa by Canadian mining and resource companies, for \$6 million. The motions judge, while agreeing that the plaintiff seemed to be trying to intimidate the defendants (para 25) and that the suit appeared to be abusive (para 30), did not dismiss the suit summarily, but did order Barrick to pay the plaintiffs over \$140,000 in costs in order to be able to defend it. The case settled shortly thereafter.

¹²⁷ Lillard, *supra* note 117, refers to SLAPPs as *ad terrorem* claims, literally, “for fear” suits.

legal claims. In this way, the project of naming and confronting SLAPPs provides a key precedent for this thesis project.

Secondly, it is a jurisprudence rich in normative commentary on the foundations of a healthy democracy, grounded in both the rights of the individual and the wider community to an open, plural, and free public sphere. If there is an upside to SLAPPs, it is this: where legislatures and courts have responded, SLAPPs have provided these democratic institutions with an opportunity to identify, articulate, and recommit to those values that make a democracy work well. While a skeptic might dismiss much of this rhetoric as liberal platitudes, anti-SLAPP measures have effectively drawn a line in the judicial sand against the hegemony of economic power. In this, they are expressions not only of liberal values, but of resistance to a pure market model of justice delivery. There is undoubtedly a greater reckoning needed with the capacity of the court to deliver just outcomes in cases of asymmetrical access to justice and the inequality of arms, but anti-SLAPP measures reduce, in at least one respect, the possibility of using court processes as a billy club against democracy itself.

Third, the existence of SLAPPs is a clarion call to courts to address systemic deformations and power imbalances, and thereby to play an important role in preserving a healthy democratic sphere. In cases on the horizontal axis, where a court need not be concerned about stepping on the toes of a co-equal branch of government, judges perhaps have more space to occupy the full extent of that protective, even enabling, role. The appropriate and crucial role of the courts as arbiter of the rules of politics will be explored in more detail in chapter 7.

Chapter 4

Political Trials as Judicial Persecution: Article 18 of the European Convention on Human Rights

As seen in the last chapter, anti-SLAPP measures seek both to constrain certain kinds of abuses of judicial process and to promote a particular vision of inclusive political participation. It will be obvious that concerns about SLAPPs are different in kind than the concerns about inherently unjust systems, such as that which prevailed in apartheid South Africa. Apartheid South Africa was seen as a pathological legal system, and as such, judicial persecution was merely a symptom of a greater malignancy. Judicial persecution in South Africa was not a corruption of the apartheid legal order, it was the enforcement of it. SLAPPs, on the other hand, are better understood as a pathological outlier in a relatively functional corpus of law and legal process. There is a reasonable critique of that perspective; after all, differential access to legal resources is by no means a problem confined to the *McLibel* case and other SLAPPs. But the political and legislative response across jurisdictions in which SLAPPs have been identified has not been an overhaul of the constitutional order or a wholesale rewriting of codes of judicial procedure, but the identification and addressing of a gap in the enforcement of existing socio-political norms protecting expression and political participation and the integrity of the judicial process. As such, anti-SLAPP measures are, to round out the medical metaphor, far more surgical. This level of precision has been made possible by the careful taxonomical work done by those who have studied SLAPPs who, by identifying and articulating their common features, facilitated a targeted response. While dealing with the problem of SLAPPs may be distinguishable from more general efforts to improve the judicial system and reinforce the rule of law, the two projects are evidently connected.

As seen in chapter 1, political trials have not been susceptible to the same level of precision in identification. Even among legal scholars, there have been considerable debates about what constitutes a political trial, with their categorisation remaining largely indeterminate, subjective, and at times little more than instinctive. Such indeterminacy has not prevented them from being the subject of genuine legal concern,

often expressed in language similar to that used for SLAPPs. Among legal observers, political trials (at least those not rising to the level of show trials) are seen as aberrations, an abuse of an otherwise normal judicial process. But there is little that has been done in the way of establishing legal frameworks for identifying and addressing them. Without the development of applicable legal mechanisms, condemnation has remained largely rhetorical.

Thus, while the persistent threats to prosecute then-candidate Hillary Clinton during the 2016 US Presidential campaign were roundly condemned,¹ there was no apparent legal impediment to prevent the President-elect from ordering his agencies to investigate and prosecute her.² While proceedings have not, to date, been initiated against Clinton, Yulia Tymoshenko was less fortunate; the former Prime Minister of Ukraine was prosecuted by a successor government comprised of her political adversaries. Throughout the proceedings, and her time in prison, her supporters persistently alleged that the charges

¹ Reaction to Donald Trump's threat to prosecute Hillary Clinton during the second Presidential debate on 9 October 2016 was swift and harsh. Former Attorney-General Eric Holder called Trump "dangerous/unfit" [to be president], drawing parallels between Trump's threat and former President Nixon's actions at the height of the Watergate crisis in the early 1970s: Holder's tweet quoted online at: <http://www.cnn.com/2016/10/09/politics/eric-holder-nixon-trump-presidential-debate/>. Holder was referring to the "Saturday Night Massacre" of 20 October 1973, in which President Nixon's Attorney-General and Deputy Attorney-General resigned after refusing to comply with an order to fire Watergate special prosecutor Archibald Cox. This analogy was also drawn in *The Atlantic*: Yoni Appelbaum, "Trump's Threat to Jail Clinton is a Threat to American Democracy", *The Atlantic* (10 October 2016), online: <http://www.theatlantic.com/politics/archive/2016/10/trumps-promise-to-jail-clinton-is-a-threat-to-american-democracy/503516/> and on *Politico.com*, the latter quoting several former US Attorneys decrying the threat as "abhorrent" and "terrifying": Josh Gerstein, "GOP ex-prosecutors slam Trump for threat to 'jail' Clinton", *Politico* (10 October 2016), online: <http://www.politico.com/story/2016/10/trump-clinton-jail-ex-prosecutors-slam-229547>. The *New York Times* also cited legal and political experts expressing alarm at the threat: Charlie Savage, "Threat to Jail Clinton Smacks of Tin-Pot Dictators, Experts Claim", *New York Times* (10 October 2016), online at: http://www.nytimes.com/2016/10/11/us/politics/donald-trump-hillary-clinton-special-prosecutor.html?_r=0 and Masha Gessen, a prolific and experienced Russian-American journalist, explained Donald Trump's threat as providing "the American public with an insight into how autocrats, sitting or aspiring, get rid of their opponents", placing the threat against Hillary Clinton in the context of previous political prosecutions, including that of Yulia Tymoshenko, whose case will be discussed in further detail in this chapter: Masha Gessen, "Donald Trump's Political Prisoners", *The New Yorker* (12 October 2016), online at: <http://www.newyorker.com/news/news-desk/donald-trumps-political-prisoners>.

² None of the legal commentators could identify a legal bar to such proceedings, and even a Harvard law professor framed the central issue as one of "democratic alternation", a political assumption that underpins the peaceful transition of power: Noah Feldman, "Trump Would Jail Clinton? There's a Name for That", *Bloomberg News* (9 October 2016), online at: <https://www.bloomberg.com/view/articles/2016-10-10/trump-would-jail-clinton-there-s-a-name-for-that>.

against her were politically motivated, brought to remove her from political competition. There is no indication that there was a mechanism available to her in Ukraine to express these concerns with any potential legal effect, nor that lawyers are generally well-equipped for the arduous task of denouncing political trials when they arise.

This is perhaps to be expected, as such cases create a powerful rule of law dilemma. On the one hand, the rule of law should mitigate against the prosecution of political opponents for reasons of political expediency. Norms of prosecutorial independence exist to ensure that decisions to prosecute are based on the law and the available evidence, and are not made arbitrarily. On the other, the rule of law applies to everyone, including political figures; stepping into the political arena should certainly not render one immune from prosecution where there are reasonable grounds to believe that a crime has been committed.³ Given the broad consensus that politically-motivated proceedings can have potentially catastrophic socio-political and human rights consequences, what is the responsibility of legal actors to intervene, and what does intervention look like?

One model is suggested by the review of Tymoshenko's case by the European Court of Human Rights (ECtHR).⁴ In applying to the Court, Tymoshenko alleged that a number of her rights under the European Convention on Human Rights (ECHR) had been violated, many of which were collateral to the issue at hand: that the conditions of her pre-trial detention violated Article 2 (right to life) and Article 3 (prohibition on degrading treatment); that the pre-trial detention itself had violated her Article 5 right to liberty and security; and that her right to a fair trial under Article 6 had been violated in a number of ways. But it was clear, both from the way in which the facts were pled in the application and the context of the proceedings that the heart of the matter was to be found in the allegation that Article 18 of the ECHR had been violated: that is, that the arrest and detention of Ms. Tymoshenko were not effected for a *bona fide* criminal law

³ Equality under the law as an aspect of the rule of law is discussed in detail in chapter 7.

⁴ *Tymoshenko v Ukraine*, no 49872/11 (30 April 2013). All citations in this chapter are to the European Court of Human Rights, unless otherwise indicated.

purpose but rather “to exclude her from political life and to prevent her standing in the parliamentary elections of 28 October 2012”.⁵

As it happens, how the Court framed and addressed Tymoshenko’s Article 18 claims, and the Article 18 claims of others, offers what might be described as an emerging jurisprudence of political trials. That jurisprudence can help us begin to think through some of the dilemmas of identifying persecutory political trials from the unique perspective of human rights. To the extent that at least some of those trials might be understood as persecutory, the reasons for judgment in cases decided under Article 18 provide a further template for understanding judicial responsibility in cases of judicial persecution.

4.1 The Meaning and Purpose of Article 18

Article 18 of the ECHR reads as follows:

ARTICLE 18 Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

On the plain wording of Article 18, it does not enumerate a protected right *per se* and, as such, can only be pled in conjunction with the violation of one of the derogable rights protected by the ECHR.⁶ Some Convention rights are non-derogable, which is to say that they cannot be restricted under any circumstances, such as the prohibition on torture (Article 3) or the prohibition on slavery (Article 4). Article 18 has no relevance to those rights. However, most Convention rights are subject to restrictions under some circumstances, such as the Article 5 right to liberty and security of the person, which may only be restricted “in the following [enumerated] cases and in accordance with a procedure prescribed by law”. Article 18 joins the fray where the allegation is that a right was restricted in circumstances that are not among those contemplated by the Convention. For example, if a violation of Article 18 is pleaded in conjunction with

⁵ *Ibid* at para 289, in which the Court paraphrases the applicant’s allegation.

⁶ This is a point frequently emphasised by the ECtHR, most notably in *Gusinskiy v Russia*, *infra* note 26 at para 73.

Article 5, this is an allegation that the applicant's right to liberty or security of the person was violated for a reason other than those permitted by Article 5.⁷ Indeed, this was one of the allegations in the *Tymoshenko* case, and one that, in form if not in substance, was accepted by the Court. In its 2013 judgment, the ECtHR held that Article 18 had been violated on the basis that Ms. Tymoshenko's pre-trial detention had been motivated not by a need to protect the public or prevent flight (which are permitted under Article 5(c) of the ECHR), but rather to "punish the applicant for a lack of respect towards the court which it was claimed she had been manifesting by her behaviour during the proceedings",⁸ which is not one of the enumerated grounds.

Article 18 is one of a handful of provisions in the Convention that serve to clarify the limits of Convention rights, including Article 5 § 1 (enumerated permitted restrictions on liberty), 8 § 2 (general test for any restriction on private and family life), and 9 § 2 (general test for any restriction on freedom of thought, conscience and religion). Article 14 imposes a general prohibition on discrimination. And Article 18 sits immediately after, and corresponds to, Article 17, which prohibits the "abuse of rights", which is to say the use of rights to destroy or limit the rights of others.⁹ Just as rights cannot be abused under Article 17, neither can restrictions under 18.

As such, Article 18 acts as a watchdog for purposes not authorised by the Convention, what might be termed collateral purposes, and particularly collateral purposes of a specific kind. It is clear from the *travaux préparatoires* of the Convention that Article 18 was specifically intended to protect against politically-motivated threats to fundamental rights. Early comments by the drafters' Legal Committee contemplate a prohibition on restrictions "for motives based, not on the common good or general

⁷ Satzger et al note that there are sometimes explicit and implicit limitations on rights. Explicit limits are those expressly provided for in the ECHR. Implicit limitations are those that might otherwise be justified within the scheme of the ECHR, for example where the right in question conflicts with another right. Helmut Satzger, Frank Zimmermann & Martin Eibach, "Does Art. 18 Grant Protection against Politically Motivated Criminal Proceedings? - Rethinking the Interpretation of Art. 18 ECHR against the Background of New Jurisprudence of the European Court of Human Rights" (2014) 4(2) Eur Crim LR 91 at 104.

⁸ *Ibid* at para 299.

⁹ An observation made in the Concurring Opinion of Judge Serghides in *Merabishvili*, *infra* note 103 at para 22.

interest, but on reasons of state”¹⁰ or, alternatively, that “no limitations shall be imposed except those established by law, the sole object of insuring the recognition and respect for the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.”¹¹ In verbal comments presenting the report of the Legal Committee, the following rationale was provided:

But – and if this is the essential point – the international collective guarantee will have, as its purpose, to ensure that no State shall in fact aim at suppressing the guaranteed freedoms, by means of minor measures which, while made with the pretext of organising the exercise of those freedoms on its territory, or of safeguarding the letter of the law, have the opposite effect. That is the reason for Articles 5(1), 6 [the then-precursor to Article 18] and 7(2) of the draft Resolution submitted to you.¹²

This reference to “pretext” at first seems to indicate a concern with disingenuity, but this passage is more about guarding against any national half-heartedness when it comes to upholding Convention rights. What was sought by the Convention was nothing less than the implantation of a human rights culture in the states that ratified it, states, it should be recalled, that had very recently emerged from the horrors of World War II and some of which had endured fascist and totalitarian government.

This pedagogical mission is clear from another passage from the Legal Committee’s report:

... It is legitimate and necessary to limit, sometimes even to restrain, individual freedoms, to allow everyone to peaceful exercise of their freedom and to ensure the maintenance of morality, of the general well-being, of the common good and of public need. When the state defines, organises, regulates and limits freedoms for

¹⁰ *Travaux préparatoires* at 2, Report of the Legal Committee to the Consultative Assembly (5 September 1949) at 14(b) [*Travaux*], online: [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART18-CDH\(75\)11-BIL1338905.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART18-CDH(75)11-BIL1338905.pdf)

¹¹ *Travaux* at 3, Draft recommendation of language for (then) Article 6.

¹² *Travaux* at 3, Plenary sitting on 7 September 1949, per Mr. Teitgen.

such reasons, in the interest of, and for the better insurance of, the general well-being, it is only fulfilling its duty.

That is permissible; that is legitimate.

But when it intervenes to suppress, to restrain and to limit these freedoms for, this time, reasons of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for co-ordinating and guaranteeing, then it is against the public interest if it intervenes. Then the laws which it passes are contrary to the principle of the international guarantee.¹³

If this language implies a specific concern about inappropriate statutory language, a later draft is more to the point:

2. It is recognised that by virtue of the general principles mentioned under Article 9 [the then-precursor of Article 18], cases of abuse of power constitute a violation of law.¹⁴

This reference to “abuse of power” is perhaps clarified by parenthetical comment in a draft circulated a few months later, which makes specific mention of the “theory of the misapplication of power” (*la théorie du détournement de pouvoir*). The doctrine of *détournement de pouvoir* was one with which many of the drafters would have been very familiar, as it has long been foundational in the civil law tradition.¹⁵ It is a doctrine that specifically assesses whether the motive of a person exercising a public power is at odds with the purpose for which that power was conferred.¹⁶ There is not a perfect analogue in common law, although there are obvious parallels in the doctrine of *ultra vires*, in which a public authority exceeds its power.

¹³ *Travaux* at 3 (emphasis added).

¹⁴ *Travaux* at 5.

¹⁵ This idea of *détournement* was also influential in the Québec critique of SLAPPs: see chapter 3, *supra* at 93-94.

¹⁶ “Détournement de pouvoir et de procédure”, *Dalloz* (February 2018), online: <https://www.dalloz-avocats.fr/documentation/Document?id=DZ/OASIS/000411#DZ/OASIS/000411/PLAN1>.

Ultimately the final language of Article 18 came to be somewhat more neutral, but the idea of *détournement de pouvoir* remained: the power to restrict rights under the Convention could only be exercised for the specifically delineated purposes, with the necessary corollary being that to restrict rights for any other purpose would be a misuse of power, and a violation of Article 18.¹⁷ Given that rights can be restricted for a number of reasons, some valid, and some not, it is at least theoretically possible for Article 18 to be violated, even if the underlying right was not violated.¹⁸

4.2 The European Court's Initial Approach to Article 18

Article 18 then, rather unusually in human rights law, concerns itself with the question of motive. For the practical and evidentiary reasons canvassed in the last chapter, many anti-SLAPP measures have shied away from the question of motive. But motive is not an issue that can be easily evaded when it comes to political trials: motive is a key determinant – on most theories at least – of whether a particular proceeding is a political trial (and intention is a key determinant of whether it is judicial persecution). The *Tymoshenko* case is but one of a series of cases brought before the European Court of Human Rights by applicants who have argued that the proceedings brought against them in their home state are politically-motivated prosecutions. In large measure, such allegations have been unsuccessful. However, this corpus of cases provides a fascinating jurisprudence on how the law might address the question of whether a particular prosecution is an impermissible political trial.

For the first 50 years of the ECHR, there was no case that considered the application of Article 18. In fact, the Article lay largely dormant until it was first argued before the

¹⁷ The *American Convention on Human Rights* (“Pact of San José, Costa Rica”), Organization of American States (OAS), 22 November 1969 1144 UNTS 123 (entered into force 18 July 1978) [ACHR]) contains a similar provision to Article 18, although it is expressed in positive, rather than negative, terms:

Article 30 – Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

¹⁸ David Harris et al, *Law of the European Convention of Human Rights*, 3d edition (Oxford: Oxford University Press, 2014) at 857.

Court in *Handyside v United Kingdom*, a case filed in 1972.¹⁹ However, in *Handyside*, the Court took the position that it had no cause to rule on Article 18, having found no violation of the free-standing right with which it was pled. Similarly, the ECtHR either found no violation, or otherwise found it unnecessary to rule on alleged violations of Article 18 in the next 32 cases in which it was raised. While some of these were cases in which the applicant did not pursue their Article 18 allegations before the Court, there did seem to be a general tendency for the Court to sidestep Article 18 allegations. A recent analysis of Article 18 case law found that:

... there are two scenarios in which a separate examination under Article 18 may be dispensed with. First, an appraisal under Article 18 may be forgone when the Court has carried out detailed examinations of an alleged violation of a substantive right. The Court may consider it sufficient that the principal right invoked has not been violated in order to warrant the conclusion that an alleged violation of Article 18 is unsubstantiated. ... In contrast, the Court may be satisfied with a violation only of that principal provision, obliterating an examination of an ancillary claim based on improper use of restrictions under Article 18. A separate appraisal under Article 18 may be viewed as superfluous, on the ground that the misuse of powers is ‘absorbed’ into the assessment of encroachments on substantive rights or on the right of individual application.²⁰

With respect, both lines of reasoning ignore the unique, and distinct, expressive value of an allegation under Article 18. It is one thing to say that you have been locked up, for example, on suspicion of a crime (whether rightly or wrongly). It is quite another to say that you have been locked up for a crime because the government of the day sought to discredit you as, for example, a political opponent. This kind of targeting is a wrongful act distinct from the violation of rights itself, and shedding light on this kind of improper instrumentalisation of state processes was exactly what the drafters of the

¹⁹ *Handyside v United Kingdom*, no 5493/72, 24 ECHR (Ser A) (7 December 1976). While *Handyside* was a case with undoubtedly important political dimensions – the question being whether the seizure of all copies of the “Little Red Schoolbook”, which was deemed obscene, and the prosecution of the applicant for its publication – it is quite distinct from the other political trials canvassed in this chapter.

²⁰ Yutaka Arai and Joachim Meese, “Prohibition on the Misuse of Power (Article 18)” in Pieter van Dijk et al, eds, *Theory and Practice of the European Convention of Human Rights*, 5th ed (Cambridge: Interstentia, 2018) at 1096-1097. In a scathing Concurring Opinion in a recent case, *Tchankotadze v Georgia*, *infra* note 79 at paras 14-42, Judge Küris creates a taxonomy of five ways in which the Court has avoided deciding the substance of an Article 18 claim.

Convention sought to do by including Article 18. As explained by one trio of commentators, violations of most Convention rights can be inadvertent, and are hopefully exceptional, and as such do not threaten the “foundation of trust” that underpins a treaty-based regime.²¹ On the other hand,

... what if a state and its representatives deliberately disregard elementary principles of a modern democratic and pluralist society? What if guarantees are systematically disregarded in order to achieve aims which are alien to human rights protection – in the words of the court: if there is a “hidden agenda”? Especially in our context: what if a state interferes with citizens’ rights just in order to achieve political aims or to destroy political opponents? In such cases, it will not be enough to merely condemn the measures taken in relation to one (or some) individual case(s). ... in order to address such a systemic malfunction, e.g. when the *criminal justice system is perverted into an instrument of suppression*, it does not suffice to condemn the state for one or more violation(s) of specific Convention rights.²²

In a second article on Article 18, these authors observe:

... if a violation of Art. 18 ECHR in conjunction with another Article is ascertained although it has already been established that the other Article has also been breached taken alone, this signals that something more than an “ordinary” violation of Convention guarantees has occurred. This additional element is the fact that the infringement happened not accidentally but on purpose, shattering the foundation of trust with the respondent state.²³

In other words, in some cases there is something more than an inadvertent and discrete rights violation at stake, one which one would normally expect the state to remedy when it is brought to its attention. Instead, some cases reveal a deliberate, pernicious violation of rights for reasons that are obviously impermissible. In doing so, the state in question

²¹ Satzger et al, *supra* note 7, at 111.

²² *Ibid*, at 112.

²³ Helmut Satzger, Frank Zimmermann & Martin Eibach, “Does Art. 18 ECHR grant protection against politically motivated criminal proceedings? (Part 2) – Prerequisites, questions of evidence and scope of application” (2014) 4(3) Eur Crim LR 248 at 251.

is thumbing its nose at the Convention and its purposes, thereby undermining the human rights obligations to which it has committed itself.

It wasn't until 2004 that an Article 18 issue squarely, and unavoidably, came before the Court, in *Gusinskiy v Russia*.²⁴ Gusinskiy, the major shareholder and chairman of a Media Most, an outlet that had been critical of the government, had been detained in the course of a criminal investigation against him. The investigation, and his detention, continued until he agreed to sell his media company to Gazprom, which was state-controlled, at a price determined by Gazprom. As a result of that agreement, all charges against Gusinskiy were dropped. Gusinskiy subsequently complained that he had been detained as a pressure tactic to drive him to sell Media Most. Indeed, this *quid pro quo* seemed to be explicitly contemplated in the written agreement selling Media Most, providing powerful written evidence of ulterior motive. The ECtHR explicitly condemned this kind of deal, expressing the view that "it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies."²⁵ Faced with written evidence of this ulterior motive in the context of what might otherwise, on its face, have seemed a fairly innocuous use of criminal procedure, the Court found that Gusinskiy's liberty had been restricted "not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons",²⁶ namely to intimidate him,²⁷

The next case to find a violation of Article 18 came three years later, with the Court again benefiting from rather compelling evidence that the applicant Cebotari's 3-month detention had not been based on a "reasonable suspicion of [the applicant] having committed an offence" as required by Article 5(1)(c).²⁸ The Court found that, in fact, it could "only conclude that the real aim of the criminal proceedings and of the applicant's

²⁴ *Gusinskiy v Russia*, no 72076/01, ECHR 2004-IV (19 May 2004).

²⁵ *Ibid* at para 76.

²⁶ *Ibid* at para 77.

²⁷ *Ibid* at para 76.

²⁸ *Cebotari v Moldova*, no 35615/06 (13 November 2007) at para 52.

arrest and detention was to put pressure on him”, in this case to keep his company from pursuing its own claim before the ECtHR.²⁹

Close readings of the judgments in both *Gusinskiy* and *Cebotari* evince a certain reluctance by the ECtHR to find a violation of Article 18,³⁰ with the Court in both cases reaching that conclusion when it was too obvious to ignore, or the only possible conclusion. The Court would not explain the reasons for its extreme caution until its next substantive judgment on Article 18, in the notorious case of Mikhail Khodorkovskiy.

4.3 *Khodorkovskiy and the Presumption of Good Faith*

It is in its judgment on the first complaint brought by Khodorkovskiy against Russia that the Court provides a broader commentary or interpretive guidance on Article 18. Khodorkovskiy was an extremely wealthy man who owned a large oil company, Yukos, and several other ventures. He was also an outspoken critic of the government of Vladimir Putin, and, in early 2003, announced plans to donate significant amounts of money to opposition parties. He was arrested in October 2003 and subject to pre-trial detention for over 19 months with respect to a number of alleged financial crimes, including tax evasion. Khodorkovskiy had a number of complaints about his arrest and detention, but undoubtedly the core of his complaint was the allegation that criminal prosecution had been “for a political end” and to appropriate his company’s assets.³¹ Unlike Gusinskiy’s case, there was no written evidence of such motive; in contrast to the facts in *Cebotari*, the Court concluded that the authorities possessed a “reasonable suspicion” that Khodorkovskiy had committed the crimes in question.³²

²⁹ *Ibid* at para 53.

³⁰ See Arai & Meese, *supra* note 20 at 1099; see also Keller & Heri, *infra* note 76 at 7: “...the Court is often reluctant to find a violation of the provision in the highly sensitive political contexts in which it is invoked.”

³¹ *Khodorkovskiy v Russia*, no 5829/04 (31 May 2011) at para 249.

³² *Ibid* at para 258.

As the ECtHR notes in its judgment, Khodorkovskiy's arrest had attracted a great deal of attention from the international community, with a number of individuals, organisations, and even courts supporting the applicant's view that the proceedings against him were politically motivated.³³ Indeed, his case would become so notorious that President Putin, to avoid controversy, ultimately pardoned and released Khodorkovskiy in advance of the 2014 Sochi Olympics. Thus there can be little doubt that the Court, in finding that Article 18 had not been not violated, likely felt a certain amount of pressure to justify its conclusion.

With respect to international perception (including the opinion expressed by a Special Rapporteur for Europe), the Court quite rightly rejected that those opinions could be considered as evidence "in the legal sense", noting that "political process and adjudicative process are fundamentally different" and that "it is often much easier for a politician to take a stand than for a judge".³⁴ On the other hand, the Court found more compelling the determinations of courts in the UK and Cyprus, which had refused to extradite Khodorkovskiy associates to Russia on the basis that proceedings against Khodorkovskiy and Yukos were politically motivated.³⁵ In distinguishing the extradition cases, the Court suggested that the evidence presented and legal arguments made in those courts may not have been the same as those made in the ECtHR, ultimately holding that this evidence did not meet its standard of proof under Article 18, which "may be different from those applied domestically."³⁶

In establishing its standard of proof, the Court noted that the "whole structure of the Convention rests on the general assumption that public authorities in the member

³³ *Ibid* at 17 (section I.E, paragraph not numbered). Amnesty International would go on to identify both Khodorkovskiy and his co-defendant, Anton Lebedev, as prisoners of conscience on the basis that their [second] trial was "deeply flawed and politically motivated": Daisy Sindelar, "Amnesty International Recognizes Khodorkovskiy, Lebedev As 'Prisoners of Conscience'", (*Radio Free Europe/Radio Liberty*, 25 May 2011). Online: https://www.rferl.org/a/amnesty_international_declares_khodorkovsky_and_lebedev_prisoners_of_conscience/24201273.html.

³⁴ *Ibid* at para 259.

³⁵ See note 33 *supra*.

³⁶ *Ibid* at para 260.

States act in good faith”.³⁷ Secondly, while the presumption of good faith is rebuttable, an applicant alleging that restrictions were applied “for an improper reason” will have to “convincingly show that the real aim of the authorities was not the same as that proclaimed”, with a “mere suspicion” being insufficient.³⁸ Taken in tandem, these points can be said to express the Court’s eagerness to take member states at their word, and its concomitant reluctance to find that a state is lying or obfuscating about its reasons for acting. In order to succeed under Article 18, an applicant would have to convincingly establish – in effect, prove – state disingenuity, an allegation that presumably could be largely repelled by a consistently-maintained lie. The Court specifically rejected Khodorkovskiy’s suggestion that, once a *prima facie* case had been made that the state’s motives were improper, the burden should shift to the state to prove that it had adhered to the Convention (an approach that would have been similar in kind to that taken in many of the anti-SLAPP measures canvassed in the last chapter).³⁹ While the Court did accept that, in general, an improper reason might be “reasonably inferred from the context”,⁴⁰ it was not enough for Khodorkovskiy to show that he had “political ambitions”, that he “could become a serious political player”, that he was “already supporting opposition parties”, or “that it was a State-owned company which benefited most from the dismantlement of [his] industrial empire.”⁴¹ As the Court concludes:

... any person in the applicant’s position would be able to make similar allegations. In reality, it would have been impossible to prosecute a suspect with the applicant’s profile without far-reaching political consequences. The fact that the suspect’s political opponents or business competitors might directly or indirectly benefit from him being put in jail should not prevent the authorities from prosecuting such a person if there are serious charges against him. In other words, high political status does not grant immunity.⁴²

³⁷ *Ibid* at para 255.

³⁸ *Ibid*.

³⁹ *Ibid* at para 256.

⁴⁰ *Ibid* at para 255.

⁴¹ *Ibid* at para 257.

⁴² *Ibid* at para 258. In a subsequent case, also involving Khodorkovskiy, the Court would defend its high standard of proof, in the absence of which “... the Court would have to find violations in every high-profile

This is the Court expressing the rule of law dilemma created by the cloud of politics, and reckoning with the problem of political trials. Recall Leon Friedman's typology of political trials from chapter 1: those that are politically motivated, those that are politically determined, and those with substantial political effects.⁴³ In this judgment, the Court is making it clear that establishing that one's case clearly falls into the third category will not suffice in establishing an Article 18 violation. That is entirely in keeping with the orientation of Article 18 to the problem of motive.⁴⁴ Thus the problem of establishing motive – who, by what evidence, and to what standard – becomes the central legal issue. As for Khodorkovskiy, the Court takes a particularly hard evidentiary line for proving a violation of Article 18:

The Court admits that the applicant's case may raise a certain suspicion as to the real intent of the authorities, and that this state of suspicion might be sufficient for the domestic courts to refuse extradition, deny legal assistance, issue injunctions against the Russian Government, make pecuniary awards, etc. However, it is not sufficient for this Court to conclude that the whole legal machinery of the respondent State in the present case was *ab initio* misused, that from the beginning to the end the authorities were acting with bad faith and in blatant disregard of the Convention. This is a very serious claim which requires an *incontrovertible and direct proof*. Such proof, in contrast to the *Gusinskiy* case, cited above, is absent from the case under examination.⁴⁵

Suddenly, the standard of proof is “incontrovertible and direct”, ideally written evidence of the kind produced in *Gusinskiy*. It is hard to reconcile this approach with the possibility of proof by reasonable inference that the Court had theorised a few paragraphs earlier. Nor does it account for the likelihood that a state acting in bad faith would actively conceal its improper motives (thus the apt term, ‘hidden agenda’), which would make it highly improbable that incontrovertible and direct evidence would fall

case where the applicant's status, wealth, reputation, etc. gives rise to a suspicion that the driving force behind his or her prosecution was improper.” *Khodorkovskiy and Lebedev v Russia*, nos 11082/06 and 13772/05 (25 July 2013) at para 903.

⁴³ See chapter 1, note 17, and accompanying text.

⁴⁴ Furthermore, one would expect that complaints that cases were “politically determined” would be an argument directed at due process and the independence of the courts, which considerations which may or may not attract Article 18 scrutiny.

⁴⁵ *Khodorkovskiy v Russia*, *supra* note 31 at para 260 (emphasis added).

into the hands of the applicant, who, after *Khodorkovskiy*, retains the burden of proof throughout.⁴⁶ It also seems to ignore the problem of mixed motives, where a state, through its various branches, might be acting for a plurality of reasons, some proper, some not. Recall that in *Gusinskiy*, the court found a violation of Article 18 where the applicant had been detained “not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, *but also for other reasons*”.⁴⁷ Absent the possibility of mixed motives, or for motives to evolve over time, it should not, logically speaking, be possible for there to be a violation of Article 18 without a corresponding violation of an underlying right, as explicitly contemplated by *Gusinskiy*.⁴⁸ Indeed, it is not clear what distinct purpose Article 18 serves if it can only operate in conjunction with a corresponding violation.

Moreover, the Court’s judgment requires that the applicant prove that the whole of the proceedings against him, and all parts of the system, were deployed against him for an improper purpose, and this, to a near certain degree of probability. In fairness, that was what Khodorkovskiy was claiming, that the entirety of the proceedings against him was politically motivated, so this standard may have been particular to his case.⁴⁹ Given the tack chosen by Khodorkovskiy and under the framework established in this first case, he and his associates would be equally unsuccessful in two further applications against Russia.⁵⁰

⁴⁶ A problem also identified by Harris et al, *supra* note 18 at 859.

⁴⁷ See note 26 *supra* (emphasis added).

⁴⁸ Harris et al, *supra* note 18 at 857.

⁴⁹ The Court seemed to express some discomfort with the breadth and reach of Khodorkovskiy’s claim: *Khodorkovskiy and Lebedev v Russia* at para 905. This has led some commentators to wonder if Khodorkovskiy “wanted too much”: Helmut Satzger et al, *supra* note 23 at 251.

⁵⁰ *OAO Neftyanaya Kompaniya Yukos v Russia*, no 14902/04 (20 September 2011) and *Khodorkovskiy and Lebedev v Russia*, *supra* note 42. In the latter case, the Court would comment, at para 908, that the “[e]lements of ‘improper motivation’ which may exist in the present case do not make the applicants’ prosecution illegitimate “from the beginning to the end”: the fact remains that the accusations against the applicants were serious, that the case against them had a “healthy core”, and that even if there was a mixed intent behind their prosecution, this did not grant them immunity from answering the accusations.”

4.4 *Ducking the Issue in Lutsenko and Tymoshenko*

By contrast, the Court was much more comfortable finding a violation of Article 18 in *Lutsenko*,⁵¹ the companion case to *Tymoshenko*, the broad facts of which were discussed at the outset of this chapter. Yuriy Lutsenko had been Minister of the Interior in the Tymoshenko government and, at the time of his arrest, was the leader of an opposition party in Ukraine. Like Tymoshenko, he was charged with, among other things, abuse of office. The Court held that both Lutsenko's arrest and detention violated Article 5 of the Convention.

In *Lutsenko*, the Court seemed to be more comfortable adjudicating Article 18 in the context of a finding that "the applicant's arrest and detention ... had their own distinguishable features which allow the courts to look into the matter separately from the more general context of politically motivated prosecution of the opposition leader."⁵² In reviewing the documentary evidence, they noted that Lutsenko's communication with the media (in order to publicly deny the allegations against him) was explicitly indicated as one of the grounds for his arrest. As such, the Court concludes

... such reasoning by the prosecuting authorities clearly demonstrates their attempt to punish the applicant for publicly disagreeing with accusations against him and for asserting his innocence, which he had the right to do. In such circumstances, the Court cannot but find that the restriction of the applicant's liberty permitted under Article 5 § 1 (c) was applied not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons.⁵³

This is not, of course, entirely responsive to Lutsenko's allegation that the prosecution against him was politically motivated, but it does go considerably further than the Court would go for Tymoshenko, a decision in which they would attempt to dodge the core issue of political motivation. In *Tymoshenko*, the Court acknowledged that the applicant

⁵¹ *Lutsenko v Ukraine*, no 6492/11 (3 July 2012).

⁵² *Ibid* at para 108.

⁵³ *Ibid* at para 109.

made two arguments with respect to the violation of Article 18: “taken in conjunction with the Article 5 as regards the actual purpose of her pre-trial detention; and taken in conjunction with Article 6 as regards the fairness of the applicant’s criminal prosecution and its allegedly ulterior motives”⁵⁴ but, without further explanation, chose to focus exclusively on the first allegation. It found a violation of Article 18 on the basis that “the actual purpose of this measure was to punish the applicant for a lack of respect towards the court which it was claimed she had been manifesting by her behaviour during the proceedings”⁵⁵ and having so found, sidestepped the more significant allegation that her prosecution was politically motivated.

As it happens, ignoring this bigger issue was convenient because, by the time that the Court ruled in April 2013, the political damage had been done: Ms. Tymoshenko had, by virtue of her imprisonment, been prevented from standing in the parliamentary elections in October 2012, some seven months earlier. As such, the ECtHR’s ruling could not provide an effective remedy for a highly significant element of the alleged violation. However, basing their decision on a more narrow point left the majority open to accusations of wilful blindness, including that leveled by three of their brethren in a Separate Concurring Opinion. Judges Jungwiert, Nußberger and Potocki were not only highly critical of the majority for ducking the central issue, they went on to find – based on the applicant’s identity, the prevailing political context, and the nature and timing of the charges, that there were other ulterior motives underlying the action of the relevant authorities which were not related to the proper conduct of criminal proceedings *per se*, but rather to the applicant’s identity and influence as a leading opposition politician in Ukraine.”⁵⁶ In particular, these judges could not ignore that the applicant was the main political opponent of the current President of Ukraine, and had, only a year earlier obtained 45.47% of the popular vote; that, shortly before her detention, she and her party had made clear that she would be running in the upcoming parliamentary elections; that the charges against her pertained to a political decision that she had

⁵⁴ *Tymoshenko*, *supra* note 4 at para 297.

⁵⁵ *Ibid* at para 299.

⁵⁶ Separate Concurring Opinion of Judges Jungwiert, Nußberger and Potocki at 71. This would be the first of a series of Concurring Opinions urging a more forceful approach on Article 18 cases.

made while in office; that similar charges had been laid against at least eight high-level members of her (former) government; and that investigations were completed with uncharacteristic speed and “in such a way that the applicant was completely hindered from continuing her political activity”.⁵⁷ Clearly, in these judges’ view, improper motive could be reasonably inferred, although it is hard to reconcile this reasoning with the Court’s established standard of “incontrovertible and direct proof”. Thus this group of judges implicitly rejected the stringent test that had been established in *Khodorkovskiy*, and endorsed a broader view of the evidence in Article 18 cases, one which gave due consideration to contextual evidence.

4.5 Contextual Evidence and Judicial Persecution in Azerbaijan

Indeed, contextual and circumstantial evidence would play a key role in a series of subsequent cases coming out of Azerbaijan. As has been noted in a series of reports and comments emanating from the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE), the European Union, and the human rights mechanisms of the United Nations, the last decade has been a grim time for civil society organisations in Azerbaijan.⁵⁸ One of the ways that this has manifested itself is in a pattern of prosecutions brought against human rights activists, the quintessence of judicial persecution. The first of these cases, that of Ilgar Mammadov,⁵⁹ would set a precedent and provide a template for condemnation by the Court of a pattern of judicial persecution in Azerbaijan.

Mammadov was, at the time of his arrest in February 2013, the Director of the School of Political Studies (part of a network of similar schools affiliated with the Council of Europe) and a co-founder of the Republican Alternative Civic Movement (REAL). He had also announced that he was considering a run for President, in election set to take place in October of that year. On his blog, Mammadov had reported on a riot that had

⁵⁷ *Ibid* at 69-70.

⁵⁸ A good summary of the findings of international bodies on the persecution of dissidents in Azerbaijan, and particularly the findings of United Nations Special Rapporteurs, can be found in the European Court’s judgment in *Aliyev v Azerbaijan*, nos 68762/14 and 71200/14 (20 September 2018) at paras 79-87.

⁵⁹ *Ilgar Mammadov v Azerbaijan*, no 15172/13 (22 May 2014) [*“Mammadov No 1”*].

taken place in Ismayilli in January, but despite having only arrived in Ismayilli the day *after* the riots had taken place, he was charged with incitement, and a court ordered that he be detained for 2 months, a detention order that was confirmed on appeal and that was extended three more times until his criminal trial began in November 2013. (In the meantime, the Electoral Commission had refused to accept his nomination papers.) At the end of April 2013, additional charges were laid against Mammadov, including the much more serious charge of “mass disorder”,⁶⁰ and in March 2014 he was convicted and sentenced to seven years’ imprisonment.⁶¹

The domestic case was a travesty on all counts. The ECtHR found that there was no “reasonable suspicion” that Mammadov had committed an offence, and thus neither his arrest nor his detention could be justified, breaching Article 5 § 1.⁶² The Court also found that there had been no proper judicial review of his detention, in violation of 5 § 4, specifically repudiating the Azerbaijani’s courts’ apparent rubber-stamping of the Prosecutors’ requests:

118. In all their decisions in the present case, the domestic courts limited themselves to copying the prosecution’s written submissions and using short, vague and stereotyped formulae for rejecting the applicant’s complaints as unsubstantiated. In essence, the domestic courts limited their role to one of mere automatic endorsement of the prosecution’s requests and they cannot be considered to have conducted a genuine review of the “lawfulness” of the applicant’s detention. ...⁶³

The Court also denounced, as a violation of the right to a presumption of innocence set out in Article 6 § 2, a joint statement by the Prosecutor and Minister of the Interior accusing Mammadov of a series of “illegal actions” aimed at “social and political destabilisation”.⁶⁴ By this point, the ECtHR has clearly formed the view that the case had, under Friedman’s model, been politically determined, including the clear

⁶⁰ *Ibid* at para 49.

⁶¹ *Ibid* at para 55.

⁶² *Ibid* at para 100.

⁶³ *Ibid* at para 118.

⁶⁴ *Ibid* at para 127 (referring to a statement quoted at para 14 of the judgment).

suggestion that the domestic courts have been complicit by repeatedly rubber-stamping the prosecution's requests for pre-trial detention and apparently ignoring the applicants' arguments on judicial review. Implicit in this critique is a demand that courts exercise independent judgment in ascertaining whether the state has good cause to detain an accused, highlighting the particular duty of courts to provide proper recourse where a detainee is held without a reasonable suspicion of having committed a crime.

The Court having taken the view that the case was politically determined, and clearly having a dim view of the situation overall, the question was how would they apply the stringent tests established under Article 18 as to whether the case had been politically motivated? First, having found that no reasonable suspicion existed for Mammadov's arrest and detention, the Court held that "the authorities have not been able to demonstrate that they acted in good faith."⁶⁵ In other words, the presumption of good faith had been successfully rebutted. "However", the Court goes on to say, "that conclusion in itself is not sufficient to assume that Article 18 was breached, and it remains to be seen *whether there is proof that the authorities' actions were actually driven by improper reasons.*"⁶⁶ Given the absence of a reasonable suspicion, there was no question of mixed motives or a "healthy core" to the case. On the basis of "the combination of the relevant case-specific facts", consisting, it seems, almost entirely of the timing of Mammadov's arrest following specific blog entries, the Court held that "the actual purpose of the impugned measures was to silence or punish the applicant for criticising the Government and attempting to disseminate what he believed was the true information that the Government were trying to hide."⁶⁷ In other words, just as the minority of judges had in *Tymoshenko*, the Court had opted to infer motive from contextual evidence rather than requiring "incontrovertible and direct proof".

The underlying facts of four subsequent cases – *Rasul Jafarov*,⁶⁸ *Mammadli*,⁶⁹ *Rashad Hasanov and Others*,⁷⁰ and *Aliyev*⁷¹ would vary in some respects, but the persecutory

⁶⁵ *Ibid* at para 141.

⁶⁶ *Ibid* (emphasis added).

⁶⁷ *Ibid* at para 143.

