Constitutional damages, procedural due process and the *Maharaj* legacy: A comparative review of recent Commonwealth decisions (part 1)

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1 Introduction

The concept of constitutional damages in Commonwealth constitutional jurisprudence owes its origin to the Privy Council judgment in *Maharaj v Attorney General of Trinidad and Tobago (2)*[1] which established that damages could be recovered as 'appropriate relief' to enforce a right in the Bill of Rights. The right implicated in *Maharaj* was the right to due process of law[2] which, like the right to the protection of the law,[3] were guaranteed in the 1962 independence Constitution and later the 1976 Republican Constitution of Trinidad and Tobago. Neither Constitution defined these expressions nor have they been subjected to distinct meanings by the courts. However, these terms are taken to contemplate the common law principles of natural justice as well as those well-known basic rights of an arrested, detained and accused person in a criminal trial as guaranteed in many Constitutions of Commonwealth countries.

Any discussion of the approach of the courts towards the understanding of these vexed expressions begins with the *Maharaj* judgment. So, too, is the discussion of the constitutional damages jurisprudence in the Commonwealth.[4]

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[1][1979] AC 385 (PC) (hereafter *Maharaj (2)/Maharaj* legacy/*Maharaj* judgment/jurisprudence).

[2]Section 4(a) of the Republican Constitution of 1976.

[3]See s 4(b) of the 1976 Constitution.

[4]*Maharaj (2)*, one way or the other, influenced the following leading authorities on constitutional damages in the Commonwealth: New Zealand – *Simpson v Attorney General* (*Baigent's* case) [1994] 3 NZLR 667 (NZCA); *Taunoa v Attorney General* [2007] NZSC 70, [2007] 5 LRC 680, [2008] 1 NZLR 429 (SCNZ); South Africa – *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3; 2008 (7) BCLR 601; 2008 4 SA 458 (CC); and Canada – *Vancouver (City) v Ward* 2010 SCC 27 (CanLII) [2010] 2 SCR 28 (SCC).

Yet, notwithstanding its jurisprudential relevance, the *Maharaj* judgment has brought in its trail both clarity and confusion. Clarity to the extent that, at the time that judgment was rendered, Commonwealth courts were grappling with, and issuing contradictory judicial opinions as to what 'appropriate relief' meant in their respective independence Constitutions.[5] Again, given that their Lordships chose a case as problematic as this to enunciate the principle of constitutional damages, has left unexplained two problems of public law particularly relevant to this discussion. The first is the issue of liability of the State for judicial error. The second is that the judicial slip upon which the court imposed liability involved a breach of the principle of natural justice. It is these two problems of public law that inform the difficulties encountered by litigants who have sought to bring their cases within the province of the *Maharaj* jurisprudence. The case law emanating from this source provide the materials analysed in the first part of this paper. Drawing essentially from West Indian and New Zealand case law – two jurisdictions where the *Maharaj* legacy has not only been adopted but has thrived – this paper investigates the extent to which, outside the realm of the *Maharaj* judgment, the courts have held the State liable in damages for breach of the fundamental principles of justice. The discussion of the Irish experience provides appropriate comparative and contrasting material.

At common law, damages are not recoverable merely because an administrator failed to observe the rules of natural justice in reaching a decision. Declaratory or other public law remedies are preferred by the courts as appropriate remedies in those circumstances. But, there are instances where actions for damages have been successful where natural justice has been breached in a pure administrative law setting. One instance is where the appointment of a public officer vested with constitutional security of tenure is interfered with in violation of the principle of procedural fairness. While the Privy Council judgment in *Rees v Crane*[6] is a classical illustration of this category, the Constitutional Court decision in *Masetlha v President of the Republic of South Africa*[7] does not belong to this class of cases. Plaintiffs have been successful in cases where the appointee held office under constitutional or statutory authority and there was a breach of procedural fairness in the conduct of the disciplinary proceedings.[8] This brings into focus the violations of procedural fairness involving magistrates and other judicial officers.[9] This aspect of the problem is the subject

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[5]Okpaluba 'Judicial redress for breach of fundamental rights in Nigeria' (1981) 23 *Journal of the Indian Law Institute* 190; Okpaluba *Judicial approach to constitutional interpretation in Nigeria* (1992) 343.
[6][1994] 2 WLR 476, [1994] 1 All ER 833, [1994] 2 AC 173, [1994] 1 LRC 57 (PC).
[7][2007] ZACC 20, 2008 (1) SA 566 (CC).
[8]*Meerabux v Attorney General of Belize* [2005] UKPC 12, [2005] 2 WLR 1307, [2005] 2 AC 513.
[9]*Fraser v Judicial and Legal Services Commission* [2008] UKPC 25 (PC); *Durity v Attorney General of Trinidad and Tobago* [2008] UKPC 59 (PC); *Inniss v Attorney General of Saint Christopher and Nevis* [2008] UKPC 42 (PC).

of part two of this paper. Also discussed in that context is the role damages has played or has failed to play where natural justice has been breached in the context of the UK Human Rights Act 1998.

2 Grappling with the concept of due process

In jurisprudential parlance, the concept, 'due process of law', originated from American constitutional law. It is an expression which, in other common law jurisdictions, is severally referred to as a fair judicial process, a fair hearing, a fair trial or simply, procedural fairness.[10] Whatever nomenclature adopted, reference is here being made to this constitutional phenomenon designed to capture those well known principles of the common law referred to as the rules of natural justice[11] which an adjudicator must observe in both criminal[12] and civil[13] proceedings.[14] It is, in a way, a standard used to measure the quality of the procedure adopted in adjudication as to ascertain whether it accords with the fundamental principles of justice, or in an administrative law situation, to gauge whether an administrative action or executive decision was arrived at with due regard to the revered principles of procedural fairness.

Due process clauses appeared for the first time in the common law world in the Fifth and Fourteenth Amendments to the American Federal and State Constitutions. In the American constitutional landscape, the due process clause is an elastic concept representing both procedural and substantive rights.[15] On the

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[10]See generally, Okpaluba *The right to a fair hearing in Nigeria* (1990) 1.

[11]The concept of 'natural justice' is well known at common law to represent the twin requirements that a party to any proceeding before a court or tribunal which has the duty to determine that a person's rights, obligations, or interests protected or recognised by law, be given adequate notice and opportunity to be heard – *audi alteram partem* – and that the judge, adjudicator or decision-maker be impartial in the determination and uninterested in the outcome of the proceeding – *nemo debet esse judex in propria sua causa*. The extent of the requirements of natural justice depends on the circumstances and the nature of the decision, assessed in light of any relevant statutory provisions – *Combined Beneficiaries Union Incorporated v Auckland City COGS Committee* [2008] NZCA 423 para 11.