⁶⁸ *Rasul Jafarov v Azerbaijan*, no 69981/14 (4 July 2016).

pattern remained the same: arrest and continuous detention without reasonable suspicion, a new set of more serious charges laid prior to trial, which inevitably led to a conviction. In each case, the Court sought proof that these actions were driven by improper (or “ulterior”) purposes; in each case such proof was derived from the combination of the lack of reasonable suspicion and contextual factors. Over time, the catalogue of “contextual factors” built up: statements by the Azerbaijani authorities that human rights organisations were “traitors” operating as a “fifth column”;⁷² a growing list of political prisoners;⁷³ and a litany of alarmed statements by international organisations. In none of the cases, other than *Mammadov*, was there any indication that the applicants were political figures, a point often argued by Azerbaijan in its denial of a political motive: the Court did not find this persuasive.⁷⁴ In each case, the Court found that the actual purpose of the arrests and prosecutions was to “silence and punish” the applicants for their human rights-related activities. The charges were so obviously disingenuous that at least five of the activists were pardoned very shortly after their conviction.⁷⁵

⁶⁹ *Mammadli v Azerbaijan*, no 47145/14 (19 April 2018).

⁷⁰ *Rashad Hasanov and Others v Azerbaijan*, nos 48653/13, 52464/13, 65597/13 and 70019/13 (7 June 2018).

⁷¹ *Aliyev v Azerbaijan*, *supra* note 58.

⁷² See, for example, *Rasul Jafarov* at paras 35-42.

⁷³ Indeed, at least two of the applicants appear to have been targeted, in part, for preparing a “consolidated list of political prisoners” in Azerbaijan for the Council of Europe: *Rasul Jafarov* at para 7, *Aliyev* at para 10.

⁷⁴ See, for example, *Mammadli* at para 103, *Rashad Hasanov and Others* at para 124.

⁷⁵ *Mammadov*, on the other hand, was convicted on the basis of essentially the same accusations that had been made against him to justify his pre-trial detention, and which had already been found wanting by the ECtHR in *Mammadov No 1*. His trial and conviction were the subject of a second application to the ECtHR, in which the Court found violations of Article 6 (right to fair trial), but declined to rule on whether there had also been violations of Article 18: *Ilgar Mammadov v Azerbaijan (No 2)*, no 919/15 (16 November 2017) [*Mammadov No 2*]. The Court concluded that:

237. Having regard to the aforementioned considerations, the Court finds that the applicant’s rights to a reasoned judgment and to examine witnesses were infringed. His conviction was based on flawed or misrepresented evidence and his objections in this respect were inadequately addressed. The evidence favourable to the applicant was systematically dismissed in an inadequately reasoned or manifestly unreasonable manner. Even though the case was remitted once for a new examination by the Supreme Court and an attempt was made to address some of the defence’s requests and objections, none of the shortcomings noted above were eventually remedied. The above findings are sufficient to conclude that the criminal proceedings against the applicant, taken as a whole, did not comply with guarantees of a fair trial.

Interestingly, in at least two of these cases, *Mammadli* and *Hasanov and Others* the applicants had not, themselves, raised a breach of Article 18, with the Court choosing to raise it *proprio motu*. This lends some credence to the view that the high standard of proof established in the *Khodorkovskiy* cases, described by Keller and Heri as a “sheer insurmountable hurdle”, may have dissuaded a number of applicants from even trying to argue Article 18.⁷⁶ Just as the *Mammadov* case had suggested that the bar for proving an ulterior motive might be lowering, in *Rasul Jafarov*, the Court admits that allegations under Article 18 might not often be susceptible to the “direct evidence” sought in *Khodorkovskiy*:

158. The Court considers that, depending on the circumstances of the case, improper reasons cannot always be proven by pointing to a particularly inculpatory piece of evidence which clearly reveals an actual reason (for example, a written document, as in the case of *Gusinskiy*) or a specific isolated incident. In this case, as in *Ilgar Mammadov* ..., the Court considers that it can be established to a sufficient degree that proof of improper reasons follows the combination of relevant case-specific facts.

Indeed, by the time that *Rasul Jafarov* is decided, there seems to be some pressure building on the Court for a less restrictive interpretation of Article 18. Academic commentaries on the Convention had noted the Court’s reluctance to accept contextual evidence, an “onus aggravated by the general reluctance of the Court to rely on Article 18

It is worth noting that the Court’s finding of a violation of Article 6 in *Mammadov No 2* can only be read as a condemnation of the behaviour of the presiding court, in other words, as an explicit finding of judicial persecution by the court itself. Moreover, the refusal of Azerbaijan to act in accordance with the findings of the ECtHR in *Mammadov No 1* led to the first ever referral of infringement proceedings by the Council of Europe Committee of Ministers to the Grand Chamber of the ECtHR. The Grand Chamber very recently unanimously held that Azerbaijan, by not expunging the original charges and voiding whatever flowed from them, had breached Article 46 § 1 of the Convention, which requires states to implement the decisions of the ECtHR: *Ilgar Mammadov v Azerbaijan* [Grand Chamber], no 15172/13, Judgment (Article 46 § 4) (29 May 2019). For an analysis of the implications of this judgment see Başak Çali, “No Going Nuclear in Strasbourg: The Infringement Decision in *Ilgar Mammadov v. Azerbaijan* by the European Court of Human Rights”, *Verfassungsblog* (30 May 2019), online: <https://verfassungsblog.de/no-going-nuclear-in-strasbourg/> and Jessica Gavron and Ramute Remezaite, “Has the ECtHR in *Mammadov* 46(4) opened the door to findings of ‘bad faith’ in trials?”, *EJIL: Talk!* (4 July 2019), online: <https://www.ejiltalk.org/has-the-ecthr-in-mammadov-464-opened-the-door-to-findings-of-bad-faith-in-trials/>.

⁷⁶ Helen Keller and Corinne Heri, “Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights’ Untapped Potential to Protect Democracy”, (2016) *Hum Rts LJ* 1 at 7. Both strategically and financially, it is usually considered wise to limit one’s arguments to those with the greatest chance of success.

proprio motu".⁷⁷ Two other commentators called for greater judicial courage in the application of Article 18, one of whom was, remarkably, a sitting judge of the Court.⁷⁸ And two concurring judgments in a 2016 case in which an Article 18 was not really at issue queried whether the standard of proof was appropriate.⁷⁹ The Concurring Opinion of Judge Kūris is particularly scathing, referring to the perils of ignoring what he calls (borrowing language from Richard Dawkins) what ESK ("every schoolboy knows"):

... What if the "contextual evidence" that an applicant was politically persecuted by the authorities is measured in library stacks? What if (as phrased in *Khodorkovskiy and Lebedev* ...) the "appearances [which] speak in favour of the applicants claim of improper motives" are *so abundant* that anyone who wants to see things as they really are would no longer be able to subscribe to the presumption of good faith with respect to that particular Government? ...⁸⁰

There is a distinction to be drawn, in Judge Kūris' view, between "'appearances' that are only speculation and 'appearances' that are 'ESK'".⁸¹ This raises the concerns canvassed in chapter 1 about courts looking foolish or disingenuous or cowardly if they ignore plain evidence of persecution, in this case by imposing a test so exigent that the findings of the Court strain all credulity. This perception matters, not just for the institutional prestige of judiciary, which is not unimportant, but to the more fundamental question of whether it can be trusted to deliver justice.

With several judges of the Court now actively, and loudly, pleading for a review of the standard, and with the standard obviously softening in the *Mammadov* and *Rasul*

⁷⁷ See, for example, Arai & Meese, *supra* note 20 at 1099-1100. Similarly, Harris et al, *supra* note 18 at 860, query whether "applicants are left with an overwhelming obstacle when it comes to establishing Article 18 claims."

⁷⁸ Keller & Heri, *supra* note 76. Helen Keller was appointed in 2011 and is expected to sit until 2020.

⁷⁹ *Tchankodatze v Georgia*, No 15256/05 (21 June 2016). The Joint Concurring Opinion of Judges Sajó, Tsotsoria and Pinto de Albuquerque referred to the standard of proof as "prohibitively high" (at para 7), and insisted on a review of the current standard. Similarly, the Concurring Opinion of Judge Kūris describes the standard as "mountain high" (at para 6).

⁸⁰ Concurring Opinion of Judge Kūris at para 9. In the next paragraph, he goes on to express a concern about an overly cautious approach and "the relationship between law and reality."

⁸¹ *Ibid* at para 48.

Jafarov cases, the need was apparent for a ruling from the Grand Chamber of the ECtHR.⁸²

4.5 Mixed and Evolving Motives in *Merabishvili v Georgia*⁸³

The case of Ivane Merabishvili was, like *Tymoshenko* and *Lutsenko*, a case of a former government official being prosecuted by a successor government. Merabishvili had been a Minister, and later Prime Minister in the United National Movement (UNM) government of Mikheil Saakashvili until October 2012, when the UNM government was defeated by the coalition Georgian Dream. Merabishvili then became the leader of the opposition (Saakashvili having left the country), but was arrested in May 2013 and charged with a variety of crimes pertaining to his time in office. He was detained for several months pending trial.

In his application to the ECtHR, the applicant alleged generally that “the purpose behind the criminal proceedings and his pre-trial detention had been to remove him from the political scene and to prevent him from standing in the Georgian presidential election of October 2013.”⁸⁴ However, the applicant’s case would come to hinge on a more specific allegation, which the government denied, that Merabishvili had been removed from his cell in the middle of the night on 14 December 2013 to be questioned about two other unrelated, but politically charged, investigations.⁸⁵ The applicant alleged that, had he provided the information requested, he had been assured that he would be released and permitted to retain whatever monies he had. This incident became the pivot point for the case because the Grand Chamber found that both the applicant’s arrest and his pre-trial detention did not initially violate Article 5 of the Convention. However, both at first instance and in the Grand Chamber, the Court found

⁸² The Grand Chamber is akin to the Supreme Court of the ECtHR. Rather than the standard 7 judges who sit on ordinary judgments, the Grand Chamber is composed of 17 judges of the Court, excluding those judges who heard the case at first instance. It tends to accept cases where a definitive interpretation of one or more provisions of the Convention is needed.

⁸³ *Merabishvili v Georgia* [Grand Chamber], No 72508/13 (28 November 2017).

⁸⁴ *Ibid* at para 93.

⁸⁵ These other matters were the 2005 death of Prime Minister Zurab Zhania, and the bank accounts of former President Saakashvili.

the particular allegations pertaining to the midnight removal to be credible, and that this indicated a “plurality of purposes” behind the actions of the Georgian authorities. On the basis of this incident, the Court concluded that there had been a violation of Article 18 (taken in conjunction with Article 5 § 1), finding that

... during the pre-trial detention, which is to be seen as a continuing situation, the predominant purpose of the restriction of the applicant’s liberty changed. While in the beginning it was the investigation of offences based on a reasonable suspicion, later on it became to obtain information about Mr Zhvania’s death and Mr Saakashvili’s bank accounts, as shown by the incident on 14 December 2013.⁸⁶

What is important about the case is not, in truth, the specific result, which, as it happens, was quite controversial.⁸⁷ Rather, it is the Grand Chamber’s detailed reasoning on the interpretation of Article 18. First of all, the Court took the opportunity, as had been urged by some commentators (discussed above), to note that while Article 18 does not operate independently, it does have some autonomous meaning, in that it prohibits the restriction of Convention rights for reasons not contemplated by the Convention.⁸⁸ This affirmative prohibition is supplemental to a violation of the underlying rights, which is why a violation of Article 18 can be found even where an independent underlying violation has not been found (as, indeed, was the case here).

After reviewing the case law of the Court to date, the Grand Chamber noted three further opportunities for clarification:

- (i) On the issue of proof of bad faith, whether the terms of Article 18 “appear capable of allowing a more objective assessment of the presence or absence of ulterior purpose and thus a misuse of power”;⁸⁹

⁸⁶ *Merabishvili* at para 353.

⁸⁷ The vote for finding a violation of an Article 18 violation was very narrow: 9 votes to 8. For the reasons against such a finding, see the Joint Partly Dissenting Opinion of Judges Raimondi, Spano, Kjølbrot, Grozev, Ravarani, Pastor Vilanova, Poláčeková and Hüseyinov.

⁸⁸ *Ibid* at para 288.

⁸⁹ *Merabishvili* at para 283. Here the Court explicitly notes the reference to “détournement de pouvoirs” in the Convention’s *travaux préparatoires*, as well as a lack of consistency in the Court’s application of other restrictive clauses.

- (ii) On the standard of proof, and whether an insistence on “direct and incontrovertible proof” is appropriate (particularly given that it had not been required in some cases);⁹⁰
- (iii) How to disentangle ulterior purposes in cases (like this one) where there is a “plurality of purposes”.⁹¹

To answer the first and third questions, the Grand Chamber clarified that the purpose of Article 18 was to prevent the misuse of power.⁹² Where the state’s sole purpose was one alien to the Convention, finding an Article 18 violation would be relatively straightforward. The difficulty came when a restriction was applied for both a valid and an invalid purpose, with the question then being “whether the prescribed purpose expunges the ulterior one, whether the mere presence of an ulterior purpose contravenes Article 18, or whether there is an intermediary answer.”⁹³ The Grand Chamber found its intermediary answer by crafting a “predominant purpose” test, in which a restriction may be found compatible with the Convention even if pursues both proper and improper purposes, as long as the proper purpose is the main one.⁹⁴

On the second point, the Grand Chamber expressed concern that the Court had imposed a significantly different standard to Article 18 than it had to other restriction clauses (Articles 5 § 1, 8 § 2, 9 § 2 etc), as well as imposing a special burden on applicants. It rationalised this higher standard on the basis that the Court was really trying to ascertain whether the expressed purpose was merely cover for the ulterior one, a problem now addressed by the “predominant purpose” test.⁹⁵ As for the burden of proof, the Grand Chamber noted the special evidentiary difficulties inherent in cases where ulterior motives are at issue – the ‘hidden agenda’ problem.⁹⁶ However, rather than

⁹⁰ *Ibid* at para 284.

⁹¹ *Ibid* at para 285.

⁹² *Ibid* at para 303.

⁹³ *Ibid* at para 292.

⁹⁴ *Ibid* at para 305.

⁹⁵ *Ibid* at para 309.

⁹⁶ *Ibid* at para 311, see also paras 312-313, and 315.

shifting the burden as had been proposed in *Khodorkovskiy*, it adopted the ECtHR's more general approach of eschewing onus in favour of examining "all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion."⁹⁷ Nonetheless, the standard of proof remained high, "beyond reasonable doubt", although contextual evidence alone could meet that standard.⁹⁸

If the Grand Chamber had hoped that the "predominant purpose" test would quell all concerns about the proper interpretation of Article 18, it was not entirely successful. Two Concurring Opinions were filed in the *Merabishvili* case, both deeply critical of the adoption of that approach.⁹⁹ The Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović is a primer on political trials, citing Kirchheimer, Shklar, Christenson, and Pendas and Meierhenrich, among others. It calls for the Court to safeguard democracy and condemn all proceedings brought with ulterior motives, expressing concern that to do otherwise "could even be seen as a possible endorsement of the existence and acceptance of political persecution."¹⁰⁰ In this Opinion, it is alleged that the predominant purpose test ignores the plain language prohibition in Article 18, and leaves "too wide a margin of appreciation for governments to implement illegitimate restrictions, combining them with legitimate purposes."¹⁰¹ In their view, "proceedings become 'poisoned' as long as 'destructive' political motives come to light, and this should lead to an uncontested violation of Article 18."¹⁰² Similarly, Judge Serghides believes that a legitimate purpose will be tainted by an illegitimate one, such that "the former cannot be extricated or separated from the latter."¹⁰³ Indeed, he finds it

⁹⁷ *Ibid* at para 311.

⁹⁸ *Ibid* at paras 312, 316-317.

⁹⁹ However, in the end, 13 of the 17 judges endorsed the "predominant purpose" test.

¹⁰⁰ Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović at para 11. Notably, the first two of these judges are from Georgia and Ukraine, which have been the subject of several Article 18 allegations.

¹⁰¹ *Ibid* at para 16.

¹⁰² *Ibid* at para 11. And, in para 38: "Therefore, in cases where there is evidence misuse of State machinery for improper political ends, the Court should treat it by default as the predominant purpose and thus find a violation of Article 18." (In original, this statement is in bold.)

¹⁰³ Concurring Opinion of Judge Serghides at para 35. It is worth noting that Judge Keller was not one of the judges in *Merabishvili*, either at first instance or in the Grand Chamber.

highly inappropriate for the Court to be weighing purposes,¹⁰⁴ and that doing so “would widen the restrictions prescribed by the Convention making the Convention apply not only to legitimate restrictions, but also to a mixture of legitimate and illegitimate restrictions.”¹⁰⁵ In his view, “the mere presence of an ulterior purpose, if it is proven, contravenes Article 18.”¹⁰⁶

These Separate Opinions are an uncomfortable blend of narrow interpretation and deep principle, suggesting that the well of controversy in Article 18 jurisprudence is only beginning to be tapped. While the majority’s predominant purpose test appears to be pragmatic and neutral, it is not; when combined with the high standard of proof for establishing an improper motive, the benefit of the doubt remains firmly with the state. But perhaps that is at it should be: there is considerable peril in impugning a state’s legal system on the basis of mixed motives, or of immunising political figures who have, in fact, committed crimes merely because those who go after them have political reasons of their own for doing so. Does the fact that Donald Trump has called for the prosecution of Hilary Clinton and may gain politically by doing so mean that a prosecutor, acting independently, might never be able to bring charges? Or that a judge should refuse to hear the case? Surely the factual independence of prosecutors and judges would be a contextual factor to be considered, among others.

4.6 Justitia’s Blindfold, Loosened?

Since the Grand Chamber’s judgment in *Merabishvili* in late 2018, it seems that the ECtHR has become much more open-minded about both the arguments and the evidence that it will consider under Article 18. In a recent case decided, *Selahattin Demirtaş v Turkey (No. 2)*, the Court took pains to review the political context in which the applicant, a leader of an opposition party, was arrested and detained, including the reports of various NGOs and a pattern of detention of several other members of the

¹⁰⁴ *Ibid* at para 34.

¹⁰⁵ *Ibid* at para 26.

¹⁰⁶ *Ibid* at para 46.

applicant's political party.¹⁰⁷ Finding not only that there was an ulterior political purpose in the applicant's lengthy and ongoing pre-trial detention, the Court held that it was not only predominant, but that it was particularly egregious, noting that even if the initial explanation had been legitimate, it had become less plausible over time.¹⁰⁸ In other words, the benefit of the doubt, or to use the Court's language, the presumption of good faith, wears thin over time.

In the same month, the Grand Chamber decided *Navalnyy v Russia*,¹⁰⁹ the latest in a series of applications brought by Russian opposition leader Alexei Navalnyy. The Grand Chamber rejected the finding of the lower Chamber that it was unnecessary to examine the Article 18 allegations, accepting the applicant's contention that these were a "fundamental aspect" of his case.¹¹⁰ The Court found that the applicant, who in this case was complaining about seven of his arrests, had been targeted and that the pretexts offered had become "progressively more implausible".¹¹¹ In this case, however, it was clear that the Court's patience with the respondent state had been stretched to the breaking point. It noted that the violations occurred despite the "authorities' increasing awareness that the practices in question were incompatible with Convention standards" including with respect to similar findings involving Navalnyy himself,¹¹² and specifically pointed to the consistent failure of domestic courts to, among other things, address Navalnyy's allegations of political persecution, which were, in the circumstances, "at least arguable" and "had heightened ... concerns that the real reason for the applicant's prosecution and conviction had been a political one."¹¹³ In other words, there are

¹⁰⁷ *Selahattin Demirtaş v Turkey (No. 2)*, No 14305/17 (20 November 2018, referral to Grand Chamber accepted 18 March 2019), para 264.

¹⁰⁸ *Ibid* at paras 269-273. The Court also noted that the Turkish government had failed to advance any serious argument that the Article 18 allegations were unfounded (para 271), and specifically questioned the independence of the courts (para 271) that had repeatedly failed to justify their repeated extensions of the applicant's detention, as required by the ECHR (paras 190-193).

¹⁰⁹ *Navalnyy v Russia* [Grand Chamber], No 29580/12 and 4 others (15 November 2018).

¹¹⁰ *Ibid* at para 164.

¹¹¹ *Ibid* at para 168.

¹¹² *Ibid* at para 171.

¹¹³ *Ibid*, referencing *Navalnyy and Ofitserov v Russia*, Nos 46632/13 and 28671/14 (23 February 2016) at paras 116-119. *Navalnyy and Ofitserov* is, itself, a textbook case of judicial persecution, in which the

indications that the European Court of Human Rights is beginning to disaggregate the institutions of state, and specifically criticise the judiciary's instrumental and specific role in human rights violations. Just as the ECtHR is refusing to be played for a fool, it is beginning to make clear that domestic courts are also obliged to consider whether rights are being limited for improper political purposes.

4.7 *Political Trials and Judicial Persecution*

What does the jurisprudence under Article 18 teach us about the proper role of the ECtHR, and courts in general, in addressing the misuse of power? Is the jurisprudence specific to the European Convention scheme, or are there broader lessons to be learned? It is apparent that the analysis under Article 18 is an emerging jurisprudence of political trials, with all of the difficulties and dilemmas entailed. This body of case law raises a number of the recurring themes common across all of the case studies in judicial persecution: background assumptions of good faith, concerns about wilful judicial ignorance of compelling contextual evidence, possible structural bias disguised as legal interpretation.

For example, with respect to good faith, the Grand Chamber, and particularly the Concurring Opinions leading up to it, all seem to agree that there is a place for a presumption of good faith, and the deference that comes with it. But it is clear that the presumption has become considerably less robust, and that deference must yield when the countervailing facts are so compelling that to ignore them is tantamount to a kind of wilful blindness. Courts, while apolitical themselves, cannot ignore political reality, particularly where such blindness would plainly permit an abuse of power. Failing to do so not only does injustice, but it can have a profound effect on the perception of the courts as a wise institution.

And as for the question of judicial persecution, to what extent can an improper motive on the part of prosecuting authorities be imputed to the courts? In *Merabishvili*, the

criminal law was “arbitrarily and unforeseeably construed to the detriment of the applicants” (para 115) with obvious deeply political motivations and effects (paras 117-119). Despite this, the Court in 2016 had found that the case was not susceptible to analysis under Article 18.

Grand Chamber notes, largely *en passant*, that “... those prosecutions [of politicians] cannot in themselves lead to the conclusion that the courts which dealt with the question whether or not to place and keep the applicant in pre-trial detention were driven by such a [political] purpose.”¹¹⁴ This observation is premised on a proper separation of powers, in which each branch of government operates independently of the other. Indeed, it is remarkable that this is one of the few comments in the Article 18 jurisprudence to specifically treat the courts as separate from the other authorities of the state. This is, of course, a conflation endemic to international or supranational human rights systems; after all, a state will be found to have violated human rights regardless of which particular branch of government causes the breach. Similarly, for the purpose of judicial persecution it makes little difference whether the court itself intends to persecute the target. What matters is whether it is aware that it is being used for that purpose, and as such, is a conscious and willing mechanism for such persecution. In that respect, the two recent decisions – *Selahattin Demirtaş*, which imposes on courts a duty to justify ongoing detention, and *Navalnyy*, which specifically reiterates the ways in which Russian courts have failed the applicant – may indicate that courts will find themselves subject to considerably more pointed critiques from the ECtHR in the future. The deference that might have been associated with the presumed ignorance of domestic courts is wearing thin.

Under Article 18, the ECtHR has been urged, by commentators and concurring judges alike, to take up the charge of defending political pluralism. Pointing to the genesis of the Article – and the Convention more generally – in the ashes of totalitarianism in Europe, Keller and Heri refer to Article 18 as providing “untapped potential to protect democracy”:

... the provision allows the Court to prune undemocratic buds from the legal systems of Member States before these can bloom and bear the fruit that represents a larger problem. The drafters of the Convention knew that “what we must fear today is not the

¹¹⁴ *Merabishvili* at para 323.

seizure of power by totalitarianism by means of violence, rather the totalitarianism which will attempt to put itself in power by pseudo-legitimate means.¹¹⁵

Similarly, in their Joint Concurring Opinion in *Merashbivili*, Judges Yudkivska, Tsotsoria and Vehabović urged that the Court be the “conscience of Europe” and “the symbol of practical expression of the aspiration of society for effective democracy ...”.¹¹⁶ Ultimately, the majority would demur on this point: in the 374 paragraphs of its judgment, democracy was never mentioned by the majority, although it would not be long before the Court, in *Selahattin Demirtaş*, would criticise the Turkish government’s politically-motivated arrest and detention of its political opponents as particularly offensive to the ECHR scheme, and a threat to “the whole democratic system itself.”¹¹⁷

In his Concurring Opinion in *Merabishvili*, Judge Serghides draws a link between totalitarianism and arbitrariness, which of course will engage its opposite, the rule of law. He cites a famous lecture by Lord Denning on this point:

... The only admissible remedy for any abuse of power – in a civilised society – is by recourse to law.

In order to ensure this recourse, it is important that the law itself should provide adequate and efficient remedies for abuse or misuse of power from whatever quarter it may come. No matter who it is – who is guilty of the abuse or misuse. Be it government, national or local. ... Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else the oppressed will get to the point when they will stand it no longer. They will find their own remedy. There will be anarchy.”¹¹⁸

Coming full circle, this was, of course, what occurred in South Africa, as articulated by Nelson Mandela in his address at the Rivonia trial. Unable to achieve justice through peaceful protest, unable to find justice in the courts, the choice of the members of ANC

¹¹⁵ Keller and Heri, *supra* note 76 at 3, citing a statement by Lodovico Benvenuti (Italy) from the *Travaux* at 4.

¹¹⁶ Joint Concurring Opinion of Judges Yudkivska, Tsotsoria and Vehabović at para 12.

¹¹⁷ *Selahattin Demirtaş v Turkey (No 2)* at para 272.

¹¹⁸ Concurring Opinion of Judge Serghides at para 37, citing Lord Denning, *The 1980 Richard Dimbleby Lecture: The Misuse of Power* (London: British Broadcasting Corporation, 1980).

was either to be resigned to one's racial fate as dictated by the apartheid programme, or to take up arms in revolution. This highlights the crucial role that courts play as a bulwark against rule by force, whether that force is repressive, economic, or prosecutorial, and to avoid complicity in such systems. In the jurisprudence of Article 18, the essential ingredients of judicial responsibility are revealed: to the rule of law, to the polity, and to the integrity of the judicial institution. These responsibilities, and the ethics and doctrine that underpin them, are the subject matter of the next Part.

Part II: Towards a Model of Judicial Responsibility

Chapter 5

Transnational Judicial Identity: Professional Ethics and the Judicial Role

In the case studies canvassed in the last three chapters, there are plural actors in judicial persecution: litigants, prosecutors, other lawyers and court officers, police, and political operatives at various levels. Depending on the type of case or the particular legal system, some actors may play a more significant role than others. This thesis focuses on the actor whose role is literally decisive in all cases of judicial persecution: the judge or judges themselves.

It is the presence and function of the judge that creates the forum and mechanism of judicial persecution. It is in the act of adjudication – of hearing and deciding the case – that the alchemy of judicial persecution occurs, the transformation of the underlying oppression into a nominally lawful act. Dyzenhaus defends his focus on the act of judging as the study of the relationship between law and justice.¹ Following Dyzenhaus' lead, this thesis suggests that the act of adjudication operates to transform law into an act of "justice". This is the process of legitimation, or as Kirchheimer called it, authentication. Absent adjudication, and the imprimatur of justice that it provides, judicial persecution loses its qualifier and its attendant mystique: it is simply persecution. It is the attempt to align the justice of the judicial function and the injustice of persecution that creates a paradox, one that this thesis contends judges cannot ignore.

Judicial participation in what might be termed "suspect" proceedings is, in itself, an act of judgment, one that needs to be handled, as all acts of judgment, in a manner consistent with one's ethical duties as a judge, one's legal capacities, and one's judicial responsibilities. In order to assess the actions and options available to judges confronted with cases of judicial persecution, it is necessary to have as clear as possible a sense of

¹ David Dyzenhaus, "With the Benefit of Hindsight': Dilemmas of Legality", in Emiliios Christodoulidis and Scott Veitch. *Lethe's Law: Justice, Law and Ethics in Reconciliation* (Oxford and Portland, OR: Hart Publishing, 2001) at 67.

the contours of the judicial role. The next three chapters will endeavour to develop such a picture: chapter 6 will examine judicial doctrine on improper proceedings and chapter 7 will propose a model of judicial responsibility. However, to start, this chapter will ask the foundational question of what, or rather who, is a judge?

5.1 Judges and Transnational Judicial Identity

In this chapter, it will be argued that judicial identity has certain fundamental elements, and that these elements exist transnationally. This is posited from a premise that the ethical norms established by and for the judiciary do more than simply guide the actions of individual judges. Rather, they establish a distinct professional identity, one that in an increasingly globalised and judicialised world, transcends national and legal boundaries. In other words, being a judge has a professional meaning that operates transnationally.²

By understanding themselves as part of a global profession, judges can ground the exercise of their judgment in a transnational professional ethic, making them accountable not only to local constituencies but to the global fellowship of judges. Anne-Marie Slaughter was among the first to describe the “global community of courts”, one composed of national and international courts, in which

... the institutional identity of all these courts, and the professional identity of the judges who sit on them, is forged more by their common function of resolving disputes under law than by the differences in the law they apply and the parties before them.³

² In this project, transnational methodology functions by looking for commonalities between states, but without accepting “statism” as a paradigm. This is to say that transnational normativity can exist (at least in theory) regardless of the existence of states, and legal and normative agency can reside in people, whether individually or in various collectivities, regardless of their nationality or location. A transnational approach is perhaps most simply described by what is not (or at least not necessarily): neither domestic law nor international law, both of which assume a state-centric model.

³ Anne-Marie Slaughter, “A Global Community of Courts”, (2003) 44 Harv Int’l LJ 191 at 192.

Slaughter notes that this community is “constituted above all by the self-awareness of the national and international judges who play a part”,⁴ noting that they meet in a variety of settings, participate in organisations, and by citing each other, engage in what has been termed a “transnational judicial dialogue”, grounded in

a recognition of one another as participants in a common judicial enterprise. They see each other not only as servants and representatives of a particular government or polity, but also as fellow members of a profession that transcends national borders.⁵

This has led some to argue that the transnational community of courts might be seen as an organisational field, “a community of organizations that partakes of a common meaning system and whose participants interact with each other more frequently and fatefully with one another than with actors outside of the field.”⁶ Whether transnational judicial interactions are indeed more “frequent and fateful”, there is strong evidence that judges have, in recent decades, been developing such a common meaning system, one of the products of which is the development and citation of a series of transnational codes of ethics,⁷ including the following:

- The IBA Minimum Standards of Judicial Independence (International Bar Association, 1982);
- The United Nations Basic Principles on the Independence of the Judiciary (adopted by Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, endorsed by UN General Assembly 1985);

⁴ *Ibid* at 192.

⁵ Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) at 68, and Anne-Marie Slaughter, “A Typology of Transjudicial Communication Symposium” (1994) 29 U Rich L Rev 99. This dialogue has been predominantly discussed and analysed with respect to legal, rather than ethical cross-fertilisation: Olga Frishman, “Transnational Judicial Dialogue as an Organisational Field”, (2013) 19(6) European Law Journal 739 at 741. However, Melissa A Waters, “The Future of Transnational Judicial Dialogue”, (2010) ASIL Proceedings 465 at 466 notes the transformative impact of transnational judicial dialogue on judicial identity.

⁶ Frishman, *ibid* at 744, citing W Richard Scott, *Institutions and Organizations: Ideas, Interests, and Identities*, 3rd ed, (Los Angeles: Sage Publications, 2008) at 86.

⁷ This is a phenomenon that has also been charted by Jörg Philipp Terhechte, “Judicial Ethics for a Global Judiciary – How Judicial Networks Create their Own Codes of Conduct”, (2009) 10(4) German LJ 501. This article provided a useful starting point in establishing the list of codes on which I have relied.

- The European Charter on the Statute for Judges (Council of Europe, 1998);
- The Universal Charter of the Judge (International Association of Judges, 1999; updated 2017);
- Burgh House Principles on the Independence of the International Judiciary (Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, 2005);
- The Bangalore Principles of Judicial Conduct (Judicial Group on Strengthening Judicial Integrity, 2007);
- The Magna Carta of Judges (Consultative Council of Judges of Europe, 2010);
- Mount Scopus International Standards of Judicial Independence (International Association of Judicial Independence and World Peace, approved 2008 and revised 2015); and
- Bologna and Milan Code of Judicial Ethics (International Association of Judicial Independence and World Peace, 2015).⁸

Of these, particular attention is paid to those codes generated by networks of judges as the articulation and the transmission of norms by and among judges. The Universal Charter of the Judge was adopted by the International Association of Judges, an organisation founded in 1953 with the goal of “bringing together national associations of judges”.⁹ One French observer of the first meeting, which then included representatives of eight European nations, noted the commonality of concern between French and Italian judges, for example: to ensure that judges were accorded all due respect, but also that they warranted that respect by being carefully selected; to have their independence

⁸ The UN Basic Principles, the Bangalore Principles, and the Magna Carta of Judges have been cited by the European Court of Human Rights in, for example, in *Harabin v Slovakia*, no 58688/11 (20 November 2012). The Bangalore Principles have also been cited by the United Nations Human Rights Committee and the Judicial Committee of the Privy Council, and has been cited as the basis for judicial codes developed in Belize, the Philippines, and Scotland; the Judicial Integrity Group provides a list of such citations on its website at: <https://www.judicialintegritygroup.org/impact-of-the-bangalore-principles>.

⁹ Information about the IAJ is taken from its website: <https://www.iaj-uim.org/home/#>.

safeguarded, but also to remain above the political fray.¹⁰ While originally focused on Europe, the IAJ now possesses four regional groups: European; African; Iberoamerican; and the Asian, North American and Oceanian Groups, and the representatives of 42 countries have signed on to the Universal Charter, which was first adopted in 1999 and updated in 2017.

Similarly, the Judicial Group on Strengthening Judicial Integrity (commonly known as the Judicial Integrity Group), authors of the Bangalore Principles, was started as “an informal group of Chief Justices and Superior Court Judges from around the world”. Its first meeting was held under the auspices of the UN Global Programme Against Corruption, in response to concerns raised by the NGO community that the public were losing confidence in their judicial systems.¹¹ In drafting the Principles, the Group consulted 32 domestic, regional, and international codes of judicial conduct.¹² In their commentary on the Bangalore Principles, the Judicial Integrity Group touts the Principles as “[giving] expression to the highest traditions relating to the judicial function as visualised in all cultures and legal systems” and that they “are seen more and more as a document which all judiciaries and legal systems can accept unreservedly”.¹³

By contrast, the Consultative Council of European Judges (commonly abbreviated CCJE) is regionally focused, having been established by the Council of Europe. However, its 47 members represent states possessing a variety of legal and constitutional traditions (including several countries featured in the last chapter). Their

¹⁰ “Vers une association internationale de magistrats”, historical document dated November 1952, posted on IAJ website: http://www.iaj-uim.org/iuw/wp-content/uploads/2013/07/birth-of-IAJ-1_F.pdf (my translation).

¹¹ Michael Kirby, “A Global Approach to Judicial Independence and Integrity”, (2001) 21(2) U Qld LJ 147 at 148 with respect to the history and drafting process of the Bangalore Principles. See also the *Commentary on the Bangalore Principles of Judicial Conduct*, online: www.judicialintegritygroup.org/images/resources/documents/BP_Commentary_Engl.pdf [*Commentary on the Bangalore Principles*] at 5. The Bangalore Principles themselves are available online at: www.judicialintegritygroup.org/images/resources/documents/ECOSOC_2006_23_Engl.pdf. Additional information about the Judicial Integrity Group can be found on its website: <https://www.judicialintegritygroup.org/jig-group>.

¹² The codes consulted, which are drawn from all over the world, are listed in the *Commentary on the Bangalore Principles* at 10-12.

¹³ *Ibid* at 5. Terhechte, *supra* note 7 at 510, refers to the Bangalore Principles as the “Magna Charta of judicial ethics on a global stage”.

2010 Magna Carta of Judges is, in essence, a compilation of conclusions from the CCJE's issued opinions on such topics as independence, the rule of law, fair trial within a reasonable time, and ethics and liability.¹⁴ In doing so, the CCJE relied on other codes, most notably the UN Basic Principles and the-then draft Bangalore Principles.

In constructing a model of judicial identity, this thesis also relies on scholarly transnational studies, particularly recent edited collections that incorporate a wide gamut of jurisdictions. A 2012 collection edited by Anja Seibert-Fohr focuses on Europe, usefully incorporating both civil and common law jurisdictions, and a combination of “emerging” (and some regressing) and established democracies.¹⁵ In assembling their collection of contributions from 19 jurisdictions, Richard Devlin and Adam Dodek went to particular pains to incorporate a range of legal traditions (civil law, common law, socialist, and mixed systems) from all over the world.¹⁶

Using a transnational approach here creates the possibility of outlining a model of judicial identity that connects judges around the world in ways that they already see themselves as connected. This connection is itself evidenced by the existence of international judicial networks and the concomitant rise of professional accountability.¹⁷ While judges are a part of government, the rule of law requires them also to hold

¹⁴ Information about the CCJE taken from the CCJE website: <https://www.coe.int/en/web/ccje/background-and-mission>. Links to the Magna Carta and its underlying opinions can be found online at: <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta>.

¹⁵ Anja Seibert-Fohr, ed, *Judicial Independence in Transition* (Berlin, Heidelberg: Springer, 2012).

¹⁶ Richard F Devlin & Adam Dodek, “Regulating judges: challenges, controversies and choices”, in Richard F Devlin and Adam Dodek, eds, *Regulating Judges: Beyond Independence and Accountability* (Cheltenham: Edward Elgar, 2016). It bears noting that judicial writing about the African experience tends to be disproportionately represented by authors from South Africa, Israel and, to a lesser extent, Nigeria. Notably, there were a wider range of African jurisdictions consulted in the development of the Bangalore Principles, although regrettably few from Francophone jurisdictions.

¹⁷ Peter H Solomon Jr, “The Accountability of Judges in Post Communist States: From Bureaucratic to Professional Accountability”, in Anja Seibert-Fohr, ed, *supra* note 15 contrasts professional accountability with the bureaucratic accountability that predominated in Communist states. He observes (at 911) that judges in both the common law and civil law traditions “form a professional group, sharing an ethos and marked by particular values and skills.”

government to account. It is to this fundamental duality that Reeves alluded when he referred to the “peculiar features of the judicial position”.¹⁸

The emphasis on transnational normativity is not intended to deny the importance of context. Seibert-Fohr, among other transnational observers, has been profoundly critical of efforts to impose a single model for judicial independence in all contexts, describing many examples of countries in which, for example, pure judicial self-governance has gone awry.¹⁹ In this respect, a transnational approach can actually leave room for considerably more nuance than recourse to international law, which is often criticised as hegemonically imposing Western standards. Nonetheless, the transnational norms articulated in these codes create a constraint on the ability of individual judges to act inconsistently with professional norms, at least to the extent that judges, individually or of a particular jurisdiction, commit to being a judge in this transnational sense.²⁰ In return, the solidarity created by a transnational judicial identity can provide an important counterweight for local efforts to limit judicial authority in a manner inconsistent with these norms. Thus, when the Chief Justice of Sri Lanka was removed from office in January 2013, seemingly for ruling against the government’s interests,²¹ this development was not considered to be a purely domestic matter to be assessed solely in relation to Sri Lankan constitutional norms. Rather, it was understood as an assault on the independence of the judiciary and the rule of law more generally, attracting international condemnation, including from the International Commission of

¹⁸ Anthony R Reeves, “Judicial Practical Reason: Judges in Morally Imperfect Legal Orders”, (2011) 30 Law & Phil 319 at 320. In fact, Reeves referred to five distinctive features, which I have reordered for the sake of clarity: (i) judicial decision are occasions for the use of state power; (ii) judges make decisions in the context of a legal system that claims to settle many matters that come before the courts; (iii) legal standards do not guarantee their own legitimacy; (iv) most judges are officials of morally imperfect states; and yet (v) judges are expected to authoritatively interpret law.

¹⁹ Anja Seibert-Fohr, *infra* note 32, particularly at 1345-1352.

²⁰ In this sense, these codes might be considered to create a “common identity statement”: Frishman, *supra* note 5, citing Klaus Dingwerth and Philipp Pattberg, “World Politics and Organizational Fields: the Case of Sustainability Governance”, (2009) 15 Euro J Int’l Rel’ps 707 at 738.

²¹ Shihar Aneez and Ranga Sirilal, “Sri Lanka’s Rajapaksa removes chief justice after impeachment”, *Reuters* (13 January 2013), online: <https://in.reuters.com/article/srilanka-impeachment/sri-lankas-rajapaksa-removes-chief-justice-after-impeachment-idINDEE9oCo5R20130113>.

Jurists.²² The Commission also condemned the suspension of over 2700 judges in Turkey following a failed coup in July 2016 as endangering “the deepest foundations of the separation of powers and the rule of law”.²³ And when the Polish government tried to force the Chief Justice and 26 of her Supreme Court colleagues into early retirement in July 2018, the European Commission swiftly and successfully challenged the measure at the European Court of Justice as a threat to the rule of law, and the judges were reinstated.²⁴ In short, there is a growing sense that what it means to be a judge is no longer a matter of local contingency.

This chapter endeavours to explore and define a transnational notion of judgehood. A comparison and synthesis of the key elements of these codes of conduct has permitted the identification of five core elements of judicial identity: independence, impartiality, efficacy, virtue, and fidelity to law. By identifying these attributes, this thesis does not seek to glorify judges, but to set out a series of benchmarks against which their work and their personal and institutional interactions may be judged. Indeed, by publicly articulating expectations of conduct and character, the codes help to lift the veil on the judicial role; they establish the terms and even the vocabulary of judicial accountability, effectively saying ‘these are the standards to which judges should be held’. This openness has the effect of significantly democratising accountability, and suggests a heightened awareness of judicial office as a public trust, and judicial work as public service.

²² International Commission of Jurists, “ICJ Condemns Impeachment of Sri Lanka’s Chief Justice” (11 January 2013), online: <https://www.icj.org/icj-condemns-impeachment-of-sri-lankas-chief-justice/>. The International Commission of Jurists is a non-governmental organisation composed of 60 eminent lawyers and judges from around the world, which was founded in 1952 to, among other things, “promote and expand the rule of law”: <https://www.icj.org/about/vision-mission-and-statutes/>.

²³ International Commission of Jurists, “ICJ Condemns Purge of Judiciary” (18 July 2016), online: <https://www.icj.org/turkey-icj-condemns-purge-of-judiciary/>. The ICJ has spoken out again recently with respect to the removal of 16 more judges and prosecutors in January 2019 and the conviction of a former judge and head of the judges’ organisation YASLAV for alleged membership in FETÖ (an organisation banned in Turkey due to its connection with the exiled preacher and activist Fethullah Gülen): “Turkey: Dismissal of judges and prosecutors tainted by unfairness, says ICJ” (4 February 2019), online: <https://www.icj.org/turkey-dismissal-of-judges-and-prosecutors-tainted-by-unfairness-says-icj/>.

²⁴ “Poland reverses law on removing judges”, *BBC News* (21 November 2018), online: <https://www.bbc.com/news/world-europe-46296859>. See also Alexei Trochev and Rachel Ellett, “Judges and their Allies”, (2014) *J of L & Cts* 67, in which the authors chart the use of “off-bench” alliance-building behaviour by judiciaries facing threats to their autonomy.

5.1.1 *The Very Idea of a Judge*

In common parlance, a ‘judge’ is an arbiter of disputes, a person trusted by the parties who come to her to decide on their behalf. To have earned that trust, she must be seen as fair-minded, able to act impartially as between the parties, as well as independent, uncorrupted by external pressures. And she must be seen as effective, to be able to make a decision. This latter quality includes, presumably, both the ability to decide in a timely and transparent way, which is to say without undue delay, and through reasoning that is comprehensible, even if it is, to some readers, unsatisfactory.

These attributes can perhaps be described as the *functional* qualities of a judge. In large measure they describe what judges do: they reason, they decide, and in doing so they act impartially and independently. These functions have been formally expressed in, for example, the Mount Scopus International Standards of Judicial Independence, in which the “objectives and functions” of the judiciary are said to include:

1.2.1.1. To resolve disputes and administer the law impartially between person and between persons and public authorities;

1.2.1.2. To promote, within the proper limits of the judicial function, the observance and attainment of human rights; and

1.2.1.3. To ensure that all people are able to live securely under the rule of law.²⁵

This list also serves to emphasise that judges not only have specific jobs to do – dispute resolution and legal administration – but that they perform those functions within the framework of law: the disputes that they adjudicate are characterised in legal terms, and so too is the justice that they deliver: legal justice, *per jus ad justitiam*. In doing so, they promote a particular socio-political structure, the rule of law, which at the very least is a society built on agreed-upon rules, from which all equally derive the benefit and to which all are equally subject. Judges also function within the limits of their socio-political role, a role usually framed in the negative: a judge is not part of the executive –

²⁵ International Association of Judicial Independence and World Peace, “Mount Scopus International Standards of Judicial Independence” [Mount Scopus Standards], approved March 19, 2008; consolidated 2015. Online at: <https://www.jiwp.org/mt-scopus-standards>.

neither a sovereign nor part of the bureaucracy; nor is the judge a legislator – a member of whatever body, hopefully representative, that decides on the content of the law. However, the judge does fulfill an important function as an authoritative interpreter and enforcer of the law.²⁶ While judges are by no means alone in imbuing the law with meaning, in any given legal proceeding they play a decisive role in endowing it with force and consequence. This is almost always done in the circumstances of a live disagreement about the meaning and application of the law, although occasionally judges are called upon to provide guidance in the abstract, or in advance of a dispute.²⁷

However, the idea of a judge is more than just what they do, their function; even more fundamental to the idea of a judge, is how they perform those functions, both in terms of legal process and judicial approach. Thus, even as Slaughter’s global community of judges acknowledges a variety of valid legal approaches to a particular problem,

[t]his pluralism is not unbounded, however. It operates within a framework of common fundamental values, such as recognition of the necessity of judicial independence and basic due process.²⁸

The judicial role is one imbued with and defined by expectations. Much of this chapter is about the expectations that judges, collectively, have of themselves, the elements of judicial identity. But how effectively one is able to acquit herself as a judge has as much to do with public perception as it does with self-perception.

5.1.2 *Judging and Public Perception*

Public perception of judging is by no means unimportant, as captured by the aphorism “not only must Justice be done, it must be seen to be done”, drawn itself from a judicial

²⁶ The degree to which judges are “mere instruments” through which the law is made manifest is the subject of fundamental debates in legal philosophy, canvassed, for example, in David Dyzenhaus, “The Very Idea of a Judge”, (2012) 60 U of T LJ 61.

²⁷ I have written (with Douglas Guilfoyle) elsewhere, for example, on the historical debate over the advisory jurisdiction of courts and its consistency with the judicial function: Marika Giles Samson & Douglas Guilfoyle, “The Permanent Court of International Justice and the ‘Invention’ of International Advisory Jurisdiction” in Malgosia Fitzmaurice and Christian J Tams, eds, *Legacies of the Permanent Court of Justice* (Leiden: Brill/Nijhoff, 2013) at 44-48.

²⁸ Slaughter, *A New World Order*, *supra* note 5 at 68-69.

pronouncement.²⁹ Some judges have observed that there is a necessary interrelationship between the values of impartiality, independence, and efficacy and public confidence in the judiciary.³⁰ The existence of public confidence contributes in particular to the independence of the judiciary, which in turn protects judicial impartiality and increases confidence: forming a kind of righteous circle.³¹ The next chapter, for example, will canvass a number of examples of cases in which judges have expressed concern that abuses of judicial process could lead to an erosion of public confidence in the courts.

This symbiosis might also be detected in the often-tense relationship between judicial independence and accountability. Whereas judicial independence seeks to protect judges from outside influence, including popular opinion, the judiciary is still a branch of government, and judges, as public servants, are still required to be accountable to the public in the performance of their duties. In a series of particularly illuminating studies of emerging democracies, a number of scholars have noted that striking the right balance between independence and accountability, and particularly avoiding wild swings of the pendulum between them, is an essential part of establishing trust in the judicial institution, and in turn, the rule of law itself.³² This is perhaps most apparent in states in transition to democracy, in which norms and processes of public accountability may seem unfamiliar, and there is no baseline of established trust in the judiciary, but

²⁹ *R v Sussex Justices, ex parte McCarthy*, [1923] All ER 233 (KB). This same maxim has appeared in jurisprudence of the European Court of Human Rights: *Micallef v Malta* [Grand Chamber], no 17056/06 (15 October 2009).

³⁰ Thomas Cromwell, “The Development of Principles of Judicial Ethics”, Fabien Gélinas et al, *Responsibility, Fraternity and Sustainability in Law: in Memory of the Honourable Charles Doherty Gonthier* (Markham: LexisNexis, 2012) at 102. In a similar vein, Theodore Meron (then sitting as a judge of the International Criminal Tribunal for the former Yugoslavia) opined that “if the courts are viewed as impartial, they will be respected; and a court that enjoys public respect will find it easier to display independent judgment and, if necessary, to confront powerful governmental or societal interests.” Theodore Meron, “Judicial Independence and Impartiality in International Criminal Tribunals”, (2005) 99(2) AJIL 359 at 360.

³¹ *Ibid* at 102-103. Pierre Noreau and Chantal Roberge refer to public trust as a specific form of rationality, “substantive rationality” (*la rationalité matérielle*), in contrast to the “formal rationality” embodied in the values of independence, impartiality, and integrity: Pierre Noreau et Chantal Roberge, “Émergence de principes généraux en matière de déontologie judiciaire: éléments d’une théorie générale”, (2005) 84 La revue du barreau canadien 457-499.

³² Anja Seibert-Fohr, “Judicial Independence – The Normativity of an Evolving Transnational Principle”, in Siebert-Fohr, *supra* note 15 at 1324-1325, summarising the findings of the preceding chapters of this edited collection.

the same tension is reflected in the ongoing debates in the United States about the relative merits of elected and appointed judges. Thus, public trust can be an important litmus test for determining whether the balance has been struck correctly;³³ whether the public has confidence that judges act in the public interest, broadly speaking, as opposed to their personal interest or in accordance with influence brought to bear by powerful private or public actors.

This model, in which independence and accountability exist on a continuum, was criticised in a recent transnational study of judicial regulation, in which Devlin and Dodek instead proposed a “regulatory pyramid” that incorporates four facets: values, processes, resources, and outcomes.³⁴ These four facets are obviously interconnected, and, as the authors note, often overlap: for example, judicial independence has obvious resource implications, but is also seen as a value. It is the values component of the pyramid, which they describe as incorporating impartiality, independence, accountability, representativeness, transparency, and efficiency, that corresponds most closely with the subject matter of this chapter.

The expressed need for public confidence explains the somewhat peculiar place occupied by various articulations of judicial virtue,³⁵ and particularly integrity, in many of the codes of judicial ethics.³⁶ Virtue is something of a catchall for a range of personal attributes including intelligence, temperament, courage, and wisdom. While such

³³ *Ibid* at 1331.

³⁴ Devlin & Dodek, *supra* note 16 at 5-11.

³⁵ See for example Article 6.6 of the Bangalore Principles, which call for judges to “be patient, dignified and courteous”. Similarly, Article 6.1.1 of the Bologna and Milan Global Code call for judges “to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour”: Bologna and Milan Global Code of Judicial Ethics [Bologna and Milan Global Code], available online at: <https://www.jiwp.org/global-code-of-judicial-ethics>. In an Appendix to the *Commentary on the Bangalore Principles of Judicial Conduct*, the Judicial Integrity Group canvasses the standards for judges as expressed by the most significant religious and cultural traditions, noting that: “From earliest times, in all cultural and religious traditions, the judge has been perceived as an individual of high moral stature, possessing qualities distinct from those of ordinary individuals, subject to more rigorous constraints than others ...”, at 147.

³⁶ See, for example, the *Commentary on the Bangalore Principles of Judicial Conduct* at para 101: “Integrity is the attribute of rectitude and righteousness. The components of integrity are honesty and judicial morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner befitting the judicial office...”.

virtues are not always articulated in the codes, they certainly tend to be implicit in the professional assessment of judges, particularly those who attract significant public and peer admiration. These qualities are often most explicitly articulated during the selection and appointment process: the Burgh House Principles, for example, call for judges to “be chosen from among persons of high moral character, integrity and conscientiousness ...”.³⁷ Indeed, there now exists a branch of jurisprudence, first proposed by Lawrence Solum, that suggests good judgment is itself defined by the exercise of personal virtue, that “judges should render the decisions that would be made by a virtuous judge.”³⁸ To ascertain what such a decision would be would naturally require a high degree of self-reflection. Indeed, all of the five identified attributes – independence, impartiality, efficacy, virtue, and fidelity to law – can only be ensured by the individual and collective commitment of judges themselves.³⁹

5.1.3 Judges and Self-Perception

To this point, the focus has been on the perceptions of the public, but it would be meaningless to speak of judicial identity, or judicial normativity, without attaching it to the human judicial actors themselves. Many authors speak of the importance of creating a “culture of judicial independence”,⁴⁰ but focus on this from an institutional perspective, rather than that of the individual judge. Undoubtedly, institutional structure is important as it provides the conditions in which judges perform their work.

³⁷ Article 2.1, The Burgh House Principles on the Independence of the International Judiciary, available on the website for University College London’s Centre for International Courts and Tribunals, online: https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf.

³⁸ Lawrence B Solum, “Virtue Jurisprudence: A Virtue-Centred Theory of Judging” (2003) 34 *Metaphilosophy* 178-213 at 182.

³⁹ The Preamble of the Bangalore Principles observes that “it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.” Para 14 of the *Commentary on the Bangalore Principles of Judicial Conduct* also speaks of individual and collective responsibility. Garoupa and Ginsburg describe judicial reputation as a problem of “team production”, in which individual reputation is “in part a function of the work of other judges”: Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago: University of Chicago Press, 2015) at 24-28.

⁴⁰ Most notably, perhaps, Simon Shetreet, “Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure” in Simon Shetreet and Christopher Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Leiden: Martinus Nijhoff, 2012) at 17-67. Shetreet was instrumental in the drafting of the Mount Scopus International Standards of Judicial Independence, which includes a section on “Building and Maintaining Culture of Judicial Independence” at Article 1.4.

Such a culture also interacts with the broader public, establishing public expectations and impacting other norms, such as respect for the rule of law. But for a culture of judicial independence to be firmly established, it surely requires normative transmission and internalisation by judges themselves. Where projects of institutional reform have failed, for example in some states in Central and Eastern Europe, it has been observed that “institutional changes ... have not been matched by a mental transition among judges or jurists in general.”⁴¹

The modern promulgation of judicial codes of conduct, both domestically and internationally, is driven by a recognition that there is a content to judicial identity that needs to be specified and donned by those who assume the judicial mantle. As the bench becomes more diverse, and as courts proliferate, earlier formal and informal channels of cultural transmission become less available. Some other contexts, such as states in transition from authoritarianism or states in which judicial corruption has become endemic, warrant a complete overhaul of judicial culture. In both instances, ordinary channels of training by osmosis have been supplemented, or sometimes supplanted, by the explicit articulation of judicial ethics through codes of conduct. These codes, however, are only the first step, and must be complemented by ongoing judicial education and the entrenchment of transnational judicial networks, so that one’s professional identity becomes responsive to the norms and practices of other judges and jurists, rather than the punctual demands of the current domestic political order.⁴² As noted, this judicial identity is built on five pillars, each of which will now be discussed in detail.

5.2 *The First Element: Independence*

Of all of the elements, it is the concept of judicial independence that has received the most attention in transnational codes of conduct and scholarly commentaries. The earliest transnational codes were concerned primarily with what is termed in some

⁴¹ Solomon, *supra* note 17 at 931, citing three “close observers” of the region.

⁴² These are both key conclusions of the Seibert-Fohr study, *supra* note 32 at 1299-1302 and 1325. The *Commentary on the Bangalore Principles of Judicial Conduct* devotes several pages to ongoing training for judges, at paras 199-205.

constitutional arrangements “the separation of powers”, guarding each branch of government from the undue influence of the other branches. With respect to the judiciary, there has been a particular concern with protecting the judiciary from the influence of the executive branch of government, including not just the sovereign (or President) and her Cabinet, but the bureaucracy as well. As for the legislature, this separation is somewhat more controversial. While direct interference is clearly forbidden, the degree to which the judiciary should defer to the ‘will of the legislature’ in its interpretive activities may vary by constitutional arrangement, particularly ones that enforce a notion of parliamentary supremacy (such as the UK). Judicial deference to the legislature can be, and in the case of apartheid South Africa, for example, frequently was, framed as fidelity to law, suggesting that what the TRC described as complicity might be a judicial virtue rather than a vice.

Judicial independence has different dimensions, but the primary distinction is between the independence of the judiciary as a whole, and the independence of individual judges. For ease of reference, the former will be termed ‘institutional independence’, and the latter ‘personal independence’.⁴³

5.2.1 Institutional Independence

Most codes require that governments explicitly recognise the courts as an independent institution. For example, the UN Basic Principles on the Independence of the Judiciary open with the following statement:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governments and other institutions to respect and observe the independence of the judiciary.⁴⁴

⁴³ Under the Universal Charter of the Judge, this distinction is termed “external” and “internal” independence: Universal Charter, Articles 2 and 3. The Universal Charter is available online at: <https://www.iaj-uim.org/universal-charter-of-the-judges/>.

⁴⁴ UN Basic Principles on the Independence of the Judiciary, available online at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>. In other words, there should be a constitutionally-enshrined separation of powers, with a relationship of mutual respect

The judiciary must be understood to have autonomy over its work: the assignment of judges to specific cases must be considered a matter of judicial administration, the court itself must be left to decide whether matters fall under its jurisdiction (a power described in some areas as *la compétence de la compétence*), and judicial decisions cannot be subject to revision by the other branches. Some codes explicitly include a prohibition on ‘court-stacking’, that is to say “changing the composition of the court in order to affect its decision-making”,⁴⁵ most famously, perhaps, threatened by Franklin Roosevelt when, in the wake of the Court’s striking down some of his signature New Deal legislation, he proposed an increase in the number of seats on the US Supreme Court from 9 to 15.⁴⁶ Chapter 2 included an account of how the apartheid regime increased the size of and stacked the Appellate Division in response to the Division’s invalidation of legislation disenfranchising Coloured people.⁴⁷

This kind of structural independence includes the conditions under which judges are employed, although these are often listed as an aspect of personal independence.⁴⁸ If institutional independence is based on the relationship between the branches of government, then surely a non-transactional employment relationship is a fundamental aspect. Most codes recognize that this requires that the criteria for the appointment of judges must be objective, and objectively applied; that judges enjoy security of tenure, either for life (or until a fixed retirement age) or for a fixed term; and that they cannot

between between all branches of government acting in their own spheres: see Article 2.2 of the Bologna and Milan Global Code of Judicial Ethics, *supra* note 35, as well as Seibert-Fohr, *supra* note 32 at 1348.

⁴⁵ See, for example, the Mount Scopus Standards, *supra* note 25, Article 2.5.

⁴⁶ This was avoided by the so-called “switch in time that saved nine”, in which Justice Owen Roberts seemed to change his previously expressed view on minimum wage legislation to one more sympathetic to the New Deal programme in *West Coast Hotel Co v Parrish*, (1937) 300 US 379. For background (and quantitative evidence of the switch) see Daniel E Ho & Kevin M Quinn, “Did a Switch in Time Save Nine?” (2010) 2(1) J Legal Analysis 69.

⁴⁷ See chapter 2, *supra* at 56-57.

⁴⁸ See, for example, the IBA Minimum Standards of Judicial Independence [IBA Standards], Article 1(b), available online at:

https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

In the leading case from Canada’s apex court on the subject of judicial independence, *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 [PEI Reference], the majority described financial remuneration as having both an institutional and an individual dimension, at para 121. Under Devlin & Dodek’s regulatory pyramid, these matters are considered to be part of the “Resources” facet: Devlin & Dodek, *supra* note 34 at 23-26.

be removed from office except through an independent process. Judicial salaries must be fixed and adequate, and in no way affected by any executive branch assessment of performance.⁴⁹ Judges' physical security must also be ensured, and they must be provided with the resources necessary to perform their duties. Thus there is both a negative 'hands off' obligation on the part of the other branches, and a positive engagement to enable the judiciary to do its work. In this way, the institutional conditions are created to ensure that judges are able to exercise personal independence.

However, these 'trappings' of judicial office should not give rise to the misapprehension that independence is a right, entitlement, or privilege of the judge herself.⁵⁰ Judicial independence is not, as Seibert-Fohr observes, a liberty belonging to judges; rather it "has the purpose of protecting the individual (not the judiciary) in his or her right to due process."⁵¹ Judges are paid well not for their benefit, but to reduce their temptation to accept bribes; while judges' security of tenure is undoubtedly enviable, it is intended to keep them from tailoring their judicial decisions to enhance their future employment prospects, whether on the courts or elsewhere. The range of options available for holding judges accountable tends to be narrow in order to protect their independence. Judges as a class enjoy immunity from legal claims arising from their work. Performance complaints against judges are often addressed by disciplinary bodies composed wholly or substantially of other judges, rather than by the justice ministry that is likely politically responsible for their appointment and the general operation of the justice system.⁵² One suspects that this kind of judicial self-regulation will be more

⁴⁹ Thus at paras 133-34 of the *PEI Reference*, the Court held that the salaries of all provincial court judges could be reduced as a general cost-cutting measure, but that an independent commission had to be interposed between the judges and the government in negotiations in order to preserve the appearance of judicial independence.

⁵⁰ Article 2.1 of the Bologna and Milan Global Code specifically cautions against this misconception: "Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of the system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. ...". Bologna and Milan Global Code, *supra* note 35 at Article 2.1.

⁵¹ Seibert-Fohr, *supra* note 32 at 1343.

⁵² In Canada, for example, complaints against federally-appointed judges are handled by the Canadian Judicial Council, which is chaired by the Chief Justice of Canada and whose membership is entirely composed of judges drawn from courts around the country. The Council promulgates expected standards of conduct: *Ethical Principles for Judges*, online: <https://www.cjc->

credible in contexts where the judiciary enjoys higher levels of public trust; by contrast, as discussed in chapter 2, the South African TRC was not convinced that concerns about independence should exempt the apartheid-era judiciary from being called to account during its Legal Hearing.

5.2.2 *Personal Independence*

Somewhat confusingly, the independence of individual judges is frequently subdivided into personal and substantive independence, in which the former refers to the terms and conditions of judicial service (as set out above), and the latter to the exercise of the judicial function by a particular judge.⁵³ Poetically expressed in the Mount Scopus Standards, substantive independence can be described as “a judge [being] subject to nothing but the law and the commands of his conscience”.⁵⁴ What this thesis terms “personal independence” would under this taxonomy be considered “substantive independence”. If institutional independence is intended to safeguard judges from influence emanating outside the judiciary, the idea of personal independence includes protection from pressure within the judiciary, requiring judges to act independently of their colleagues and regardless of any administrative hierarchies within courts.

Article 1.1 of the Bangalore Principles is somewhat more comprehensive in its description of personal independence:

A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf. On 7 March 2019, the Chair announced a review of the *Ethical Principles*, seeking public input: https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2019_0307_en.asp. However, few of the Codes explicitly propose judicial self-regulation, although Article 7-1 of the Universal Charter of the Judge, *supra* note 43, for example, suggests that “disciplinary proceedings should be carried out only by independent bodies, that include a majority of judges”.

⁵³ Both the IBA Standards and the Mount Scopus Standards use this terminology: IBA Standards, Article 1; Mount Scopus Standards, Article 2.2.

⁵⁴ Mount Scopus Standards, Article 2.2.2.

The extraneous influences suggested here extend well beyond a problem of separation of powers. This includes popular opinion, the opinion of family and friends, conflicts of interest, and inducements or threats by external actors or the parties themselves.⁵⁵ It bears remembering that, in many places around the world, corruption, including judicial corruption, remains endemic, with profound effects on a number of judicial values.⁵⁶

5.2.3 *The Relationship Between Judicial Independence and Impartiality*

The relationship between independence and impartiality is a complicated one; the values are frequently lumped together in a single aspiration for an “independent and impartial judiciary”, particularly in human rights instruments.⁵⁷ The *Commentary on the Bangalore Principles* describes the interaction of the two as follows:

The concepts of “independence” and “impartiality” are very closely related, yet separate and distinct. “Impartiality” refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” connotes absence of bias, actual or perceived. The word “independence” reflects or embodies the traditional constitutional value of independence. As such, it connotes not merely a state of mind or an attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.”⁵⁸

⁵⁵ Tom Bingham, former Lord Chief Justice of England and Wales, provides the following list in *The Rule of Law* (London: Allen Lane, 2010) at 92: “Does the principle require independence of anyone or anything other than the government? It does. It calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.”

⁵⁶ Indeed, the Judicial Integrity Group itself grew out of collaborations with Transparency International and the UN Global Programme Against Corruption. For the history of the Group see: <https://www.judicialintegritygroup.org/images/resources/documents/JIG%202000-2011.pdf>.

⁵⁷ See, for example, Article 14(1) of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

⁵⁸ *Commentary on the Bangalore Principles* at para 24. See also *PEI Reference* at para 111, contrasting impartiality as a “state of mind” and independence as the status of the court” (emphasis in original).

While the point is made only in passing in this extract, for the purpose of constructing a judicial identity, it should be emphasised that independence might also be seen as a state of mind. Because the work of judgment is solitary, being a judge can be a lonely business,⁵⁹ and judging requires personal confidence and courage. And while public confidence is important, personal judicial independence requires that the judge act “irrespective of popular acclaim or criticism”.⁶⁰ Later, the *Commentary* notes that independence and impartiality are “mutually reinforcing attributes of the judicial office. Independence is the necessary precondition to impartiality and is a prerequisite for attaining impartiality. A judge could be independent but not impartial (on a specific case by case basis), but a judge who is not independent cannot, by definition, be impartial (on an institutional basis).”⁶¹ Thus, just as institutional independence creates the conditions of personal independence, independence creates the conditions of impartiality.

5.3 The Second Element: Impartiality

Inescapably, perception matters as much as fact in the judicial attribute of impartiality. Impartiality is the fundamental quality of fairness, symbolised by the scales held aloft in images of Justitia. A judge must come to each case with no preconceptions, with scales in balance, confident that she can decide it fairly, and solely on the basis of weighing the evidence and arguments that she hears in the courtroom. While impartiality need not be explicitly established (indeed, in the ordinary course, it should be presumed), actual or

⁵⁹ Interestingly, however, the *Commentary* specifically cautions against “complete isolation”: *ibid* at para 31.

⁶⁰ *Ibid* at para 28, but see paras 27-30 generally. In a recent book on judging, Justice Robert Sharpe strikes the balance as follows: “The good judges is certainly aware of the prevailing public mood but cannot be swayed or influenced by fear of making a decision that is unpopular or controversial.” Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 250.

⁶¹ *Ibid* at para 51. In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, *supra* note 48, LaForest J (in dissent, although not on this point) noted at para 332 that “... it is important to remember that judicial independence is not an end in itself. Independence is required only insofar as it serves to ensure that cases are decided in an impartial manner.” Schabas makes the same point with respect to the individual human right to be tried by a fair and impartial tribunal as defined by Article 6(1) of the European Convention on Human Rights: William Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2016) at 294.

perceived bias must be actively dispelled. For the judiciary to be trusted, judges must be seen as impartial.

Similarly, impartiality must be manifest both in the outcome of judicial decision-making and in the process of hearing the case. Perceptions of bias can arise in the absence of proper judicial decorum, in which the language, behaviour, or demeanour of the judge is indicative of hostility or preference.⁶² Indeed, in all of her activities, both inside and outside the courtroom, the judge must conduct herself in a way that avoids creating the appearance of bias. If independence requires that judges avoid engagement in political activities, impartiality sets the bar considerably higher: restricting a judge's relationships, comments in conversation, or public remarks on current controversies, particularly where those may become live issues in cases before the court.⁶³ A famous example of a decision based on the perception of potential bias was the UK House of Lords' decision to set aside their earlier declaration that Augusto Pinochet did not enjoy immunity and so could be extradited to Spain to face investigation for crimes against humanity. The decision was set aside when it was discovered that one of the Law Lords who had decided the case, Lord Hoffmann, was the Chairman of the Board of the charitable wing of Amnesty International, an intervenor in the case.⁶⁴

This does not mean that any suspicion of bias will suffice. A subjective concern must be justified on an objective basis: the apprehension of bias must be "reasonable", with the assumption that the "reasonable observer" would be both fair-minded and informed.⁶⁵ That being said, the judge has a responsibility to recuse herself should she find herself unable to decide a matter impartially, or even if she believes that a reasonable apprehension of bias exists. This obviously requires a significant degree of self-reflection

⁶² *Commentary on the Bangalore Principles* at paras 58-59 and 62-63. See also the caution against "constant interference" at para 63; a similar caution is contained in Article 6.2 of the Bologna and Milan Global Code.

⁶³ *Commentary on the Bangalore Principles* at para 66.

⁶⁴ *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 2)*, [1999] 2 WLR 272 (UKHL).

⁶⁵ *Commentary on the Bangalore Principles* at paras 77 and 81. This subjective-objective standard is undoubtedly derived from the approach outlined by many courts worldwide in approaching questions of judicial bias: see, for example, *Micallef v Malta*, *supra* note 29 at paras 93-98.

and humility. Indeed, in a recent book on judging, Robert Sharpe (a judge of the Ontario Court of Appeal) writes at some length about the need for judicial introspection on questions of impartiality, recognising the need to draw on personal experience, but relying on those experiences “judiciously and with circumspection.”⁶⁶

While impartiality is often described as an attribute that finds form (or fails) on a case-by-case basis, it can also be reasonably described a personal quality. Some people are more open-minded than others. Some people are more capable and generous listeners. Some people are natural partisans, and are unable or unwilling to shed that identity to assume a seat on the Bench. Not everyone, even among the best legal minds, is cut out to be a judge. Building a judicial identity involves an honest self-assessment of whether one has the necessary personal disposition to be a judge.

What has been abandoned in recent years is the normative equation of impartiality with neutrality.⁶⁷ There has perhaps been no more decisive a damnation of neutrality as a principle than that attributed to South African Archbishop Desmond Tutu: “[i]f you are neutral in situations of injustice, you have chosen the side of the oppressor.”⁶⁸ Neutrality is incompatible with the exercise of judicial conscience, because neutrality exists in the absence of values. The *Commentary on the Bangalore Principles* specifically rejects the notion that a judge’s personal values, philosophy, or beliefs about the law constitute

⁶⁶ Sharpe, *supra* note 60 at 259, and 256-263 generally. In particular, at 261 he notes the following observation from the Canadian Judicial Council’s 1991 Commentaries on Judicial Conduct (*Commentaries on Judicial Conduct* (Cowansville: Éditions Yvon Blais, 1991) at 12-13): “[T]he wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and to act upon different points of view with an open mind. To keep that mind truly open, the judge, more than most, must respond to the challenge of self-examination.”

⁶⁷ Neutrality is sometimes also characterised as an outdated conception of the principle of independence: see, for example, Seibert-Fohr, *supra* note 32 at 1317.

⁶⁸ The precise circumstances of this iconic quote have been lost, but it was more likely directed at the long-time refusal of the liberal West to condemn apartheid than an indictment of the South African judiciary. There is a famous quote along the same lines from Holocaust survivor Elie Wiesel: “We must take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented”. “Nobel Peace Prize acceptance speech” (10 December 1986), published online by The Elie Wiesel Foundation for Humanity: <https://eliewiesel.org/Elie-Wiesel/nobel-prize-speech/>. Notably, both of these quotes emerged from political contexts in which the law was infamously coopted in order to formalise systems of discrimination and persecution.

bias, quoting from a decision of the US Supreme Court that “proof that a judge’s mind is a *tabula rasa* (blank slate) would be evidence of a lack of qualification, not lack of bias.”⁶⁹ Hutchinson is more blunt: “[t]he only difference between judges with politics and those without is that the former know what their politics are.”⁷⁰

Certainly, there is nothing that prevents, and perhaps even much to commend, a judge having lived a full and engaged life prior to appointment, Albie Sachs, former anti-apartheid freedom fighter and retired justice of the Constitutional Court of South Africa has written extensively on the relationship between personal experience, legal intuition, and judicial reasoning.⁷¹ And once on the Bench, the *Commentary on the Bangalore Principles* affirms that judges, who are “[increasingly] called upon to address broad issues of social values and human rights, to decide controversial moral issues, and to do so in increasingly pluralistic societies”, are less likely to be effective if they are unduly isolated from the community that they serve.⁷² This implies an expectation that judges situate their decisions in their social context, and so must have some understanding of that context.⁷³ In common parlance, judges should not be “out of touch” with the communities that they serve.⁷⁴ Sharpe also notes that judges, in assessing their impartiality, must guard against the danger that “the habits that you are trained in, the

⁶⁹ *Commentary on the Bangalore Principles* at para 60, citing *Laird v Tatum*, (1972) 409 US 824. See also the decision of the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 33-36, citing views from scholars and judges from the US, South Africa, and Israel, and which includes the following passage (at para 33): “Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge’s identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.”

⁷⁰ Allan Hutchinson, “Towards Judicial Accountability – Are the Excuses Getting Lamer?” (1996) 45 UNB LJ 97 at 99.

⁷¹ See Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009).

⁷² *Commentary on the Bangalore Principles* at para 32.

⁷³ For example, in response to significant criticism from the Bar and the public of gender and racial bias, in 1994 the Canadian Judicial Council resolved to develop “comprehensive, in-depth, credible education programs on social context issues which include[s] gender and race.” Cited in Rosemary Cairns Way, “Contradictory of Complementary? Reconciling Judicial Independence with Judicial Social Context Education”, in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Canada* (Toronto: Irwin Law, 2010) at 234. The first such program was rolled out 4 years later.

⁷⁴ Lord Justice Jacob of the Court of Appeal of England & Wales cautions against both unworldliness and superficial worldliness, with the remedy for both being actual “knowledge of the world”: Robin Jacob, “Knowledge of the World and the Act of Judging”, (2009) 2(1) Osgoode Hall Rev of Law & Policy 22 at 24-25.

people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish.”⁷⁵

However, in the qualifier “unduly”, there lies a warning, a corollary that there is a “due” amount of social isolation that comes with the job, and the line between due and unduly may be difficult to define. Judges will tend to live at least somewhat cloistered lives as a function of preserving their personal independence and limiting the perception of bias. While they have the same right as anyone else to free expression, they will need to exercise discretion in speaking out on the issues of the day, particularly where such issues may come before them.⁷⁶ Oliver Wendell Holmes may have advised judges to “share the passion of their time”,⁷⁷ but Lord Hoffmann’s involvement with Amnesty International ultimately proved problematic.

5.4 The Third Element: Efficacy

The Universal Declaration of Human Rights confers on everyone the right “to be tried by a competent, independent, and impartial tribunal”.⁷⁸ This requirement of competence is similarly reflected in the sixth value of the Bangalore Principles, which requires judges to be both competent and diligent. While these requirements undoubtedly include a measure of professional qualification, both in terms of training and personal capacity, they also denote an ability to be an effective adjudicator.⁷⁹

⁷⁵ Sharpe, *supra* note 60 at 260, quoting Lord Justice Scrutton “The Work of Commercial Courts”, (1921) 1 Camb LJ 6 at 8.

⁷⁶ John Sopinka, “Must a Judge be a Monk – Revisited”, (1996) 45 UNB LJ 167, generally.

⁷⁷ Quoted in the *Commentary on the Bangalore Principles* at para 33.

⁷⁸ Article 10 of the Universal Declaration of Human Rights GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [UDHR].

⁷⁹ As the aptly named Lord Judge, retired Lord Chief Justice of England and Wales, once observed of the essentially qualities of a judge: “First, a judge must have the ability to make up his or her mind and give a decision. Anyone can see a number of different possible solutions to problems and different ways to address it. In many cases that is precisely why they have come to the judge, because they cannot agree it. The judge cannot take refuge in the answer being one thing or another: the judge must decide.” Lord Judge, “Reflections of a Retired Lord Chief Justice” in Jeremy Cooper, ed, *Being a Judge in the Modern World* (Oxford: Oxford University Press, 2017).

In the *Commentary*, diligence includes the ability “[t]o consider soberly, to decide impartially, and to act expeditiously”.⁸⁰ This includes a specific duty (Principle 6.5) to “perform all judicial duties ... efficiently, fairly, and with reasonable promptness”. This is one of the few explicit recognitions in a code of judicial conduct that justice, to be effective, must be efficiently and promptly delivered, “without unnecessary cost or delay”.⁸¹ This serves as a reminder that judges, and the courts on which they sit, are justice-delivery mechanisms. They lie at the apex of a legal system that, under the rule of law, promises that agreed-upon rules will be enforced, and enforced fairly. In order for that promise to be made real for those who benefit from (and are subject to) the particular legal order, justice must actually be delivered. The services of a judge, who is above all a public servant, must be available and practically accessible, and she must be able to effectively decide the cases that come before her in a timely way.

There are significant human rights implications to untimely justice. In criminal law, it is widely accepted that a person has a human right to be tried without undue delay.⁸² This is because a cloud of suspicion is inevitably created when a person is charged with a crime, in spite of the legal presumption of innocence. As such, the rights implications are even more significant when an accused is detained pending trial. And a number of human rights treaties have explicitly extended the right to a hearing within a reasonable time to civil claims.⁸³

⁸⁰ *Commentary on the Bangalore Principles*, para 193.

⁸¹ *Commentary on the Bangalore Principles*, para 207.

⁸² See, for example, Article 14(3)(c), ICCPR. Indeed, the Supreme Court of Canada took a controversially strong stand on this question in *R v Jordan*, 2016 SCC 27, in which the Court imposed a “presumptive ceiling” for delay in criminal cases of 30 months, and which resulted in stays being issued in a number of cases.

⁸³ Article 6(1) of the European Convention on Human Rights provides for a right to a hearing within a reasonable time in the determination of civil rights: *European Convention on Human Rights*, Council of Europe, 4 November 1950, ETS 5 (entered into force 3 September 1953) [ECHR]. Article 8(1) of the American Convention on Human Rights is even more specific, extending the right “for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”: *American Convention on Human Rights* (“Pact of San José, Costa Rica”), Organization of American States (OAS), 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) [ACHR]. Article 7(1) of the African Charter on Human And Peoples’ Rights, on the other hand, is less comprehensive, limiting the right to criminal law matters and claims regarding “violating fundamental rights”: *African Charter on Human and Peoples’ Rights* (“Banjul Charter”), Organization of African Unity (OAU), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (entered into force 21 October 1986) [ACHPR]. The existence of a right to a hearing of civil claims,

Routinely lengthy delays in delivering results in any sphere of judicial activity inevitably leads to a decreased resort to the courts, which not only undermines the rights of parties who have been unable to seek the protection of the law, but the rule of law itself. Tom Bingham, former Lord Chief Justice of England and Wales, in describing the elements of the rule of law, included “[m]eans must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.”⁸⁴ Neil Andrews, widely regarded as the leading thinker on civil procedure in the UK, suggests that there are four pillars of civil justice, with one of them being “a focused and speedy process”.⁸⁵ “Prompt and accelerated justice” was also identified as a “fundamental procedural guarantee” in a project to develop principles of transnational civil procedure.⁸⁶ There is a general recognition that justice delayed is justice denied.⁸⁷

On the other hand, the *Commentary on the Bangalore Principles* specifies that external pressure to be “productive” cannot impact on a judge’s ability to act independently.⁸⁸ The judge’s first duty will always be to decide cases fully and fairly, and some matters, due to complexity or other factors, may simply be harder to decide than others. Indeed, many of the victims of judicial persecution would object that ‘justice’ was all too swiftly delivered, calling into question whether independent judicial deliberation had been brought to bear at all.

Nor, as is increasingly the case in civil justice these days, should a judge pressure parties into compromising their rights in order to see a case resolved by settlement.⁸⁹ These

of course, problematises the anti-SLAPP measures discussed in the last chapter, which of course quite deliberately seek to curtail that right.

⁸⁴ Bingham, *supra* note 55 at 85, and his discussion of delay at 88-89.

⁸⁵ Neil Andrews, “A Fresh Start: The Four Pillars of Civil Justice”, in Shetreet and Forsyth, *supra* note 40, at 98.

⁸⁶ *Ibid* at 104-106.

⁸⁷ Sharpe, *supra* note 60 at 30 believes that prompt decision-making is a “cardinal judicial virtue” and that it is not only kinder to litigants, but that it tends to result in better judgments.

⁸⁸ *Commentary on the Bangalore Principles* at para 42.

⁸⁹ *Ibid*, para 207. Indeed, a recent decision Québec Court of Appeal found that a small claims court judge had violated the relevant *Judicial Code of Ethics* for pressuring the parties to try to settle a case, to the point of adjourning the hearing, in the face of the parties’ clear intention to seek adjudication: *Re Bradley*, 2018 QCCA 1145 (especially paras 45-48).

pressures on personal independence can arise from within the judicial institution, as senior judges and court administrators try to process busy dockets with limited resources, or from specific legislative measures, such as those mandating mediation. In other cases, litigants may actively seek to manipulate time, delaying or accelerating proceedings for strategic or personal reasons. In order to navigate the difficulties of balancing the ethical logic of efficiency and their countervailing obligations, judges must appreciate the degree to which these obligations interrelate and interact.

5.5 The Fourth Element: Virtue

In addition to the functional elements of judging, the codes almost invariably include some reference to the human qualities of being a good judge, such as temperament⁹⁰ and integrity.⁹¹ There is a sense in which candidates for judicial office should come to the job endowed with the personal qualities needed to do the job well or, put another way, that only those in possession of such qualities should be appointed to the Bench.⁹² Indeed, as first mentioned above, a virtue-centred theory of judging posits that a just decision is defined as one that is made by a judge acting in accordance with judicial virtues.⁹³ Solum developed his list of virtues by first considering the vices of truly terrible judges, such as corruption, cowardice, bad temper, incompetence, and foolishness; thus, Solum's corresponding judicial virtues are temperance, courage, temperament, intelligence, and wisdom.⁹⁴ While Solum's is an interesting thought experiment, Duff levels a persuasive critique that it can provide only a limited theory of judging itself.⁹⁵ While the virtues

⁹⁰ Bangalore Principles, Article 6.6 and *Commentary* (especially paras 213-215).

⁹¹ Bangalore Principles, Value 3.

⁹² Consider, for example, the concerns over US Supreme Court Justice Brett Kavanaugh's temperament after his second appearance before the Senate Judiciary Committee: Robert Barnes, "As Kavanaugh is all but confirmed, questions linger about his judicial temperament", *Washington Post* (5 October 2018), online: https://www.washingtonpost.com/politics/courts_law/as-kavanaugh-is-all-but-confirmed-questions-linger-about-his-judicial-temperament/2018/10/05/998da822-c8c4-11e8-9b1c-a90f1daae309_story.html?utm_term=.9a54c1df19d7.

⁹³ Solum, *supra* note 38 at 198. As a branch of virtue ethics, virtue jurisprudence is distinguished from consequentialist or utilitarian theories, those that argue that the best justice is to be gauged by the result of the process, and deontological or process-oriented theories.

⁹⁴ Solum, *supra* note 38 at 186-194.

⁹⁵ RA Duff, "The Limits of Virtue Jurisprudence", (2003) 34(1/2) *Metaphilosophy* 214

identified are certainly indicative of what qualities are required to make someone a reliably good judge,⁹⁶ it is a step too far to say that whatever decisions are made by such a person are necessarily just, from a legal perspective, or that decisions made by unvirtuous judges are necessarily legally wrong.⁹⁷

Duff also convincingly criticises Solum's suggestion that temperance is the opposite of corruption in the judicial sense,⁹⁸ as corruption is clearly an affront to the ethical imperative of personal independence. Duff suggests that the opposite of corruption is not temperance, but integrity.⁹⁹

5.5.1 *The Virtue of Integrity*

All of the codes of judicial conduct studied explicitly or implicitly call upon judges to act with integrity, often tying the obligation with a need to preserve the dignity of the office,¹⁰⁰ and propriety.¹⁰¹ Integrity in the sense intended by the codes comprises a number of related obligations, as defined in the *Commentary on the Bangalore Principles*:

Integrity is the attribute of rectitude and righteousness. The components of integrity are honesty and traditional morality. A judge should always, not only in the discharge of official duties, act honourably and in a manner benefiting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behaviour and in character. There are no degrees of integrity as so defined. Integrity is absolute. In the judiciary, integrity is more than a virtue; it is a necessity.¹⁰²

⁹⁶ *Ibid* at 216.

⁹⁷ *Ibid* at 218-219. To make the point that judicial virtue cannot be constitutive of just legal decision making, Duff invites us to imagine a judge justifying her decision by “pointing to her own virtue” (at 222).

⁹⁸ *Ibid* at 217.

⁹⁹ *Ibid*.

¹⁰⁰ IBA Standards, Article 40; Mount Scopus Standards, Article 7.5; Bologna and Milan Global Code, Article 3.5.

¹⁰¹ Bologna and Milan Global Code, Article 5.1.1; Bangalore Principles, Values 3 and 4, and especially Article 3.1, which exhorts judges to “ensure that his or her conduct is above reproach”.

¹⁰² *Commentary on the Bangalore Principles*, para 101.

Many of the norms of conduct described elsewhere – those directed at avoiding the appearance of impropriety, inefficiency, and ill-temper – are inherently tied to the value of integrity. However, as a professional principle, integrity is not a virtue for its own sake: judges must conduct themselves with utmost integrity for the purpose of preserving confidence in the judicial institution.¹⁰³ The Bangalore Principles note that “[t]he behaviour and conduct of a judge must reaffirm the people’s faith in the integrity of the judiciary.”¹⁰⁴ In the view of the Judicial Integrity Group, itself established to combat judicial corruption, the stakes could not be higher:

A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance and the rule of law. Even when all other protections fail, it provides a bulwark to the public against any encroachments on rights and freedoms under the law.¹⁰⁵

As discussed earlier, public confidence in the judiciary is the prerequisite for the judiciary’s effectiveness.¹⁰⁶ As Justice Felix Frankfurter of the US Supreme Court once observed: “[t]he Court’s authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction.”¹⁰⁷ When a judge acts without integrity, it diminishes public confidence that judges, as a professional corps, possess the requisite integrity to sit in judgment over them, and thereby risks diminishing the court’s authority.¹⁰⁸

¹⁰³ See *Re Therrien*, 2001 SCC 35, in which the Court held at para 111 that, because of the unique position of the judge: “The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. ... They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.”

¹⁰⁴ Bangalore Principles, Article 3.2. See also *Commentary on the Bangalore Principles*, para 109.

¹⁰⁵ These are the opening words of the Preface to the *Commentary on the Bangalore Principles* at 5.

¹⁰⁶ In his account of judicial integrity, Soeharno notes the recent growth in discourse on integrity, which he links to the growth of judicial power and the resulting increased public scrutiny: Jonathan Soeharno, *The Integrity of the Judge: A philosophical Inquiry* (Farnham: Ashgate, 2009) at 16-20. Soeharno finds that integrity is a precondition of a judge’s perceived legitimacy to act, although it is secondary to the integrity of the judicial institution.