[12]See, eg, s 35 Constitution of the Republic of South Africa 1996.

[13]Section 34 Constitution of the Republic of South Africa 1996.

[14]See art 12(1) Constitution of the Republic of Namibia 1990.

[15]Irish courts and academics have similarly interpreted the term 'in due course of law' in art 38 of the Constitution of the Republic of Ireland as contemplating procedural as well as substantive elements. By art 38: 'No person shall be tried on any criminal charge save in due course of law'. It has been said that this expression implies 'a great deal more than a simple assertion that trials are to be held in accordance with laws enacted by parliament'. Kelly *The Irish Constitution* (2003) (4th ed) (cited in *Kemmy v Ireland* [2009] IEHC 178 at 18)] submits that the content of this right in the Irish jurisprudence has been influenced by common law, the European Convention and the case law of the European Court of Human Rights, the United States and international agreements. This has enabled Irish courts to come to the conclusion that it constitutes minimum standards of procedural and substantive aspects of criminal justice.

one hand, it involves the observance of fair procedure in the judicial system. On the other, it is taken to incorporate such substantive rights as the recognised freedoms afforded the individual for the protection of his/her person and property from unfair governmental interference. Indeed, the Fourteenth Amendment provides, *inter alia*, that no state was to abridge privileges and immunities of citizens of the United States. It forbids the States from depriving persons of life, liberty, or property without due process of law. The State must not deny anyone the equal protection of the laws.[16] In his often-cited speech on procedural due process in *Joint Anti-Facist Refugee Committee v McGrath*,[17] Justice Frankfurter had observed:

> 'Due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilisation, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process.

For further illustration, the concept of due process in American constitutional law implies the right of the person affected thereby to be brought, or himself voluntarily appear before a competent tribunal properly constituted to determine his personal liability; to be given the opportunity of being heard in his testimony to controvert the allegations against him before any decision affecting his life, liberty, property or of any right granted by statute; that no question of fact or liability be conclusively presumed against the defendant.[18] Holmes J expressed the view that whatever the disagreement about its scope, there is no doubt that due process of law embraces the fundamental concept of a fair trial, among which is the opportunity to be heard.[19] In *Palko v Connecticut*[20] Cardozo J sought to construe the due process clause in terms of key questions which a court must ask itself such as: does denial of the right claimed 'violate those fundamental

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[16]See generally, Friendly 'The Bill of rights as a code of criminal procedure' (1965) 53 *Calif LR* 929; Kaddish (1957) 66 'Methodology and criteria in due process adjudication: A survey and criticism' *Yale LJ* 319; Wechsler 'Toward neutral principles of constitutional law' (1959) 73 *Harv LR* 1; Lockhart *et al Constitutional rights and liberties: Cases and materials* (1981) (5th ed) 103; Shapiro and Tresolini *American constitutional law* (1983) (6th ed) 292; Pritchett *The AmericanConstitution* (1977) (3rd ed) 412.

[17]341 US 123 (1951).

[18]See the examples cited in *Black's law dictionary* (1990) (6th ed) 500-501.

[19]*Frank v Mangum* 237 US 309 at 347 (1915).

[20]*Palko v Connecticut* 302 US 319, 58 S Ct 149, 82 L Ed 2888 (1937). See also the analysis by Cox, *The court and the constitution* (1989) 240.

principles of liberty and justice which lie at the base of all our civil and political institutions?' Is the right claimed 'of the very essence of a scheme of ordered liberty', so that its denial would invalidate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental?'[21]

3 The *Maharaj* judgment

In *Maharaj (2),* the appellant, a barrister engaged in a case in the High Court, was committed to prison for seven days by Maharaj J of the High Court of Trinidad and Tobago on a charge of contempt in the face of the court. He successfully appealed direct to the Privy Council by special leave.[22] The Privy Council quashed the committal order on the ground that there had been a fundamental failure of natural justice in that before committing the appellant the judge did not give him the opportunity to answer to the charges against him. Meanwhile, Mr Maharaj had been pursuing a constitutional motion for redress under section 6 of the Constitution of Trinidad and Tobago, including monetary compensation on the ground that he had been deprived of his personal liberty without due process of law. In this regard also, he was successful.[23]

The act which led to the breach was an order of a superior court judge in the exercise of jurisdiction. Ordinarily, a judge enjoys immunity from all acts done in the exercise of judicial power.[24] This is a well-established principle of the common

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[21] *Palko* (n 20) 328. Although the Commonwealth Constitution of Australia does not entrench a Bill of Rights, the High Court has, by construction of ch III of that Constitution, incorporated the due process principles into Australian constitutional jurisprudence. See per Gaudron J in *Dietrich v The Queen* [1992] HCA 57, (1992) 177 CLR 292 at 362-363. See further *Harris v Caladine* [1991] HCA 9, (1991) 172 CLR 84; *Re Nolan; Ex parte Young* [1991] HCA 29, (1991) 172 CLR 460; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18, (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24, (1996) 189 CLR 51. See further, William 'Procedural due process under the Australian Constitution' (2009) 31/3 *Sydney LR* 411; Wheeler 'Due process, judicial power and chapter III in the New High Court' (2004) *Fed LR* 9; (2004) 32 *Fed LR* 205; Lacey, 'Inherent jurisdiction, judicial power and implied guarantees under chapter III of the Constitution' [2003] *Fed LR* 2, (2003) 31 *Fed LR* 57; McHugh 'Does chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21 *Australian Bar Review* 235; Kirk 'Chapter III and legislative interference with the judicial process: *Abebe v Commonwealth* and *Nicholas v The Queen*' in Stone and Williams (eds) *The High Court at the crossroads: Essays in constitutional law* (2000) 119.

[22] *Maharaj v Attorney General of Trinidad and Tobago* [1977] 1 All ER 411 (PC).

[23] *Maharaj (2)* (n 2).

[24] The recent case of *Claassen v Minister of Justice and Constitutional Development* 2010 6 SA 399, 2010 2 SACR 451, [2010] 4 All SA 197 (WCC) was solely decided on this basis. Although the facts of this case were closely similar to those of *Maharaj (2)* (n 2) and *Kemmy* (n 15) 178, no reference was made to *Maharaj (2)* or constitutional damages as an alternative ground of liability hence it is kept out of this discussion. But, see Okpaluba 'Constitutional and delictual damages for judicial acts and omissions: A review of *Claassen* and recent common law decisions' forthcoming, (2011) *Lesotho LJ*.

law.[25] But, speaking for the majority of the Privy Council, Lord Diplock stated that it was only errors in procedure that were capable of constituting infringements of the rights protected by section 1(a) of the Constitution of Trinidad and Tobago. He explained that: (a) mere irregularity in procedure will not be enough; (b) it must be such error as to be tantamount to a failure to observe one of the fundamental rules of natural justice; and (c) it must be in such a situation where a person has been deprived of 'life, liberty, security of the person or enjoyment of property' and there was no likelihood of a reversal of the order on appeal at the crucial time.[26]

Lord Diplock further rationalised that the claim for redress under section 6(1) for what has been done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State. First, it is not vicarious liability; it is a liability of the state itself. Secondly, it is not a liability in tort at all; it is a liability in the public law of the State, not of the judge himself, which has been newly created by section 6 (1) and (2) of the Constitution.[27] Thirdly, it is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. Fourthly, it is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Finally, this kind of situation 'can be anything but a very rare event'.[28]

Since the *Maharaj* judgment was rendered, litigants have approached the courts seeking to base their claims on one or more of the principles therein enunciated. One of the questions with which the courts have been confronted has been whether the judicial conduct complained of fits within the difficult-to-comprehend *Maharaj* formulation. In the process, attempts have been made to link varying claims to the *Maharaj* judgment often oblivious of the fact that the case itself is a 'very rare' exception. Closely associated with this problem is the equally nebulous concept of the 'protection of the law' breach for which plaintiffs have claimed constitutional damages. While this article does not deal with all the issues that have grown out of the robust formulations of Lord Diplock in *Maharaj* such as the use or misuse of the constitutional motion[29] or the mode of

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[25]Okpaluba and Osode, *Government liability: South Africa and the Commonwealth* (2010) para 11.1; Okpaluba, 'Adjudicator's immunity from liability in negligence: The case of Advertising Standards Authority of South Africa' (2007) 17/1 *Lesotho LJ* 41.

[26]*Maharaj* (n 2) 399.

[27]*Ibid*. While approving the concept of immunity of the judge from civil liability, Flood J held in *Deighan v Ireland, Attorney General* [1995] 2 IR 56 at 63 that the majority decision in *Maharaj* was of no assistance to the plaintiff since it was based on s 6(1) of the Constitution of Trinidad and Tobago of which there was no corresponding provision in the Constitution of Ireland.

[28]*Maharaj* (n 2) 400.

[29]See Okpaluba 'The use and misuse of the constitutional motion in Commonwealth Caribbean Constitutional redress adjudication' forthcoming (2011) *Speculum Juris*.

quantification of constitutional damages;[30] it does explore the problem of the availability of constitutional damages for breach of the constitutional concept of due process of law and the common law principles of natural justice.

4 Application of the *Maharaj* formula

In *Boodram v Attorney General of Trinidad and Tobago,*[31] the appellant who was on trial for murder contended that his constitutional rights had been infringed by continuing press reports which were calculated to prejudice his trial and by the failure of the Director of Public Prosecutions to take measures to forestall or prevent their publication. The Privy Council affirmed the Court of Appeal by dismissing the constitutional motion. Lord Mustill held that the 'due process of law' guaranteed by the Constitution has two elements relevant to the present case. The first is the fairness of the trial itself while the second is the availability of mechanisms which would enable the trial court to protect the fairness of the trial from invasion by outside influences. In turn, these mechanisms form part of the 'protection of the law' which is guaranteed by section 4(b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. Accordingly, it is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law. In expressing this conclusion their Lordships did not altogether foreclose the possibility of an application to the High Court for relief under the Constitution in a case of trial by media where the chance of a fair trial is obviously and totally destroyed, for there is no due process of law available in such a case to put the matter right. Equally, however, they have no doubt that it is only in a very rare case that an application to the High Court should be entertained. The proper forum for a complaint about publicity is the trial court.[32]

In approving the 'illuminating judgment of Phillips JA in *Lassalle v Attorney General of Trinidad and Tobago*[33] from which their Lordships have derived much assistance', Lord Millett gave some indications as to what due process in the Constitution of Trinidad and Tobago represents. In *Thomas v Baptiste*,[34] Lord Millett held that the due process clause requires the process to be both judicial and 'due'. It is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted

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[30]See Okpaluba and Osode (n 25) para 17.3.
[31][1996] AC 842 (PC).
[32](N 2) 854.
[33](1971) 18 WIR 379 (T&T CA).
[34][2000] 2 AC 1 (PC).

standards of justice observed by civilised nations which observe the rule of law. And, yet, the clause thus gives constitutional protection to the concept of procedural fairness. Whether alone, or in conjunction with section 5(2), the due process clause extends to the appellate process as well as the trial itself. In particular it includes the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action.[35]

In addition to the concept of due process being directed to securing access to the courts, equal treatment, a fair trial and observance of the rules of natural justice,[36] it has been held that by requiring sentence of death to be passed on all defendants convicted of murder, without any consideration of the culpability and circumstances of the individual defendant, section 4 of the Offences Against the Person Act 1925 violated the prohibition in section 5(2)(b) of the Constitution of Trinidad and Tobago on the imposition of cruel and unusual treatment or punishment.[37]

The appellant in *Khan v The State*[38] challenged the constitutionality of section 2A of the Criminal Law Act 1979 as amended by the Criminal Law (Amendment) Act 1997 based on the constitutional guarantees of 'due process of law' in section 4(a) of the Constitution and the right to the protection of the law enshrined in section 4(b). It was submitted that the due process guarantee afforded protection against a law which operated in an arbitrary or disproportionate manner.[39] In imposing liability for the grave crime of murder on those who lacked the *mens rea* ordinarily required for convicting for that offence, section 2A operates in a manner as harsh, arbitrary, oppressive and unreasonable as to violate the due process guarantee. In resisting the argument the respondent relied on the broad legislative discretion accorded by the Constitution to Parliament. It was for Parliament, not the courts, to judge what legislative measures would best serve the interests of the country, and within very broad limits it had authority to define the content of criminal offences. Section 2A did not make unlawful what had previously been lawful, since it had never been lawful to commit an arrestable offence. Nor was the section discriminatory, since

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[35]*Thomas* (n 34) 22.

[36]*Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265 (PC) at 269; *Ong Ah Chaun v Public Prosecutor* [1981] 648 at 673; *Boodram* (n 32) 845; *Maharaj* (n 2) 399.

[37]*Roodal v The State* [2003] UKPC 78. See also *Khan v The State* [2003] UKPC 79, [2004] 2 WLR 692, [2005] 1 AC 374 (PC) holding to same effect in respect of s 2A of the Criminal Law Act 1979 (T & T).

[38]*Khan* (n 37).