¹⁰⁷ *Baker v Carr*, (1962) 369 US 186, at 267.

¹⁰⁸ The Supreme Court of Canada goes on to quote the following in *Re Therrien* at para 111: “the vulnerability of judges is clearly greater than that of the mass of humanity or of ‘elites’ in general: it is rather as if his or her function, which is to judge others, imposed a requirement that he or she remain

5.5.2 *The Virtue of Wisdom*

Similarly, the necessity of judges being wise, particularly as contrasted with being ignorant or foolish, is obvious. Solum speaks of wisdom in both senses, theoretical wisdom, *sophia*, and practical wisdom, *phronesis*,¹⁰⁹ the latter being “the virtue that enables one to make good choices in particular circumstances”.¹¹⁰ In a similar vein, Anthony Reeves proposes a model of “judicial practical reason”, a form of wisdom that is conscious of the “peculiar features of the judicial position.”¹¹¹

In recent years, there have been some interesting empirical studies into what constitutes judicial wisdom.¹¹² One such study, conducted by a pair of psychologists, involved interviewing judges who had been nominated by the peers as “wise” decision-makers. The key attributes identified, including open-mindedness, an understanding of interpersonal and cultural context, patient listening, and curiosity were attitudinal, and focused on process, rather than outcome.¹¹³ This need to understand interpersonal and cultural context hearkens back to the debate about the extent to which judges are expected to live cloistered lives in order to preserve the appearance of impartiality. It is an argument against being ignorant of the socio-political context in which events unfold; recall that an appreciation for the political context and a pattern of persecutory behaviour proved decisive in the ECHR finding a violation of Article 18 in the Azerbaijani cases.¹¹⁴ It also raises the issue of the background and life experience, which, the Seibert-Fohr study reveals, is becoming an increasingly attractive attribute

beyond the judgment of others” [Court’s translation], citing Yves-Marie Morissette, “Figure actuelle du juge dans la cité” (1999) 30 RDUS 1 at 11-12.

¹⁰⁹ This is also the conception of judicial wisdom promoted by Kronman in Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Belknap Press of Harvard University Press, 1994) at 225.

¹¹⁰ Solum, *supra* note 38 at 192.

¹¹¹ Reeves, *supra* note 18 at 320.

¹¹² Jeremy A Blumenthal & Daria A Bakina, “Judicial Wisdom: An Introductory Empirical Account”, (2016) 52(2) Ct Rev 72; Heidi M Levitt and Bridget Dunnivant, “Judicial Wisdom: The Process of Constructing Wise Decisions”, (2015) 28(3) J of Constructivist Psychology 243.

¹¹³ Levitt and Dunnivant, *supra* note 112, generally.

¹¹⁴ See chapter 4 at section 4.5.

for judges in all legal systems.¹¹⁵ This is tied, perhaps, to a general recognition that, with increased constitutionalism and the associated rise of judicial review, including on questions of human rights, judges are increasingly being called upon to adjudicate complex social, political, and even moral issues. While age itself does not guarantee wisdom, life experience does tend to provide a level of perspective that can be associated with wisdom.

5.5.3 *Judicial Courage*

Before leaving this discussion of judicial virtue, Solum's notion of courage should be highlighted, as it will come up again later. As defined by Solum, judicial courage is to be understood as contrasted with both cowardice, on the one hand, and rashness on the other.¹¹⁶ Judicial courage is of two kinds. The first is physical courage, the capacity to resist intimidation by threats of physical violence, as is endemic in many parts of the world.¹¹⁷ The second is civic courage, which involves a willingness to "risk career and reputation for the ends of justice."¹¹⁸ While professional reputation is not, as has been discussed earlier, unimportant, its value must be properly understood and distinguished from the social disapprobation that comes from making necessary but unpopular decisions: "[a] civically courageous judge understands that the good opinion of others is worth having if it flows from having done justice and that social approval of injustice is an impermissible motive for judicial action."¹¹⁹

¹¹⁵ Seibert-Fohr notes the trend, even in civil law jurisdictions that had historically recruited judges as young law graduates, to recruit judges with greater professional and life experience: Seibert-Fohr, *supra* note 32 at 1316. Not surprisingly, perhaps, Jacob, *supra* note 74 at 25-27, also expressed the view that life experience was essential for a judge to have the requisite "knowledge of the world".

¹¹⁶ Solum, *supra* note 39 at 190.

¹¹⁷ Colin Farrelly and Lawrence B Solum, "An Introduction to Aretaic Theories of Law" in Colin Farrelly and Lawrence B Solum, eds, *Virtue Jurisprudence* (New York: Palgrave MacMillan, 2008) at 10. Although threats of violence against judges are less common in the United States, the authors specifically cites the threatening of a US federal district court judge by one defendant and the 2005 murder of her husband and mother by another.

¹¹⁸ Solum, *supra* note 38 at 190. In "Statutory Lawlessness and Supra-Statutory Law" *infra* note 128 at 10, Gustav Radbruch, reflecting on judicial activity during the Third Reich, admonishes judges to go even further: "the judge's ethos ought to be directed toward justice at any price, even at the price of his own life."

¹¹⁹ Farrelly and Solum, *supra* note 117 at 10. The former Chief Justice of England & Wales, Lord Judge highlights the need for judges to have "moral courage or fortitude": Lord Judge, *supra* note 79 at 21-22.

Thus, while courage is undoubtedly a personal virtue, it is also one that is, or at least should be, enabled by the conditions of institutional independence. Security of tenure should empower judges to take personal risks in pursuit of just outcomes. They should take pride in going against the grain. It is not hard to identify an implicit suggestion that apartheid-era judges in South Africa lacked, among other virtues, judicial courage. In the aftermath of the Third Reich, Gustav Radbruch specifically appealed to jurists to find the courage to resist laws “that betray the will to justice”.¹²⁰

5.6 *The Fifth Element: Fidelity to Law*

Fundamental to a notion of judicial identity is the notion that a judge’s first loyalty is to the law itself. Judges are public servants, but they are public servants of a particular kind, empowered to interpret, apply, and thus enforce the law. This is, at once, a manifest constraint on their power and a source of considerable independence. As John Griffith once put it:

... Judges are also lions under the throne but that seat is occupied in their eyes not by the Prime Minister but by the law and their conception of the public interest. It is to that law and to that conception that they owe allegiance. In that lies their strength and their weakness, their value and their threat.¹²¹

Lying under the throne, a judge’s allegiance to the law is foundational to her ethical identity. Judges are the guarantors of the rule of law, the Aristotelian ideal of a government of laws, not men, and to that end, as will be discussed in chapter 7, need to have a working theory of the rule of law. But, as has been noted, particularly in the case of South Africa, questions may also arise about the validity of law itself, its nature and its limits. The apartheid-era judiciary was harshly criticised for their limited willingness to probe whether the unjust law that they were enforcing was worthy of the authority with which they were endowing it.

¹²⁰ Radbruch published this view within months of Germany’s surrender at the end of World War II, in Gustav Radbruch, “Five Minutes of Legal Philosophy (1945)”, as translated by Bonnie Litchewski Paulson and Stanley L Paulson and published in (2006) 26(1) Oxf J of Legal Studies 13 at 14.

¹²¹ JAG Griffith, *The Politics of the Judiciary*, 3d ed (London: Fontana Press, 1985) at 199.

The law is, at the very least, a collection of binding legal instruments: constitutions, statutes, and other authoritative statements of law. In civil law jurisdictions, these other statements of law are broadly described as doctrine. In common law jurisdictions, some are to be found in the prior judicial decisions of higher courts, sometimes (and somewhat confusingly) described as jurisprudence. There is broad agreement that it is the authority of a particular instrument – its capacity to bind, to create obligations, to decisively mandate or prohibit – that defines whether something is ‘law’ as opposed to say, a mere rule, or policy, or custom (all of which might, in some instances, be law, but in others might not be). At the root of fundamental disagreement lies the question of how a particular instrument derives and maintains that authority. In the act of adjudication, by enforcing the law, a judge validates that law’s claim of authority.

In its theoretical form, law is a discipline that oscillates between determinacy and indeterminacy, between a sense that the content of rules by which a society chooses to govern itself must be clear, and an appreciation that claims to legality frequently clash and frequently fail in surprising ways. However, in applied law, the apotheosis of which is adjudication, law must be determined: a judge must identify, interpret, and enforce it, often in the face of wildly competing claims. Establishing the appropriate criteria for determining whether and how judges should validate a legal claim to authority is one of the main preoccupations of legal theorists.

Legal positivists contend that whether an instrument is law is to be assessed on the basis of how it came into existence. The most influential current theory of positivism is that first propounded by HLA Hart in a 1958 article in the *Harvard Law Review* called “Positivism and the Separation of Law and Morals”¹²² and further developed in his 1961 book *The Concept of Law*.¹²³ Hart’s theory of what constitutes law is based on two foundations: (i) that law comes into being according to specific primary and secondary rules (which he terms “rules of recognition”); and (ii) that while law and morals may intersect, there is no essential relationship between them (the “separation thesis”). Ascertaining whether something is law is thus an analytical exercise, in which moral

¹²² HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71(4) *Harv L Rev* 593.

¹²³ HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

judgment plays no role. An immoral or unjust law may still be law,¹²⁴ although such a law may attract a personal obligation of disobedience.

In practical terms, a judge confronted with an unjust law must choose between her moral obligation to disobey the law and her legal obligation to apply the law. Under Hart's theory, if the former obligation prevailed, the judge's conscience would dictate that she either resign as a judge, or at least, somehow, recuse herself from the case at hand. Indeed, as was discussed in chapter 2, the question of whether judges should resign in the face of unjust laws engendered lively debate in apartheid South Africa.

Other theorists are considerably more skeptical about there being no inherent limits on the content of law. In his work on positivism, Hart was explicitly responding (in part) to the claims of those who believed that there were moral limits of what could be constituted as law, a school of thought often termed "natural law". Hart's theory faces its most emotionally potent challenger in the views of Gustav Radbruch, who Hart saw as emblematic of those critiques of positivism originating from "those who have descended into Hell, and like Ulysses or Dante, brought back a message for human beings."¹²⁵

Radbruch himself resisted indeterminacy in law. A German legal philosopher, Radbruch, prior to World War II, had developed a philosophy of law (*rechtsphilosophie*) that identified the quality of certainty as the defining feature, and function, of law.¹²⁶ This was not the only quality that law possessed; his idea of the law had three elements: certainty, justice, and expediency. But in this earlier, more abstract phase of his work Radbruch ranked certainty first.¹²⁷ However, Radbruch's comfort with certainty became

¹²⁴ As Hart bluntly states the point: "Proof that the principles by which we evaluate or condemn laws are rationally discoverable, and are not mere "fiats of the will," leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws." Hart, *supra* note 122 at 626.

¹²⁵ *Ibid* at 615. Barend van Niekerk, writing at the heart of the apartheid era in South Africa, would call Radbruch "a warning voice": Barend van Niekerk, "A Warning Voice from Heidelberg: The Life and Thought of Gustav Radbruch", (1973) 90 S Afr LJ 234.

¹²⁶ Gustav Radbruch, "Legal Philosophy" (*Rechtsphilosophie*) (1932) as translated by Kurt Wilk and published in *The Legal Philosophies of Lask, Radbruch, and Dabin* (Cambridge, MA: Harvard University Press, 1950) at 108.

¹²⁷ "It is more important *that* the strife of legal views be ended than that it be determined *justly* and *expediently*." [Italics in original.] *Ibid*.

profoundly unsettled by his experience of the Third Reich. Having witnessed the Nazi corruption of law and legal processes to persecute, denaturalise, and murder millions of people and, it can be fairly said, heartbroken by the failure of the legal profession in any significant numbers to resist the brute force of Nazi law, Radbruch's post-war writings explicitly repudiate positivism in language that would later be echoed by critics of apartheid:

Positivism, with its principle that 'a law is a law', has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the 'must' of compulsion, it never serves as a basis for the 'ought' of obligation or for legal validity.¹²⁸

In positing an alternative theory, Radbruch reorders his list of the essential elements of law, so as to make certainty subordinate to a minimum threshold of justice and stating that statutes that fail to meet this threshold ought not to be recognised as law. This view has come to be known as Radbruch's Formula:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: *Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law.* For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this

¹²⁸ Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law (*Gesetzliches Unrecht und übergesetzliches Recht*) (1946)", as translated by Bonnie Litschewski Paulson and Stanley L Paulson and published in (2006) 26 *Oxford J of Legal Studies* (2006) 1-11 at 6.

standard, whole portions of National Socialist law never attained the dignity of valid law.¹²⁹

While Hart expressed sympathy for Radbruch's position, he condemned it as naïve at best, and, at worst, possibly illiberal.¹³⁰ Hart preferred a formulation that, rather than import a moral evaluation into the content of law, positioned the moral obligation to resist unjust law as a personal one. In other words, the determination that a law was unjust was one to be made in a personal rather than professional capacity, and was thus a question external to the law itself. By taking this view, Hart accepted that law could be fundamentally unjust, even boundlessly wicked.

As may be obvious, each of these approaches sets a considerably different agenda for the act of adjudication. Hartian positivism suggests that a judge faced with a deliberately unjust law is not faced with a legal question. In stark contrast, Radbruch's naturalism suggests that it is the very first question that a judge must address, as it goes to the very root of the validity of the law in question. Of these two conceptions of law, Radbruch's is surely the more humane, but Hart's is the more operationally straightforward. Since Hart's theory of legal validity is based on a relatively objective assessment of whether the conditions of recognition have been met, an apparent question of fact, it could be quickly dispensed with. It is therefore unsurprising that judges have, if not explicitly endorsed positivism, tended to operate on positivist assumptions.

For all of its moral clarity, Radbruch's formula relies on a seemingly fluid and subjective assessment of the "justice" of law. The only hint as to what justice means in circumscribing otherwise valid law, other than the Nazi legal system that inspired the Formula, is the determination of whether equality has been "deliberately betrayed". Absent a supreme law enshrining – and ideally defining – these overarching values, it would take considerable institutional confidence for judges to declare that the legislature, in passing a statute, failed to even "attempt at justice". This is not to say that

¹²⁹ *Ibid* at 7 (emphasis added). The idea that much of Nazi law was never valid law would underpin a number of German prosecutions in the post-war period, including the so-called "grudge informer" case cited by Hart.

¹³⁰ Hart, *supra* note 122, at 617-618.

Radbruch's Formula is a dead letter; there are many countries around the world with constitutional systems that explicitly permit judges to strike down overtly discriminatory statutes, including Germany itself.¹³¹ Such supreme bills of rights can be understood as written incarnations of the supra-statutory law for which Radbruch advocated.

What each of these views share is a sense that the source of the moral assessment of law lies outside the law itself. Ronald Dworkin, by contrast, proposed that the solution to the dilemma of unjust law could lie within the law.¹³² Dworkin's theory of law is highly pertinent to the subject matter of this thesis because it is based on an account of what judges actually do when interpreting and applying law in particular cases. Dworkin posits that law is more than a set of rules, but includes "principles, policies, and other standards".¹³³ In studying US case law, Dworkin noticed that judges frequently relied on principles, such as "no one shall be permitted to profit by his own fraud"¹³⁴ and "the courts will not permit themselves to be used as instruments of inequity and injustice"¹³⁵

¹³¹ The *Grundgesetz* (German Basic Law) guarantees, *inter alia*, equality and freedom from discrimination (Article 3), is binding on all organs of government (Article 1), and is enforceable in the courts for redress (Article 19.4) and judicial review (Article 100). *Grundgesetz für die Bundesrepublik Deutschland*, 23 May 1949. An official English translation, published by the Bundestag, is available online: <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

¹³² Dworkin's first contribution to the so-called "Hart-Dworkin debate" was published as Ronald Dworkin, "The Model of Rules", (1967) 35(14) U Chi L Rev 14-46 [The Model of Rules]. This theory would be developed in Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) [*Taking Rights Seriously*] and Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986). Dworkin's approach has been adopted by other legal theorists addressing unjust laws, including David Dyzenhaus' repudiation of the apartheid-era judiciary's plain fact approach to statutory interpretation in favour of the common law approach in, among other volumes, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2d ed (Oxford: Oxford University Press, 2010) and Douglas Edlin's theory of a common law duty to develop the law in Douglas E Edlin, *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (Ann Arbor: University of Michigan Press, 2008).

¹³³ Dworkin, The Model of Rules at 22. He defines a principle as a "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable [this type of standard is what Dworkin describes as a policy], but because it is a requirement of justice or fairness or some other dimension of morality"(at 23). In *Taking Rights Seriously* at 84, Dworkin refines his theory to prefer decisions generated by principle rather than policy.

¹³⁴ Dworkin, The Model of Rules at 23-24, citing *Riggs v Palmer*, (1889) 115 NY 506, and 26-27.

¹³⁵ Dworkin, The Model of Rules at 24, citing *Henningsen v Bloomfield Motors, Inc*, (1960) 32 NJ 358, itself citing Frankfurter J in *United States v Bethlehem Steel*, (1942) 315 US 289 at 326.

in interpreting and in effect circumscribing positive law.¹³⁶ Given that the legal force exercised by these principles could not be explained by Hartian rules of recognition,¹³⁷ Dworkin's interpretivism, as it has come to be known, exposes important gaps in positivism's account of law.

Indeed interpretivism is at odds with both positivist and naturalist theories of law. Where positivism constrains the content of law, Dworkin expands it. Where natural law positions the locus of assessing the content of law outside the law itself, in morality, Dworkin recaptures it within law itself. Of the two disagreements, the gap between naturalism, in which the law is tempered by moral principles and the interpretivist recognition of legal principles that themselves may be informed by moral considerations is undoubtedly narrower than either's clash with positivism. However, the gap that remains is structurally significant, particular in describing what judges incorporate into the act of adjudication. According to Dworkin, when judges rely on principles to impose basic requirements of fairness, they are applying the law as surely as the competing laws that they might be avoiding in the process. By recognising a more extensive set of legal tools, Dworkin urges a practice of judicial interpretation in which the result is dictated by the reading that can be best justified on the basis of legal principles, particularly the interrelated principles of consistency and fairness.¹³⁸ As Dworkin puts it:

An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in hypotheticalal circumstances.¹³⁹

¹³⁶ The most ubiquitous example perhaps being courts reading in conditions of reasonableness: Dworkin, *The Model of Rules* at 28.

¹³⁷ *Ibid* at 41, described the origins of principles as follows: "The origin of ... legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained."

¹³⁸ Dworkin, *Taking Rights Seriously*, chapter 4 generally, but particularly the description of decision-making at 104ff, which Dworkin ascribes to a wise judge he names "Hercules".

¹³⁹ *Ibid* at 88.

The doctrine of political responsibility acts as a constraint on judges, as it does with all political officials, and requires them to “make only such political decisions as they can justify within a political theory that also justifies the other decisions that they propose to make.”¹⁴⁰ Put plainly, this is what it means to act on principle, and to act with integrity, with the political theory representing the “wholeness” that integrity requires. Such a decision will necessarily involve judgments of political morality, but it is a mistake to imply that such judgments are impositions of the judge’s personal morality.¹⁴¹ Rather, they are reflections of the judge’s best account of community morality, as reflected in the laws and institutions of that community, and even where that might be at odds with popular opinion.¹⁴²

Of course, in practice, judges are not expected to engage in highly theoretical and as yet unresolved debates about the content of law in the course of their daily work. However, what a judge includes in their interpretive arsenal will have a profound impact on what they consider to be the ‘law’ to which they owe allegiance, and to how they interpret their duty to do justice according to law. While coming at the question from different angles, Dworkin and Radbruch agreed that justice was an essential component of law,¹⁴³ and even Hart expressed the hope that, in what he considered the rare case in which judges were called upon to exercise discretion, they would do so rationally and “by reference to social aims”.¹⁴⁴

One final point bears mentioning, and it is not a marginal one. The engagement of judges with the law during the process of adjudication is not limited to their interpretation of the substantive law, however that comes to be defined, but also

¹⁴⁰ *Ibid* at 87.

¹⁴¹ *Ibid* at 123ff.

¹⁴² *Ibid* at 126.

¹⁴³ In 1970, during the turmoil of the Nixon Administration, Dworkin explicitly confronted the idea that justice and legality are separate values, saying that “legality makes no sense, even as an independent goal, unless the principles [of justice] ... are among its features.” Ronald M Dworkin, “What is the Rule of Law?”, (1970) 30(2) *Antioch Rev* 151 at 151.

¹⁴⁴ Hart, *supra* note 122 at 614. His critics were dubious that such “penumbral” cases were rare, most pointedly Lon L Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart”, (1958) 71(4) *Harv L Rev* 630 at 661-669.

includes the rules of civil and criminal procedure, as well as the requirements of due process, whether expressed through local codes or the minimal guarantees of international human rights law. Just as impartiality requires that “justice is seen to be done”, so too does legality. Judges not only commit to a legal result, but also to reaching that result in a legal way.

5.7 Transnational Judicial Identity and Judicial Solidarity

This chapter has endeavoured to establish that there is a common core of judicial ethics – independence, impartiality, efficacy, virtue, and fidelity to law – constitutive of a transnational judicial identity. It has done so by reading across a series of codes, many of which were drafted by international judicial networks, that aspire to articulate both the institutional conditions and standards of conduct necessary for effective adjudication. The development of these international codes reflects a sense in which there is a global community of judges, operating at least somewhat in tandem to preserve and entrench the rule of law.¹⁴⁵ As such, the reputation of the judiciary is no longer a purely local affair, and the conduct of judges everywhere should reflect and reinforce the dignity of the judicial institution.¹⁴⁶

With transnational judicial responsibility comes the promise of transnational judicial solidarity, a solidarity that can and has empowered judges to fight back against threats to their personal and institutional independence.¹⁴⁷ Just as the work of the judiciary

¹⁴⁵ In the Preface to the *Commentary on the Bangalore Principles of Judicial Conduct* at 5, the Judicial Integrity Group refers to the “global judiciary” as the “one great bastion of the rule of law throughout the world”.

¹⁴⁶ In their 2015 study, Garoupa and Ginsburg suggest that this is the result not only of globalisation generally, but arises from the increased scrutiny of, and competition for, public systems of dispute resolution at all levels: *supra* note 39 at 167.

¹⁴⁷ As Slaughter observes in *A New World Order*, *supra* note 5 at 99: “[Judicial visits and exchanges] socialize their members as participants in a common global judicial enterprise. That awareness is important for convincing judges to try to uphold global norms of judicial independence and integrity in countries and at times when those are under assault.” She goes on to tell the story of how the Chief Justice of Zimbabwe, under attack by then-President Robert Mugabe, was reminded that he was “not alone” by letters of support received from fellow judges around the world. (While the Chief Justice in question was not identified, this is likely a reference to Chief Justice Anthony Gubbay, who was forced out of office by the Mugabe regime in 2001: “Zimbabwe resolves judge row”, *BBC News*, 2 March 2001, online: <http://news.bbc.co.uk/2/hi/africa/1198897.stm>).

provides a refuge for those whose rights would be trampled by the powerful, a commitment to these professional values, and the judicial solidarity that they represent, can provide some shelter for the work of the judiciary.¹⁴⁸ The language of these codes can add normative weight to the protestations of, for example, a recently-dismissed judge, protestations that might otherwise be seen as self-serving. Beyond the enculturation of their fellow judges, these codes enhance judicial transparency, by publicly communicating both why judges act as they do and the standards to which judges agree to be held. As such, adherence to these principles can provide a personal and institutional foundation for judicial resistance to judicial persecution. Indeed, the next chapter will consider another way in which judges have expressed their commitment to institutional integrity, through the articulation of a range of judge-made principles and doctrines barring abusive and vexatious proceedings, and imposing substantive limits on the exercise of rights and powers.

¹⁴⁸ For example, the European Network of Councils for the Judiciary (ENCJ) has proposed a collective response in situations where an ECJN Member signals that the rule of law is under threat in their jurisdiction, especially in relation to the independence of the judiciary. The ENCJ “will give its opinion on the compliance of any planned reform or with general European or specific ENCJ Standards in this field. The ENCJ will also seek cooperation with the European Institutions in such a case.” *ENCJ Strategic Plan 2018-2021*, online: https://www.encj.eu/images/stories/pdf/GA/Paris/encj_4_year_plan_2018_2021_adopted_ga_2017.pdf.

Chapter 6

A Doctrine of Judicial Resistance

The next chapter will suggest that judges have a responsibility to understand and reckon with the institutional part that they play in judicial persecution. However, if a case is to be made for the existence of such a responsibility, it must not only be consistent with judicial role morality, it must be grounded in some practical capacity for action. The last chapter endeavoured to establish the boundaries of the judicial role; this chapter will provide the doctrinal tools that judges might apply to the challenge. It does so by gathering together doctrines and principles that have expressed the limits of judicial patience for abusive proceedings.

In each of the case studies provided in chapters 2, 3, and 4, presiding judges have been placed in a position of complicity with judicial persecution. In each case, legal and judicial processes have been used, with varying degrees of intentionality and effect, to target and persecute political opponents, and when those efforts have entered the courtroom, they have created a conflict between judges' fundamental duty to do justice and the routine application of the law. Each context generates, at least from the external point of view, an expectation that judges recognise and balance the unjust effects of judicial 'business as usual'.

The dilemmas varied in each case. In apartheid South Africa, the ordinary law was actually rather extraordinary: judges operated in a legal system in which much of the criminal and administrative law to which they nominally owed their fidelity was directed to the establishment and maintenance of a system of racial discrimination, dispossession, and disenfranchisement. The apartheid regime supplemented this body of law with constitutional elements designed to create a judicial culture of deference, promulgating the doctrine of legislative supremacy and explicitly including prohibitions on judicial review in some statutes. Unless a judge was, like Goldstone, one of the handful of liberal judges who routinely "read down" statutes in an effort to protect individual rights, they were inevitably acting as an instrument in the execution of apartheid's legal agenda.

The same cannot be said of the tort law that underpins most of the SLAPPs jurisprudence, and the criminal and fiscal laws that underpin much of the Article 18 case law. These are, for the most part, laws of general application,¹ often with strong salutary purposes. In these cases, judges were relied upon to ignore the broader power dynamics and political motivations involved, leading to accusations of wilful blindness. But given the evidentiary difficulty of establishing motive as discussed in chapters 3 and 4, it is difficult to ascertain under what theory of law judges are supposed to have acted otherwise, from an internal point of view.

Indeed, for all of its condemnation, the Report of the South African Truth and Reconciliation Commission laid out neither specific consequences for the judges that had been so harshly criticised² nor any explicit prescription about how judges might have behaved differently, or should act in the future. Lawyers and legal scholars know that, while judges might wish to be attentive to the external point of view, their reasons for acting, if they are to be judicial as opposed to nakedly revolutionary, must be sound in law. Thus, at the height of apartheid, John Dugard urged the use of international law and a human rights-based approach.³ Later, David Dyzenhaus argued that courts should have relied on the common law tradition's presumptions of liberty and equality in interpreting apartheid law in order to blunt its harshest effects.⁴ In both respects,

¹ There are, of course, exceptions, such as the suspiciously political crimes under which some of the Article 18 applicants were tried, such as Tymoshenko and Lutsenko in Ukraine, or Navalnyy in Russia.

² Indeed, the vast majority of the judges sitting on the Bench at the end of apartheid would remain on the Bench following the transition to multiracial democracy.

³ These critiques varied from general condemnations to more specific studies. John Dugard took aim at the entire apartheid legal regime in "Using the Law to Pervert Justice", (1983) 11(2) Hum Rts 22 and *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1988), whereas in "Hanged by the Neck Until You are Dead", Barend van Niekerk criticised the judiciary for the discriminatory imposition of the death penalty: (1969) 86 S Afr LJ 457 at 463. The publication of this article would lead van Niekerk to be charged (and acquitted) for contempt: 1970 (3) SA 655, but he would be convicted of a second contempt charge two years later, after a speech in which he criticised judges (among others) of failing to condemn the *Terrorism Act 1967*: 1972 (3) SA 711. (John Dugard wrote about van Niekerk's run-ins with the law in "Judges, Academics, and Unjust Law: the Van Niekerk Contempt Case", (1972) 89 S Afr LJ 271.

⁴ David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford: Oxford University Press, 1991) [*Hard Cases* (1991)]. David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) [*Judging the Judges*]. David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010) [*Hard Cases* (2010)].

Dugard and Dyzenhaus took seriously the role of judges to act within the constraints of their judicial role. As lawyers, they knew that broad demands that judges act ‘more justly’ would, perhaps even should, fall on deaf ears, and thus both advocated options that they asserted existed within the law itself.

Similarly, effective opposition to SLAPPs relied on appeals to competing legal obligations, whether the right to petition or freedom of expression. A number of jurisdictions, in passing anti-SLAPP measures, have enshrined and prioritised a right to unfettered political participation, although that does not in itself say much about what judges’ role specifically should be in offsetting the consequences of SLAPPS. The Article 18 jurisprudence is endeavouring to include an overarching requirement in human rights law that courts attend to democratic conditions, thereby making inquiries into prosecutorial motive relevant and decisive.

This chapter endeavours to supplement this more specific jurisprudence by seeking out those legal mechanisms that courts have used to avoid becoming embroiled in abusive proceedings. There were hints of this body of law in the jurisprudence canvassed in chapter 3, in which a handful of courts, without a specific anti-SLAPP statute to apply, nonetheless responded to SLAPPs in the language of procedural law: early termination, shifting burdens of proof, and condemnations of litigant behaviour in the form of cost awards and punitive damages. Framed as expressions of judicial resistance, this chapter will consider what the range and rationale of approaches used by courts to prevent or halt the misuse of court processes can tell us about the scope of the judicial function, and assess their potential as tools for judges to resist authenticating judicial persecution.⁵

⁵ In addressing the details of procedural law, there is an unavoidable emphasis on those doctrines that have been most fully developed by domestic courts. Although a range of jurisdictions will be canvassed, it has been necessary to develop some national focus, in this case on Canada. However, there is an upside to relying on Canadian court practice, which is influenced by Canada’s plural legal traditions, and particularly common law and civil law approaches.

6.1 *Inherent Jurisdiction and Abuse of Process*

The necessary first step in judicial persecution is the invocation of the court's jurisdiction; the case through which a target is to be persecuted must be before the court. This tends to be fairly straightforward, at least in common law systems, where the relevant court's jurisdiction is invoked passively; the court does not choose or approve its docket but rather adjudicates the claims that come before it. However, and perhaps as a counterweight to this passive extension of jurisdiction, common law courts are believed to possess, in addition to whatever powers are assigned to them by statute or otherwise, an inherent jurisdiction to do that which is necessary to effectively administer justice. Notably, this includes the power not to allow a case placed before a court the benefit of a full hearing under certain conditions.

The quintessential and most popular articulation of inherent jurisdiction was written by Master IH Jacob of the UK High Court in 1970, stating that “the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed or abused.”⁶ He goes on to say that “without such a power, the court would have form but lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law.”⁷ In Master Jacob's view, the inherent jurisdiction of the court had five components: (i) it is part of procedural law; (ii) it is exercisable by summary process; (iii) it can be invoked not only in relation to the litigants but anyone (for example to prevent obstruction of justice), and in respect of matters not raised between the parties; (iv) it is to be distinguished from the exercise of judicial discretion; and (v) powers of the court's inherent jurisdiction are additional to any powers provided under the Rules of Court.⁸ In other words, superior courts possess considerable power to

⁶ IH Jacob, “The Inherent Jurisdiction of the Court”, (1970) 23 Curr Leg Probs 23 at 27.

⁷ *Ibid.*

⁸ *Ibid* at 24-25. Indeed, it has often been said that it is the inherent jurisdiction of the court that empower it to make rules, like Rules of Court, to govern its own process: Keith Mason, “The Inherent Jurisdiction of the Court”, (1983) 57 Austral LJ 449 at 449. Moreover, inherent jurisdiction may be invoked to condemn behaviour that “may be in literal compliance with some statute or rule of court.” Mason, *ibid.*

protect their dockets where they suspect that court processes may be misused, and this power is a fundamental dimension of such courts' institutional identity.

Diplock LJ opens his judgment in *Hunter v Chief Constable of the West Midlands Police* with the following description of inherent jurisdiction:

This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.⁹

It is possible to think of inherent jurisdiction in a weak sense, as a reserve of power that may be called upon if the court believes that it is equitable to do so in a particular case. But Lord Diplock, in disavowing discretion, implies that the doctrine is better understood in a stronger sense, imposing a duty on a court to prevent misuse of judicial procedure in cases where it would be “manifestly unfair” to one of the parties, or “would otherwise bring the administration of justice into disrepute”. If, as it seems, inherent jurisdiction is intended to protect both the parties and the judicial institution itself, then a judge's failure to act positively in a situation that warrants the invocation of the doctrine may well betray both the interests of justice and of the court. Abuse of process is one of two main instances in which the inherent jurisdiction is customarily invoked, with the other being the power to punish for contempt of court; in other words, to ensure that the authority of the court is not ignored. To allow a contempt of court to go unchecked would not only diminish the court's authority, but weaken the rule of law.¹⁰

⁹ [1981] UKHL 13.

¹⁰ In *MacMillan Bloedel v Simpson*, [1995] 4 SCR 725 (SCC) at para 38, Lamer CJ refers to “those powers which are essential to the administration of justice and the maintenance of the rule of law.”

Absent inherent jurisdiction, “the court would be obliged to sit still and see its own process abused for the purpose of injustice.”¹¹

For obvious reasons, the power to stay, dismiss, or give judgment in an action or make other appropriate orders in cases of abuse of process is the doctrine most pertinent to this thesis.¹² For example, when the British Columbia government repealed that province’s anti-SLAPP legislation in 2001, it expressed the view that courts had all the powers that they needed to dismiss SLAPPs without specific legislation, it was likely to have been referring to powers derived from, *inter alia*, inherent jurisdiction.¹³ While inherent jurisdiction is procedural in nature, it also promotes a positive vision of the proper administrative of justice, one that is fair, effective, and efficient. In Master Jacob’s words: “[i]t connotes that the process of the court must be used properly, honestly, and in good faith...”.¹⁴ While Master Jacob would agree with Lord Diplock that an exhaustive list is impossible, he suggests that abusive proceedings often fall into one or more of the following categories:

- (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;

¹¹ *Cocker v Tempest*, (1841) 7 M&W 502 at 503, per Alderson J. A South African commentator, writing during apartheid, suggests that inherent jurisdiction is “[a]n almost primordial power with which [Supreme Courts are] endowed to give effect to the demands of justice...”: Marimous Wieslers, “Foreword” in Jerold Taitz, *The Inherent Jurisdiction of the Supreme Court* (Cape Town: Juta & Co Ltd, 1985).

¹² This is one of the two main “powers” described by Jacob, *supra* note 6 at 28. There is some discussion in the literature of the possible distinction between the inherent jurisdiction of the court and its inherent powers: see, for example, Marcelo Rodriguez Ferrere, “The Inherent Jurisdiction and its Limits” (2013) 13(1) Otago L Rev 107 at 111-112, but the view that the inherent jurisdiction is the source of particular powers, and so is manifested in the exercise of those powers is more persuasive: see for example, Liang, *infra* note 37 at 378.

¹³ In fact, in the two British Columbia cases in which the court identified the proceedings as SLAPPs, they relied on the provision of the British Columbia Rules of Civil Procedure permitting claims to be struck out for disclosing no reasonable course of action: *Fraser v Saanich*, [1999] BCJ 3100 and *Scory v Krannitz*, 2011 BCSC 936. However, both cases make reference to the leading case interpreting the rule, *Hunt v Carey*, [1990] 2 SCR 959, in which the Supreme Court of Canada had noted that such rules were, in effect, codifications of inherent jurisdiction (at 968) and derived from the inherent power of the court to “ensure both that there remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for ‘vexatious’ actions without legal merit designed solely to harass another party” (at 970). Moreover, the awards of special costs with respect to its finding that the plaintiffs’ conduct was “reprehensible and deserving of censure” is implicitly based on the courts’ inherent jurisdiction (*Fraser* at para 52). See discussion of these cases, *supra*, chapter 3 at 91-92.

¹⁴ Jacob, *supra* note 6 at 40.

- (b) proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way;
- (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
- (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.¹⁵

Given what is exemplified by this list, it would appear that the doctrine of inherent jurisdiction denies courts the luxury of being passive observers of fundamentally baseless or abusive proceedings and, in so doing, lending such proceedings the imprimatur of judicial legitimacy. Indeed, a court, acting under its inherent jurisdiction, may well be empowered to act *proprio motu* to strike out claims that constitute an abuse of process, which is to say even if a motion to that effect is not made by one of the parties. Particularly in the context of an ever-increasing number of self-represented parties appearing in civil courts across the common law world, this is an approach that courts might need to consider more often.¹⁶ Indeed, in its leading case on inherent jurisdiction, the Supreme Court of Canada noted that “[o]ne of the earliest manifestations of the superior court’s inherent jurisdiction was the appointment of counsel to represent impecunious litigants *in forma pauperis*.”¹⁷ This implies that while the European Court of Human Rights found fault with the UK policy that denied legal

¹⁵ *Ibid* at 43.

¹⁶ See, for example, the Canadian Bar Association’s 2013 report, *Equal Justice: Balancing the Scales* (online: https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf) at 44-48, which canvasses research on the explosion in self-represented litigants (SRLs), particularly in civil and family court, both in Canada and the United States, noting that up to 80% of litigants are not represented in some matters. There is relatively little official data from the UK, but a briefing paper prepared by the House of Commons Library noted that, in the first quarter of 2013, 80% of family law litigants were litigants-in-person (LIPs), following sweeping financial cuts to the Legal Aid system in 2012: Gabrielle Garton Grimwood, “Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales” (2016), online: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SNO7113>.

¹⁷ *R v Caron*, 2011 SCC 5 at para 25. In *Caron*, the Court affirmed an interim cost award, grounded in an exercise of inherent jurisdiction, for a litigant who had run out of funds and would have had to abandon his case very late in proceedings. In an earlier case in which the Supreme Court of Canada affirmed an interim cost award for a public interest litigant, the Court affirmed that inherent jurisdiction could be grounded in the “desirability of mitigating severe inequality between litigants, albeit in a “narrow class of exceptional cases”: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 31.

aid to the defendants in the *McLibel* case, there may well have been a discrete and specific failure of the trial judge not to exercise his inherent jurisdiction to ensure that Morris and Steel had some minimal degree of legal representation.

This is not to imply that the power to exercise inherent jurisdiction is unlimited. Courts have been quick to suggest that the doctrine should be confined to clear cases, and have urged that it be used sparingly and cautiously.¹⁸ One commentator, after reviewing how the doctrine has been deployed in several common law settings, concluded that while an exhaustive definition of the doctrine remains elusive, inherent jurisdiction is defined by the following principles:

- (a) [it] is exercised where necessary;
- (b) [it] has the aim of avoiding injustice; and
- (c) [it] exists in the absence of explicit statutory regulation, but is not easily wrested away from the courts by legislative action.”¹⁹

On this last point, there is considerable debate about the extent to which a clear statutory proscription could displace the doctrine,²⁰ although one might anticipate some deference to legislative preferences. Moreover, given its asserted role in upholding the authority of the court, and thus the rule of law, the invocation of inherent jurisdiction must clearly meet some test of legality, in the sense of being predictable²¹ and informed by legal principles.²² Nonetheless, it is clear that inherent jurisdiction remains a judicially useful doctrine, which has been deployed remedially in a variety of situations when it was considered to be just and equitable to do so, sometimes with great trepidation, sometimes with considerably less.

¹⁸ *Ziebenhause v Bahlieda*, 2015 ONCA 471 at para 13; *R v Caron*, *ibid*, at para 30. At least one observer has referred to its use being confined to cases of “necessity”: MS Dockray, “The Inherent Jurisdiction to Regulate Civil Proceedings” (1997) 113 Law Quarterly Rev 120 at 130.

¹⁹ Ferrere, *supra* note 12 at 142.

²⁰ Dockray, *supra* note 18 at 128.

²¹ *Ibid* at 128-130, refuting some of the broadest interpretations of the doctrine.

²² Mitchell & Heaton, *infra* note 38 at 572-577, for example, propose three principles for the appropriate invocation of inherent jurisdiction by WTO tribunals.

6.1.1 *Inherent Jurisdiction Beyond Common Law Superior Courts*

While the fullest scope of inherent jurisdiction exists in common law superior courts, there seems to be some authority for the proposition that all courts have at least some inherent powers to control their own processes, whether through rules of procedure or the enforcement of their orders.²³ The judgment of Lord Morris of Borth-y-Gest in *Connelly v DPP* is often cited as authority for this more general understanding of inherent jurisdiction:

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process ...²⁴

At least one member of the Supreme Court of Canada seems to have left the door open to such an interpretation in that court's leading case on inherent jurisdiction. In *R v Caron*,²⁵ the Court affirmed an order by a superior court ordering interim costs in provincial (statutory) court proceedings, attributing to the superior court's inherent jurisdiction both the power to order interim costs and to assist the provincial court by providing that ruling. However, in her separate concurring reasons, Justice Abella makes clear that, rather than affirming the inherent jurisdiction of the superior court to "assist" the provincial court, she would have preferred to address the question of whether such costs could have been ordered by the provincial court itself, so that the inherent jurisdiction of the superior court need not include routinely interfering in matters properly before another court.²⁶ On this reading, the scope of any court's

²³ *Ibid* at 125-127. See also Mason, *supra* note 8 at 456, citing Australian authority for the proposition, and Chester Brown, *infra* note 34 at 207.

²⁴ *Connelly v DPP*, [1964] AC 1280 at 1301.

²⁵ *R v Caron*, *supra* note 17, per Abella J concurring. It should be noted that the majority did not adopt this view.

²⁶ *Ibid* at para 54: "When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction with the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an

inherent jurisdiction would be understood to be coextensive with, and limited to, the scope of that particular court's substantive jurisdiction.

This raises another more literal sense of the term “inherent jurisdiction”, one in which superior courts, sometimes referred to as courts of general jurisdiction, possess a plenary residual jurisdiction to adjudicate on matters not otherwise susceptible to judicial intervention.²⁷ It is under this jurisdiction, for example, that a superior court has the power to review executive or administrative action not explicitly assigned to another court, and so to ensure that there is no right without a remedy.²⁸ As such, inherent jurisdiction also acts to fill judicial gaps. This is the sense in which it has been said to apply, for example, in the European Court of Justice (ECJ),²⁹ in contrast to the generally applicable *compétence d'attribution* (jurisdiction as conferred exclusively by the relevant treaties and protocols).³⁰ The ECJ has used the Court's overriding duty to ensure that “the law is observed”, as was required by Article 164 of the European Economic Community (EEC) Treaty,³¹ to avoid a *déni de justice* in cases that might not otherwise explicitly fall within its jurisdiction.³² At least one commentator has made the link between the civil law concept of *déni de justice* and the common law doctrine of

injustice and accomplish its statutory objectives.” However, the question of whether the provincial court could have made the order itself was not before the Court.

²⁷ Jeffrey Berryman, *The Law of Equitable Remedies*, 2d ed (Toronto: Irwin Law, 2013) at 26. As the Supreme Court of Canada held in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 32: “The notion of ‘inherent jurisdiction’ arises from the presumption that if there is a justiciable right, then there must be a court competent to vindicate the right.”

²⁸ Kate Olley, “The Inherent Jurisdiction in Judicial Review” (2000) 5(2) *Jud Rev* 80.

²⁹ This court is now one of three courts that together constitute the Court of Justice of the European Union (CJEU). However, it was the ECJ that rendered the decisions in question, and so will be referred to as such.