[39]*R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [2001] 2 AC 19 at 38; *R v Offen* [2001] 1 WLR 253; *Winterwerp v The Netherlands* (1979) 2 EHRR 387 at 403 para 30; *Van Droogenbroeck v Belgium* (1982) 4 EHRR 44 at 461 para 48; *Bouamar v Belgium* (1987) 11 EHRR 1 at 15 para 47; *Quinn v France* (1995) 21 EHRR 529 at 543 para 52.

it applied equally to all. It was neither arbitrary nor capricious, nor novel to attach enhanced penal sanctions to the commission of a crime which had fatal consequences. The due process clause was directed to securing access to the courts, equal treatment, a fair trial and observance of rules of natural justice. The respondent however accepted that a criminal statute might violate the due process guarantee if it were too vague or uncertain to enable the citizen to regulate his conduct[40] but section 2A was not vulnerable to that objection.

Lord Walker held for the majority that the Constitution of Trinidad and Tobago, like other Constitutions, represents a balance democratically struck to promote certain ends and protect certain rights. The essence of constitutionality lies in strict observance by every organ of the state of the limits set by the Constitution on its own peculiar functions. Accordingly, the legislature and the executive should not exercise powers which properly belong to the judiciary. The judiciary for its part must exercise the powers which the Constitution expressly or impliedly allots to it, and no others. It is plain that under this Constitution, Parliament has very broad, although not unfettered, legislative authority. It acted to restore the substance of a rule which had long formed part of the law and which had never been the subject of intentional legislative amendment. Most importantly, Lord Walker held that while the primary focus of the due process guarantee is on the procedural rights, their Lordships would accept the opinion of de la Bastide CJ at the Court of Appeal 'that a law which altered the substantive criminal law might be unreasonable and oppressive as to be subject to challenge on grounds of unconstitutionality'. In adopting this approach, Lord Walker held that the application of sections 4(a) and (b) of the Constitution should not be unduly restricted. In that regard, the Court of Appeal was right to have endorsed the judgment of Parliament when it held that the 1997 amendment of the Criminal Law Act which in effect re-introduced a rule of common law which had formed part of the jurisprudence of Trinidad and Tobago for very many years, could not be considered as even remotely approaching the type of enactment that might reasonably attract such a challenge. The appeal failed on this ground.[41]

4.1 Claims based on protection of the law

The Privy Council raised the issue of the meaning of 'protection of the law' which the claimant sought in *Lewis v Attorney General of Jamaica*[42] but it refrained from providing any definition of the term. Indeed, it drew no distinction between the meanings of these expressions and in *Khan* they were treated as synonymous. However, the Chancellor of the Guyanese Judiciary not only posed the question

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[40] *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294; *Sabapathee v The State* [1999] 1 WLR 1836.

[41] *Khan v The State* [2003] UKPC 79, [2004] 2 WLR 692, [2005] 1 AC 374 para 11.

[42] [2001] 2 AC 50 at 85.

but also proffered an answer. In *Kent Garment Factory v Attorney General*[43] George C held that the concept of protection of the law is premised on the existence of a court system which must fulfil two primary purposes. First, it must be a court where all would have access in order to vindicate any perceived wrong or to defend against any allegation of wrongdoing. And, secondly, such a court would render an impartial, binding and enforceable judgment after a fair hearing. Conceptually, therefore, protection of the law is quite different from a mistaken application of the law or the evidence by a court or tribunal. Accordingly, the appellant's complaint that its fundamental right to the protection of the law had been violated when the appropriate administrative agency denied its legitimate expectation to have its import licence extended was untenable. Another reason advanced by Chancellor George as to why the procedure adopted by the appellant was misconceived was that the special procedure contemplated by Article 153 of the Constitution of Guyana 1980 was only available for the protection of those aspects of the protection of the law as set out in Article 144 which deals with both criminal and civil law.[44]

It was held in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago*[45] that once someone committed to prison for contempt of court could appeal to the Court of Appeal, and meantime, apply for release on bail, his position became essentially no different from that of a person convicted of any other offence. In other words, convicted persons cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison.[46] In determining whether someone's right not to be deprived of his liberty except by due process of law had been violated, it was the legal system as a whole which must be looked at, not merely one part of it. Since *A*, one of the two journalists jailed for contempt of court, had been able to secure his release on bail pending his appeal against his conviction, his position was essentially no different from that of a person convicted of an offence. Any shortcomings in the first hearing could be made good on the appeal and the grant of bail meanwhile, so the system as a whole was fair. Accordingly, *A* had enjoyed the benefit of the process and was not entitled to constitutional relief on that ground. Lord Brown explained that in laying down the basic principle in *Maharaj*, Lord Diplock was addressing a legal system that was unfair. Distinguishing *Maharaj* from the present case, Lord Brown observed:

> Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings[47] on the point, one

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[43](1991) 46 WIR 177, [1993] 3 LRC 240 at 251g.
[44]*Id* 253a/b-e.
[45][2004] UKPC 26, [2004] 3 WLR 611, [2005] 1 AC 190, [2005] 1 All ER 499 (PC).
[46]*Id* para 89 per Lord Brown.
[47]*Maharaj* (n 2) 409-410.

> can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr Ali was able to secure his release on bail within four days of his committal – indeed, within only one day of his appeal to the Court of Appeal – their Lordships would hold the legal system as a whole to be a fair one.[48]

For an applicant to succeed in his claim, it follows that there must be some protection which the law failed to provide. What, therefore, was that protection in *Hinds v Attorney General of Barbados*?[49] The appellant was convicted of arson and sentenced to eight years imprisonment. He had been refused legal aid and thus was unrepresented at trial. He was however represented by counsel in the Court of Appeal. Following the dismissal of his appeal he brought a constitutional motion complaining that his right to a fair trial had been infringed. His motion was dismissed by the Court of Appeal and affirmed by the Privy Council. Lord Bingham for the Judicial Committee held that since the appellant was represented at the appellate level, the ordinary appellate processes had given adequate opportunity to vindicate his right to a fair hearing since:

> It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in such fresh proceedings based on section 24.[50]

The appellant in *Forbes v Attorney General of Trinidad and Tobago*[51] had been sentenced to five years imprisonment for possession of drugs and were released on bail pending appeal after nineteen months. He was detained again following his sentence being varied by the Court of Appeal to one of 18 months imprisonment to start afresh. He was finally released after 11 months on account of the Privy Council allowing his appeal on conviction. The question was whether a person who has served a term of imprisonment before his conviction was quashed on appeal has been deprived of his constitutional rights to due process and protection of the law.[52] His appeal on constitutional relief was dismissed. Lord Millett held that it was only in rare cases where there has been a fundamental

[48] *Independent Publishing Co* (n 45) para 88 per Lord Brown.
[49] [2002] 1 AC 854 (PC).
[50] *Id* 870 para 24.
[51] [2002] UKPC 21 (PC).
[52] *Id* para 13.

subversion of the rule of law that resort to constitutional redress would be appropriate. However, although the constitutional rights to due process and protection of the law were the recognised exception, it does not, as Lord Diplock observed in *Maharaj*, guarantee a judicial process free from error. This was the reason for the appellate process. Here, the appellant had spent his terms of imprisonment before his convictions were set aside on appeal. He was imprisoned after a fair and proper trial before a competent court of law. There was therefore no procedural error, let alone any subversion of the judicial process. The appellant thus enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. His rights were not infringed so, his constitutional motion failed.[53]

As Lord Hailsham pointed out in his dissenting opinion in *Maharaj,* it is difficult to draw a distinction between 'a mere judicial error and a deprivation of due process'. In both *Maharaj* and the case of *A*, the journalist in the *Independent Publishing Co*, the judicial errors stemmed from the unfairness of the hearing in each case. The distinction however lay on the absence of a right of appeal in *Maharaj* and its availability in the *Independent Publishing Co* case. In the circumstance, their Lordships regarded *A* as having 'enjoyed the benefit of due process'. Lord Brown concluded: 'As in *Hinds*, so too here: any shortcomings in the first hearing could be made good on appeal and by the grant of bail meanwhile. The system as a whole was fair'.[54] Now that the right of appeal exists, their Lordships found little reason to maintain the rather unsatisfactory distinction originally made in *Maharaj* 'between fundamental breaches of natural justice, mere procedural irregularities and errors of law'.[55]

4.2 The approach of the New Zealand courts

Even though the *Maharaj* judgment involved the interpretation of provisions in a written Constitution, the Court of Appeal of New Zealand embraced it and applied its outcome in the interpretation of the provisions of the New Zealand Bill of Rights Act 1990 in *Baigent's* case.[56] This approach was followed in *Dunlea*[57] and consistently in subsequent cases.[58] It was recently affirmed by the Supreme Court

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[53] *Id* para 18.
[54] *Independent Publishing Co* (n 45) para 92.
[55] *Id* para 93.
[56] *Baigent's* case (n 5).
[57] *Dunlea v Attorney General* [2000] 5 LRC 566, [2000] 3 NZLR 136 (CA).
[58] See, eg, *Attorney General v Hewitt* [2001] NZAR 148 (HC) at 162; *Binstead v Northern Region Domestic Violence (Programmes) Approval Panel* [2002] NZAR 865; *Minister of Immigration v Udompun* [2005] NZCA 128, [2005] 3 NZLR 204 (CA); *Brown v Attorney General* [2006] NZAR at 575; *Percival v Attorney General* [2006] NZAR 215 (John Hansen J); *R v Williams* [2007] 3 NZLR 207 (CA); *McKean v Attorney General* [2007] 3 NZLR 819 (Fogarty J).

of New Zealand in *Taunoa v Attorney General.*[59] In none of these cases was there any question of judicial error within the *Maharaj* mould. The issues deliberated upon in most of them concerned violations of the rights in the Bill of Rights Act by the police, immigration and prison authorities. For instance, in *Udompun,*[60] the rights infringed by the police and immigration authorities were held to implicate the Thai tourist's dignitary interests while in *Caie v Attorney General*[61] it was an arrested farmer's procedural right to be informed promptly of the reasons for his arrest. However, the cases discussed below have implications on the subject matter of this paper.

4.2.1 *Brown v Attorney General*

The question in *Brown* was whether the State breached the rights of the appellant under the New Zealand Bill of Rights Act 1990? And, if so, would monetary relief be an appropriate remedy? The appellant was charged with attempted murder, wounding with intent to cause grievous bodily harm, and aggravated robbery, each together with a person unknown. A long-sleeved t-shirt was found at his flat with the victim's blood on it. The T-shirt had sweat stains. The appellant wanted DNA testing to prove it was not the appellant's sweat, but was refused funds to have the shirt tested for DNA by an Australian laboratory. When it was subsequently established that the T-shirt had been worn by another resident in the flat, the appellant obtained a discharge from the conviction for murder. He claimed that as a consequence of breaches of various rights accorded to him under sections 21 to 25 and 27 of the New Zealand Bill of Rights Act 1990, he had suffered an unjustifiable loss of liberty from 1996-02-02 until 1997-06-02 which was the time he spent in jail following his conviction. He contended that his murder trial was not fair because he was denied appropriate resources with which to defend himself. He claimed compensation from the Crown in the sum of $3 million, together with interest and costs. He was unsuccessful before Glazebrook J[62] and in the Court of Appeal.

The case failed on the ground that the appellant was not able to establish any breach of his right under the Act as the refusal to grant him legal aid was neither unlawful nor unreasonable. This meant that the court did not have to decide the second question which was whether compensation was the appropriate remedy. William Young J nonetheless addressed the point. He expressed the view that New Zealand courts should not award compensation as a remedy for unfair trial process; rather, they should require such complaints to be raised with either the trial judge or on appeal. Among the general and particular reasons given by the Court of Appeal Judge for so suggesting were: (a) the rules as to trial fairness

[59](N 5).
[60]*Udompun* (n 58).
[61]*Caie v Attorney General* [2005] NZAR 703.
[62]*Brown v Attorney General* [2003] 3 NZLR 335 (HC).

have been developed for the purpose of determining whether appeals should be allowed and not for determining entitlements to compensation. They are therefore not likely to be well-suited for applications in a compensation context; (b) the purposes for which rules are used necessarily have an impact on their content. If the rules as to trial fairness are required to serve the dual function of determining whether criminal appeals ought to be allowed and entitlements to compensation, there are likely to be consequential changes in practice to the disadvantage of criminal appellants. It is likely to become harder for appellants to persuade appellate courts that there was unfairness; (c) for the courts to recognise claims for compensation in relation to unfair trial process would create a fiscal burden on the taxpayer which parliament can hardly be seen to have authorised; (d) the 'natural' remedy for breach of fair trial rights is to be found in the jurisdiction of trial and appellate courts rather than by way of damages; (e) in any event, it is difficult to see why a person who has been convicted following an unfair trial is a more deserving claimant for compensation than another person convicted following a trial which miscarried for reasons other than state unfairness; and (f) this approach is consistent with the most recent Privy Council jurisprudence.[63]

4.2.2 New Zealand decisions since Brown

The New Zealand experience insofar as the *Maharaj* jurisprudence is concerned, has been outlined elsewhere.[64] The focus here is on the dicta and decisions of the Court of Appeal and the Supreme Court indicating that damages can be recovered for judicial error in breach of a right in the Bill of Rights. To that effect, there are four cases for mention and discussion.