³⁰ Anthony Arnall, “Does the Court of Justice have Inherent Jurisdiction?”, (1990) 27(4) *Comm Mkt L Rev* 683, generally, but especially 700-707.

³¹ The current treaty in force is the *Treaty for the Functioning of the European Union: Treaty on the Functioning of the European Union* (Consolidated Version), European Union, Official Journal Doc C 202/3 (7 June 2016), online: <https://eur-lex.europa.eu/> [TFEU].

³² Arnall, *supra* note 30 at 684. Arnall refers to a number of cases in support of this proposition, emphasising particularly *Les Verts v European Parliament*, Case No 294/83, [1986] ECR 1339, in which the Court affirmed its jurisdiction to review measures adopted by the European Parliament. The civil law concept of a *déni de justice* arises from the requirement that where there is a right, there must be a remedy. Under the TFEU, the CJEU has explicit rights of review pursuant to Articles 263, 264, 267, and 269.

inherent jurisdiction, although he urged the utility of inherent jurisdiction in the broader sense as well.³³

6.1.2 *Transsystemic and International Inherent Jurisdiction*

While the doctrine of inherent jurisdiction is traditionally understood to be a common law doctrine, this may be more of a question of nomenclature than substance. If one understands the heart of the doctrine to be the exercise by courts of powers not expressly contemplated by legislation or rules – that is to say if one discards the common law baggage of the term ‘inherent jurisdiction’ in favour of an idea of ‘inherent powers’ – there do appear to be analogues in civil law.³⁴ For example, much of what is covered by the doctrine of inherent jurisdiction is contemplated by article 49 of the Québec Code of Civil Procedure.³⁵ Moreover, there seems to be ample evidence that the doctrine informs the practice of a number of international courts and tribunals, including the International Court of Justice (ICJ),³⁶ international criminal tribunals,³⁷ and the panels and tribunals of the WTO.³⁸ While the particular range of inherent powers varies by body, they all operate to fill procedural *lacunae*, prevent misconduct and control abuse of the court’s process. The fact that international courts and tribunals,

³³ *Ibid* at 706-707.

³⁴ Chester Brown provides persuasive examples of this in “The Inherent Powers of International Courts and Tribunals”, (2006) 76(1) *Brit YB of Int’l L* 195 at 206.

³⁵ Article 49 of the Québec Code of Civil Procedure reads: “The courts and judges, both in first instance and in appeal, have all the powers necessary to exercise their jurisdiction. They may, at any time and in all matters, even on their own initiative, grant injunctions or issue protection orders or orders to safeguard the parties’ rights for the period and subject to the conditions they determine. As well, they may make such orders as are appropriate to deal with situations for which no solution is provided by law.” While the Superior Court of Quebec is a court of inherent jurisdiction under the Canadian Constitution, and as such could likely not have been deprived of its powers by the provincial legislation, this article also empowers the Cour du Québec, which is a statutory court. For a brief history of inherent powers in Québec, see Yves-Marie Morissette, “Abus de droit, quérulence et parties non-représentées”, (2003) 49 *McGill LJ* 23 at 49-51.

³⁶ *Ibid* at 211-212.

³⁷ Jessica Liang, “The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals”, (2012) 15(3) *New Crim L Rev* 375.

³⁸ Andrew D Mitchell & David Heaton, “The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function”, (2009) 31 *Mich J Int’l L* 559, particularly at 566-568. The authors, in fact, express concern that that Tribunals have been too “shy” about explicitly acknowledging their inherent jurisdictions, sometimes distorting interpretation of the so-called “Covered Agreements” to try to justify a particular procedural ruling, or neglecting to explain the legal basis altogether, at 568.

whose powers are generally considered to be strictly constrained by the terms of state consent embodied in their constituting treaties, invoke the doctrine is particularly telling, indicating that such bodies have a judicial quality that transcends a strict construction of its powers. Judge Rosalyn Higgins, for example, has described inherent jurisdiction at the ICJ as the powers necessary to “regulate matters connected with the administration of justice” and to “protect the integrity of the judicial process”, including the power to consider preliminary objections to the Court’s exercise of jurisdiction.³⁹ On a similar theory, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that it had the power to punish contempt despite there being no provision for this in the Court’s statute.⁴⁰ In one such case, the ICTY held that:

13. There is no mention in the Tribunal's Statute of its power to deal with contempt. The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded. As an international criminal court, the Tribunal must therefore possess the inherent power to deal with conduct which interferes with its administration of justice. ...⁴¹

The ICTY was acutely aware that, in its reference to both inherent jurisdiction and the power to punish contempt, it was relying on common law concepts, but it linked the necessity for contempt powers with the rule of law,⁴² and found that “[a] power in the Tribunal to punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity” to ensure that its jurisdiction is not frustrated

³⁹ *Legality of the Use of Force (Serbia & Montenegro v Belgium)*, 2004 ICJ 279 at 338-339 (Separate Opinion).

⁴⁰ *Prosecutor v Tadic, Case No IT-94-1-A-R77, Judgment of Allegations of Contempt Against Former Counsel Milan Vujin* (31 January 2000) “Vujin” at paras 13-18. This is not to say that there was no textual support for the charge; the allegation was a violation of Rule 77 of the Tribunal’s Rules of Procedure, the drafting of which was entrusted to the judges of the Tribunal pursuant to Article 15 of the Statute of ICTY. See also *Prosecutor v Hartmann, Case No IT-02-54-R77.5, Judgment on Allegations of Contempt* (14 September 2009) at para 18. The *Hartmann* case is particularly notable because it was a judgment in contempt against an author who was not otherwise linked to any proceedings before the ICTY, demonstrating a particular expansive understanding of the contempt power, and the inherent jurisdiction that underpins it.

⁴¹ *Vujin*, *ibid* at para 13 (footnote omitted).

⁴² *Ibid* at para 16.

and basic judicial functions safeguarded.⁴³ These powers were codified, and to a certain extent circumscribed, by the later Statute of the International Criminal Court.⁴⁴

6.1.3 *Jurisdiction and Justiciability*

One of the inherent powers of an international court is *la compétence de la compétence* (*kompetenz-kompetenz* in the original German), the power of an adjudicative body to decide, at least at first instance, whether it properly has jurisdiction over the particular case, issue, or question before it.⁴⁵ A court may not have jurisdiction for any number of reasons, such as the subject-matter of the case, or previous agreement of the parties, or the doctrine of *forum non conveniens*, and thus courts must always ensure that they have jurisdiction before proceeding. In the *Northern Cameroons* case, for example, in which the underlying issue had become moot, the International Court of Justice (ICJ) framed the question of whether to extend jurisdiction over a case as an unavoidable threshold question, particularly where the court feels that the question is not justiciable:

If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate the merits of the Application would be inconsistent with its judicial function, it should refuse to do so.⁴⁶

Fundamentally, a justiciable matter is one that is amenable to full and final resolution by judicial process. To say that a matter is not justiciable is to deny the existence of one or more of three related conditions for justiciability. First is that, at heart, the case raises

⁴³ *Ibid* at para 18.

⁴⁴ Liang, *supra* note 37 at 390-391.

⁴⁵ “Compétence de la Compétence”, in John P Grant and J Craig Barker, eds, *Encyclopaedic Dictionary of International Law* (3d ed) (Oxford University Press, 2009), online: <http://www.oxfordreference.com/view/10.1093/acref/9780195389777.001.0001/acref-9780195389777-e-428>.

⁴⁶ *Northern Cameroons (Cameroon v UK)*, 1963 ICJ 15, at 37. See also *Nuclear Tests (Australia v France)*, 1974 ICJ 253, at 259-260. In *Northern Cameroons*, the ICJ held that, since political events (the territory in question had voted to join Nigeria the year before) had overtaken any legal issue arising between the parties, Cameroon and the United Kingdom, it would be inappropriate for it to judge the case in full (at 38):

The Court must discharge the duty to which it has already called attention--the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.

a legal question, not merely a political or moral one.⁴⁷ Secondly, the case is as yet unresolved, which is to say that there is a current and ongoing disagreement between the parties.⁴⁸ And thirdly, to say that a case is justiciable is to imply that it is amenable to resolution via legal method, and so squarely within the relative expertise of the court. It is particularly in this third way that justiciability can be understood as a threshold issue of jurisdiction; fundamentally, a court must decide whether a case falls within its institutional (and usually constitutional) competence. As such, in *Buttes Gas & Oil Co v Hammer (No 3)*, Lord Wilberforce denied that justiciability was a discretionary issue, describing it instead as “inherent in the very nature of the judicial process”.⁴⁹

Of course, a court’s decision to demur on the basis of the “political question” doctrine or its analogues can itself be seen as a profoundly political decision, and there have been many judicial cautions against judges hiding from difficult cases under the guise of non-justiciability.⁵⁰ In truth, there are almost always legal dimensions to political questions, just as there are political dimensions to legal issues, and where the line is drawn will almost always appear to be an exercise of, if not discretion, then judgment. As such, in

⁴⁷ Indeed, in the United States, one of the grounds of holding that a matter is not justiciable is the “political question” doctrine: *Baker v Carr* (1962) 369 US 186. This case, in which the drawing of legislative districts in the state of Tennessee was held to be justiciable, was particularly controversial because it dealt with an issue that had inherently political implications.

⁴⁸ To be contrasted with a “moot” issue, or one that is not yet “ripe”. For example, in the *Nuclear Tests* case, *supra* note 46, the ICJ held that there was no point in the Court deciding the issues raised as France had foresworn the nuclear testing activity that was the subject matter of the dispute. The ICJ came to a similar conclusion in its 2016 decision on *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India)*, 2016 ICJ 255, finding that there was no live dispute between the parties. On the other hand, the ICJ does have the power to issue advisory opinions, and such requests often arise in the absence of a live conflict. This power is somewhat controversial, with some countries (the US, in particular) believing that the issuance of advisory opinions is incompatible with the judicial function: Marika Giles Samson & Douglas Guilfoyle, “The Permanent Court of International Justice and the ‘Invention’ of International Advisory Jurisdiction” in Christian J Tams & Malgosia Fitzmaurice, eds, *Legacies of the Permanent Court of International Justice* (Leiden: Martinus Nijhoff Publishers, 2013) at 44-48.

⁴⁹ [1982] AC 888 at 932.

⁵⁰ Most notably, US Chief Justice Marshall in *Cohens v Virginia*, (1821) 19 US (6 Wheat) 264 at 404: “It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. ... Questions may occur which we would gladly avoid; but we cannot avoid them.”

the doctrine of justiciability provides judges with a lens through which to consider their potential role in judicial persecution.⁵¹

6.1.4 Abuse of Process

In the context of the problems raised in this thesis, it is worth focusing on one particular dimension of the court's inherent jurisdiction, the power to prevent the abuse of court process. As a matter of procedure, the precise meaning and scope of "abuse of process" is, like inherent jurisdiction itself, somewhat amorphous, but seems to capture at the very least, (i) proceedings brought with no reasonable basis (often termed "frivolous"); (ii) vexatious proceedings, with "vexatious" being used to denote both duplicative proceedings⁵² and those demonstrably motivated by actual malice;⁵³ and (iii) proceedings brought for a collateral purpose.⁵⁴ Abuse of process is an umbrella doctrine that can be applied where the requirements of a more specific doctrine, such as issue estoppel in the case of duplicative proceedings, might not be present.⁵⁵ It is an allegation that can be pressed against a public authority or a private litigant, with respect to improper criminal or civil proceedings, either in defence of the allegedly abusive action or, as will be described below, as a claim for damages.

⁵¹ In this respect, consider the scathing dissent of Justice Kagan in the very recent case of *Rucho et al v Common Cause et al*, (2019) 588 US ____ in response to the majority's view that extreme partisan gerrymandering was not justiciable in the federal courts. Online: https://www.supremecourt.gov/opinions/18pdf/18-422_901.pdf. Undoubtedly, Justice Kagan would characterise the majority's avoidance of the central issue as the effective "authentication" of what she terms "practices ... that imperil our system of government" (at 33).

⁵² Most famously, *Hunter v Chief Constable of the West Midlands Police*, *supra* note 9, in which the Birmingham Six sued for damages alleging that they had been beaten by police during their interrogation, an allegation that had been rejected at their criminal trial. (Ironically, the conviction of the Birmingham Six would come to be understood as an infamous miscarriage of justice, and they were subsequently exonerated.) See also *Toronto (City) v CUPE Local 79*, 2003 SCC 63, in which the Court found that a labour union's grievance on behalf of a dismissed employee amounted to an effort to relitigate the employee's criminal conviction, at para 37. In both cases, the claims were seen as "collateral attacks" on previous court judgments and therefore dismissed.

⁵³ See, for example, *Erschbamer v Wallster*, 2013 BCCA 76 at para 12.

⁵⁴ See for example, the classic case of *Grainger v Hill*, (1838) 4 Bing (NC) 212 in which creditors obtained a ship's register, to which they had no right, by having the plaintiff arrested on the strength of a false allegation that a loan was due.

⁵⁵ *Toronto (City)*, *supra* note 52 at para 37.

There are two animating concerns at play when the court applies the doctrine of abuse of process. First, there is a concern for the target of the abuse, and their right to be free from oppression. But there is also a strongly related concern about the proper administration of justice. In *Toronto (City) v CUPE Local 79*, the Supreme Court of Canada said that:

... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.⁵⁶

Thus, it is clear that abuse of process has both individual and institutional implications, in that abusive proceedings are seen to have a negative impact on the reputation of the justice system. As such, when a court is satisfied that the proceedings are an abuse of process, it will be motivated to exercise its inherent jurisdiction to prevent the case from being heard in full. In one particularly memorable case, *National Bank Financial Ltd v Barthe Estate*, the Nova Scotia Court of Appeal struck the pleadings and permanently stayed the claims of the plaintiff bank, which had failed to disclose a settlement agreement containing an admission of responsibility that completely contradicted its main argument, at the appeal stage.⁵⁷ The judgment in *Barthe Estate* begins with the following admonition:

There may come a time – in rare and exceptional circumstances – when a Court is satisfied that because of a party's egregious and unfair conduct during the course of litigation, it is obliged to intervene and say:

⁵⁶ *Ibid* at para 35, citing McLachlin J (as she then was) in *R v Scott*, [1990] 3 SCR 979 at 1007.

⁵⁷ *National Bank Financial Ltd v Barthe Estate*, 2015 NSCA 47. It hardly bears mentioning that this is a remedy that, when granted, tends to be granted at a significantly earlier stage of proceedings; indeed the Court believed that this was the first time that pleadings had been struck at the appeal stage (at para 187).

Enough is enough. By your actions you have forfeited the right to participate and you will be held accountable for the harm and grief you have caused others.

This is such a case.⁵⁸

The unanimous decision of the Court justified the extraordinary remedy, which also included an award of \$3 million in punitive damages and costs on a solicitor-client basis, by stating that the Bank's conduct had "tainted the case to such a degree as to be manifestly unfair", and had "brought the administration of justice into disrepute by impairing the adjudicative function of the courts and undermining public confidence in the legal process."⁵⁹ Thus, the Court expressed deep concerns about the impact of the case on both the defendants (the individual interest) and the image and integrity of the justice system (the institutional interest). In justifying punitive damages, ordinarily confined to cases of bad faith, the Court explains the multidimensional harm caused by misusing judicial process:

... Bad faith arises out of the breach of duty of good faith owed by a malefactor to the person wronged. There, the impugned conduct forms for direct link, from wrongdoer to victim. Abuse of process on the other hand, adds a third element, the judiciary, to the dynamic. The misconduct is seen to have directly besmirched the integrity of the court's own process, yet in a way that has caused serious damage to the interests of other affected, innocent parties. ...⁶⁰

Abuse of process is also, at least in some jurisdictions, a free-standing tort often, but not always, pleaded in counterclaim to the suit alleged to be abusive. For example, in *Warman v Wilkins-Fournier*, an Ontario case pre-dating the enactment of anti-SLAPP legislation in that province, the defendant's counterclaim in a defamation action alleged that the plaintiff was a frequent litigant who, in this case and others, filed suit for the

⁵⁸ *Ibid* at para 1.

⁵⁹ *Ibid* at paras 452 and 471.

⁶⁰ *Ibid* at para 452.

purpose of intimidating and silencing political opponents.⁶¹ In the vocabulary available at that time, the cause of action in the counterclaim was the tort of abuse of process.⁶² On a motion to strike the counterclaim, the motions judge canvassed the law on abuse of process, which established the following elements of the tort: (i) the processes of law are used for an ulterior or collateral purpose, such as extortion or oppression; and (ii) a definite act or threat in furtherance of that purpose (beyond the institution of the proceedings themselves).⁶³

Some jurisdictions place less emphasis on the second element or include other elements,⁶⁴ but in all cases, a plaintiff must establish that the legal process is being used for a purpose extraneous to it, usually to extract a benefit that the court process itself cannot provide, or one to which the plaintiff is plainly not entitled.⁶⁵ As a general rule, putting the target to the cost and inconvenience of civil proceedings will not be *per se* abusive, although if the plaintiff initiates the claim on the basis of facts known to be false and for the purpose of pressuring or coercing the target, it could “constitute a misuse or perversion of the court’s processes”, and ground an action in tort.⁶⁶

Such conduct is recognised as delictual in the civil law tradition as well. The Québec Code of Civil Procedure now includes a series of provisions that proscribe abuse of procedure, allowing the court to make declarations on application by the parties or on its own motion and including the specific prohibition on the use of procedure “to defeat the ends of justice ... particularly if it operates to restrict another person’s freedom of expression”⁶⁷ (Art 51). This part of the Code provides sweeping powers, including to dismiss or stay the proceeding (Art 53); or order advance costs (Art 53); or award

⁶¹ *Warman v Wilkins-Fournier*, 2010 ONSC 2826 at para 7.

⁶² *Ibid* at para 11.

⁶³ *Ibid* at paras 12-15.

⁶⁴ For example, there has been some inconsistent case law in British Columbia questioning the necessity of the second requirement and indicating a third element, the establishment of actual damages. See, for example, *Oei v Concord Pacific Acquisitions*, 2018 BCSC 1346 at paras 12-14, 21.

⁶⁵ *Ibid*, citing several examples, at paras 28-40.

⁶⁶ *Ibid* at para 44.

⁶⁷ As discussed in chapter 3, *supra* this is Québec’s anti-SLAPP measure.

damages or punitive damages even, it seems, in the absence of a specific substantive claim for damages (Art 54);⁶⁸ or to designate a person to be a “quarrelsome litigant” in order to prohibit them from instituting further proceedings without leave of the court (Art 55).⁶⁹ While originally motivated by a desire to condemn SLAPPs, these measures are explicitly broader in scope and intended to “give the judge the means to protect the judicial institution when he realises that the institution is in the process of doing a disservice to the ends for which it exists.”⁷⁰ In other words, these provisions provide specific tools for judges to resist authenticating improper proceedings.

The doctrine of abuse of process also exists in criminal procedure, functionally acting as an outer limit on prosecutorial discretion,⁷¹ such as “Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system.”⁷² Abuse of process of the first “fairness” type, in which the accused is prejudiced, is far more common and straightforward and so is sometimes referred to as the “main” category; those cases that raise concerns about their effect on the integrity of the justice system as a whole fall into the “residual category”.⁷³ Of cases of the second type, the Supreme Court of Canada has said, in *R v Babos*:

... the question is whether the state has engaged in conduct that is offensive to societal notions of fair play and decency and whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system. To put it in simpler terms, there are limits on the type of conduct society will tolerate in the prosecution of offences. At times, state conduct will be so troublesome that having a trial – even a fair one – will leave the impression that the justice system condones

⁶⁸ A clear indication of the delictual, and not purely procedural, nature of *abus de procédure*.

⁶⁹ In other jurisdictions, such people are most often described as “vexatious litigants”. The doctrine of *abus de procédure* is strongly related to the broader notion of *abus de droit*, which is prohibited by the Civil Code itself (art 7), and which will be discussed in greater detail below.

⁷⁰ Author’s own translation of *Harris c Amadi Okoli*, 2010 QCCS 251 at para 15.

⁷¹ See, for example, *Henry v British Columbia (Attorney General)*, 2015 SCC 24, in which the majority held, at para 49, that “[i]t is a bedrock principle that the exercise of core prosecutorial discretion is immune from judicial review, subject only to the doctrine of abuse of process ...”.

⁷² *R v Anderson*, 2014 SCC 41 at para 50.

⁷³ *R v Babos*, 2014 SCC 16 at para 31.

conduct that offends society's sense of fair play and decency. This harms the integrity of the justice system.⁷⁴

The emphasis in the residual category is for a court to “dissociate” itself from abusive state conduct, but the court will always ask itself whether the integrity of the justice system is better served by granting a stay or proceeding to trial.⁷⁵ In *Babos*, the Court was shocked by the threatening conduct of the prosecutor:

Without question, the bullying tactic to which Ms. Tremblay resorted was reprehensible and unworthy of the dignity of her office. It should not be repeated by her or any other Crown. ... In threatening to charge Mr. Piccirilli with more offences if he did not plead guilty, Ms. Tremblay betrayed her role as a Crown. Manifestly it is the type of conduct the court should dissociate itself from.⁷⁶

On balance, however, the Court did not uphold the stay imposed by the trial judge, finding that the societal interest in a trial on the merits outweighed the damage done by the impugned conduct. In her dissent, Abella J could not accept that conclusion: “when the conduct is so profoundly and demonstrably inconsistent with the public perception of what a fair justice system requires, proceeding with a trial means condoning unforgivable conduct.”⁷⁷ She went on to observe:

Of course the public has an interest in trials on the merits, but it has an even greater interest in knowing that when the state is involved in proceedings, particularly those that can result in an individual's loss of liberty, it will put fairness above expedience. Justice is not only about results, it is about how those results are obtained. When a Crown threatens an accused with additional offences if he or she does not plead guilty, the public's interest in the results of a trial must yield to the transcendent interest in protecting the public's confidence in the integrity of the justice system.⁷⁸

⁷⁴ *Ibid* at para 35.

⁷⁵ *Ibid* at paras 68-69.

⁷⁶ *Ibid* at para 61.

⁷⁷ *Ibid* at para 72.

⁷⁸ *Ibid* at para 85. On the other hand, in a recent notorious case of police misconduct, *R v Nuttall*, 2016 BCSC 1404, the trial judge, having found that the police had entrapped and facilitated the crimes with

The debate among judges in *Babos* lays bare the powerful connection between judicial concerns about abuse of process and public confidence in the judicial system. In such cases, the question is what would be more unfair, in the public sense: a stay of charges or allowing the case to go forward under a cloud of prosecutorial misconduct.⁷⁹ As such, the threshold may change as community mores about crime and punishment evolve.

6.2 Improperly Motivated Proceedings

In applying the doctrine of abuse of process, courts have tended to shy away from the question of motivation, and for good reason. Motive, particularly ulterior motive, is often hard to prove, a phenomenon canvassed, *inter alia*, by the European Court of Human Rights in its Article 18 jurisprudence. In the Canadian SLAPPs jurisprudence canvassed in chapter 3, motive has ultimately been found to be less salient than the chilling effects on free expression and engagement in public debate. Nonetheless, there is an undercurrent of at least suspected purposefulness that runs through the jurisprudence on abuse of process. Moreover, demonstrably bad motives remain relevant. Proceedings motivated by malice are a recognised instance of abuse of process, and malicious prosecution is a recognised tort in some jurisdictions.

which the defendants had been charged, stayed the case against two defendants who had been convicted by a jury of terrorism. As Madam Justice Bruce observed (emphasis added):

[835] ...There is clearly a need to curtail the actions of the police in a prospective sense to ensure that future undercover investigations do not follow the same path. Moreover, to permit the defendants' conviction to stand in the face of this kind of police misconduct would be offensive and *would cause irreparable damage to the integrity of the justice system*.

[836] There are no remedies less drastic than a stay of proceedings that will address the abuse of process. The spectre of the defendants serving a life sentence for a crime that the police manufactured by exploiting their vulnerabilities, by instilling fear that they would be killed if they backed out, and by quashing all doubts they had in the religious justifications for the crime, is *offensive to our concept of fundamental justice*. Simply put, the world has enough terrorists. We do not need the police to create more out of marginalized people who have neither the capacity nor sufficient motivation to do it themselves.

⁷⁹ The Court has not always been so concerned to balance perceptions against the demands of justice. As noted in the last chapter, in *R v Jordan*, 2016 SCC 27, the Supreme Court of Canada imposed an “presumptive ceiling” of 30 months’ delay from the time that a person is criminally charged to the anticipated end of their trial, undoubtedly aware that a number of serious cases would be stayed as a result.

6.2.1 Prosecutorial Misconduct

It is generally recognised that prosecutors require a significant measure of legal immunity in order to afford them the independence necessary to properly exercise their discretion. Nonetheless, this immunity has often been held not to be absolute. For example, in the watershed case of *Nelles v Ontario*, the Supreme Court of Canada held that the need for prosecutorial independence must be weighed against public confidence in the administration of justice, and the need for victims of genuine misconduct to have access to accountability and some remedial mechanism.⁸⁰ However, the Court established a stringent test, in which it must be established that the proceedings were initiated without reasonable and probable cause and that, in instituting proceedings, the defendant acted out of malice, or with “a primary purpose other than that of carrying the law into effect”.⁸¹ Note that malice alone is not enough; the prosecution must also have brought the case knowing that there was insufficient evidence to convict. The *Nelles* test has been affirmed as being equally applicable under the civil law system in Québec, as consistent with the civil law notion of “intentional fault”.⁸² It is clear that the bar for succeeding on such a claim is set high, and – for the same reasons justifying a broad grant of immunity – courts will be quick to dismiss unpersuasive allegations, including at an early stage.⁸³

In a similar vein, and highly pertinent for the subject-matter of this thesis, is the American concept of “selective prosecution”, in which the criminal law is applied differentially on the basis of improper criteria. In the US context, such criteria have been held to include race or religion, with the test for establishing selective prosecution being whether the prosecution had both a discriminatory effect and was based on a discriminatory motive.⁸⁴ This is based on the equal protection guarantee of the US Constitution, which guards against prosecutorial decisions being based on arbitrary

⁸⁰ *Nelles v Ontario*, [1989] 2 SCR 170 at 195-198.

⁸¹ *Ibid* at 192.

⁸² *Proulx c Québec (Procureur general)*, [2001] 3 SCR 9 at para 35.

⁸³ *Nelles*, *supra* note 80 at 194.

⁸⁴ Robert J Frater QC, *Prosecutorial Misconduct 2d ed* (Toronto: Thomson Reuters, 2017) at 49, citing *US v Armstrong*, (1996) 517 US 456.

grounds.⁸⁵ Functionally then, the doctrine, like the doctrine of abuse of process, acts as a constraint on prosecutorial discretion, with the equal protection guarantee acting as a counterweight to the so-called “presumption of regularity”, the assumption that a prosecutor is properly discharging their duties.⁸⁶

What could constitute “arbitrary” grounds in this analysis? Would, for example, this doctrine preclude politically-motivated proceedings? Just as one can ascertain what constitutes ‘improper’ purpose only by establishing a baseline of ‘proper’ purpose in an abuse of process cases, so too should a determination of whether grounds are arbitrary be measured against the standard of a non-arbitrary basis for prosecution, namely the belief based on probable cause that the accused has committed an offence. Where such a belief exists, a prosecution would not be considered arbitrary even in cases of mixed motives, such as those described in the Article 18 jurisprudence canvassed in the last chapter, and contrary to the harder line taken in the Separate Opinions in *Merabishvili*.

However a number of the cases raised under Article 18 pose the difficult question of whether there might be a tipping point, a threshold beyond which a proceeding might be an abuse even in the face of a belief that an offence has been committed. The need for a balance to be struck in cases of mixed motives is certainly implied in the assertion of a “healthy core” in the *Khodorkovskiy and Lebedev* case and those that followed it and in the “predominant purpose” standard established in *Merabishvili*.⁸⁷ While each test would locate the tipping point differently, each implies a potential for improper motivations to overwhelm proper ones.

Where one comes down on this question is likely to be correlated to two predispositions. First of all, the language of “taint” in the Separate Opinions implies a belief that rights – and the motives for their limitation or violation – should be pure, and that rights claims should always prevail over competing, and legitimate, criminal justice claims. Secondly,

⁸⁵ *US v Armstrong*, *ibid* at 456-457.

⁸⁶ “Selective prosecution” has also been recognised in Canadian jurisprudence, at least in theory, but it has not been successfully argued: Frater, *supra* note 84 at 49-51.

⁸⁷ See extensive discussion of this jurisprudence, *supra*, in chapter 4.

the view reflected in the Separate Opinions depends on the relative robustness, or fragility, of the presumption of good faith, a somewhat legalistic way of asking: how much do you trust states? This degree of trust might be a natural predisposition, or as was perhaps the case in the Russian context, it might be strongly influenced by the exigencies of *realpolitik*, or perhaps it might be sorely damaged by an apparent pattern of conduct, as evidence by the ECtHR's mounting skepticism about the Azerbaijani justice system in recent years. This question of good faith is relevant well beyond the Article 18 context.

6.3 Good Faith and the Doctrine of *Abus de Droit*

Chapter 4 noted that the ECtHR operates on a presumption of good faith as to the underlying conduct of states. Both chapter 3 and this chapter have noted that the passive model of jurisdiction – in which courts hear whatever cases are put before them by the parties – similarly operates, at least implicitly, on an assumption that the cases on the docket are brought and prosecuted in good faith. As a general theme, this chapter endeavours to explore existing judicial mechanisms for addressing situations in which that assumption is put to the test.

There is an important distinction to be made between a background assumption of good faith and the overarching obligation of good faith that exists in some civil law jurisdictions, and this has important implications for understanding how these doctrines might fit together. This overarching obligation is expressed in Article 6 of the Québec Civil Code, which, in turn, may well have found some inspiration from then-Article 1134 of the French Civil Code.⁸⁸ While good faith is not explicitly defined in the Quebec Civil Code, it has been said to take on its ordinary meaning of honesty and fairness.⁸⁹ It is an obligation that forces legal subjects to consider how the exercise of

⁸⁸ The relevant portion of Article 1134 is now Article 1104 (« Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public. ») In the French Civil Code (C civ), the article is intended to apply to the negotiation, conclusion, and execution of contracts, whereas, given its placement in the structure of the Québec Civil Code, the obligation applies more broadly.

⁸⁹ Louise Rolland, « La bonne foi dans le Code civil du Québec : du général au particulier », (1996) RDUS 378. As Rolland puts it: « les tribunaux ont posé que les rapports juridiques s'inscrivent dans la vie en société qui, pour être harmonieusement ordonné, commande implicitement l'honnêteté. »

their rights relates to and affects the rights of others. And it is an obligation that, based on its origins, is best understood in light of its codal corollary, the prohibition on “abus de droit” (abuse of rights) in Article 7 of Quebec Civil Code.⁹⁰

In Québec, the requirement of good faith in civil contract law was first recognised by the Supreme Court of Canada in *National Bank v Soucisse*,⁹¹ in which the Court implied an obligation of good faith in the performance of every contract,⁹² in that case effectively adding a requirement that the bank in *Soucisse* inform the heirs of an estate that a surety was revocable. Subsequently, in *Houle v Canadian National Bank*,⁹³ the Court expanded the obligation of good faith to include a prohibition of *abus de droit*, effectively ‘reading in’ to an agreement a requirement of reasonable notice for the execution of a demand loan. The latter case clarified that the standard for finding a breach of good faith in the private law context was not malice, or even the absence of good faith, but an unreasonable exercise of the right in question.⁹⁴ In these cases, once again, there is a finding by a court that good faith and reasonableness are standards implicit in law. As such, they can be fairly characterised as articulations of the kinds of legal principles that Dworkin had observed in the US context.

⁹⁰ In contrast to Article 6, Article 7 does not appear to have a French codal analogue. However, Article 17 of the European Convention on Human Rights prohibits the abuse of rights, i.e. the reliance on Convention rights to “engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” *European Convention on Human Rights*, Council of Europe, 4 November 1950, ETS 5 (entered into force 3 September 1953) [ECHR]

⁹¹ [1981] 2 SCR 339. The case involved a bank seeking execution on a loan guarantee that, the Bank alleged, had passed to the heirs of the original guarantor, for debts incurred after his death. The Court held that the Bank was under an obligation to inform the heirs of the existence of the guarantee, and that it could be revoked, before advancing monies to the debtor. My discussion and understanding of the evolution of good faith in contract law has been much informed by Rosalie Jukier’s clear writing on this subject, particularly Rosalie Jukier, “*Banque Nationale du Canada v Houle* (S.C.C.): Implications of an Expanded Doctrine of Abuse of Rights in Civilian Contract Law”, (1992) 37 (1) McGill LJ 221 and Rosalie Jukier, “Good Faith in Contract: A Judicial Dialogue between Common Law Canada and Québec”, (2019) 1(1) J Commonwealth L, online: <https://www.journalofcommonwealthlaw.org/article/7599-good-faith-in-contract-a-judicial-dialogue-between-common-law-canada-and-quebec>.

⁹² This obligation, according to the Court, was implied by law, including the requirements of equity as expressed in then-article 1434 of the *Civil Code*: *Soucisse*, *ibid* at 356-357.

⁹³ *Banque Nationale du Canada v Houle*, [1990] 3 SCR 122.

⁹⁴ *Ibid* at 154-155.

What is notable is that the doctrines of good faith and *abus de droit* were judicial creations, which is particularly unusual in a civil law context in which rights and obligations are generally understood to arise from and be limited to the provisions of the prevailing code. Rather, they arose as a judicial reaction to an identified need to address unreasonable conduct, even where black letter law might have pointed in a different direction. Admittedly, they were not judicially woven from whole cloth – the judgments in *Soucisse* and *Houle* are lengthy and draw inspiration from civilian jurisprudence, doctrine, and the interpretation and application of other codal provisions – but it is significant that these judgments *preceded* and inspired the adoption of Articles 6 and 7 of the Québec Civil Code. Moreover, despite their origins, these codal articles do not apply solely in the realm of contractual obligation, as indicated by their placement in the general provisions of the Code.

The doctrine of *abus de droit* was long recognised in jurisprudence prior to being specifically articulated in Québec’s Civil Code as covering a broad range of legally injurious activity, and is defined in Article 7 of the Code as the exercise of rights “with the intent of injuring another or in an excessive and unreasonable matter, and therefore contrary to the requirements of good faith.” As Quebec’s Justice Ministry’s commentary on the article sets out:

If, in its application, the theory of abuse of rights often makes reference to principles and notions of civil liability such as fault and prejudice, it nonetheless remains distinct. Abuse is neither simple mistake or negligence: it occurs when a right, the legality of which is not in question and the normal exercise of which is completely legitimate, is exercised in a manner contrary to the requirements of good faith. Abuse thereby occurs because this exercise, intending to injure, either does not respect the rights of the other or is exercised in an excessive or unreasonable manner, and so upsets the balance of rights between of the parties.⁹⁵

⁹⁵ Ministère de la Justice, *Commentaires du ministre de la justice – Le code civil du Québec, Titre 1* (Québec: Les Publications du Québec, 1993). Translation by author of:

Si, dans son application, la théorie de l’abus de droit fait souvent appel aux principes et notions de la responsabilité civile, dont celles de la faute et du préjudice, elle demeure cependant distincte. Car l’abus n’est ni une simple erreur ni une négligence : il survient lorsqu’un droit, dont la licéité n’est pas mise en cause, dont l’exercice normal est pleinement légitime, est mis en œuvre d’une manière contraire aux exigences de la

What marks the phenomenon is the existence, often undisputed, of an underlying legal right, which has been relied upon or asserted improperly. While the Ministry commentary could be read as requiring a malicious intent, both a plain reading of the language of Article 7 and its application indicate that malicious abuse of rights is only one particular instantiation. In Québec, there are three categories of conduct that have been prohibited as an *abus de droit*: (i) the malicious exercise of one's rights; (ii) the improper exercise of one's rights; and (iii) the antisocial exercise of one's rights.⁹⁶ As such, while malice will likely lead to a finding of *abus de droit*, bad faith can also be found in the absence of malice, for example when rights are exercised negligently or recklessly to the detriment of another. While there is clearly a distinction to be made between situations in which one actively seeks to harm another, and those in which the one simply doesn't care, both may constitute a violation of the notion of solidarity that underpins the positive obligation of good faith. Thus, the abuse of rights can be seen as situated along a spectrum of intentionality:

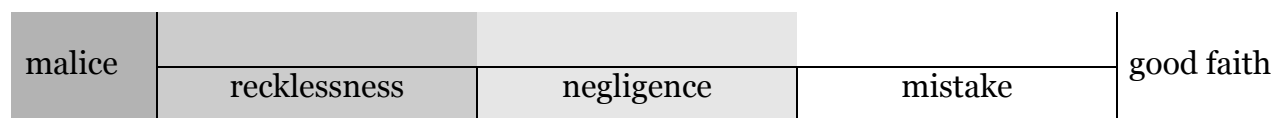


Figure 6.1 Abuse of Rights: Degrees of intentionality

In the context of this thesis, understanding the doctrine of *abus de droit* is useful for two reasons. First of all, there exists a significant body of jurisprudence on the abuse of the right to sue (*abus de droit d'ester en justice*), which is closely related to, and logically coextensive with, the doctrine of *abus de procédure* (abuse of process) canvassed above.⁹⁷ Thus, under Québec civil law at least, abuse of process can properly be understood as an instantiation of the wider doctrine of *abus de droit*. Secondly, and more importantly perhaps, both the obligation and the prohibition on *abus de droit*, like the obligation of good faith, impose a basic moral frame on the law, at least for the

bonne foi. L'abus existe donc parce que cet exercice, en cherchant à nuire, ne respecte pas le domaine d'exercice des droits d'autrui ou parce que la manière étant excessive et déraisonnable, elle vient rompre le jeu d'équilibre entre les droits des uns et des autres.

⁹⁶ Jean-Louis Beaudoin et al, *La responsabilité civile*, 8e éd (Cowansville: Éditions Yvon Blais, 2014) at §§ 1-218 – 1-220. The authors, citing Josseland, suggest that it is only the third category that embodies the essence of a distinct fault, with the first two compensable under general theories of fault.

⁹⁷ While beyond the scope of this thesis, persistent abuse of this type of right would underpin judicial declarations that an individual or entity is a vexatious litigant.

purposes of enforceability. In that respect, it has been said that the doctrine of *abus de droit* represents an “antenorm”, a form of “superlegality” suffusing the interpretation of all other legal rights and responsibilities, thereby placing limits on the prerogative scope of rights and operating to avoid the tyranny of rights.⁹⁸

6.4 *Abus de pouvoir and the Rule of Law*

Similarly, a sense of the “superlegal” informs the public law analogue to *abus de droit*, *abus de pouvoir* (abuse of power). The doctrine of malicious prosecution, discussed earlier, is but one branch of a more expansive doctrine of the abuse of public power, one that extends well beyond the scope of criminal law to all facets of public law. The most famous case of *abus de pouvoir* in Canada, *Roncarelli v Duplessis*,⁹⁹ was an action for damages brought against a public official who misused his power to persecute a member of a religious minority. While it is a private law case, it applies public law principles in what amounts to judicial review of the exercise of executive power, and thus blends civil law concepts of fault and a common law interpretation of public law rights and duties.

Roncarelli was a Jehovah’s Witness who posted bail for a large number of his fellow faith group members jailed for proselytising. Roncarelli’s activities came to the attention of the Premier and Attorney-General of Québec, Maurice Duplessis, who believed that Jehovah’s Witnesses were immensely dangerous to the social fabric of the predominantly Roman Catholic province. On 4 December 1946, Duplessis held a press conference announcing that he had directed the Liquor Commission to revoke the liquor licence for Roncarelli’s restaurant due to his support of the Jehovah’s Witnesses, ultimately causing the business to fail. The main question, as framed by the majority of the Supreme Court, was whether Duplessis was acting “in good faith in the exercise of his official functions” when he had the permit cancelled.¹⁰⁰

⁹⁸ Pierre-Emmanuel Moyse, “L’abus de droit : l’anténorme — Partie 1” (2012) 57(4) McGill LJ 859. (See also Pierre-Emmanuel Moyse, “L’Abus de droit : l’anténorme — Partie II” (2012) 58(1) McGill LJ 1.)

⁹⁹ *Roncarelli v Duplessis*, [1959] 1 SCR 121.

¹⁰⁰ *Ibid* at 151, with reasons at 153-155. “Majority” is a relative term for this judgment, but here refers to the judgment written by Martland J, in which Kerwin CJ and Locke J joined. In the result, six judges

Roncarelli is perhaps best known as a classic affirmation of the rule of law, which in Canada is an unwritten constitutional principle. This is particularly reflected in the concurring reasons given by Rand J that there is “no such thing as absolute and untrammelled ‘discretion’” and that, absent express legislative language, no statute “can be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute”.¹⁰¹ Rather, says Rand J, “[d]iscretion’ necessarily implies good faith in discharging public duty” and held that Duplessis’ action in having Roncarelli’s liquor licence cancelled “was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute.”¹⁰² In the context of the exercise of public power, Rand J offers the following definition of “good faith”:

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.¹⁰³

In other words, good faith is tied to a purposive application of the statute in question, and is vitiated by a finding that a public authority acted for an unrelated purpose, in this case persecution on religious grounds. Having found that Duplessis had committed a public wrong, the Court still had to establish that he was susceptible to a private law claim for damages;¹⁰⁴ it did so by finding that because Duplessis was acting beyond the

found Duplessis liable, and three judges dissented. Interestingly, while Martland J frames the issue as one of good faith, he does not discuss it in those terms.

¹⁰¹ *Ibid* at 140.

¹⁰² *Ibid* at 140-141.

¹⁰³ *Ibid* at 143.

¹⁰⁴ Such a claim was grounded in then-article 1053 of the Civil Code, which establishes a general liability for damages caused by the defendant’s fault.

scope of his official capacity, he was acting in his personal capacity.¹⁰⁵ This makes clear the intimate relationship between the doctrine of *abus de pouvoir* and the common law administrative law concept of *vires*, which requires public authorities to act within the scope of their powers.

In *Roncarelli*, judges suggested that there were inherent limits on the exercise of public power, whether framed within the rule of law, or the boundaries of good faith. Decades later, courts would recognise limits on the exercise of private rights in the *abus de droit* cases, grounded, again, in good faith and reasonableness. While these limits offer substantive interpretative guidelines, so do the older and more procedural doctrines of inherent jurisdiction, abuse of process, and improperly motivated proceedings. All of these suggest a limit to the courts' tolerance for the instrumentalisation of law and legal processes for improper purposes. And while the creation and articulation of the judicial doctrines canvassed in this chapter are, of course, legal acts, they are also powerful expressive acts.

6.5 Doctrine as a Form of Judicial Expressivism

The invocation by judges of the doctrine of inherent jurisdiction, the imposition of punitive damages and special costs, and the reading in of an implied obligation of good faith are all expressions of judicial normativity, the imposition of basic standards of sociopolitical morality in the prosecution of legal rights and powers. Gathered here, they do not simply represent a laundry list of procedural and substantial limits, but rather expressions of concern about unfairness and the impact of oppressive conduct on the target of the litigation; the impact of unfairness on public perception of the courts and

¹⁰⁵ On this issue, see Claude-Armand Sheppard, “*Roncarelli v Duplessis*: Art. 1053 C.C. Revolutionized”, (1960) 6(2) McGill LJ 75 and David Mullan, “*Roncarelli v Duplessis* and Damages for Abuse of Power: For What Did it Stand in 1959 and For What Does it Stand Today?”, (2010) 55(3) McGill LJ 587. On a related procedural note, an issue arose as to whether Duplessis, as a “public officer” should have been given 30 days’ notice of the impending suit pursuant to Article 88 of the Civil Code. This question was given fairly short shrift in the majority reasoning (on the basis that Duplessis was acting outside his official capacity) but the failure to provide such notice was decisive for two of the dissenting justices. As Leckey has argued, the willingness of the majority to ignore the rule requiring notice itself raises a rule of law issue: Robert Leckey, “Complexifying *Roncarelli*’s Rule of Law”, (2010) 55(3) McGill LJ 721.

their processes; and the preservation of court processes for “proper” purposes, an idea closely connected to the concept of good faith.