4.2.2.1 The Thai tourist's case

The trial judge had held in *Minister of Immigration v Udompun*[65] that the Immigration Service had breached its natural justice obligations to the plaintiff, a Thai tourist. The breach stemmed from the officers not properly advising her of her right to counsel when she was detained at the Airport for alleged immigration violation. She was awarded damages. The Court of Appeal held that there was neither breach of natural justice nor of section 23(1) when she was detained in Auckland. Having thus held, it was not necessary for the court to deal with the question whether the Bill of Rights Act compensation should not be available for breaches of natural justice obligations. Because the matter was raised, the court proceeded to make some preliminary observations.

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[63] [2005] 2 NZLR 405 (CA) para 142.
[64] See Okpaluba and Osode (n 25) para 3.2.1.2, 57-62.
[65] *Udompun* (n 58).

It was held that there was force in the proposition that compensation should not be available for breaches of natural justice as a matter of course. It should not lightly be assumed that the Bill of Rights Act has overtaken the existing law on administrative law damages to this extent.[66] In normal circumstances it would be a sufficient remedy for a breach of natural justice to have the impugned decision set aside, a declaration that it was not properly made and, if possible, an order to make the decision anew. Where an effective remedy already exists, the Bill of Rights Act compensation will not be needed.[67] This is a principle applied by the European Court of Human Rights[68] as it is the approach required by section 8(3) of the United Kingdom Human Rights Act 1998.[69] The view that there should be caution in the area of damages for breaches of natural justice is reinforced by the fact that the Bill of Rights Act compensation remedy was developed largely to meet New Zealand's international human rights commitments, and especially those under the ICCPR.[70] There is no general guarantee of natural justice in the ICCPR except in the criminal law context where, under article 14(1), there is a right to a fair and public hearing by an impartial and independent tribunal.[71]

4.2.2.2 Prisoners' loss of human dignity

The Supreme Court judgment in *Taunoa v Attorney General*[72] is the highest judicial authority on quantification of constitutional damages in New Zealand, if not in the Commonwealth. The appellants/prisoners had contended that they suffered breaches of natural justice in the application of prison discipline, the so-called 'Behaviour Modification Regime' (BMR), against them. That their rights to the observance of natural justice under section 27(1) of the Bill of Rights Act were denied by their placement on the BMR because they were not given the opportunities to be heard on the placement and its continued application to them.[73] However, they did not claim additional damages on this account. Elias CJ

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[66]*Id* para 168.

[67]See *Baigent's* case (n 5) at 676 (per Cooke P), at 692 (per Casey J), at 703 (per Hardie Boys J) and at 718 (per McKay J) and the comments of the same court in *Wilding v Attorney-General* [2003] 3 NZLR 787 para 14.

[68]See the English Law Commission and Scottish Law Commission *Damages under the Human Rights Act 1998* (Law Comm No 266/Scot Law Comm no 180/Cm 4853 2000) at 4.36.

[69]*Udompun* (n 58) para 169.

[70]See *Baigent's* case (n 5) per Cooke P at 676, Casey J at 691, Hardie-Boys J at 699-700 and 702, and McKay J at 718.

[71]*Udompun* (n 58) para 170. Note, however, that in art 10 of the Universal Declaration of Human Rights the right to a fair and public hearing by an independent and impartial tribunal is available not only in the criminal context but also 'in the determination of his rights and obligations'.

[72](N 5) 680.

[73]At the Court of Appeal in *Taunoa* (n 5) para 239, it was held that while the failure to provide for visits by the Superintendent or for medical visits were breaches of the Regulations, and were components in the Judge's finding that BMR breached s 23(5), but they did not amount to a breach of s 27(1) of the Bill of Rights Act. Neither the Superintendent nor the medical officers had any

held that the appellants were denied natural justice in the application of the BMR and the deprivation of their lawful entitlements, and that the breach of section 27(1) was a result of the failure to comply with the law. She was however not prepared to grant even a formal declaration to that effect. The reason was that, to the extent that the failure of natural justice was relevant, it was subsumed within the findings of breaches of sections 9 and 23(5).[74] Again, Blanchard J held that in determining whether a measure of damages should form part of the remedy in a particular case the court should begin with the nature of the right and the nature of the breach. He observed that some rights are of a kind where a breach is unlikely to warrant recognition in monetary terms. In that regard, breaches of natural justice are likely to be better addressed by traditional public law means, such as ordering the proceeding in question to be reheard. On the other hand, breaches of some rights of a very different character will inevitably demand a response which must include an award of damages whether in tort or under the Bill of Rights Act.[75]

4.2.2.3 Change in previous procedure

In *Combined Beneficiaries Union Incorporated v Auckland City COGS Committee,*[76] the plaintiffs sought damages for the loss of funding which occurred because the relevant department had changed the previous procedure for doing so without adequate notice that the time limit for making the applications was to be enforced as mandatory and inflexible. Andrews J held that there was procedural unfairness in that the respondents breached the plaintiffs' rights to natural justice at common law and under section 27(1) of the Act. She made a declaration to that effect but declined to award the plaintiffs Bill of Rights damages. They appealed against the decision not to award damages.

The Court of Appeal held that there was certainly authority for the proposition that the Bill of Rights Act damages were not usually awarded for breaches of section 27(1). In support,[77] the court relied on the principles enunciated in *Baigent's* case,[78] and opinions expressed in *Udompun,*[79] *Brown*[80] and *Taunoa*[81] already set out in this context. The court found it unnecessary for the purposes of the case to decide whether, as a matter of principle, it should uphold the respondents' position that Bill of Rights damages are never available for section

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adjudicative function in relation to the segregation of an inmate to which s 27(1) could relate.
[74] *Taunoa* (n 5) para 105 per Elias CJ.
[75] *Id* para 261. Tipping J para 298 agreed with Blanchard J's comments on natural justice.
[76] *COGS Committee* (n 12) paras 56-58.
[77] *Udompun* (58) paras 168-170.
[78] *Baigent's* case (n 5).
[79] *Udompun* (n 58) paras 168 and 169.
[80] *Id* paras 100-101 and 141-142.
[81] (N 5) paras 261 and 298.

27(1) breaches.[82] Glazebrook J (Hammond J concurring) however found strong support in *Taunoa* and *Udompun* for the proposition that Bill of Rights damages for breach of section 27(1) are rare. Such awards, it was reiterated, would be confined to circumstances where:

- there is no other effective remedy;
- human dignity or personal integrity or (possibly) the integrity of property are also engaged; and
- the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse.[83]

To uphold the respondents' position would involve overruling *Attorney-General v Upton*.[84] There could be grounds to do this as it was simply assumed in that case that the Bill of Rights damages were awardable. There is no reasoned decision on whether or not that should be the case. Again, if the comments of William Young J in *Brown v Attorney-General*[85] were followed, this would mean that, if the situation in that case arose now, damages may not be awarded. Although the majority in *Brown* expressed no view as to when, if ever, compensation or financial relief would be an appropriate remedy for breach of 'fair trial' rights, they acknowledged the strength of William Young J's views on the subject.[86]

It was held that where a right contained in the Bill of Rights has been violated there is no automatic 'right' to be compensated for the breach.[87] Whether Bill of Rights damages are payable is a matter for the court[88] as the grant of monetary compensation for a breach of an affirmed human right is discretionary.[89] In order to decide whether the trial judge was correct in not awarding damages in this case, it is important to assess the nature of the right and the nature of the breach since it may be inappropriate to award damages for a breach which is relatively minor or which has been adequately recognised by other means.[90] Having regard to the fact that the breach involved in this case was trivial – even if the persistence

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[82] Apart from holding that the question of liability under s 27(1) did not arise for determination in the present case, Baragwanath J was more concerned with the kind of damage for which recompense was sought such as injury for a kind of 'bureaucratic error' in this case (para 100). For instance, damages have been successfully sought where the injury affected liberty (*Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA) and reputation [1983] NZLR 662 (PC). Whereas in this case and in *Minister of Fisheries v Panfield Holdings Ltd* [2008] NZCA 216 (CA) it was 'only economic loss' in which the law offers less protection – *Naysmith v Accident Compensation Corporation* [2006] 1 NZLR 40 (HC) para 80.
[83] *COGS* (n 12) para 70.
[84] (1998) 5 HRNZ 54 (CA).
[85] [2005] 2 NZLR 405 (CA) paras 141-142.
[86] *Id* paras 100-101.
[87] *COGS* (n 12) paras 76-79.
[88] *Baigent's* case (n 5) at 692 and 718 per Casey and McKay JJ respectively.
[89] Per Tipping J in *Taunoa* (n 5) para 303 approving the Court of Appeal decision in *Link Technology 2000 Ltd v Attorney General* [2006] 1 NZLR 1 paras 34-37.
[90] Per Blanchard J in *Taunoa* (n 5) paras 256 and 261 respectively.

in refusing to accept a late submission is taken into account. There was no question of dignity or personal integrity involved, there was no property right at all, rather, it was a mere right to be considered for a discretionary grant. The breach was 'committed in the course of the laudable aim of trying to tidy up the sloppy administration of the COGS scheme up to that point'. Furthermore:

> … an award of damages was not needed to deter future decision-makers as the breach had already been remedied for the future. [According to] Blanchard J, … the level of any award should reflect other ways the State has acknowledged the wrongdoing: for example the speed with which the conduct was brought to an end, measures put in place to prevent recurrence and whether there has been a public apology.[91] In this case the breach was remedied for the following year and we understand that this was done even before the proceedings were issued.[92]

4.2.2.4 Breach of natural justice in a prison disciplinary hearing

McKean v Attorney General[93] involved an appeal against the judgment of Fogarty J refusing to grant the appellant compensation under the Bill of Rights Act for breaches of natural justice that occurred in the course of a prison disciplinary hearing.[94] The charge that the appellant/prisoner tampered with urine samples was heard by a Visiting Judge who found the charge proved and the appellant was sentenced to five days cell confinement and 28 days' loss of privileges. On the appellant's application for judicial review, Fogarty J set aside the sentence and declared the hearing invalid, procedurally unfair. It was in breach of the principles of natural justice in three respects because the applicant: (a) was refused legal representation whereas he was entitled to representation; (b) did not have prior notice of the full report upon which the prosecution relied as only extracts of it were read out; and (c) he was not given the opportunity to challenge the report through cross-examination.

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[91] *Taunoa* (n 5) para 262.

[92] Per Glazebrook J in *COGS Committee* (n 12) para 79. Baragwanath J held, paras 113-115, that the court's opinion on the question of liability for damages under s 27(1), which is of considerable importance, should have been reserved for a case which turns upon it since it was a moot point in the present case. So, too, should the question of what if any relief, including declaration, should be granted for breach. 'That is because of the need for care when considering whether and if so how the jurisprudence concerning redress for breach of public law obligations should be extended beyond the present bounds. We are still at a relatively early stage in the development of a rights' jurisprudence. It is in my view generally desirable in that context to avoid premature determination of important issues unnecessary to the decision in the case. So, I would rather say that the quantum appeal, against the nil award of damages, is dismissed and that the cross appeal is allowed; not because we are necessarily of a different opinion from the High Court as to the construction of s 27(1), but because justice has been done without it: the CBU secured a factual finding sufficient to explain its delay in making its funding application and the triviality of the claim makes it undeserving of discretionary declaratory relief.'

[93] [2009] NZCA 553.

[94] *McKean v Attorney General* [2007] 3 NZLR 819 (HC).

However, Fogarty J refused the applicant's claim for compensation.[95] The reason was that the scheme of the Corrections Act 2004 was that Visiting Judges could not be held to account by the Crown. If so, compensation would not be available to prisoners for Bill of Rights breaches by Visiting Judges. Analytically, *Baigent's* case[96] enunciated two basic *rationes decidendi*. The first proposition is that the Crown is directly liable for all breaches of the rights in the Bill of Rights Act as a matter of public law. The second, and possibly narrower ratio, is that the Crown is directly responsible only for a breach of the rights in the Bill of Rights Act by the executive. Preferring the second scenario because it would serve to protect the independence of the judiciary, Fogarty J held that the applicant's claim for the Bill of Rights Act compensation failed. If that approach were wrong and the wider *ratio* of *Baigent's* case applied, Fogarty J went on to consider whether it would be appropriate to award compensation to the applicant, and concluded that it was not. The applicant's case demonstrated the efficacy of judicial review, which was adequate redress for the errors of the Visiting Judge in this case. The claim for compensation was therefore not made out and there was no question of delay in the whole process.