The mechanisms canvassed in this chapter are, at their heart, protective, created by judges to empower themselves to protect the court’s capacity, in Master Jacob’s words, “to fulfill itself as a court of law”.¹⁰⁶ The common foe is perhaps best expressed in the French expression *le détournement des fins de la justice* (literally translated as the diversion of the ends of justice). While the nature of the concern and the appropriate remedial response will tend to differ in cases where *détournement* is deliberate, it is apparent that the court’s primary concerns are twofold: to preserve the rights of the ‘victim’ (while giving due consideration to the general right of access to court processes) and, consistently, to uphold the integrity of the judicial institution and the rule of law itself. Thus each of the doctrines can be seen as the innermost of three concentric circles girded by a commitment to the ends of justice and, ultimately, the rule of law.

The consistent judicial recognition of these doctrines presents a profound challenge to any notion that judges should be passive observers of judicial persecution. Evidently, not all cases of abuse of process are judicial persecution, but all cases of judicial persecution are an abuse of process, and these mechanisms provide an established procedural framework for judges to think about and address such situations. The cases of *abus de droit* and *abus de pouvoir* raise a somewhat different challenge for judges: in those cases, the persecution has preceded the invocation of the court’s jurisdiction, but when such cases find themselves in the courts, it is the responsibility of the judge not to validate the persecution, and to seize the opportunity to affirm the basic socio-ethical framework in which the parties must exercise their private rights and public power.

The braver judgments from apartheid South Africa have this quality, serving to remind those in positions of power that courts start from the assumption that justice matters in the enforcement of law. Some of those have been canvassed in chapter 2, like the decision at first instance in *Roussow v Sachs*.¹⁰⁷ Similarly, in *Nkwinti v Commissioner of*

¹⁰⁶ See note 7 above.

¹⁰⁷ See discussion in chapter 2, *supra* at 61.

Police, the full bench of the Eastern Cape Provincial Division reviewed the indefinite detention of a prisoner under emergency powers and refused to accept that the asserted “complete discretion” of the authorities overruled the Court’s *habeas corpus* powers. Writing for the Court, Kannemeyer J expressed doubt

that it was the Legislature’s intention or that of the State President when making the regulations that the detainee against whom no charge is brought and who has been given no opportunity, when detained, to advance reasons to establish, or to attempt to establish that his detention is unnecessary, should be deprived of his right to advance such reasons before his further detention is ordered. One’s sense of justice is offended by any such suggestion and only express words or a clear inference would lead one to accept that this was the intention of those responsible for the legislation and the regulations.¹⁰⁸

Dyzenhaus uses this judgment as an example of the common law approach to legal interpretation that he advocates. But it also fulfills a more basic expressive function, to suggest to the legislature the possibility of a higher moral and legal standard, to appeal to their better angels. Of course, Justice Kannemeyer knew that the apartheid regime intended to accord to the regime’s officials an unlimited and arbitrary power, but unlike so many other judges during apartheid,¹⁰⁹ he insisted that if the legislature wished to do so, it would have to say so, in the clearest possible language. In its judgment, the Court’s expressivism served two purposes.

First and most obviously, it served to affirm the presumption of liberty, to publicly condemn a not-really hypothetical policy of indefinite detention beyond judicial control. Dyzenhaus would account for this under the common law approach to legal interpretation, but it can also be understood as the Court defining a principle that, in the Dworkinian account of legal integrity, recanted earlier decisions and was consistent with

¹⁰⁸ *Nkwinti v Commissioner of Police*, (1986) 2 SA 421 (E) at 438, cited in David Dyzenhaus, *Hard Cases (2010)* at 149-152.

¹⁰⁹ For example, the Appellate Division, as exemplified by its decision in *Rossouw v Sachs*, *supra* note 107.

hypothetical future decisions.¹¹⁰ In other words, it was an expression of legal commitment, a statement of what the court was willing to countenance from this point forward. However, secondly, and perhaps more crucially, it served to firmly locate the onus of defeating the presumption of liberty within the political branches of government. In short, the Court refused to do the government's dirty work. It was a loud refusal to authenticate the government's violation of individual rights.

The fact that such an interpretation was relatively rare in apartheid South Africa hints at the degree to which it was controversial. As discussed in chapter 2, apartheid-era judges tended to prefer what Dyzenhaus condemned as the "plain fact" approach to the interpretation of statutes, in which they filled statutory gaps in accordance with the apparent intention of the legislature. In Dyzenhaus' account, this approach seems odious, but in other less fraught contexts, it might be described as "purposive" interpretation. While there is a distinction to be made between legislative intention and statutory purpose, sometimes this distinction is a rather fine one.

Were the South African cases "hard" cases in the sense in which Dyzenhaus and Dworkin use that term: were they in fact cases in which the applicable legal rules did not dictate a particular outcome? Or were the liberal judges simply disingenuous? The dilemma was put rather bluntly by Dworkin in discussing how moral judges might operate in unjust systems:

In these cases the judge seeking to do what is morally right is faced with a familiar sort of conflict: the institutional right provides a genuine reason, the importance of which will vary with the general justice or wickedness of the system as a whole, for a decision one way, but certain considerations of morality present an important reason against it. If the judge decides that the reasons supplied by background moral rights are so strong that he has a moral duty to do what he can to support these rights, then it may be that he must lie, because he cannot be of any help unless he is understood

¹¹⁰ Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 88.

as saying, in his official role, that the legal rights are different from what he believes they are.¹¹¹

While critics of the reasoning in *Nkwinti* might be slow to call it a lie, they likely would accuse it of being based on the application of extralegal standards, either of morality or of a requirement of statutory precision that was at least controversial, particularly in light of the approach to interpretation taken by the apex Appellate Division during the same era. If the plain fact approach was supported by a theory of judicial responsibility, namely the proper confines of the judicial role in a constitutional order that prized legislative supremacy,¹¹² what was the theory of judicial responsibility that animated the Bench that decided *Nkwinti*?

The doctrines discussed in this chapter have exposed some deep-seated undercurrents of law and legal process as it is understood and applied by judges: the requirements of good faith, reasonableness, and fairness. Again and again, judges have, as a matter of institutional competence, relied on reasoning grounded in these principles to limit the worst abuses of process, of rights, and of power, often summarily dismissing such proceedings and imposing punitive costs orders on those who brought them. They have done it in the SLAPPs cases, in applying the doctrine of abuse of process as discussed above and in chapter 3. They have condemned police and prosecutorial misconduct, in *Nuttall* and *Babos*. The European Court of Human Rights has condemned unfairness and abuse, both in the SLAPP context in *Steel & Morris*, and in the context of ulterior motive in, *inter alia*, the Azerbaijani cases.

This chapter has endeavoured to make the case that there are legal tools available to judges to combat judicial persecution. It is the contention of this Part that the possibility for action, combined with the ethical demands of judicial office canvassed in the last chapter, suggests that judges have a responsibility to resist complicity in judicial persecution. It is the ambition of the next and final chapter to generate a model of

¹¹¹ *Ibid* at 326-327.

¹¹² Dyzenhaus accepts that plain fact judges “were driven by a political ideal of judicial responsibility”, although he disputes the validity of that ideal: Dyzenhaus, *Hard Cases 2010* at 118-119.

judicial responsibility that can adequately respond to the problem of judicial persecution.

Chapter 7

Judicial Persecution and Judicial Responsibility

7.1 *On the Universe of Viable Responses*

In *Justice Accused*, Robert Cover explored how judges in the antebellum United States who were morally opposed to slavery found themselves ruling in favour of the enforcement of the Fugitive Slave Acts of 1793 and 1850.¹ These Acts were US federal laws that mandated the return of runaway slaves to their owners, as well as penalising those who assisted slaves in their efforts to escape, and were consistently enforced, including in states that had abolished slavery. The Acts provided the mechanism for enforcing of the “Fugitive Slave Clause” of the US Constitution (Article 4.2.3), a compromise included to encourage southern states to join the union; the Clause would remain in force until the passage of the 13th Amendment in 1865, after secessionist southern states were defeated in the Civil War.

Justice Accused was published in 1975, at the heart of apartheid in South Africa, and while it was not directly inspired by that context, the parallels are obvious.² Cover was particularly interested in the reasoning of abolitionist judges who nonetheless enforced the Acts, consistently resolving the “moral-formal” dilemma in favour of the formal.³ His study proposes a theory of cognitive dissonance, in which abolitionist judges respond to the pressure created by that dissonance by reasoning expressed in one or more of the following formulations that denied their personal responsibility: (1) elevation of the formal stakes; (2) retreat to mechanistic formalism, and (3) ascription of responsibility

¹ Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975) [*Justice Accused*].

² The parallels may be obvious but Cover himself notes in the Acknowledgments to *Justice Accused* that it was actually inspired by the judicial enforcement of draft laws during the Vietnam War, an analogy that Cover first drew in Robert M Cover, “Book Review of Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression” (1968) 68(5) *Columb L Rev* 1003 at 1005-1007.

³ Cover, *Justice Accused* at Part III, generally.

elsewhere.⁴ It is, as Martha Minow characterised it, “a stunning exploration of how powerful men could assert that they had no power to resist doing what they believed was wrong.”⁵ *Justice Accused* was published almost 45 years ago, and yet remains as powerful a guide to judges eschewing responsibility for their role in injustice today as when it first appeared.

In the first of Cover’s formulations, judges rhetorically maximise the importance of “fidelity to law” and the resulting judicial restraint as supporting “the social compact”, and by contrast minimising the relative importance of the liberty of the individual in question.⁶ Notice the apparently perfect overlap here between positivism and judicial role morality. As Cover puts it: “[t]hus, the end served by fidelity to ‘law’ is escalated to the basis of society itself.”⁷ This notion of “fidelity to law” could be supplemented by reasoning of the second type, in which judges read a statute mechanistically and rely on precedent to buttress their decisions, despite, as Cover points out, there existing, as in most cases, a fair amount of procedural, evidentiary, and interpretive latitude.⁸ This is the phenomenon that Cover describes as the “judicial can’t”,⁹ and was appealing because by being mechanical, it was also perceived as impersonal.¹⁰ Mechanistic formulations function not only to mask the many smaller choices that judges make but also, by concealing the availability of alternatives, limit judges’ sense of their own responsibility for arriving at the result that they have. As Cover puts it:

⁴ *Ibid* at 229.

⁵ Martha Minow, “Introduction: Robert Cover and Law, Judging, and Violence” in Martha Minow et al, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: The University of Michigan Press, 1992) at 1.

⁶ Cover, *Justice Accused* at 230. For example, Cover cites Justice McLean’s reasoning in *Miller v McQuerry*, (1853) 17 F Cas 332 (No 9583, CC Ohio) at 339: “by the judicial powers, would undermine and overturn the social compact.” This kind of reasoning might also be combined with an explanation of the importance of the Fugitive Slave Clause itself as part of the constitutional bargain that brought the United States into being: *ibid* at 192.

⁷ *Ibid* at 230.

⁸ *Ibid* at 233.

⁹ *Ibid* at Chapter 7 generally.

¹⁰ *Ibid* at 234. Cover labels this phenomenon “the retreat to formalism”.

The discomfort incidental to a difficult choice will be heightened insofar as the judge views himself as having had personal responsibility for a choice from among the many alternatives before him. The discomfort will be reduced insofar as he can view himself as a mechanical instrument of the will of others.¹¹

In this way, the mechanistic reasoning technique feeds into the third formulation, the ascription of responsibility elsewhere. This is often framed within the doctrine of the separation of powers, in which primary responsibility for the content of the law is ascribed to the legislative branch.

Analytically and historically, Cover understood and, to some extent, sympathised with the response of these judges to the situation in which they found themselves. The dilemma, he confirms, was “real enough”¹² and the “universe of viable responses” was in many ways framed by the particular time and place in which they did their work.¹³ And yet, Cover is clearly also deeply concerned about the consequences of a relatively small cadre of judges with sufficient moral imagination to support abolition failing to find room in the law to resist the obvious injustice of returning people to slavery. In his view, decisions from these judges carried additional weight, reducing the credibility of the legal arguments advanced by abolitionists, discouraging recourse to the courts, and providing moral comfort to those judges who were content to let slavery persist.¹⁴ *Justice Accused* confirms that good-hearted judges are the most effective authenticators of judicial persecution.¹⁵

¹¹ *Ibid* at 235.

¹² *Ibid* at 257.

¹³ *Ibid* at 258.

¹⁴ *Ibid* at 237-238.

¹⁵ *Ibid* at 225, 237. The *Commentary to the Bangalore Principles* at para 15 notes the individual and collective responsibility of judges to respect and honour judicial office as a public trust, quoting the advice given by the Chief Justice of Australia to new judges in 1996: “...But if, at the end of the day, you share with my colleagues whom you highly esteem a sense of service to the community by administering justice according to law, you will have a life of enormous satisfaction. Be of good and honourable heart, and all will be well.” *Commentary on the*

The central question of the second Part of this thesis is what good-hearted judges should do in cases of judicial persecution, and suggests that, surely, judges should be able to do better in the second decade of the 21st century than they did in the 19th century. While in Cover's analysis it might have been perfectly natural for these judges to "stress and reiterate the rhetoric of limits and confinement and their justifications rather than that of facilitation, power, and responsibility",¹⁶ it was undoubtedly destructive. These judges knew that what they were doing was immoral and unjust, and by choosing to do it anyway, sought to deny their agency. By contrast, this chapter endeavours to create a model of judicial responsibility that opens up the "universe of viable responses". In short, if, in Cover's description, "judges' understandings of the nature of law and especially of the role of a judge led them to feel constrained",¹⁷ this thesis is directed at constructing a new set of understandings that could lead to better and more empowered results.

To this point, the second half of this thesis has been directed at establishing a clear picture of the norms, demands, constraints, and aspirations of the judicial role, particularly as understood by judges themselves, in order to lay the groundwork for an account of judicial responsibility in the face of judicial persecution. Chapter 5 constructed a model of judicial identity grounded in the ethical norms and social expectations that judges have established for themselves. Chapter 6 canvassed the legal norms that judges themselves have applied to various types of improper proceeding, as a starting point from which to suggest a broader scope of legal and expressive action for judges. Approaching the problem of judicial persecution from this combination of professional norms and judicial doctrine is based on the premise that any theory of judicial responsibility will only be capable of influencing judicial action if it is consonant with how judges themselves understand their role. In other words, what is

Bangalore Principles of Judicial Conduct [Commentary on the Bangalore Principles], online: www.judicialintegritygroup.org/images/resources/documents/BP_Commentary_Engl.pdf at 31.

¹⁶ Cover, *Justice Accused* at 237.

¹⁷ Minow, *supra* note 5 at 4.

proposed here is a way for judges to think about their responsibility in the face of judicial persecution that is derived from prior commitments made by judges themselves. Just as judges must act from the internal legal point of view, this theory endeavours to operate from an internal role-specific perspective.

In generating this account of judicial responsibility, attention has been paid to the specific concerns highlighted by the case studies canvassed in Part I and what they indicate about the preoccupations of judges and their critics in cases of judicial persecution. Specifically, the case studies reveal the relevance of three dimensions of judicial responsibility: to the rule of law, to the polity, and to the judicial institution itself. This chapter will first set out some preliminary thoughts on the nature of judicial responsibility and then explore each of these three dimensions of responsibility in turn.

To the extent that South African judges defended their actions during apartheid, they argued, much like Cover's abolitionist judges, that they were bound by the law, essentially appealing to the authority of the rule of law. While the definition and content of the rule of law is often disputed,¹⁸ in the context of apartheid South Africa this was an appeal to a particularly thin conception, and one that was both unduly deferential to the role of the legislature in the legal order and insufficiently attentive to the role that the judiciary plays in shaping that order. In order to guard against the persecutory instrumentalisation of courts, this chapter will focus on the judicial role in upholding and promoting the rule of law, suggesting a considerably thicker account (particularly at section 7.4 *infra*).

Similarly, in condemning both SLAPPs and European political trials under Article 18, judges have grappled with a range of concerns about the potential challenges that abusive court proceedings pose to individual rights and the democratic process. The mere presence of political dynamics has been

¹⁸ Mary Liston, citing Jeremy Waldron, refers to the rule of law as one of those philosophical concepts that is "essentially contested": Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State", in Lorne Sossin and Colleen Flood, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery, 2013) 39 at 40.

uncomfortable often to the point of paralysis for courts, both domestic and international. Most of the Article 18 jurisprudence is indicative of the great lengths to which courts will go to erect barriers to the recognition of political motivation. But the dilemmas posed by these cases are real, and the principle that access to court processes for the resolution of disputes should be fettered only in obvious cases of abuse has largely been maintained. Nonetheless, courts have come to appreciate, with gradually increasing frequency, that where their jurisdiction is being instrumentalised to limit political expression and participation, and particularly to discriminate and oppress, they have a role to play in maintaining a healthy, plural, and properly functioning political sphere. This will be the subject of section 7.5 below.

And underlying all of the case studies, in comments from judges and observers alike, is a profound concern that judicial persecution makes a mockery of the judicial institution itself. In both apartheid South Africa and the contexts underlying the Article 18 proceedings, this has led to the perception that domestic judicial institutions are not independent or impartial. In SLAPP cases, the effect is perhaps closer to a sense that courts are merely another setting in which the economically powerful can act as bullies. In all cases, there is a danger that the public will lose confidence that courts are able to deliver on the promise of justice, a promise that lies at the very core of the judicial function, and so must lie at the core of any theory of judicial responsibility. The responsibility of judges to uphold the credibility of the judicial institution will be discussed, *infra*, at section 7.6.

7.2 Justice and the Judicial Function

Underpinning all of these discussions, however, is the question of what lies at the core of the judicial function. Chapter 5 introduced the idea that the judge is an alchemist, who by her authentication through legal process transforms the raw violence of ordinary persecution into judicial persecution, a more stylised and, in that, less obvious iteration. Hopefully by now, this thesis has demonstrated that

the phenomenon of ‘judicial persecution’ is manifestly real, although admittedly the nomenclature itself is simply an artifice, an effort to create a shorthand for the obvious incongruity that results from the alchemical process in which persecution is transformed into a package labelled ‘justice’. Only the most blinkered or most motivated legalists can be untroubled by such a juxtaposition. The risk is that courts look foolish,¹⁹ or worse yet, they appear institutionally corrupt.

Conscientious judges hold themselves and each other to high ethical standards because the product delivered by judges is supposed to be just: the primary work product of judges is a process and a decision that will be formally labelled ‘justice’. Thus, as outlined in the previous chapter, judges will deploy what they understand to be their inherent powers to dismiss abusive proceedings because such proceedings are manifestly unjust. They can refuse to uphold decisions, enforce rights, and apply laws where to do so would endow unfair or unreasonable decisions, actions, and laws with the imprimatur of justice. It is because they must aim to achieve a process and outcome worthy of being labelled ‘justice’ that judges should, and often do, impose implicit standards of reasonableness, good faith, and fairness.

It is obviously beyond the scope of this thesis to develop a thoroughgoing account of what justice means. However, because judges are aware that judicial process and judgment will, at least nominally, be affixed with the label of justice, an unavoidable duty arises to deliver a product that is not manifestly unworthy of that label. If the goal of the justificatory account of adjudication urged by Dworkin remains somewhat vague, perhaps a more modest and specific goal could be that judges should be able to defend their judgments, at least to themselves, as having avoided manifest injustice. Indeed, the “principles” identified by Dworkin (such as “no one shall be permitted to profit by his own

¹⁹ See discussion of apparent foolishness in chapter 1, *supra* at 24.

fraud”)²⁰ have a common thread with those identified in the previous chapter, namely the avoidance of intolerable unfairness.

In assessing the minimum content of what justice means in this context, judges might consider thought experiment proposed by Dyzenhaus, in which he argues that the inclusion of the promise to administer justice in the judicial oath would “look rather odd if one substituted for ‘justice’ the phrase ‘ideology of the powerful’”.²¹ They would also do well to consider the reflections of John Trengove, who served on the Appellate Division in South Africa from 1978 to 1986:

... It is a sad fact that the image of our judiciary, the esteem which their judgments enjoyed in the past and the general perception of the administration of justice, that they have been adversely affected by our courts’ application and enforcement of unjust and discriminatory laws. Our courts have appeared to have accepted in many instances their passivity and their subservience to the sovereignty to Parliament, a doctrine which should really have no application in a country where there is an absence of a general right of franchise. The courts have on occasion, it is true, expressed their regret having to bow to the sovereignty of Parliament. But I believe that we have failed, and I regret that I also have at times been guilty of this failure, to express unequivocally our displeasure at having to apply and enforce discriminatory and unjust laws. And I do hope that our courts will realise what effect this has had on the public perception of the administration of justice, and that they would in future take a bolder stand.²²

²⁰ See general discussion of Dworkinian principles, *supra*, chapter 5 at 185-187.

²¹ David Dyzenhaus, “With the Benefit of Hindsight’: Dilemmas of Legality” in Emiliios Christodoulidis and Scott Veitch, *Lethe’s Law: Justice, Law and Ethics in Reconciliation* (Oxford: Hart Publishing, 2001) [“With the Benefit of Hindsight”] at 69.

²² Quoted (from a recorded transcript of conference) in Michael Kirby, “Lawyers in an Unjust Society – Reflections on a Conference of the Legal Resources Centre of South Africa”, regarding a conference held at the University of Witwatersrand, Johannesburg, South Africa 12-13 April 1989 (unpublished), online: <http://www.austlii.edu.au/au/journals/AUSocLegPhilB/1989/5.pdf> at 23-24. Justice Trengove sat as a judge for 19 years during apartheid, eight of which on the Appellate Division. In 1995, he was invited to sit as an Acting Judge on the newly-formed Constitutional Court, replacing Justice Richard Goldstone who had been granted a leave of absence to serve as Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia.

Justice Trengove here is admitting to a number of judicial failures. While he questions the courts' adherence to the doctrine of Parliamentary supremacy in a state in which the majority was disenfranchised, the thrust of his comments point to the expressive role that courts should play in condemning unjust and discriminatory laws, not only for reasons of justice, but as a matter of institutional credibility. By using the language of failure, Trengove implies that judges had a responsibility to speak out against unjust and discriminatory laws, even if they felt compelled to apply them. In their written submission to the TRC, a group of leading judges made a similar point: "[e]ven where legislation could not, as a matter of law, be ignored, judges should have acknowledged situations where law and justice diverged."²³ And this was the call from the National Association of Democratic Lawyers in their Submission to the TRC:

Could we not expect that judges compelled to implement laws which offended the fundamental values of our legal system and their own sense of justice might find some way of articulating their frustration, their regret and their unwilling complicity in the course of making judgment? Judges' formal independence, their secure tenure, and the fact that no judge has ever been removed from office by the mechanism available placed them in a very powerful position to criticize and condemn – on and off the bench – measures which departed from the most fundamental values of our legal heritage. Some of course have done so, and these few examples make the possibilities quite clear.²⁴

The duty to speak out described here hearkens back to the expressivist dimension of the judicial role introduced in the last chapter. Such expressivism can take many forms, from *obiter*, to legal interpretation, to protest (whether through institutional or public channels) to resignation, and perhaps even some

²³ Chief Justice I Mahomed et al, "The Legal System in South Africa 1960-1994: Representations to the Truth and Reconciliation Commission", (1998) 115 S Afr LJ 21 at 32.

²⁴ "Submission by the National Association of Democratic Lawyers to the Truth and Reconciliation Commission on the Role of Lawyers and the Legal System in the Gross Human-Rights Violations of Apartheid", (1998) 115 S Afr LJ 86 at 98.

combination of approaches.²⁵ Indeed, in their 1988 report *South Africa and the Rule of Law*, the International Commission of Jurists noted that, given the institutional limitations on the judiciary to deliver justice under apartheid, most black lawyers and political leaders in South Africa believed that liberal judges should resign, but “it was generally acknowledged that resignation would have little impact unless it was accompanied by a public exposure of the reasons for resigning.”²⁶ The International Commission highlighted instances of judges exercising judicial choice in favour of liberty, and Goldstone provides an example of a 1982 case, *S v Govender*, in which he and a colleague, sitting as a two-judge panel, noticed, it seems for the first time in 30 years, that the language of the *Group Areas Act* was discretionary and exercised their discretion to set aside an eviction order where it would have effectively rendered the applicant homeless.²⁷ As it happened, with the government under international pressure to end apartheid, it chose not to appeal this order and abandoned prosecutions against other non-whites living outside their assigned areas, resulting in thousands of black South Africans moving into white areas,²⁸ and providing a clear indication that institutional capitulation could cut in more than one direction. Cases like this led the International Commission to suggest that “[i]t is important to

²⁵ In “Atrocious Judges”, *supra* note 2 at 1006-1007, Cover considered the options available to judges who opposed enforcing draft laws during the Vietnam War, including resignation, narrow and protective interpretation of the relevant statutes (“he will interpret the law to conform to his conscience even if such a course requires the disregard or stretching of authority”), and what he termed “judicial civil disobedience”, in which the judge would refuse to follow the law and set resisters free. He admitted that the latter option would be properly described, if widespread, as “incipient insurrection”.

²⁶ Geoffrey Bindman, ed, *South Africa: Human Rights and the Rule of Law* (London, New York: Pinter Publishers, 1988) [Bindman Report] at 113. The authors noted that two judges were “believed to have resigned in protest against government action” but had not publicly discussed the reasons for their resignation. One of the judges to which Bindman referred would have been Lourens (Laurie) Ackermann, who sent at least some kind of message when he stepped down from the Transvaal Provincial Division to inaugurate a Chair in Human Rights at Stellenbosch University. Later appointed to the newly-established Constitutional Court in 1994, Ackermann ultimately confirmed, in his submission to the TRC, that he had resigned due to his ethical, jurisprudential, and religious objections to apartheid: Justice LWH Ackermann, “Submission to the Truth and Reconciliation Commission Re: Role of the Judiciary”, (1998) 115 S Afr LJ 51 at 53.

²⁷ Justice Richard J Goldstone, “The Challenges of Judicial Independence” in Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010) at x-xi.

²⁸ *Ibid* at xi.

measure the performance of the South African judiciary bearing in mind the limitations that are placed on them by the Executive, *but ignoring self-imposed limitations.*”²⁹

It is clear that there is sometimes a tension between legal and institutional strictures and the delivery of just process and outcomes, and the question then is how that tension should be managed, and where the balance struck. Drawing its inspiration from the reflections above and the findings in chapter 6, this thesis contends that delivering justice might be more than a vague aspiration, one easily overwhelmed by the purported certainty of black letter law, but may in fact be the very stuff of judging. This raises a strong countervailing responsibility for judges to avoid, at the very least, repackaging manifest injustice in the guise of legal justice. However, underpinning any credible theory of judicial responsibility is a premise that judges possess the necessary capacity to exercise choice, and the necessary agency to act.

7.3 *Responsibility as Liability: The Case for Judicial Agency*

The abnegation of judicial choice through the legal or systemic supersession of judicial will is a recurring theme in judicial pronouncements from morally difficult contexts, and one played at volume in accounts of judicial behaviour that seems obviously unjust. As noted above, in *Justice Accused* Robert Cover describes this abnegation as the “judicial ‘can’t””, the judicial intoning of language of compulsion. As Cover puts it:

... occasionally one finds the judicial opinion used to suggest the immorality of the law. Very often this suggestion is coupled with a statement that the judge is, nevertheless, bound to apply the law, immoral as it may be. In such cases, and in the law of slavery they abound, it is useful to ask whether we are not dealing with a different rhetorical purpose: not the justification of the result and the underlying principles, but the justification of the judge. The judge may be telling us: I know the result reached is morally indefensible and

²⁹ Bindman Report at 110 (emphasis added).

I wish primarily that you understand the sense in which I have been compelled to reach it.³⁰

The “judicial can’t” described by Cover is qualitatively similar to the phenomenon of judicial disempowerment described by David Dyzenhaus in his writing on the self-justification of apartheid-era judges.³¹ It certainly resonates in the defence of Justice Leon’s condemnation of Andrew Zondo by Chief Justice Corbett at the Truth and Reconciliation Commission, who explained that the judge “had no choice” but to sentence Zondo to death.³² This assertion of constraint is logically necessary for judges to avoid responsibility for their decisions: if one is, for reason of legal or institutional constraint, *unable* to act in a particular way, one cannot be held morally accountable for the failure to do so.³³ Agency – the freedom to make choices about one’s action – is the unarticulated premise of moral culpability.

To what extent is this assertion of constraint persuasive in cases of judicial persecution? It has been shown to be unpersuasive on the question of a judge’s complicity in persecution as a crime against humanity. Oswald Rothaug and Rudolf Oeschey were convicted of crimes against humanity at Nuremberg for their work as judges enforcing laws against Jews and foreigners in the Third Reich’s so-called Special Courts.³⁴ Radbruch argued for the criminality of judges

³⁰ Cover, *Justice Accused* at 119.

³¹ David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998) [*Judging the Judges*], especially chapter 2.

³² Quoted by Dyzenhaus, *ibid* at 42, and discussed in some detail in chapter 2, *supra* at 62-65. This was also representative of the view of the judiciary during apartheid, as found, for example, during a fact-finding mission by the International Commission of Jurists in 1988, resulting in the Bindman Report, which at 109 noted that: “The judges deny that they have any choice, and they claim that they merely do what the legislature has commanded them to do through legislation.”

³³ Cover, *Justice Accused* at 121. Cover goes on to problematise, however, what is meant by “can’t”, noting that there is a significant moral difference between “can’t” in the physical sense and “can’t” as it tends to be used by judges, i.e. in the logical or conventional sense.

³⁴ International Military Tribunal, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume III: “The Justice Case”*, (Washington, DC: US Govt Print Off, 1949) [Justice Case]. Of the jurists on trial, only two were tried for activities related specifically to their activities as a judge: Rudolf Oeschey and Oswald Rothaug, both judges

who were complicit in the judicial murder of dissidents, and supported their prosecution.³⁵ Joseph Rikhof has catalogued a series of cases in which judges have been held responsible for participating in atrocity,³⁶ including the Nazi judges convicted at Nuremberg³⁷ and by the Permanent Military Tribunal in France;³⁸ the 14 Japanese judges convicted in the International Military Tribunal for the Far East;³⁹ and the more recent conviction of four former judges in Argentina for their participation in crimes against humanity committed during the so-called Dirty War.⁴⁰ Rikhof also notes that Canada has excluded a number

of the District Court and Special Court in Nuremberg. Persecution (through judicial means) was specifically alleged against Rothaug. All were alleged to have committed, *inter alia*, crimes against humanity, including (at 3) using “extraordinary irregular courts, superimposed upon the regular court system ... to suppress political opposition to the Nazi regime.”

³⁵ Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law [*Gesetzliches Unrecht und übergesetzliches Recht*] (1946)”, translated by Bonnie Litschewski Paulson and Stanley Paulson, (2006) 26(1) Oxf J of Leg Studies 1 at 4-5 and 9-10.

³⁶ Joseph Rikhof, “Judges as Perpetrators of War Crimes and Crimes Against Humanity” (2017) 1 PKI Global Justice Journal 9, online: <http://www.kirschinstitute.ca/judgesasperpetrators/>.

³⁷ *Supra* note 34.

³⁸ *Trial of Robert Wagner, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others*, Case No 13, Permanent Military Tribunal at Strasbourg (1946). One of the defendants was Richard Huber, who had been the President of the Special Court in Strasbourg. The French Military Tribunal charged and convicted him (in absentia) of being an accomplice to premeditated murder after he had pronounced death sentences, as dictated by Gauleiter (local Nazi Party leader) Wagner, on fourteen men after trials that both failed to establish the charges against them and to meet even basic fair trial standards. Notably, despite the demand from Wagner, Huber was held not to have acted on superior orders. There is an argument to be made that the “Special Courts” of the Third Reich were courts in name only and, as such, a resulting debate about whether those who presided in those courts should be considered ‘judges’ at all, but that discussion is beyond the scope of this thesis.

³⁹ These judges, who were military officers who presided over military tribunals of American prisoners of war, were accused of trying, convicting, and sentencing the POWs to death under “false and fraudulent charges without affording them a fair trial, interpretation of the proceedings, counsel, or an opportunity to defend”, in violation of the laws and customs of war. They were tried in three trials at the International Military Tribunal for the Far East (IMTFE): the *Trial of Lieutenant-General Shigeru Sawada and Three Others*, the *Trial of Lieutenant General Harukei Isayama and Seven Others*, and the *Trial of General Tanaka Hisakasu and Five Others*, Law Reports of Trials of War Criminals, Volume V at 1-81 (online: http://www.loc.gov/rr/frd/Military_Law/law-reports-trials-war-criminals.html).

⁴⁰ *Fundamentos de la sentencia No 1718* (Tribunal Oral en lo Criminal Federal N° 1 de Mendoza, 26 July 2017), online: <http://www.cij.gov.ar/nota-27733-Difunden-los-fundamentos-de-la-sentencia-que-conden--en-la-provincia-de-Mendoza-a-ex-jueces-federales-por-cr-menes-de-lesa-humanidad.html>. Of the four former judges, only two of them, Luis Francisco Miret and Rolando Carrizo, were judges at the time of the events in question; the other two defendants, Otilio Roque Romano and Max Petra Recabarren, were a prosecutor and public defender respectively. In large measure, the crimes of which the defendants were convicted were primarily failures to act, such as

of judges from refugee status under Article 1F of the Refugee Convention, which denies refugee status to those for whom there are serious reasons to believe have committed serious crimes, including crimes against humanity.⁴¹ For example, the Chief Judge of the Military Court, which heard political cases and routinely ordered executions during the Siad Barre regime in Somalia, was excluded on the basis that there were reasonable grounds to believe that he was guilty of a crime against humanity.⁴² The relevant legislation in Canada specifically lists “members of the judiciary” as the kind of senior official that might be excluded if the government in question has committed systematic or gross human rights abuses or crimes against humanity.⁴³

Such allegations might traditionally have been subject to a claim of judicial immunity, the doctrine that absolves judges of liability for their *ex officio* judicial acts. Judicial immunity exists in order to preserve the independence of judges, to ensure that their decisions are not influenced by a fear of being sued by, for example, a disappointed party.⁴⁴ Crucially, however, judicial immunity is generally understood as an absolute bar to *civil* liability, and not as insulating a

failures to investigate and failures to deal with properly brought *habeas corpus* petitions, but they were nonetheless found guilty of, *inter alia*, homicide, unlawful deprivation of freedom, and torture “aggravated by political persecution”: “28 Ex-Officials of Argentina's Military Dictatorship Sentenced” (*Telesur*, 26 July 2017), online: <https://www.telesurenglish.net/news/In-Landmark-Ruling-28-Former-Officials-of-Argentinas-Military-Dictatorship-Sentenced-20170726-0039.html>.

⁴¹ Rikhof, *supra* note 37, and Joseph Rikhof, *The Criminal Refugee: The Treatment of Asylum Seekers with A Criminal Background in International and Domestic Law* (Dordrecht: Republic of Letters Publishing, 2012) at 223.

⁴² *Mohamud v Canada (Minister of Citizenship & Immigration)* (1994), 83 FTR 267 (FCTD). Notably, however, in another case it was held not to be sufficient that a judge was voluntarily involved in “a justice system run by dictators” where the evidence had not established the applicant’s knowledge of crimes committed by the military authorities: *Mankoto v Canada (Minister of Citizenship & Immigration)*, 2005 FC 294.

⁴³ Section 35(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and s 16(g) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227.

⁴⁴ This may be the pragmatic purpose of the doctrine, but John Henry Merryman theorises that civil immunity is based on a judge’s duty being to the public rather than to any individual, thus lacking the (common law) duty of care necessary to underpin a claim of tort liability. Quoted in Mauro Cappelletti, “Who Watches the Watchmen? A Comparative Study on Judicial Responsibility”, (1983) 31(1) *Am J of Comparative L* 1 at 38. Such a case might be distinguished from the civil law fault of *deni de justice*, for example, which in Italy (at least at that time) could attract civil liability based on a judge’s specific duty to litigants: *ibid* at 41.

judge from possible criminal prosecution (where the misconduct in question can be properly characterised as criminal in nature).⁴⁵ Indeed, to the extent that the subject matter is persecution of the sort prohibited as a crime against humanity, modern international criminal law is generally unpersuaded by claims of official immunity, which for example are specifically excluded by the *Statute of the International Criminal Court*.⁴⁶

Moreover, in the context of international criminal law, constraint arguments raised by judges would, at the very least, raise questions of legal consistency. Assuming that the structure of such an argument would be that the judge was subject to a level of constraint sufficient to raise the affirmative defences of necessity or duress, it could reasonably be asked why such defences are not more widely available to perpetrators operating under considerably more immediate and salient physical duress. For example, in *Erdemović*, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that a soldier could be held liable for participating in the massacre of unarmed Bosnian civilians despite his credible fear that he would be summarily shot if he disobeyed the order.⁴⁷ Indeed, the driving theory of international criminal law is that systemic evil is constructed through the participation of individuals, and therefore amenable to the assignment of individual responsibility. It does not ignore the fact that some people are more responsible than others,⁴⁸ including

⁴⁵ See, for example, footnote 1 of *Mireles v Waco*, (1991) 502 US 9 (USSC). The United States is considered to have one of the broadest doctrines of judicial immunity in the world, providing absolute civil immunity even in cases of malicious or corrupt purposes: Jeffrey M Shaman, “Judicial Immunity from Civil and Criminal Liability” (1990) 27 San Diego L Rev 1 at 2. Many other countries take a considerably more circumscribed approach, albeit while endeavouring to strike a balance between judicial independence and accountability: see country reports cited by Cappelletti, *ibid* at 36-40.

⁴⁶ Article 27 of the *Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) [ICC Statute].

⁴⁷ *Prosecutor v Dragen Erdemović*, IT-96-22-A, Judgment (7 October 1997), International Criminal Tribunal for the former Yugoslavia, Appeals Chamber). Online: <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>.

⁴⁸ The Office of the Prosecutor of the International Criminal Court has established a policy under which it focuses its efforts on investigating and prosecuting those “most responsible” for the most serious crimes: Office of the Prosecutor, International Criminal Court, Policy paper on case

under the notion of command responsibility,⁴⁹ but it places moral and legal limits on the duty to follow orders. Despite what can only be described as among the most brutal examples of constrained agency, the legal demand on Erdemović was that he follow a settled moral duty to not participate in a war crime.

If moral and legal culpability exists in such extreme circumstances, it is hard to imagine how it should not exist for judges, who would be expected to sacrifice considerably less in order to stand up to brutality and injustice.⁵⁰ The legal histories of the Third Reich and apartheid South Africa, for example, reveal few instances in which a judge was relieved of his duties for ruling against the interests of the regime,⁵¹ although such rulings were, of course, relatively rare. Such was the value of maintaining the illusion of legality that it was not worth it for the regime to demonstrate their authoritarianism against judges, which might

selection and prioritisation (15 September 2016), online: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

⁴⁹ Under the theory of command responsibility (codified in Article 28 of the *Statute of the International Criminal Court*), superior officers can be held responsible for the crimes of their subordinates even if they are not present at the time of the commission of a crime. For a survey of the law in this area see Chantal Meloni, “Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?” (2007) 5(3) *J Int Crim Just* 619.

⁵⁰ Indeed, Radbruch, *supra* note 35 at 10, had little patience for the suggestion that judges could invoke ‘necessity’ – “in that they would have risked their own lives had they pronounced National Socialist law to be statutory lawlessness” – as a defence, given that he believed that “the judge’s ethos ought to be directed toward justice at any price, even at the price of his own life” (as noted previously at note 118, chapter 5, *supra*).

⁵¹ Indeed, there is no indication that South African judges felt particularly under threat, although there was perhaps an understanding that a liberal judge’s career prospects might be limited, as was evidenced by the 1957 and 1959 appointments of regime loyalists to be Chief Justice, with well-respected senior judges being passed over: John Dugard, *Human Rights and the South African Legal Order*. Princeton: Princeton University Press, 1978). Graver notes that Nazis rarely disciplined or sanctioned judges for “non-conforming rulings” and cites a contemporary observer, Karl Loewenstein, as observing that “not a single case is reported in which a judge who resigned was sent to a concentration camp, or even lost his pension”: Hans Petter Graver, *Judges Against Justice: On Judges When the Rule of Law is Under Attack* (Heidelberg: Springer, 2015) at 41-42, citing Karl Loewenstein, “Reconstruction of the Administration of Justice in the American Occupied Germany”, (1948) 61 *Harv L Rev* 419 at 444. See also Osiel, who noted that judges who criticised the repressive policies of the *juntas* in both Brazil and Argentina were not “repressed or forced to resign”: Mark J Osiel, “Dialogue with Dictators: Judicial Resistance in Argentina and Brazil”, (1995) 20(2) *Law & Soc Inq* 481 at 486. Of course, it is worth remembering that relatively few judges were troubled by the dilemmas that this thesis considers and that many judges were not just accidentally complicit, but enthusiastic supporters of the regimes in question.

bruise the perception of institutional independence and the veneer of legality that it afforded.

However, the purpose of this discussion is not to argue for judicial liability,⁵² but merely to suggest that judges have been recognised as possessing sufficient agency, in the legal sense, on which one might base a positive model of judicial responsibility. Not only that, exercising independence is an inherent part of the judicial function: Aharon Barak, the retired President of the Supreme Court of Israel, specifically rejects the notion that a judge is an agent of the legislature “who carries out the orders of his or her principal”⁵³ because of judges’ responsibility for maintaining “the coherence of the legal system as a whole”.⁵⁴ Barak suggests that judges’ primary responsibility is to bridge the gap between law and life, using the process of interpretation to mediate between the generality of enacted law and its application to the particular circumstances of the case at hand.⁵⁵ It is in that context that judges might consider the nature of their responsibility to the rule of law.

⁵² That can be left to Graver, *supra* note 51, who devotes Chapter 6 of his book to making the case for the criminal liability of judges who have participated in persecution. As he notes, at 118: “One can never commit gross violations of human rights with the legitimate expectation that one will not be punished, and the law should not protect such an expectation. Not even judicial immunity should offer this protection. Judicial immunity is important, not for the benefit of the individual judge but for the benefit of the rule of law. It must therefore not be construed in such a way as to become an obstacle to the rule of law and a protection of those who break it down.”

⁵³ Aharon Barak, *The Judge in a Democracy* (Princeton, NJ: Princeton University Press, 2006) at 16. However, as will be discussed later, some theorists do adopt an agency model for the judiciary, with “society” being the ultimate principal: see *infra* note 79 and accompanying text.

⁵⁴ *Ibid* at 17: “All parts of the law are linked. Whoever interprets one statute interprets all the statutes. Whoever enforces one statute enforces the whole legal system. Normative harmony must exist between the different parts of the legal system.” Of course, coherence in and of itself has no particular normative valence. Apartheid was, at least from the internal point of view, a coherent system; as such, Barak’s model offers little guidance for systems that are not directed at justice.

⁵⁵ *Ibid* at 5. Barak expounds a “dynamic” and “purposive” approach to statutory interpretation, at 7, which, in the Israeli constitutional context of an entrenched bill of rights, permits declarations of invalidity.

7.4 The Responsibility to the Rule of Law

The rule of law is both a foundational socio-legal concept and one that is ill-defined. Indeed, there is some question as to whether it is a legal concept at all, or rather a political one, a descendant of the Aristotelian notion of a nation ruled by laws, not men. In his entry in the *Stanford Encyclopedia of Philosophy*, Jeremy Waldron describes the rule of law as “an ideal of political morality”, suggesting that it is one of a number of ways that a society can choose to organise its collective affairs.⁵⁶ While considered foundational to liberal democracy, the term “rule of law” itself is often left undefined in the text of many constitutional documents, including the Canadian constitution,⁵⁷ or omitted entirely. In the common law tradition, AV Dicey coined the term “rule of law”,⁵⁸ although as a political structure, its roots obviously run much deeper. Moreover, analogues of the rule of law exist in European political traditions, such as the *rechtstaat* and *l'état de droit*,⁵⁹ and it has become a term of transnational significance.⁶⁰

As a result of its application to a variety of problems in a variety of settings, the definition of the rule of law has evolved, albeit without becoming settled. Many leading commentators on the rule of law remark on the lack of precision in its

⁵⁶ Jeremy Waldron, “The Rule of Law” in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, Fall 2016 edition (Metaphysics Research Lab, Stanford University, 2016). See also Joseph Raz, “The Rule of Law and Its Virtue”, in Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 224.

⁵⁷ There is a brief reference to the rule of law in the preamble to the Canadian *Constitution Act*: “Canada is founded upon principles that recognize the supremacy of God and the rule of law”, but the rule of law has generally been understood to be an unwritten constitutional principle: see for example, *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32

⁵⁸ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (Indianapolis: Liberty Classics, 1915) at 110-115.

⁵⁹ For a discussion of the meaning of these terms, and how they relate to each other, see Martin Loughlin, “Rechtsstaat, Rule of Law, l’Etat de droit” in Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) at 312-341.

⁶⁰ Jothie Rajah, “‘Rule of Law’ as Transnational Legal Order” in Terence C Halliday & Gregory Shaffer, eds, *Transnational Legal Orders* (Cambridge: Cambridge University Press, 2015) at 340-373. Brian Tamanaha describes how support for the idea of the rule of law spread around the world in the 1990s: Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, New York: Cambridge University Press, 2004) at 1-3. For more critical takes on the rule of law project, see *infra* note 71.

definition,⁶¹ including the former Chief Justice of the UK Supreme Court, Lord Bingham, who after decades on the bench explained his interest in writing about the rule of law on the basis that although “the expression was constantly on people’s lips, I was not quite sure what it meant, and I was not sure that all those who used the expression knew what they meant either, or meant the same thing.”⁶²

7.4.1 *Thin and Thick Conceptions of the Rule of Law*

Some favour a relatively “thin” definition, consisting of certain formal principles of law (for example that law is of general application, that it is clear and publicly knowable, that it is stable, and that it applies only prospectively), combined with some procedural requirements (such as law being administered through independent and impartial courts, the publication of reasons for judgment, and that those subject to the law are entitled to confront the evidence against them).⁶³ Others favour a “thicker” or “substantive” conception, which includes the adherence to fundamental human rights.⁶⁴ The World Justice Project (WJP), an international organisation that produces an index of countries’ adherence to the rule of law, endeavours to chart a middle course, citing four requirements: (i) government and its officials are accountable under the law; (ii) laws are clear,

⁶¹ For example, Mary Liston, *supra* note 18 and Tamanaha, *supra* note 60 at 3, who describes it as “an exceedingly elusive notion”.

⁶² Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) at vii.

⁶³ Fuller’s “inner morality of law” provides one such set of formal requirements: Lon L Fuller, *The Morality of Law* (New Haven; London: Yale University Press, 1969). The idea of thin and thick conceptions of the rule of law is not an original one: Brian Tamanaha divides conceptions of the rule of law into formal and substantive, with each category then yielding thinner and thicker versions, *supra* note 60 at 91. Dyzenhaus similarly distinguishes between two understandings of the “rule-of-law project”: one in which the rule of law requires no more than acting in accordance with the law, whatever its content; the second requiring compliance with those “principles that need to be exhibited by a legal order”: David Dyzenhaus, “Preventive Justice and the Rule-of-Law Project” in Andrew Ashworth et al, *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013) at 92. This second conception places judges under a duty to exercise a degree of normative control over the legal sphere, to ensure that anyone who “purport[s] to act in the name of law” observes such principles.

⁶⁴ One of the most notable recent accounts of such a thick conception was delivered by Bingham, *supra* note 62, and consisted of eight components, including formal requirements, limits on discretion and the exercise of power, as well as respect for human rights and the international legal order.

publicised, stable and fair; (iii) an accessible, fair, and efficient process for the enactment and administration of law; and (iv) an accessible, impartial, and independent judicial system.⁶⁵ In incorporating some substantive content to the rule of law, the WJP cites the following apt observation from Arthur Chaskalson, former Chief Justice of the Constitutional Court of South Africa:

[T]he apartheid government, its officers and agents were accountable in accordance with the laws; the laws were clear; publicized, and stable, and were upheld by law enforcement officials and judges. What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair (only whites, a minority of the population, had the vote). And the laws themselves were not fair. They institutionalized discrimination, vested broad discretionary powers in the executive, and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is ‘an empty vessel into which any law could be poured’.⁶⁶

The concerns expressed by Chaskalson suggest the useful distinction made by some commentators between the rule of law and “rule by law”, in which authoritarian governments impose a rules-based order without subjecting themselves to the corresponding legal accountability.⁶⁷ While rule by law can usefully be distinguished from totalitarian rule, in which an executive relies on “a

⁶⁵ World Justice Project, *Rule of Law Index* (2011 edition), online at https://worldjusticeproject.org/sites/default/files/documents/WJP_Rule_of_Law_Index_2011_Report.pdf. Notably, the report expresses concerns about obstacles to access to civil justice, for example, with respect to several countries with otherwise high scores, including Canada, due to the high cost of legal advice and representation.

⁶⁶ *Ibid* at 9.

⁶⁷ See, for example, Magaloni’s account of the autocratic use of courts: “Autocrats employ courts to enforce their commands directed to bureaucratic subordinates and the citizenry, but they normally do not resort to these institutions to arbitrate conflicts among members of the ruling elite.” Beatriz Magaloni, “Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico” in Tom Ginsburg & Tamir Moustafa, eds, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) at 180.

prerogative, legally unbounded power”,⁶⁸ Chinese law professor Li Shuguang explains that such a distinction can be fairly unimportant:

... under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion.⁶⁹

Moustafa and Ginsburg outline the five functions of courts in authoritarian (rule by law) regimes, including to “establish social control and sideline political opponents” and “bolster a regime’s claim to ‘legal’ legitimacy”.⁷⁰ If it is true, as Tamanaha contends, that the rule of law is “*the* preeminent legitimating political ideal in the world today”,⁷¹ there is a real danger in the fluidity of its definition, and the consequent susceptibility to its misuse, both as a function of cynical

⁶⁸ Dyzenhaus, *supra* note 63 at 95.

⁶⁹ Cited in Tamanaha, *supra* note 60 at 3. See also George Ge Chen, “Le droit, C’est Moi: Xi Jinping’s New Rule-By-Law Approach” (Oxford Human Rights Hub Blog, 26 July 2017), online: <http://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach/>, in which the author discusses the Chinese legal tradition of rule-by-law and how President Xi, while expanding law’s reach to regulate government officials, is also reviving it as an instrument to control civil society.

⁷⁰ Tamir Moustafa and Tom Ginsburg, “Introduction: The Functions of Courts in Authoritarian Politics” in Ginsburg & Moustafa, *supra* note 67 at 4. The other three functions are to “strengthen administrative compliance within the state’s own bureaucratic machinery and solve coordination problems among competing factions within the regime”, “facilitate trade and investment”, and “implement controversial policies so as to allow political distance from core elements of the regime”.

⁷¹ Tamanaha, *supra* note 60 at 4. Raz is deeply critical of the “promiscuous” use of the language of the rule of law to refer to a long list of fashionable political ideals: Raz, *supra* note 56 at 211-212. Hutchinson and Monahan refer to the rule of law as the “will-o’-the-wisp of constitutional history”: Allan C Hutchinson & Patrick Monahan, “Democracy and the Rule of Law” in Allan C Hutchinson and Patrick Monahan, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 99. More trenchantly, Hutchinson and Monahan argue that the rule of law prizes individual liberty over democratic governance, and thus undermines communitarian values: *ibid* generally. Similarly, based on his experience working in international development, Humphreys came to believe that rule of law promotion operates as a sort of Trojan horse for the imposition of a fairly hegemonic laundry list of economic and political projects that may well undermine the effective sovereignty of the people affected: Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge: Cambridge University Press, 2010).

politics and genuine misunderstanding. Not surprisingly, many despotic regimes have had a great affection for a rules-based order and rule of law rhetoric.⁷²

Judith Shklar suggested that some of this confusion is the result of the conflation of two distinct historical accounts of the rule of law.⁷³ The first is the Aristotelian account of the “rule of reason”, which she warns is perfectly compatible with fundamentally unequal political systems (such as Athenian slavery) and with what Ernst Fraenkel referred to as the “dual state” as it existed in, for example, Nazi Germany and apartheid South Africa.⁷⁴ By contrast, Montesquieu’s more liberal account serves “to protect the ruled against the aggression of those who rule”, with the sole aim of ensuring “freedom from fear”.⁷⁵ Here the rule of law does not necessarily depend on the ability of a judge to persuade the public of her superior reasoning but rather aims to “prevent the executive and its many agents from imposing their powers, interests, and persecutive inclinations upon the judiciary.”⁷⁶ But while judicial virtue is not required under the latter account, judicial independence is an obvious *sine qua non*.

Both the rule of law and rule by law models allow plenty of rhetorical space for judges to declare their fidelity to law, but an important point of distinction might lie in the question of to whom, under each version of legality, do judges owe their loyalty? Rule by law implies that judges will act to support the exercise of power by the government, whereas the rule of law, in ensuring that all equally benefit from and are subject to legal norms, frequently requires judges to constrain government power, implying a greater loyalty to the broader polity. A similar

⁷² Tamanaha, *supra* note 60 at 2, catalogues an unlikely list of “rule of law” supporters, including Vladimir Putin, Robert Mugabe, and the presidents of China, Iran, and Indonesia, among others.

⁷³ Judith Shklar, “Political Theory and the Rule of Law” in Hutchinson & Monahan, *supra* note 71 at 1-16.

⁷⁴ *Ibid* at 1-2. The dual state refers to the schismatic coexistence of a normative (legal) state and a prerogative (authoritarian) one, the latter of which permitting the regime to operate unbounded by law, and which could supercede the former at will: Ernst Fraenkel, *The Dual State: A Contribution to the Study of Dictatorship* (New York, London: Oxford University Press, 1941).

⁷⁵ Shklar, *ibid* at 4. Interestingly, in the same essay, at 13-14, Shklar makes a persuasive case that Fuller’s “inner morality of law” suffers from the same frailty.

⁷⁶ *Ibid* at 5.

account of judicial responsibility is suggested by the work of Cappelletti who, after studying the practices and recommendations contained in 28 country reports from a range of legal systems,⁷⁷ advocated for a “consumer-oriented” model of judicial responsibility, which he saw as reflecting a modern trend of

seeing law and justice no longer within the framework of traditional conception – the “official” conception of the “rulers, governors, and other officials” – but rather in the framework of more democratic conception, that of “the consumers of law and government.” Judicial responsibility, in other terms, shall be seen not as a function of the prestige and independence of the judiciary per se, nor as a function of the power of any abstract entity like the state or of any actual ruler, individual or collective. Rather, it shall be seen as a function of the “consumers,” that is, the citizenry; hence, as an element of a system of justice which combines impartiality, and the degree of detachment demanded for impartiality, with an adequate degree of societal openness and responsiveness – openness and responsiveness to society and to the individual members of society, *at whose service only* the system of justice must work.⁷⁸

In a similar vein, Garoupa and Ginsburg invoke an agency model to describe the work of judges, in which judges exercise power and perform tasks on behalf of the ultimate principal, society.⁷⁹ There is perhaps something unpalatable about categorising litigants as ‘consumers’ or ‘principals’, just as there is in characterising the ‘justice’ delivered by judicial processes as a product.⁸⁰ Such

⁷⁷ Cappelletti, *supra* note 44. This article is the revised version of a General Report on Judicial Responsibility prepared for the 1982 Congress of the International Academy of Comparative Law, and based on country reports from common, civil, and socialist law jurisdictions.

⁷⁸ Cappelletti, *supra* note 44 at 62 (emphasis in original).

⁷⁹ Garoupa and Ginsburg, *supra* note 54 at 3. “Society” here is defined as “an aggregate of individuals and groups with varied interests and preferences”, and while it is acknowledged that society often selects and monitors judicial agents through political intermediaries, “judges are also viewed in many cases as agents of the public to help monitor the politicians.” Structured this way, Chief Justice Barak would likely find the agency model significantly less objectionable.

⁸⁰ Indeed, in their 2013 report on access to justice, the Canadian Bar Association specifically eschewed the term “client” or “user” in favour of “person” in order to “avoid reducing the individual’s role in the justice system to a passive category of recipient of services”: Canadian Bar Association, *Equal Justice: Balancing the Scales* (available online:

language undercuts the noble mysticism of the judicial process, reducing it to mere work. However, this demystification also serves to clarify and democratise that work: judges provide a specific public service, independent and fair legal decision-making, and the benefit of that service should be equally available to all of the system's users.⁸¹

While it would undoubtedly be useful, this thesis will not settle the meaning of the rule of law. However, given the indeterminacy of the concept, it is essential that judges establish for themselves a working theory of the rule of law that clarifies the place of law, and thus their role, in the socio-political and normative order. Given the imprimatur of justice that attends a judgment of the court, any judicial theory of the rule of law must attend to the relationship between law and justice.⁸² In Dyzenhaus' view, only if there is an intrinsic relationship between law and justice can law "provide a place where those subject to it can contest it when it is used as an instrument of brute and arbitrary power."⁸³ It is this type of instrumentalisation that this thesis attempts to address, and exactly these types of contestations, by judicial office-holders acting in the name of law, that it seeks to frame and support.

7.4.2 Towards a Judge-Oriented Working Theory of the Rule of Law

A judge's working theory of the rule of law must, in large measure, be directed to those dimensions that bear on the core of their institutional role, namely to

https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf at 12. Garoupa and Ginsburg list a diversified range of judicial "products", including "resolving particular disputes, applying general norms to individual cases, making new laws, and monitoring other officials." Garoupa and Ginsburg, *supra* note 54 at 3-4.

⁸¹ Indeed, Paul Kahn suggests that "the availability of the courts is a better measure of democratization than the availability of the vote. The vote empowers a majority. Only the lawsuit empowers each citizen." Paul W Kahn, "Independence and Responsibility in the Judicial Role" in Irwin P Stotzky, ed, *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder: Westview Press, 1993) at 77.

⁸² In "With the Benefit of Hindsight" at 66, Dyzenhaus suggests that "it is in what judges do that the central question about the rule of law – the relationship between law and justice – is manifested."

⁸³ *Ibid* at 68.

constrain the abuses of private and public power. One of the most useful judge-oriented definitions of the rule of law comes from an unlikely source, Duncan Kennedy, generally a skeptic of judicial authority, who proposes a definition of the rule of law that requires the following:

That there be justiciable legal restraints on what one private party can do to another, and on what executive officers can do to private parties;

That judges understand themselves to be enjoined to enforce these restraints independently of the views of the executive and the legislature, and of political parties;

That judges understand themselves to be bound by a norm of interpretative fidelity to the body of legal materials that are relevant to whatever dispute is before them.⁸⁴

Kennedy describes this as a procedural or institutional definition of the rule of law, one that specifically eschews substantive content.⁸⁵ But here Kennedy is either unduly modest or blinkered: some substantive content is unavoidably implied by the existence of “justiciable legal restraints”, some of which, as the principles and doctrines discussed in the last chapter demonstrate, go beyond the *vires* doctrine implied by Kennedy to include standards of fairness, reasonableness, and good faith. Similarly, if Dworkin is to be believed, the ‘body of legal materials’ to which judges owe their fidelity would include legal principles that, in disavowing specific applications of an otherwise valid rule for example, extend beyond the merely procedural. And the judicial independence espoused by this definition is focused not on the institutional dimensions of independence, but rather on substantive, personal independence.

⁸⁴ Duncan Kennedy, *A Critique of Adjudication (fin de siècle)*, (Cambridge, MA: Harvard University Press, 1997) at 13.

⁸⁵ *Ibid.*

The Instrumental Value of an Equality of Arms

One omission from this core definition is Kennedy's focus on political influence at the expense of other forms of power, and particularly private economic influence.⁸⁶ This not only means the possibility of direct corruption, such as bribery, but also the application of superior economic power to legal pursuits, as exposed most palpably in the SLAPP cases. Judges should be conscious of the potentially seductive effect of such power, often clothed in a stark inequality of legal representation, on their own capacity to adjudicate cases fully and fairly. In shifting political debate to the judicial forum, SLAPP proponents do not just reframe the issues, they move them into a venue that, when operated as intended i.e. in an adversarial context with counsel present for both sides, is markedly more expensive than the public square, and thus reproduces existing economic inequalities. Recall that the ECtHR found that, "given the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's", the UK's failure to grant legal aid to Steel and Morris in the *McLibel* case violated their right to a fair trial.⁸⁷ But what does this mean?

This can be read as suggesting (perhaps among other things), that due to the inequality of arms the trial judge was simply not in a position to fairly hear and decide the case. A similar theory animated Canadian courts to make funding for counsel available in the *Caron* and *Okanagan Indian Band* cases.⁸⁸ It is also present in the landmark Australian case that established the right to counsel for criminal defendants,⁸⁹ which led a subsequent Chief Justice of the Australian High Court, Michael Kirby, to remark:

⁸⁶ This is not to imply that Kennedy does not attend to economic power dynamics elsewhere in his analysis of adjudication. Indeed, the omission is surprising because he is so attentive to the influence of social class and economic power dynamics on law.

⁸⁷ *Steel & Morris v United Kingdom*, [2005] ECHR 103 at para 69 [*Steel & Morris*](discussed in chapter 3, *supra* at 102-103).

⁸⁸ *R v Caron*, 2011 SCC 5; *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71.

⁸⁹ *Dietrich v the Queen*, (1992) 177 CLR 292 (HC).

It is far from astonishing that the High Court should have concluded that the courts had the means to prevent [indigent defendants from being forced to “defend themselves and just do their best”] from happening. The means included the provision of adjournments of the trial as necessary and the ultimate provision of a stay of proceedings, if legal assistance was denied without justification. The outcome of this decision has been a major improvement in the provision of legal assistance to indigent persons facing serious criminal charges. It is fairer for the accused, *but it is also fairer to the judge, the jury and the community*. ... It is a recognition that the law is not content with a charade of justice but is concerned with the reality.⁹⁰

One senses in each case, there was a concern that, if a litigant could not afford to retain counsel and thereby access the attendant procedural and substantive legal expertise, there was a significant chance that there would be an intolerable gap between the strength of the parties’ actual positions in law and their capacity to effectively advocate for them.⁹¹ A more powerful party’s victory by dint of its vastly superior resources may be, on some level, rational, but it is hardly likely to be fair. This idea of intolerable unfairness is what underpins the requirement, in both international law and the domestic legal systems of most liberal democracies to ensure access to counsel for criminal accused.

Similarly, obvious disparities in access to information on key issues has necessitated the shifting of procedural and evidentiary burdens in some of the SLAPP and Article 18 jurisprudence, necessitating a rethinking of the ordinary assumptions of good faith that underpin unfettered access to the courts. While there are many reasons why judges might seek to promote equality, an insistence of something approximating an equality of arms can be seen as an instrumental

⁹⁰ Michael Kirby, “Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty”, (2006) 30 Melbourne U L Rev 576 at 588 (emphasis added, footnotes omitted). Australia, not having a bill of rights, imposed no constitutional or statutory right to counsel.

⁹¹ Similarly, the ECtHR did not suggest that the right to a fair trial guarantees a perfect equality of arms, but rather that the state must ensure that “each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a *substantial disadvantage* vis-à-vis the adversary.” *Steel & Morris* at para 62. (References omitted, emphasis added.)

value for judges, operating to preserve and effectuate their ability to be impartial, ensuring that a decision is based on the underlying merits of the case, rather than the quality (or absence) of counsel or a particular party's ability to provide (or conceal) relevant information.

Justiciability and Jurisdiction

Kennedy's definition of the rule of law also makes reference to "justiciable legal restraints". Whether a matter is justiciable is, first and foremost a jurisdictional question, one that requires judges to exercise judgment to ascertain whether the court believes it has the institutional competence to adjudicate the matter before it. Ordinarily, this rests on whether the question is legal, as opposed to political, although this sense of the word "justiciable" would be redundant here. Rather, I suspect that Kennedy uses "justiciable" as a call to courts to exercise jurisdiction to legally restrain the abusive exercise of power, including in the ways that courts have done through the doctrines discussed in the previous chapter. These include, for example, the recognition of the court's inherent powers to provide a remedy for the infringement of rights, and the enforcement of the doctrine of *abus de droit*. In this way, judges affirm the rule of law, by creating and enforcing credible and fair conditions under which it can operate, and in so doing assert their specialist role in government as the primary guardians of the rule of law.

The issue of justiciability is often entangled with controversies over the separation of powers, a doctrine often invoked to demand judicial deference to the legislature or executive, i.e. judicial restraint.⁹² Arguments over the role of the judiciary in relation to the other branches of government are reflected, for example, in the divergent judicial approaches to the interpretation of statutes in apartheid South Africa, in which most judges were content to fill gaps and promote the objectives pursued by the regime, and others, much more rarely, sought to control its excesses. It is also on display in the different reasons delivered in *Roncarelli v Duplessis* (discussed in detail in the preceding chapter)

⁹² Some key critiques of judicial review will be canvassed in section 7.5 *infra*.

in which the central question was the court's role in determining the undefined scope of discretion afforded by the *Alcoholic Liquor Act*, reflected particularly in the contrast between Justice Cartwright's dissenting judgment, which found – on the basis of the plain language of the statute itself – that the Act afforded unfettered discretion, and Justice Rand's majority view that the rule of law required that administrative discretion is necessarily constrained by statutory purposes. This, in turn, takes us back to the starting point, the problem of the indeterminacy of the rule of law: from what source or authority does Justice Rand derive the notion that the rule of law constrains administrative discretion? Or is the rule of law nothing more or less than what judges say it is?

7.4.3 *A Fiduciary Theory of the Rule of Law*

Fox-Decent, writing on *Roncarelli v Duplessis*, confronts this problem of indeterminacy by developing a relational theory of the rule of law, one grounded in what he describes as a fiduciary relationship between the state and its citizens.⁹³ This theory is grounded in both the vulnerability of persons subject to what he terms “irresistible” public power, and their inherent dignity, which requires that they be treated as ends in themselves (the principle of non-instrumentalisation) and not be subject to arbitrary power (the principle of non-domination).⁹⁴ Writing in the context of common law constitutionalism, Fox-Decent suggests that the rule of law's imposition of requirements of fairness, purposiveness, and reason-giving “provide a bulwark against the possession and use of arbitrary power”.⁹⁵ He underpins the case for understanding the relationship as fiduciary as follows:

⁹³ Evan Fox-Decent, “Democratizing Common Law Constitutionalism”, (2010) 55 McGill LJ 511 [“Common Law Constitutionalism”]. Fox-Decent attributes the origins of this theory to Roderick Macdonald's earlier observation that there is a legally significant relationship between public actors and those subject to their powers, akin to a that of a trustee and a beneficiary, citing Roderick A Macdonald, “On the Administration of Statutes”, (1987) 12 Queen's LJ 488 at 493.

⁹⁴ Fox-Decent, *ibid* at 523.

⁹⁵ *Ibid*.

Fiduciary relationships arise when one party (the fiduciary) holds discretionary power of an administrative nature over the legal or practical interest of another party (the beneficiary). This administrative power is other-regarding, purposive, and institutional; it is held so as to be used on behalf [of] others, for limited purposes, and within the framework of a legal institution such as a family or a corporation. The beneficiary is peculiarly vulnerable to the fiduciary's power in that she is unable, either as a matter of fact or law to exercise the entrusted power. The relationship between public institutions and of the people subject to them possesses these characteristics.⁹⁶

In Fox-Decent's view, the crucial point in the analogy to private law fiduciaries is that "power cannot be exercised by a public body without a concomitant assumption of duties of fairness and reasonableness."⁹⁷

As fiduciary obligations inhere to the relationship between the state authority and the individual, they are enforceable by courts as a matter of legality, rather than as the exercise of a power of judicial review, and thus the question of the separation of powers simply does not arise.⁹⁸ Enforcing the legal obligations that exist between two parties in a fiduciary relationship falls squarely within the core functions of the judicial branch, well beyond any objection that the court is exceeding its powers to impose its own policy preferences.

Moreover, Fox-Decent continues, this conception of the rule of law avoids the problem of indeterminacy, both as to its source (the circularity objection) or its content, particularly in the face of competing considerations (the indeterminacy objection).⁹⁹ Instead, the source and content of the rule of law are established by the terms of the fiduciary relationship or, put another way, the rule of law is "[t]he practical manifestation of the state's overarching fiduciary obligation to its

⁹⁶ *Ibid* at 533-534.

⁹⁷ Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority", (2005) Queen's LJ 259 at 268 ["State Legal Authority"].

⁹⁸ Fox-Decent, "Common Law Constitutionalism" at 525.

⁹⁹ *Ibid* at 526-531.

subjects”.¹⁰⁰ Just as fiduciary obligation tempers and informs the exercise of fiduciary power in the private law context, so does the rule of law temper and inform the exercise of public power. Thus, the fiduciary obligations of the state should act to restrain the political appetites of those who wield state power, by demanding that it be exercised “exclusively for the sake of the other-regarding purposes for which it is held or conferred.”¹⁰¹ As will be discussed in the next section, there is good reason to believe that the judiciary, which benefits from an institutional structure intended to insulate judges from the fray of this kind of competitive politics, is the branch of government best positioned to enforce the rule of law as a constraint on political power.

In addressing the application of the rule of law in *Roncarelli v Duplessis*, Fox-Decent was describing as fiduciary the duties of administrative decision-makers, with the courts cast as the enforcers of the underlying legal obligations. But given that courts also exercise similarly “irresistible” public powers to which individuals are subject, could the relational, fiduciary theory not apply with equal force to the exercise of the judicial function? Fox-Decent’s theory is certainly capacious enough to suggest that it could.¹⁰² Moreover, a sense of fiduciary duty would also explain why judges hold themselves to particularly strict professional and ethical standards. While generally understood in a rhetorical sense, perhaps judges take more seriously than most the “trust” dimension of the public trust with which the judicial institution is invested.¹⁰³ At the very least, a fiduciary

¹⁰⁰ Fox-Decent, “State Legal Authority” (headnote).

¹⁰¹ *Ibid* at 261.

¹⁰² Fox-Decent also suggests that “[a]s public fiduciaries, tribunals and judges are legally required to endeavour to interpret statutes in a manner solicitous of the well-being of the people subject to them.” “Common Law Constitutionalism” at 532. And he suggests in “State Legal Authority”, at 308, that the position of arbitrator provides the paradigm case of a fiduciary acting on behalf of multiple beneficiaries with competing claims, and thus exercising a power that the beneficiaries themselves are not in a position to exercise, arguing by analogy that “this is exactly the circumstance presented by the conditions of sovereignty, under which we must entrust the specification, administration, adjudication and vindication of our legal rights to the state.”

¹⁰³ See, for example, the Preamble of the Bangalore Principles of Judicial Conduct, in which judicial office is described as a public trust: “WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.”

conception of judicial duty supports a requirement that judges avoid the manifest injustice of judicial persecution, given that fiduciaries must avoid harming those to whom they owe their duty, as well as making it conceptually very difficult for judges to eschew their agency. Fiduciaries are, by definition, empowered.

7.5 *The Responsibility to the Polity*

The question of justiciability can be at its most pointed when it comes to the question of the courts regulating the political arena. While, in the abstract, there is little to argue against courts enforcing, for example, electoral rules and regulations, in the heat of an electoral campaign judicial intervention of any kind is often looked upon as an encroachment on the state of play. Nonetheless, there are plenty of examples of courts being called upon to referee political processes, both in the enforcement of electoral regulations and the protection of political rights, broadly defined. Cases of both types engage the question of judicial persecution wherever courts are being asked to authenticate fundamentally illiberal and discriminatory political practices.

In cases of the first kind, courts are called upon to regulate electoral activities, enforcing rules and basic norms of fairness in the conduct of elections that, in a democracy at least, imbue the legislative branch (and in some political systems, some parts of the executive branch) with their legitimacy to create and administer laws and regulations. This was the precondition that was absent in apartheid South Africa, where the non-white majority of the population was disenfranchised in order to maintain white rule for the overwhelming benefit of the white minority.¹⁰⁴ It is the necessary predicate that Justice Trengove came to realise was missing in the court's observance of the doctrine of parliamentary supremacy. As became clear in South Africa, a political and legal system that excludes universal franchise is, at least over the long term, fundamentally unstable: the rule of law rests on an assumption of the legitimacy of enacted law,

¹⁰⁴ Indeed, it was the Appellate Division's effort to prevent the statutory disenfranchisement of Cape Coloured people that led to the expansion and stacking of that court: *Harris and ors v Minister of the Interior*, 1952 (2) SA 428 (A), discussed in chapter 2, *supra* at 56-57.

and breaks down when the majority of the population finds no place for itself, or fails to accept its assigned place, in the legal order. As Chaskalson et al note in their submission to the TRC, there were in effect, two legal systems in South Africa, one that affected white people and one that affected black people, and the system that affected black people did not meet the standards of the rule of law.¹⁰⁵

Of course, issues of democratic legitimacy arise in far less dramatic circumstances than the aberrant apartheid regime. Questions arise in established democracies of adherence to established electoral rules, whether with respect to political donations, the drawing of electoral districts, and equal access to polls.¹⁰⁶ A wide range of such issues arise in the United States, for example;¹⁰⁷ and,

¹⁰⁵ A Chaskalson et al, “The Legal System in South Africa 1960-1994: Representations to the Truth and Reconciliation Commission”, (1998) 115(1) S Afr LJ 21 at 22-23. This was true both on the basis that black people were disenfranchised, and so the law lacked democratic legitimacy, and on the basis that the law imposed burdens on non-whites that were “deeply disadvantageous and humiliating”. In this latter respect, as argued in chapter 2, compliance with the law was, in effect, impossible for non-whites, absent a personal acceptance of subordinate status.

¹⁰⁶ United States Supreme Court Justice Stephen Breyer outlines three areas in which judges in that country are called upon to make decisions about the political process: (1) the determination and enforcement of fair voting rules; (2) the regulation of campaign finance; and (3) the interpretation and enforcement of ethics rules: “Supervision of the Political Process” in Stephen Breyer and Robert Badinter, *Judges in a Contemporary Democracy: An International Conversation* (New York: NYU Press, 2004). It is worth noting that since the writing of this article, the United States has undergone a considerable shift on at least two of the issues raised by Justice Breyer: in *Citizens United v Federal Election Commission*, (2010) 558 US 310, the US Supreme Court held unconstitutional statutory limits on corporate expenditures on “electioneering communications”; in *Shelby County v Holder*, (2013) 570 US 529, the majority found unconstitutional those sections of the Voting Rights Act that subjected the electoral laws of jurisdictions with a history of disenfranchising African-Americans to vetting by the federal Department of Justice. John Ferejohn, “Judicializing Politics, Politicizing Law” (2002) 65(3) *Law & Contemp Probs* 41 at 41 notes the increased willingness of courts to regulate political conduct (albeit in 2002), a conclusion that appears to be less true in light of the US Supreme Court’s very recent 5-4 decision upholding partisan gerrymandering: *Rucho et al v. Common Cause et al*, (2019) 588 US ____ (27 June 2019), online: https://www.supremecourt.gov/opinions/18pdf/18-422_9011.pdf.

¹⁰⁷ One of the most recent high-profile examples was the gubernatorial election in the state of Georgia, in the United States, in which Stacy Abrams, the Democratic candidate for governor, accused the Republican Secretary of State, the state official in charge of administering the election, of, among other things, purging a large number of voters from the electoral register and imposing unduly strict standards to voter registration, both of which seemed to target African-Americans. Negative perceptions were considerably exacerbated by the fact that the Secretary of State, Brian Kemp, was also her opponent (and the ultimate victor) in the gubernatorial race, and refused to relinquish his role supervising the election in which he was running. PR Lockhart, “Georgia, 2018’s most prominent voting rights battleground, explained”, *Vox* (6 November 2018),

notoriously, the hard-fought 2000 US presidential campaign was seen to have been decided by the US Supreme Court, when it enjoined a recount then taking place in the state of Florida.¹⁰⁸ In all such cases, courts risk being seen as advantaging or disadvantaging a particular candidate or party for partisan reasons, which can be highly prejudicial for the perceived political neutrality of judicial institutions. Indeed, reflecting on *Bush v Gore*, retired Supreme Court Justice Sandra Day O'Connor (who had sat on the case and, on some accounts, cast the deciding vote) wondered if the Court ought not to have refused to hear the case.¹⁰⁹ However, O'Connor's musing suggests the conflation of two issues, the extent to which a particular case is seen as political and the extent to which the Court itself is seen as politicised: it does not help that judicial appointments to the US Supreme Court are seen as political, and that in many politically charged cases, including *Bush v Gore*, rulings have been divided along "party lines", with judges being seen to have ruled in accordance with the preferences of the party of the president who had appointed them.¹¹⁰

Writing in the Israeli context, Barak argues that the second role of a judge (after bridging the gap between law and society) is to protect the constitution and democracy itself, including in the latter category not just the formal (electoral) dimensions, but "the rule of democratic values".¹¹¹ He has even coined the doctrine of "defensive democracy", according to which courts are assigned the task of "watching over our basic values and protecting them against those who

online: <https://www.vox.com/policy-and-politics/2018/10/26/18024468/georgia-voter-suppression-stacey-abrams-brian-kemp-voting-rights>.

¹⁰⁸ *Bush v Gore*, (2000) 531 U.S. 98. See also James L Gibson, "Judicial Institutions", in Sarah A Binder et al, eds, *The Oxford Handbook of Political Institutions* (Oxford: Oxford University Press, 2008) at 514-515.

¹⁰⁹ Garoupa and Ginsburg, *supra* note 54 at 14. It is not clear on what theory of judicial authority such a move might have been made, either as a real question of justiciability or as a matter of pure judicial discretion not to grant leave.

¹¹⁰ *Ibid* at 1. However, Garoupa and Ginsburg note the widespread perception that the surprise vote of Chief Justice Roberts (who had been appointed by a Republican president) to uphold the *Affordable Care Act*, the centrepiece achievement of the then-sitting Democratic president in *National Federation of Independent Business v Sebelius*, (2012) 567 US 519, might have had more to do with institutional self-preservation than his view on the underlying legal issues.

¹¹¹ Barak, *supra* note 53 at Chapter 2, generally.

challenge them.”¹¹² As such, the separation of powers does not exist to tie the hands of the judicial branch, but to balance power between the three branches, “to prevent the concentration of power in the hands of one governmental actor in a manner likely to harm the freedom of the individual.”¹¹³

The intuitive discomfort with judicial intervention in the political arena is no doubt born of what many scholars have called the “countermajoritarian difficulty” with judicial review, one that questions the democratic legitimacy of a judicial body, usually appointed rather than elected, opining on and possibly invalidating the acts and actions of democratically elected officials and bodies.¹¹⁴ The most straightforward account of the role of the judiciary in preserving political participation of various kinds is rights review. Where a constitutional democracy has an entrenched bill of rights, as in, for example the United States, courts usually have a constitutionally-mandated role to play in protecting those rights, generally by providing the authoritative interpretation of the right in question and deciding whether the particular statute or action is compatible with the right so defined. This is the procedure by which early SLAPPs were challenged, as infringements of the right to petition under the First Amendment of the US Constitution. There are a few different variations on this model, but ultimately, constitutionally protected rights act as a “trump” over the

¹¹² *Ibid* at 21-22, citing his opinion in *Velner v Chairman of the Israeli Labor Party*, HC 5364/94, 49(1) PD 758 at 808.

¹¹³ *Ibid* at 35, citing his opinion in *Rubinstein v Minister of Defence*, HC 3267/97, 52(5) PD 481 at 512. Similarly, in *Federalist* No 47 James Madison argued with respect to the separation of powers that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands ...may justly be pronounced the very definition of tyranny”: James Madison, “Federalist No 47” in Alexander Hamilton et al, *The Federalist* (Cambridge, MA: Belknap Press of Harvard University Press, 2009) at 316. As clarified by Waldron, the principle of the dispersal of power, operates in tandem with the principle of the separation of powers and the principle of checks and balances, among others, “as touchstones of political legitimacy”: Jeremy Waldron, *Political Theory* (Cambridge, MA: Harvard University Press, 2016) at 49.

¹¹⁴ The term was first coined in Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: The Bobbs-Merrill Company, 1962). A history of the debates about the countermajoritarian difficulty was canvassed in Barry Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy” (1998) 73 NYU L Rev 333.

majoritarian will to override them.¹¹⁵ While this is the prevailing theory of judicial review, Waldron, among others, makes a notoriously compelling argument that there is little reason to believe that courts are better placed than properly-functioning legislatures to protect rights and resolve questions of policy.¹¹⁶

However, as Waldron acknowledges, his argument for the relative legitimacy or expertise of the legislature has its limits, particularly with respect to minority rights, and rests on a necessary premise that the legislature has been constituted or is functioning properly.¹¹⁷ This implies that any discussion of the legitimacy of judicial review must start with the rules of the political game itself. The question of the court's role in adjudicating such rules is answered by the "process theory" of judicial review proposed by, among others, John Hart Ely, in which courts have a necessary role to play as a referee of the political process.¹¹⁸ The genesis for his theory was the *obiter* in the notorious "Footnote 4" in the US Supreme Court's decision in the *Carolene Products* case, in which the Court left for another day how strictly it should scrutinise "legislation which restricts ... political processes", including the right to vote, the dissemination of information, "interferences with political organizations", peaceable assembly, and those directed at religious and racial minorities.¹¹⁹

In *Democracy and Distrust*, Ely was, among other things, seeking an explanatory model for the activism of the Warren Court, the era in the history of the United

¹¹⁵ This idea of rights as "trumps" was first expressed by Ronald Dworkin in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at Chapter 7, generally. Other constitutional bills of rights are less absolute than that of the US; for example, both Canada (in s 1) and South Africa (in s 36) have provisions allowing for limitations on rights that are reasonable and justified in a democratic society, thereby leaving room for legislatures to justify rights-limiting measures for demonstrably compelling social and policy reasons.

¹¹⁶ Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115(6) Yale LJ 1346.

¹¹⁷ *Ibid* at 1402-1404.

¹¹⁸ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

¹¹⁹ *United States v Carolene Products Co*, (1938) 304 US 144, footnote 4. The United States Supreme Court has a tradition of assessing the constitutionality of legislation with varying standards of severity, from the highest "strict scrutiny" standard (applied, for example, in cases of apparent racial discrimination) to the "rational-basis" standard (which permits a statute to stand provided that it is not entirely irrational).

States Supreme Court that had, among other things, seen the decisions in *Brown v Board of Education*¹²⁰ (desegregating public schools) and *Griswold v Connecticut*¹²¹ (recognising an implied constitutional right to privacy) and which had often been criticised for imbuing its review of legislation with what were seen as liberal social values. Ely argued that

... the interventionism was fuelled not by a desire on the part of the court to vindicate particular substantial values it had determined were important or fundamental, but rather by a desire to ensure that the political process – which is where such values are properly identified, weighed, and accommodated – was open to those of all viewpoints on something approaching an equal basis.¹²²

In other words, Ely suggests that the Warren Court was seeking to create and enforce the conditions of political equality, not because equality is in itself a social good, but because it is a precondition to full and equal access to political participation and, as a result, to legitimate government. Moreover, while electoral rules tend to be enshrined in legislation, this does not make the conduct of free and fair elections a matter of policy of the kind on which reasonable people might disagree, and thus a matter within the particular institutional expertise of the legislative branch. And there is good reason to believe that electoral politics needs an impartial and authoritative arbiter: American professor Carol Anderson has documented that, in 2017 alone, 99 bills were introduced in 31 states that would make it harder for some citizens, mainly younger, poorer, and non-white citizens to vote in the United States.¹²³ In order to ensure effective democratic alternation, these kinds of laws must be subject to review by people who do not personally or politically benefit from the disenfranchisement of specific groups of otherwise

¹²⁰ (1954) 347 US 483.

¹²¹ (1965) 381 US 479.

¹²² Ely, *supra* note 118 at 74.

¹²³ Carol Anderson, *One Person, No Vote: How Voter Suppression is Destroying Our Democracy* (New York: Bloomsbury, 2018).

eligible voters. In other words, the countermajoritarian “difficulty” is of particular utility in such cases.¹²⁴

On this account, equality is, at least in part, an instrumental value that operates to ensure the legitimacy of the law-making process. This vision of equality, as Footnote 4 itself notes, extends well beyond universal franchise, leading to the second kind of regulation of the political arena, the protection of civil and political rights, particularly freedom of expression, of association, and of peaceful assembly. While it might suffice in some systems to vindicate these rights *qua* rights, this would not explain why courts have often tended to interpret the core of these rights as being in their democratic utility. This includes the European Court of Human Rights itself in *Steel & Morris*, affirming the public interest in “even small and informal campaign groups” being able to “contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.”¹²⁵

Courts may generally play a relatively minor role in the regulation of the political sphere, but they have considerably more jurisdiction when structural inequalities present themselves in their courtrooms. In such circumstances, courts have a choice: to allow those inequalities to be reproduced, and even amplified, through judicial process, or to try to rebalance the scales. This choice has been played out in the SLAPP cases, in which many judges have opted not to sit idly by as more powerful economic actors endeavour to bully protesters out of the public square. It is the choice to abandon preconceived notions of good faith and to more strictly scrutinise the dynamics of political trials where the ruling government goes after outspoken political opponents, particularly where those prosecutions effectively remove the opposition from the political playing field. And it is the choice that might have permitted, for example, a judicial outcry in apartheid South Africa of the kind suggested by Justice Trengove: given that the political sphere was

¹²⁴ Indeed, Kagan J’s recent dissent in *Rucho*, *supra* note 106 sounds the alarm that the partisan gerrymandering tacitly condoned in the majority’s opinion specifically precludes majoritarian political solutions, by rigging elections to prevent democratic alternation.

¹²⁵ *Steel & Morris* at para 89; see also discussion in chapter 3, *supra* at 106.

entirely distorted by racially targeted disenfranchisement, the institutional self-subordination of the judiciary to legislation and executive action empowered by that political structure could not be justified. In other words, the judges might have refused to respect and enforce the doctrine of parliamentary sovereignty, at least on matters of race.

In cases in which the political playing field is clearly uneven, judges should, in a non-partisan way and within the limits of their power, level it out, or at the very least point out that it is uneven. In order to ensure that justice is seen to be done, judges must be seen to provide a counterweight rather than a consolidation of political and economic power. In this way, judges can act both as guardians of a fair political process and as guardians of a fair judicial process, which is key to preserving the credibility of the judicial institution.

7.6 The Responsibility to the Judicial Institution

In the SLAPP cases canvassed in chapter 3, the courts and legislatures reacting to the phenomenon were concerned with two corrosive effects. The impact on political participation has just been discussed. The second, and arguably predominant concern expressed in judicial pronouncements themselves is the notion that SLAPPs are an abuse of process, whether in the strong sense of being an assault on the integrity of the court or the somewhat weaker sense of being a misdirection of the court's resources. In either sense, as discussed in the last chapter, the court possesses the inherent power, or where anti-SLAPP statutes have been passed, the statutory duty to dismiss such claims. While often possessing some normative valence, concerns about abuse of process are inherently institutional concerns; they are concerns that the misdirection or unfair use of court processes damages the institutional legitimacy of the court. The inherent protective powers of courts exist to protect that legitimacy.

7.6.1 The Nature and Necessity of Institutional Legitimacy

Ely's process theory presumed that the legislative and executive branches in a democracy require democratic legitimacy if the laws that they enact and

endeavour to execute are to be effective. But democratic legitimacy is not, ultimately, the only tool that these other branches have available: when push comes to shove, they also control the treasury and the police. While democratically unpalatable, these branches of government can endeavour to appease the masses by redistributing public funds, or to repress them with brute violence. By contrast, the judiciary is peculiarly vulnerable, possessing neither the purse nor the sword.¹²⁶ Thus its effective authority to ensure that its decisions are followed and implemented must lie elsewhere; as Gibson has noted, the principal political legitimacy of courts lies in their institutional legitimacy,¹²⁷ the public confidence invested in the institution itself. Institutional legitimacy in general has long been equated with the idea of “diffuse support”, a “reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed”.¹²⁸ What is the source of such diffuse support?

The structural and ethical norms discussed in chapter 5 exist not to ennoble judges, but to imbue the judicial institution with authority. Judges, as the judiciary’s primary and most visible institutional actors, are required to be, and to be perceived as being, independent, impartial, efficacious, virtuous, and faithful to law, so that their institutional decisions will be respected and implemented. Judicial reputation matters not only to the individual judge, but is of collective value, serving to support and enhance public confidence in the institution itself.¹²⁹ If judicial independence is to be meaningful, this cannot be

¹²⁶ It is as a result of this institutional frailty that Alexander Bickel described the judiciary as the “least dangerous branch”, *supra* note 114.

¹²⁷ Gibson, *supra* note 108 at 525.

¹²⁸ David Easton, *A Systems Analysis of Political Life* (New York: Wiley & Sons, 1965) at 273. Or Bassok describes this kind of public support as engendering “sociological legitimacy”, which can be distinguished from “normative legitimacy”, in which the institution is valued for its expertise: Or Bassok, “The Changing Understanding of Judicial Legitimacy” in Martin Scheinin et al, *Judges as Guardians of Constitutionalism and Human Rights* (Cheltenham: Edward Elgar, 2016), generally.

¹²⁹ See Chapter 1, generally, of Garoupa and Ginsburg, *supra* note 54, but especially 14-28. Garoupa and Ginsburg describe the collective dimension of judicial reputation as a problem of “team production” (at 24) and note the importance of judicial reputation among constituencies with “special power over the courts”, including the Bar and other branches of government (at 23).

accomplished simply by issuing popular decisions; rather diffuse public support for the judicial institution must come from a consistent affirmation that courts embody and deliver fairness, both in terms of process and outcomes.

The metaphor of the reservoir is an apt one in the context of this thesis. When judges are seen to act independently, fairly, and wisely, the reservoir of public trust is replenished; conversely, when they are perceived as acting corruptly, unjustly, disingenuously, or foolishly, the reservoir of good will is drawn down. There is an institutional cost to lending the imprimatur of judicial legitimacy to persecutory proceedings, to acting in a way that implies that the judicial institution, rather than being a bulwark against injustice, is simply another vehicle for the dispensation of oppression.

The routine judicial dispensation of injustice in apartheid South Africa led to the utter disintegration of public confidence in a majority of the population that the courts were a site of justice. Worse yet, they ceased to be meaningful sites of engagement for many of the people who appeared before them. Chapter 2 noted Andrew Zondo's total alienation from the judicial actors around him, his view that the prosecutor and the judge "were ignorant of our ways and feelings" and so "like ants",¹³⁰ leading to his disinterest in engaging with his criminal trial. And he was right; apartheid's segregationism had succeeded to the extent that a judge too had reported that "he had no knowledge of the lives of black people, of their feelings, their loyalties, or the pressures on them".¹³¹ In Dyzenhaus' view, the central question of whether judges could be more than ants "is the same as the central question about the rule of law – whether there is an intrinsic relationship between law and justice."¹³² While the incapacity of the white judge to relate to a black accused was, of course, a function of the apartheid system, there are

See also Helle Krunke and Martin Scheinin, "Introduction" in Scheinin et al, *supra* note 128 at 11-13 and para 14 of the *Commentary on the Bangalore Principles of Judicial Conduct*.

¹³⁰ See full quote and reference, in chapter 2 *supra* at 65.

¹³¹ See full quote and reference, *ibid*.

¹³² Dyzenhaus, "With the Benefit of Hindsight" at 66.

undoubtedly plenty of judges in other legal contexts who would struggle to relate to the lived experiences of many of the people who appear before them.

Judges themselves have expressed concern over the impact of this phenomenon on their ability to do their jobs effectively. Justice Robin Jacob of the Court of Appeal of England & Wales has urged judges to take positive steps to ensure that they have “knowledge of the world” in order to judge effectively, and particularly must avoid what he called “judgitis”, which includes the vices of pomposity and detachment from the world as most people live it.¹³³ Jacob notes that “knowledge of the world is a personal pursuit whose end lies in the ability to identify with the other – an instrumentally useful ability for a judge ...”.¹³⁴ McEvoy & Schwartz heard similar concerns expressed by a judge in Northern Ireland, recalling the danger of the heightened security protection of judges during “the Troubles”: “[t]hey were just not mixing with normal people and they weren’t living a normal everyday life. The indirect effects I would say is that certain judges started to show a degree of paranoia ... there’s a real danger of becoming institutionalised in this security.”¹³⁵ In other words, judges were becoming dangerously removed from reality.

To be a judge, then, is to walk a fine line: to be institutionally-minded, but also guard against becoming institutionalised. To be independent, without being distant. To be objective, but capable of empathy. To adopt the internal point of view on law, but remain aware of the external gaze. It is, in short, to understand and internalise the paradoxes and complexities of the judicial function and to protect the core of that function in a way that affirms the legitimacy of the judicial institution. Judges must not, on the basis of a particular theory of law, institutional theory, or even statutory directive, abdicate the core of their role by being reduced to being a mere technocrat, an empty robe, executing the orders of

¹³³ Robin Jacob, “Knowledge of the World and the Act of Judging”, (2014) 2(1) Osgoode Hall Rev of Law & Policy 22 at 23.

¹³⁴ *Ibid* at 22 (headnote).

¹³⁵ Kieran McEvoy & Alex Schwartz, “Judges, Conflict, and the Past”, (2015) 42(4) J of L & Soc 528 at 541.

the other branches of government or being so impressed by economic and political power that their rulings serve only to amplify it. They need to be able to distinguish between those parties for whom they are the last line of defence and those for whom the justice system is simply another lever of power. It is only in so doing that courts can truly be the level playing field that they are designed to be, and that the public needs and expects them to be.

7.6.2 *Protecting the Core of the Judicial Function*

The first and foremost duty of all judges is to be fiercely protective of their role in the legal and constitutional order. This includes being able to decide the legal disputes that come before them, which implies a corollary duty to reject efforts to oust their jurisdiction, as Kannemeyer J did in *Nkwinti*.¹³⁶ The judicial role includes providing authoritative applied legal interpretation, which necessitates a rejection of those theories of law and notions of deference that would leave such interpretations to the political branches, resulting in the judicial “rubber stamping” of executive orders. Dyzenhaus, describing the behaviour of the South African Appellate Division during the state of emergency puts it thus:

...the Appellate Division had given up its jurisdiction over the area of civil liberties in substance but retained it in vacuous form. The courts retained their jurisdiction but in large part it was a jurisdiction to pronounce legal what the executive says is legal. ... Each time the courts decided that they had no jurisdiction to do something which was regarded as pertaining to the very essence of the judicial role, they hastened the collapse of their own institutional integrity.¹³⁷

A similar disinclination to recognise unfettered discretion is found also in Rand J's reasons in *Roncarelli v Duplessis*, on the basis that it is inconsistent with the rule of law. Indeed, guarding against encroachments on the rule of law and the

¹³⁶ *Nkwinti v Commissioner of Police*, (1986) 2 SA 421 (E) See discussion of this case in chapter 6, section 6.5, *supra* at 219-222.

¹³⁷ David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010) [Hard Cases (2010)] at 161.

vindication of its values – good faith, fairness, and reasonableness – can be said to lie at the core of the judicial function. Vindicating these values requires that judges be aware of both specific unfairness and structural injustice, that they take seriously claims that a party is not acting in good faith rather than dismiss motive as irrelevant, and that all claims of unlimited right, power, or discretion be subject to judicial scrutiny.

The common core of the ethical values to which the global judiciary has bound itself, as identified in chapter 5, provides yet more definition of the core of the judicial role, and more direction as to what is required for its defence. The duty to be independent implies a positive duty to repel all structural and personal arrangements that would interfere with that duty. The requirement of impartiality and efficacy implies the creation and enforcement of fair and efficient procedural rules.

Leslie Green would exclude impartiality from being a constitutively “judicial” obligation, as it is shared with other kinds of decision-makers, such as mediators and arbitrators, but would include the requirement of generality; the judicial “concern to deploy some acceptable general principle as a reasoned basis for decision”.¹³⁸ This requirement, Green says, is not just logical but temporal – a commitment not just to the instant case but also to future cases. In this respect, Green’s theory mirrors Dworkin’s conception of a judicial commitment to the integrity of law: that for a judge to interpret a statute or legal instrument in a particular way, she should be comfortable with that interpretation applying in similar future cases,¹³⁹ and indeed how that interpretation may affect the

¹³⁸ Leslie Green, “Law and the Role of a Judge”, in Kimberley Kessler Ferzan and Stephen J Morse, *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S Moore* (Oxford: Oxford University Press, 2016) at 334.

¹³⁹ See chapter 5, *supra* at 185-186. Martha Minow, reflecting on Robert Cover’s views on the technocratic decision of the US Supreme Court in the *Bob Jones University* case, the subject matter of his influential 1983 article “Nomos and Narrative”, observes: “He reserved his harshest criticism for the Supreme Court justices who failed to venture commitment themselves, ‘to project their understanding of the law onto the future.’” Minow, *supra* note 5 at 8, quoting Robert M Cover, ““The Supreme Court, 1982 – Foreword: Nomos and Narrative”, (1983) 97 Harv L Rev 4 at 67.

interpretation of other instruments.¹⁴⁰ If judges, like those presiding in cases of judicial persecution, are unable to commit to, and take responsibility for, the downstream effects of their judgments, if they resort to technocratic justification or endeavour to eschew responsibility, this should alert them to the possibility that they might be authenticating injustice.

This theory supports the existence of judge-made principles of law; to return again to Dworkin's example, a judge could foresee being forever comfortable enforcing a principle that a person might not profit from their own fraud, if only to avoid the manifest injustice of the opposite conclusion. By contrast, the abolitionist judges studied by Cover endeavoured to avoid or ignore the legal consequences of their decisions, both to weaken the legal foundations of the abolitionist cause and to provide further legal justification for those who supported slavery. The judges of South Africa took little responsibility for their now obvious role in the perpetuation and legitimation of apartheid. It would not have taken much imagination for the judges (either domestically or at the ECtHR) in the early Article 18 cases to appreciate that the onus and high evidentiary bar that they imposed on applicants might serve both to embolden politically-motivated prosecutors and to dissuade their victims from alleging political motivation. Only the judges in the SLAPPs cases demonstrated insight as to the persecutory impact of allowing the civil cases in front of them to continue, both in terms of the persecution of the immediate target and the broader political chilling effects.

On the other hand, Green's suggestion that only those obligations that are exclusively judicial can be considered judicial obligations is far less persuasive. This confuses judicial obligations with judicial powers; just because only a judge can establish authoritative interpretation doesn't mean that other obligations or virtues are not constitutive. Indeed, the research in chapter 5 implies that to exercise one's independent and impartial judgment, to be wise and effective, to

¹⁴⁰ Recall Barak's view that "all parts of the law are linked" and that "[w]hoever enforces one statute enforces the whole legal system". Full quote *supra* note 54.

act with integrity, and to be faithful to law is seen by judges themselves as fundamental to judicial identity and the judicial role.

7.7 *Through Law to Justice*

Chapter 6 ended with the example of the apartheid-era judgment, penned by Kannemeyer J, in *Nkwinti*, in which he refused to assume that the legislature intended to displace the court's *habeas corpus* powers, and thus challenged the government to either say so in clear terms or, in effect, let him do his job. The question was posed as to whether the judges in that case were lying. There is no question that there was a degree of disingenuity in their feigned ignorance as to the purpose of the statute. (Indeed, prior to their decision, the regulation had been amended to make the ouster of judicial review more explicit.¹⁴¹) But perhaps the more deferential judges also lied when they held, expressly or implicitly, that because a law was motivated by political or racial animus, indeed *because* it is patently unreasonable and unfair, there was nothing for courts to do but to apply it. Perhaps one lie was more deliberately told, but it happens to be a lie that at least tried to marry law and legal process with the justice to which it is supposed to be directed.

In a similar vein, Robert Cover, writing about the dilemmas confronting abolitionist judges applying Fugitive Slave Acts in the United States, observed that studies of law and justice tend to start from “the perspective of the established order” such that judges who sought to avoid the application of the unjust statute understood themselves and were understood to be “disobedient”.¹⁴² Cover was perplexed that both the disobedients and their critics seem to overlook the possibility that law is more than the positive expression of the authority of the sovereign, however constituted. Dyzenhaus describes the purpose of Cover's study as follows:

¹⁴¹ The amended text of the relevant regulation, regulation 3(3), is quoted by Dyzenhaus in *Hard Cases* (2010) at 152-153.

¹⁴² Cover, *Justice Accused* at 1.

“it is important ... that a study of law and justice canvass that excluded possibility by asking whether the law provides opportunities to do justice which rulers, no matter how powerful they are, cannot completely control. Only that possibility allows that relationship between Law and Justice might be an intrinsic one, one which creates tensions within the law when the powerful use the law as an instrument of oppression.”¹⁴³

This thesis has used judicial persecution as a ‘stress test’ for judicial role morality because it exemplifies a problem that has plagued legal theorists for at least the last half century, namely the problem of evil expressed in legal forms. Defenders of positivism, like Hart, and formalism, like Schauer, accept as a necessary logical conclusion that law can be both evil and valid.¹⁴⁴ Radbruch argues that there must be some limit on this logical conclusion, that there is a point of radical evil at which law loses its validity, the very foundation of its legal identity. Radbruch’s Formula suggests that this point comes when law no longer even strives for justice, where it renounces equality “in the process of legislation”, “because law, even positive law, cannot be defined otherwise than as a rule, that is precisely intended to serve justice.”¹⁴⁵ Of course, Radbruch was reacting to the Nazi legal system, which was also susceptible to critique on procedural grounds: under Ely’s process theory of judicial review, the declaration of a state of emergency following the *Reichstagsbrand* – the arson attack on the Reichstag in 1933 – and resulting suspension of the Constitution and seizure of totalitarian executive control called into serious question the legality of everything that ensued.¹⁴⁶ As

¹⁴³ Dyzenhaus, “With the Benefit of Hindsight” at 67-68.

¹⁴⁴ HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71(4) Harv L Rev 593 at 626; Frederick Schauer, “Formalism” (1987) 97 Yale LJ 509 at 510 at 539.

¹⁴⁵ Gustav Radbruch, “Statutory Lawlessness and Supra-Statutory Law” (*Gesetzliches Unrecht und übergesetzliches Recht*) (1946), as translated by Bonnie Litschewski Paulson and Stanley L Paulson and published in (2006) 26 Oxf J of Legal Studies (2006) 1-11 at 6. For further discussion of Radbruch’s theory of law, see chapter 5, *supra* at 181-184.

¹⁴⁶ In his recounting of the prosecution of the Nazi informer, Radbruch notes the statement of the prosecutor that National Socialist legislation had never been valid on process grounds, being derived from the Enabling Act of 1933, which had been passed without the constitutionally required two-thirds majority: *ibid* at 5. Müller also notes the decoupling of law from political authority following the declaration of the state of emergency in Ingo Müller, *Hitler’s Justice: The*

applied to the problems of this thesis, the potential for Radbruch's Formula to invalidate law provides a tempting way to help judges out of the trap of their obligation to law, by avoiding the operation of that law.

But is it descriptively accurate? It is hard to reconcile with just how effectively Nazi law operated *as law*, in terms of regulating the activities and expectations of those subject to it, a conclusion that tacks considerably closer to Raz's basic theory, which is that law is what works. This is one of the things that makes the example of apartheid law so interesting: it also undoubtedly 'worked' in many respects, for a long time, but after decades of sustained resistance, its capacity to regulate was clearly in decline.

However, if Radbruch's theory is empirically weak as an account of law, it is considerably stronger as an account of judicial function. Equality and justice – basic fairness – might not be baked into the essence of law, but for any judicial system that purports to deliver a product labelled 'justice', such values must be realised in its processes and outcomes. This is perhaps at least part of why Radbruch was particularly heartbroken by the behaviour of lawyers and judges; it might have been too much to expect them to address the constitutive defects of Nazi law on a quotidian basis, but the gap between law and justice must have been apparent.

Thus, the basic theoretical claim of this thesis is one that is considerably more modest than Radbruch's and Dyzenhaus' essentialist views that there is a necessary relationship between law and justice. Rather, a more modest instrumental view is advanced, one that precludes law, as it interpreted and enforced by the operation of the judicial system, from being an instrument of injustice. This is the refinement of law for which judges, as the alchemists who purport to spin law into justice, must take responsibility. As Radbruch presciently wrote in 1919, long before the rise of the Third Reich:

Courts of the Third Reich, translated by Deborah Lucas Schneider, (Cambridge, MA: Harvard University Press, 1991) at Chapter 6, generally.

Legal positivism, which has constituted nothing but an elevation of State caprice into law and which has equated legal conscience [*Rechtssinn*] with obedience, this idolatry of power has been merely the juristic representation of the period of the real-political and authoritarian State. We [jurists] must first again become conscious of the proverbial opposition between law and caprice and between law and might, and we must see law again not in the first place as a decree of the State but rather as an attempt to achieve justice, and we should consider ourselves as its inspired collaborators; indeed, we should see ourselves as servants, not only of law, but, within the framework of law, of justice.¹⁴⁷

Within 15 years, German jurists were once again put to the test, and Radbruch was sorely disappointed with their failure to provide a bulwark against Nazi law. Exactly 100 years after he wrote these words, it remains unclear the extent to which his call has been heeded. It was a call that should have seen judges in apartheid South Africa be more vocally critical when law was used, in the first instance, to create and exacerbate manifest unfairness, and then to repress, criminalise, and often put to death those who protested that unfairness. It is a call to judges today to be vigilant when judicial processes are used to amplify unequal power to silence political opposition, as occurs in SLAPPs, and in the political trials litigated under Article 18, in which the irresistible force of a state's criminal justice system is brought to bear on dissidents. It is, at the very least, a call for judges to recognise persecution in legal forms and their responsibility not to alchemically transform it into something labelled justice.

¹⁴⁷ Gustav Radbruch, *Ihr Jungen Juristen* (1919) at 12-13, as translated and quoted in von Niekerk "A Warning Voice from Heidelberg: The Life and Thought of Gustav Radbruch, (1973) 90 S Afr LJ 234.

Conclusion: **Judicial Persecution and Law's Violence**

From Complicity to Judicial Responsibility

This thesis has aspired to do two things. In Part I, it has endeavoured to define and problematise 'judicial persecution' as the instrumental use of the courts by powerful parties to legitimise – or to use Kirchheimer's word – authenticate the repression of political opponents. It is, simply put, persecution perpetrated through judicial processes and, as such, through the work of judges. The three case studies in Part I have been used to illustrate the pernicious effects of the phenomenon not only on targeted individuals, but on the rule of law, the polity, and the integrity of the judicial institution.

The case studies demonstrate that judicial persecution is a recurrent pathology of legal process. Judicial persecution occurs in a number of legal systems, and assumes different guises in different contexts; the prospect of 'courtwashing' persecution is perennially appealing to powerful actors. Such persecution avails itself of a number of legal and judicial blindspots: a general discomfort with the concept of motive; a passive model of adjudication; the privileging of legal approaches and theories that encourage judicial deference to other branches of government; and an underlying assumption that law and legal process is, in itself, neutral. Judicial persecution operates by relying on a certain kind of uncritical judicial role morality to enforce law 'as it finds it', drawing sufficient satisfaction from the mechanical performance of legal formalities. As Shklar observed:

[The principle of legality] enforces persecuting laws as readily as any other kind. Formal justice can, moreover, render such laws respectable in the eyes of liberals anxious to avoid conflict. "He had his day in court; he was not really persecuted," they can argue, and congratulate themselves on the procedural perfection of formal justice.¹

¹ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964) [*Legalism*] at 148.

As such, judicial persecution has been largely overlooked both as a distinct form of persecution and of judicial instrumentalisation, masquerading as ordinary court proceedings and benefiting from a well-established judicial reticence to recognise the political dimensions and power dynamics of certain cases. This reticence has caused judges to risk overlooking their own complicity in the harms that judicial persecution causes both to its victims and to the integrity of the judicial system itself. The first Part of the thesis has aimed to prove that, contrary to what seems to be mainstream judicial belief, the stakes of judicial inaction in the face of judicial persecution are far from insignificant.

In the most extreme context provided in the case studies, the ‘courtwashing’ of a racially discriminatory regime played a crucial role in the ability of apartheid to maintain itself for decades. Its notional legality, as authenticated by the courts, created a distraction from the regime’s assault on the rule of law. It was the courts’ authentication that led the South African Truth and Reconciliation Commission (TRC) to identify and condemn the complicity of the apartheid-era judiciary in enforcing and even prolonging apartheid.² Yet those judges who provided submissions to the TRC largely defended the judiciary’s apartheid past on the basis of legal and institutional constraints. This thesis joins a literature that has contended that that there was considerably more that apartheid-era judges could have done to limit the imprimatur of legitimacy created by their participation. However, like much of this literature, it also accepts that there were real legal and institutional constraints to what judges could do from within the judicial system. Statute law frequently left little room to for interpretation, and the purposive rule of law constraints advocated by Justice Rand in *Roncarelli v Duplessis* would seem to be of little help in a situation where the aims of the regime are explicitly racist and repressive.³ Moreover, given the prevailing

² In his submission to the TRC, Justice Langa noted that the role of the judiciary was “to put the stamp of legality on a legal framework structured to perpetuate disadvantage and inequality”: Justice PN Langa, “Submission to the Truth and Reconciliation Commission on the Role of the Judiciary”, (1998) 115(1) S Afr LJ 36 at 39.

³ In their submission to the TRC, Justice Smalberger et al vigorously defended the work of judges during apartheid, and rebuffed the critique that they had been led astray by positivism: “a

doctrine of legislative supremacy, there was little space for judicial review. Truthfully, two decades after the TRC issued its report, the details of the largely defensive stance of the judiciary does not sound so very unreasonable, at least to those with an internal point of view. The animating legal theory of South Africa, legal positivism, remains dominant in practice, if not in theory, in many legal systems today, and efforts to limit so-called ‘judicial activism’ abound in both legal and political argument and in the self-imposed limits of courts around the world.

And yet, there were judges who, during apartheid itself, found ways to limit apartheid injustice. Moreover, in the 25 years since multiracial democracy took hold in South Africa, a number of apartheid-era judges have come to accept that there was more that they could have done, on some occasions operationally and often, at the very least, expressively.⁴ Such judges are, as Hart described Radbruch, “those who have descended into Hell, and like Ulysses or Dante, brought back a message for human beings.”⁵ At the risk of hubris, this thesis has been directed at deciphering that message.

Judges have been the focal point not only because are they in the best position to prevent or limit judicial persecution but, as Part II of the thesis contends, they have an institutional and vocational responsibility to do so. The thesis has endeavoured to expose and critique the foundations on which the perception of minimal judicial agency rests and the unstated premises of many of these arguments, with particular emphasis on the observations of judges and jurists themselves. The second Part of this thesis has challenged the notion that judges and courts have few tools to combat judicial persecution, based on the prior commitments of judges themselves, as expressed in two ways.

moment’s reflection should show how much worse the position would have been if the judiciary had adopted the oft-advocated ‘purposive’ approach to the interpretation of offensive statutes enacted by the previous government.” Justice JW Smalberger et al, “Submission on the Role of the Judiciary”, (1998) 115(1) S Afr LJ 42 at 46.

⁴ This point will be discussed in more detail, *infra*.

⁵ HLA Hart, “Positivism and the Separation of Law and Morals” (1958) 71(4) Harv L Rev 593 at 615.

First, the professional norms and ethics described in chapter 5 – independence, impartiality, efficacy, virtue, and fidelity to law – govern not only how each judge does her work, but are themselves constitutive of the judicial role. The existence and promulgation of ethical codes indicate a sense of individual and collective duty, not only to their home Bench but to the reputation and efficacy of what Slaughter has described as the “global community of courts”.⁶ As such, these transnational professional norms not only guide judges in their work, but have provided a measure of transnational solidarity to judges who find themselves under various forms of pressure.

Secondly, chapter 6 gathered together the many ways in which judges have expressed their intolerance for abusive and unfair proceedings through the creation of doctrine, including the doctrines of inherent jurisdiction, abuse of process, and *abus de droit*. This has demonstrated that judges have proven themselves to be capable of grappling with questions of good faith, fairness, and reasonableness, and of denying the court’s jurisdiction and imprimatur to cases where litigants have been found wanting. These doctrines operate both expressively and as legal acts of judicial resistance to assaults on the courts’ integrity and the instrumentalisation of court processes for pernicious ends. Read in tandem with the judicial pronouncements regarding SLAPPs canvassed in chapter 3, and the ethical commitments discussed in chapter 5, they clearly open up the “universe of viable responses”.

The two threads of judicial role morality and of doctrinal possibility were woven together in the final chapter as the foundations of the judicial responsibility not to be complicit in judicial persecution. This overarching duty finds expression in at least the three predominant concerns revealed by the case studies: to the rule of law, to the polity, and to the judicial institution itself. Above all, this thesis has sought to demonstrate that, by accepting that the primary output of judges is a

⁶ Anne-Marie Slaughter, “A Global Community of Courts”, (2003) 44 Harv Int’l LJ 191.

product that will be labelled ‘justice’, a *de minimis* requirement to avoid gross injustice lies at the heart of the judicial role.

Recognising that judges do not have the luxury of a critical distance from the legal systems in which they serve, this thesis has argued that they must be aware of the external gaze on their work and the impact of adopting the kind of blinkered legalism that allowed, for example, apartheid-era judges to believe in the righteousness of their work even as they came to be perceived as mere instruments of oppression. As a matter of both institutional preservation and professional ethics, judges must attend to, take responsibility for, the violence inherent in the law that they authenticate.

Law and Violence

Robert Cover opens one of his most famous essays with the following observation, “[l]egal interpretation takes place in a field of pain and death.”⁷ Whereas in earlier works, he might have meant violence more metaphorically,⁸ by the time that he penned “Violence and the Word”, he meant it literally: by judicial pronouncement, lives are torn apart and freedom, property, children and even life itself is lost.⁹ “We begin then, not with what judges say, but with what they do. The judges deal pain and death”.¹⁰ This is never more true than in cases of judicial persecution.

This view is perhaps not surprising coming from a scholar whose masterwork studied judicial decisions that sent fugitive slaves back into bondage, and who was preoccupied by judges enforcing the Vietnam-era draft. Cover had little patience for judges who sought to avert their eyes or wash their hands of the

⁷ Robert M Cover, “Violence and the Word” (1986) 95(8) Yale LJ 1601 [“Violence and the Word”].

⁸ In “Nomos and Narrative”, Cover referred to the “jurispathic” quality of state law to subordinate and destroy alternative legal orders: Robert M Cover, “The Supreme Court, 1982 – Foreword: Nomos and Narrative”, (1983) 97 Harv L Rev 4 at 40ff [“Nomos and Narrative”].

⁹ Cover, “Violence and the Word” at 1601.

¹⁰ *Ibid* at 1609.

violence wrought by their legal acts. Cover's characterisation of judicial acts certainly would have resonated in apartheid South Africa, where judicial pronouncements delivered literal violence, even death, on the bodies of those who tried to resist their oppression. It would undoubtedly resonate in the experience of Steel and Morris in the *McLibel* suit, who have detailed the effects of the lengthy trial on their family life and physical and mental health. And beyond the political consequences suffered by the prisoners catalogued in the ECtHR's Article 18 cases, there were real physical and moral harms engendered by their imprisonment. These harms were inextricably and intimately linked to – indeed caused by – judgments and orders made by judges.

However, judicial processes, particularly repressive ones, often act as a substitute for raw violence. Judicial persecution may be a legal horror, a betrayal, anathema to the rule of law, but there is a compelling argument to be made that, if power will inevitably be wielded by the powerful against those who challenge them, better that such violence be expressed in courtrooms than in extrajudicial killings or disappearances. While judges may recently have been found guilty for their part in the persecution of Argentina's Dirty War,¹¹ many more political opponents than passed through their courtrooms were simply thrown from airplanes to their death.

It also bears remembering that not all theorists believe that political trials are invariably pernicious. Shklar believed that political trials are redeemed by the pursuit of high liberal ideals, particularly in transitional moments.¹² Becker notes that, as ways of dispensing with one's political foes, political trials are one of the more humane, and that such trials might even provide considerable protection to political outgroups.¹³ Nor is Becker alone in observing it is often the politically

¹¹ For discussion, see note 40 in chapter 7, *supra*.

¹² Shklar, *Legalism* at 145.

¹³ Becker, at xii: "No system ever devised has been reluctant to face some of its foes in court. In fact, the court trial is one of the more humane ways of dispensing with an intractable opponent." Theodore L Becker, "Introduction" in Theodore L Becker, ed, *Political Trials* (Indianapolis: The Bobbs-Merrill Company, 1971).

disadvantaged that trigger political trials, seeking legitimisation of their values through judicial validation.¹⁴ This opportunity seems all the more poignant in an historical moment where the notional courtroom's status as a bastion of reasoned and evidence-based decision-making may be more crucial than ever. And Christenson goes further, suggesting that political trials (at least those conducted within the rule of law) have tremendous creative potential, achieved by "placing before society basic dilemmas which are clarified through the trial"¹⁵ and "provid[ing] society with a crucible for defining and refining its identity."¹⁶ He describes such trials as "society's own judicial review".¹⁷

In courtrooms, even so-called kangaroo courts, one's persecution might be witnessed, one might be allowed to speak and directly challenge one's persecutors. In courtrooms, there is at least the possibility of law mediating violence, and where one's case becomes a *cause célèbre*, perhaps even the chance to galvanise support for one's position. This is the great lesson of the Rivonia trial, a quintessential case of judicial persecution. By virtue of the trial, Nelson Mandela able to articulate his political position in his famous speech from the dock, thereby salting the earth of apartheid, and making of himself and his co-defendants martyrs for the cause of racial equality in South Africa. Indeed, it seems likely that he was spared the death penalty because his execution had become politically unpalatable, and his eventual release 27 years later became the precondition and symbol of peaceful political transition.

In this respect, it is useful to consider Meierhenrich and Cole's description of the Rivonia trial as "liminal" in two ways. First, it demarcated the apartheid

¹⁴ Becker, *ibid* at xii; see also Leora Bilsky, "Political Trials" in James Wright, ed, *International Encyclopedia of the Social and Behavioral Sciences* (Amsterdam: Elsevier, 2015) at 498; and Steven E Barkan, *Protestors on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements* (New Brunswick, NJ: Rutgers University Press, 1985) at 3-5.

¹⁵ Ron Christenson, *Political Trials: Gordian Knots in the Law*, 2d ed (New York: Routledge, 1999) at 5.

¹⁶ *Ibid* at 5.

¹⁷ Ron Christenson, "What is a Political Trial?", (July/August 1986) *Society* 25, at 29. On this account, political trials might be considered, to again use terminology coined by Robert Cover, "jurisgenerative": see Cover, *supra* note 8 at 11ff.

government's retreat from the use of political trials towards more arbitrary action.¹⁸ They write:

The rebalancing of the dual apartheid state – the restraining of its normative half, the toughening of its prerogative half – was an attempt by the architect of separate development to configure the rule of law as a weapon. In the wake of the Rivonia trial, and because of it, the courtroom ceased to be the primary stage for enactment of power by the apartheid regime. “As the 1960s wore on,” [Cole] has shown, “the state’s methods became more clandestine, calculated to avoid the theatrical and highly public encounters staged by political trials.”¹⁹

Notoriously, after Rivonia, the regime created new ways of dealing with the political enemies of apartheid: rather than being charged and put on trial, many were detained indefinitely under the (renewable) 90-day rule, others were simply assassinated. The ANC underwent a similar transition from legalism to embracing armed struggle, having lost faith in the possibility of fairness in apartheid courts.²⁰ In short, both ‘sides’ in the apartheid battle emerged from the Rivonia trial disenchanted with the capacity of the judicial system to deliver justice as they saw it – the ultimate destruction of the liberation movement itself on the one hand, and a decisive blow in favour of liberation on the other. Instead, both the ANC and the government turned to violent struggle, suggesting that the alternative to judicial persecution is brutality and even civil war. In considering this alternative, “Violence and the Word” is ultimately Cover’s apologia for the ordered violence of the law:

As long as pain and death are part of our political world, it is essential that they be at the center of the law. The alternative is truly unacceptable – that

¹⁸ Jens Meierhenrich and Catherine M Cole, “In the Theater of the Rule of Law: Performing the Rivonia Trial in South Africa, 1963-1964”, in Jens Meierhenrich & Devin O Pendas, *Political Trials in Theory and History* (Cambridge: Cambridge University Press, 2017) at 233.

¹⁹ *Ibid.*

²⁰ *Ibid.*

they be within our polity but outside the discipline of the *collective* decision rules and the individual efforts to achieve outcomes through those rules.²¹

So which is more horrifying? Judicial persecution or its asserted alternative, anarchy and bloodshed? Stated this way, the stakes of limiting access to judicial authentication would seem to be unjustifiably high. But one also gets the sense that this is an account that serves to hold judges hostage, with an ultimatum that they ‘authenticate, or else’. This “elevation of the formal stakes” was part of the reasoning deployed by the abolitionist judges in *Justice Accused*,²² who preferred to ally themselves with an unjust “social compact” rather than to uphold human dignity. It is the preference of apartheid-era judges for ‘order’ and ‘security’ – which, despite their efforts, remained elusive – over humane and equal justice. And when the logic is applied to the underlying circumstances of SLAPPs, it serves only to expose the brutality of economic force that tries to hide behind the genteel mask of a lawsuit.

More importantly, it is a demonstrably false dichotomy. Underlying the contribution that this thesis endeavours to make is a conviction that at least one possible alternative to judicial persecution is justice, and a confidence that judges, if they understand and accept their responsibility, can play a decisive role in imagining and instantiating this alternative. Judicial persecution was not the end of the story in South Africa, and a more peaceful path forward revealed itself only once Mandela was released from prison.

²¹ Cover, “Violence and the Word” at 1628 (emphasis in original). Austin Sarat characterises Cover’s conclusion in “Violence and the Word” as follows: “He criticized and worried about the violence of law, about its pain-imposing, destructive qualities, yet, because he could see nothing but opposition between freedom and order, he reconciled himself to law’s violence as a tragic necessity.” Austin Sarat, “Robert Cover on Law and Violence” in Martha Minow et al, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992) at 255.

²² See discussion of this Cover’s description of this judicial reasoning in chapter 7, *supra* at 223-225.

Imagining Justice

This thesis has sought to advance the possibility of judges spending less effort disclaiming their role in the violence of their judgments and focusing instead on their responsibility to identify and confront judicial persecution. How would such responsibility manifest itself, bearing in mind the constraints and powers of the judicial role? How can the theory developed in Part II be applied back to the case studies in Part I? A useful starting point is an acknowledgment that, by judges' own account of their work during apartheid – that is, from the internal point of view – they could have, and occasionally did, come considerably closer to delivering justice, even in an unjust system.

This internal point of view finds expression in the reflections of apartheid-era justices themselves, including the admission by Justice Trengove, quoted in the last chapter, that judges could have been less deferential to an unrepresentative Parliament and could have more often taken the opportunity “express unequivocally our displeasure at having to apply and enforce discriminatory and unjust laws.”²³ In their submission to the TRC, Justice Chaskalson, then President of the Constitutional Court, and his co-authors (who included judges who had served during apartheid) were struck by “the way in which these provisions were treated as ‘normal law’. It was very rare to find a judicial officer remarking on the racist and unacceptable character of apartheid law.”²⁴ Beyond the expressive, they note the suggestion by Barend van Niekerk, at the height of apartheid, that judges

²³ See the full quote in chapter 7, *supra* at 230. Justice Friedman endorsed and amplified this view in his submission, agreeing with the following comment made by Justice Goldstone in a 1993 lecture: “... a judge may speak freely in court on any topic strictly relevant to the matter before him. Where appropriate, he is entitled to criticize the law that he is required to implement if, in his opinion, it offends against morality or justice. *Indeed, in some cases it may be his duty to do so.*” (Emphasis added.) Justice G Friedman, “Submission to the Truth and Reconciliation Commission on the Role of the Judiciary”, (1998) 115(1) S Afr LJ 56 at 58, citing Justice Richard J Goldstone “Do Judges Speak Out?”, (1994) 111 S Afr LJ 258 at 263-264.

²⁴ A Chaskalson et al, “The Legal System in South Africa 1960-1994: Representations to the Truth and Reconciliation Commission”, (1998) 115 S Afr LJ 21 at 25. Like Justice Trengove, Chaskalson et al also noted the anomaly of applying the doctrine of parliamentary sovereignty in the absence of a democratic legislature: *ibid* at 30.

might “render the indefinite detention provisions nugatory by refusing to accept as creditworthy any evidence procured during a period of such detention.”²⁵

Justice Ackermann suggested that it would have been possible, when sentencing people for crimes that were not *mala in se* for judges “to have reflected in the sentence imposed by them, and in their reasons for sentence, their repugnance, on international human-rights grounds, at the fact that the sanction was undergirded by racism of the denial of other fundamental human rights.”²⁶ In *Nkwinti*, Justice Kannemeyer used strict interpretation to deny the legislature’s wish to oust his *habeas corpus* jurisdiction.²⁷ Justice Goldstone pushed back against the application of the *Group Areas Act* in *S v Govender* and effectively made the enforcement of the pass system legally untenable.²⁸ Justice Langa, who had practiced as an advocate in the courts, noted that judicial officers had often failed to treat black and white litigants, witnesses, and lawyers with equal courtesy and respect, leading to feelings of hostility towards the legal system.²⁹ At the very least, Chaskalson et al concluded in their TRC submission, “[e]ven where legislation could not, as a matter of law, be ignored, judges should have acknowledged situations where law and justice diverged.”³⁰ These reflections suggest that the scope of judicial action would vary depending on the circumstances of the particular case, from merely expressive in some cases to cogently legal acts in others. And while legal philosophy and institutional deference also came up in these submissions, the common thread running through these accounts – the source of regret – was an absence of judicial courage.

²⁵ *Ibid* at 27, noting however that van Niekerk was subsequently convicted of contempt of court for making these comments.

²⁶ Justice LWH Ackermann, “Submission to the Truth and Reconciliation Commission Re: the Role of the Judiciary”, (1998) 115(1) S Afr LJ 51 at 53. He goes on to admit that such a course might have been met by legislated minimum sentences.

²⁷ See discussion of Kannemeyer’s judgment in *Nkwinti* in chapter 6, *supra* at 219-222 and chapter 7, *supra* at 268.

²⁸ See discussion of Goldstone’s judgment in *Govender* in chapter 7, *supra* at 232.

²⁹ Langa, *supra* note 2 at 41.

³⁰ Chaskalson et al, *supra* note 24 at 32.

By contrast to the judicial inaction that largely characterised apartheid-era judging, judges were more proactive in SLAPPs cases. The issue here was not judicial courage as much as it was judicial will, a willingness to look beyond the façade of the lawsuit at hand to scrutinise the real motivations, power dynamics, and political consequences of continued adjudication. This will was apparent in some American cases even before SLAPPs were specifically identified, in court judgments noting that the orders sought would limit political expression, both directly and indirectly.³¹ It was apparent in cases from both Canada and South Africa, decided in the absence of anti-SLAPP statutes, in which judges summarily dismissed cases,³² refused to issue injunctions,³³ and awarded elevated costs in order to condemn abuse of process.³⁴ Evident in these cases and in the law reform that they have prompted is a healthy skepticism of the plaintiff's good faith, resulting in a shift in onus to require to demonstrate that claims have merit sufficiently compelling to outweigh their negative effects. And running through the European Court of Human Rights judgment in the *McLibel* case is an admonition for UK courts to open their eyes to disparities in power and the unreasonableness of evidentiary burdens.

And it is perhaps a combination of judicial courage and healthy skepticism that must characterise the appropriate judicial response, both domestically and at the European Court of Human Rights to cases raising questions under Article 18 of the European Convention on Human Rights. It is no doubt hard to look a state prosecutor square in the face and question the *bona fides* of the case over which

³¹ See discussion of *Sierra Club v Butz*, (1972) 349 F Supp 943 (ND Cal) and *POME v District Court*, (1984) 677 P 2d 1361 in chapter 3, *supra* at 84-85.

³² *MacMillan Bloedel Ltd v Galiano Conservancy Association* (1994), 2 BCLR (3d) 99 (CA); *Fraser v Saanich (District)*, [1999] BCJ 3100 (SC).

³³ *Daishowa v Friends of the Lubicon*, [1995] OJ No 1536 (per Kitley J, refusing to issue an interim injunction, overturned in part (1996), 27 OR (3d) 215 (Div Ct); and [1998] OJ No 1429 (Gen Div) (per MacPherson J, refusing to issue a permanent injunction); *Petro Props (Pty) Ltd v Barlow*, 2006 (5) SA 160 (W).

³⁴ *Fraser v Saanich (District)*, *supra* note 32; *Wrappex (Pty) Ltd v Barnes and others*, 2011 (3) SA 205 (GNP, 11 February 2011). Note also the awarding of \$140,000 in advance costs in *Barrick Gold Corporation c Éditions Écosociété inc*, 2011 QCCS 4232, in which the motions judge, while refusing to dismiss the case outright, suspected that the lawsuit was abusive and had been brought to intimidate the defendants: chapter 3, *supra*, note 126.

one is presiding. It is even difficult to frame that question, which is really a question about prosecutorial motive, as a question of law. But Article 18 itself provides the legal opening with which to do so, and the evidentiary mechanism by which to interrogate the honesty of the reply, by making relevant the full context in which arrests have been made and charges brought. In short, this evolving jurisprudence serves to empower courts to do legally what they should have been doing institutionally: live up to their promise of independence.

Paul Kahn once described judicial independence as being simultaneously both an institution of public order and “a forum for the contest over the meaning of public order”, and that, in this second sense, an independent court is “the institutional expression of the possibility of perpetual revolution.”³⁵ When judges reduce themselves to acting as mere instruments of oppression, they suppress the possibility of that revolution. This thesis has tried to show how judges can, by embodying their ethical obligations, enforcing requirements of fairness, reasonableness, and good faith, and taking seriously their legal, political, and institutional responsibilities, can instead leave open the possibility of a more just future. It suggests that judges have all that they need to rebuff efforts by the powerful to colonise the one political sphere that, structurally, is supposed to be immune to being impressed by power. Where the scales are meant to balance. Where justice is meant to be done. At the core of judicial role morality, then, is a call to action: for what is the value of independence, if it does not engender courage; the value of impartiality, if it does not deliver fairness; or the value of fidelity to law, if it does not deliver justice?

³⁵ Paul W Kahn, “Independence and Responsibility in the Judicial Role” in Irwin P Stotzky, ed, *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder: Westview Press, 1993) at 79.

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