Two questions arose for resolution before the Court of Appeal. First, was compensation available for breaches of the Bill of Rights by judicial officers? Secondly, should compensation have been ordered in this case?[97] Since the court had answered the first question in *Chapman,*[98] it delivered a brief and positive answer. It was held that Fogarty J should have adopted the wider *ratio* of *Baigent's* case whereby compensation should be available for breaches of the Bill of Rights by judicial officers.[99] It was held that Fogarty J was correct not to have awarded compensation in this case. After referring to *Chapman*, *Baigent's* case,[100] *Udompun*,[101] *Brown*[102] and *Taunoa*[103] the Court of Appeal reached the conclusion which can be briefly summarised. The first comprises those three principles already referred to in *Combined Beneficiaries Union*.[104] The second affirmed the trial judge to the effect that judicial review provided an effective, appropriate, proportionate and sufficient remedy for the breaches of natural justice that occurred in this case. There was no suggestion that the delay from the date of the decision of the Visiting Justice to the filing of the review proceedings was the fault of the Department of Corrections. The punishment was suspended within one day

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[95]See the Court of Appeal judgment: [2009] NZCA 553 paras 7-11.
[96]*Baigent's* case] (n 5).
[97][2009] NZCA 553 para 19.
[98][2009] NZCA 552 (CA).
[99][2009] NZCA 553 para 20.
[100]*Baigent's* case (n 5).
[101]*Udompun* (n 58) paras 168 and 169.
[102][2005] NZCA 28, [2005] 2 NZLR 405 (CA) paras 100-101 and 141-142.
[103](N 5) paras 261 and 298.
[104][2009] NZCA 553 para 21.

of the application for judicial review being filed and the impugned decision was quashed by the High Court. The appellant's release from prison has even spared him a rehearing (where he may have been found guilty as charged).[105] Thirdly, the factors advanced to support the granting of a remedy in this case show no significant differences between the processes for an appeal and those for judicial review. Indeed, the ability to apply for interim orders in judicial review applications may even provide an advantage over appeals. The breaches of natural justice in this case were serious but no more so than in a number of other cases that have come before the courts. It has not been suggested that there was any bad faith involved on the part of the Visiting Justice. Further, while natural justice is important in the prison disciplinary system, it is no less important in other contexts, including in particular in the context of criminal trials.[106]

4.3 Experience of the Irish courts

The plaintiff's primary claim in *Kemmy v Ireland*[107] was for damages against the State for infringement of his constitutional right to a fair criminal trial by the State through its judicial organ. The Court of Criminal Appeal had set aside his conviction for rape and sexual assault on the ground that the manner in which the trial was conducted rendered it unfair. A retrial was not ordered. However, by that time the plaintiff had served the sentence and had been released. Not being entitled to damages under section 9 of the Criminal Procedure Act 1993 because there was no miscarriage of justice, he commenced these proceedings claiming damages for a breach of his constitutional right to a fair trial. The crux of his case was that he did not receive a 'fair trial' from the trial judge and that this was a breach of his constitutional right. The right to a fair trial is one of the un-enumerated personal rights in Article 40.3 of the Irish Constitution.[108]

The defendants denied that they had any liability to compensate the plaintiff for any loss or damage he allegedly suffered as a result of his detention under orders made by the Central Criminal Court after the trial. They also denied that the trial judge was personally liable to the plaintiff for any alleged negligence or breach of duty in the manner the trial was conducted. In the absence of any primary liability, none of the defendants were vicariously liable to the plaintiff for the action of the trial judge. It followed that judicial immunity from suit was subject to or secondary to any alleged rights of the plaintiff under the Constitution and the defendants denied that judicial immunity from suit in respect of acts done in the performance of judicial duty was unconstitutional.

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[105]*Id* para 22.
[106]*Id* para 23.
[107](N 15) (2009-02-25).
[108]In terms of Article 40(3)(1) of the Irish Constitution, the 'State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'.

McMahon J rejected the plaintiff's case on the ground of judicial immunity of the judge which applied in this case notwithstanding that a fundamental right was asserted. [109] *Maharaj* and the subsequent cases discussed above in which the Privy Council had weakened the rigours of that judgment were distinguished. The trial judge posed the question: 'why must the State compensate the injured party when the error relates to a fundamental rule of natural justice?' From the convicted man's point of view, the distinction may be difficult to appreciate. Accordingly, the judge held that this was a clear example of a situation where the wrongly convicted person may have no remedy and yet the State, for higher public policy considerations, and perhaps with some reluctance, is content to live with this outcome.[110] In the present context, the plaintiff's 'right to a fair trial' should more properly be referred to as an obligation on the State to provide a *fair legal system* within which the plaintiff's trial can take place. By providing an appeal system, the State has carried out its duty in this respect. It is the legal system as a whole that must be examined before deciding whether someone's right to liberty or to a fair trial has been breached.[111] Despite the Human Rights Act 1998, there have been no decisions in the United Kingdom awarding compensation for those whose convictions have been set-aside for unfairness at trial. It would be a sorry spectacle to see the courts assert a jurisdiction to award compensation in 'exceptional' or 'egregious' cases involving breach of fair trial rights cases due to the fiscal burden such actions would create on taxpayer.[112] Finally, since the right to a fair trial includes an appeal process, the time to assess the fairness of the process, when the appeal is availed of, is after the appeal and not after the trial. If that is the correct time to make the assessment then it must be concluded that the whole process was a fair one in this instance, since the plaintiff's right was vindicated at the end of the day by the appeal court. From this it follows that there has been no breach of the plaintiff's right to a fair trial.[113]

In conclusion, McMahon J held that in a constitutional sense, the State merely provides the scaffolding for judicial activity, after which it ceases to be involved once the judge begins his work. The State may be liable for failing to erect the appropriate scaffolding, but once this is up, and the judge goes about his business, the only liability that arises is that of the judge. To speak of the State's liability for judicial acts in that context is somehow to re-introduce in disguise the concept of vicarious liability, something that is completely rejected in this context. It is somewhat contradictory, since these proceedings are taken against the State on the basis that the judge is part of the State apparatus, for the plaintiff to suggest that the established immunity which the judge enjoys ought not to benefit the State also in

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[109]*http://www.bailii.org/ie/cases/IEHC/2009/H178.html* 21/09/2010 (n 15) [2009] IEHC 178 22.
[110]*http://www.bailii.org/ie/cases/IEHC/2009/H178.html* 21/09/2010 (n 15) [2009] IEHC 178 20. See also per Lord Hailsham LC in *Maharaj* (n 2) 409-410.
[111]Per Lord Brown in *Independent Publishing Co Ltd* (n 45) paras 87-89.
[112]See also per William Young J in *Brown v Attorney General* [2005] 2 NZLR 405 para 134
[113]*http://www.bailii.org/ie/cases/IEHC/2009/H178.html* 21/09/2010 (n 15) [2009] IEHC 178 20.

such circumstances. The argument is that the judge should be identified with the State on the one hand, when liability is considered, and should, on the other hand, be distinguished from the State when immunity is in issue.[114]

In terms of article 38(1) of the Irish Constitution, it is provided that 'no person shall be tried on any criminal charge save in due course of law'. One well-litigated aspect of the 'due course' guarantee is the right to 'reasonable expedition' of the trial process which, like most areas of the constitutional law, is often concerned with applications for prohibition of the prosecution. Quite recently, however, the accused in *McFarlane v Ireland*[115] was not only interested in stopping the prosecution but also claimed damages for breach of the right to reasonable expedition of his trial. The plaintiff's claim was supported by what, in Irish constitutional jurisprudence is referred to as the *Meskell* doctrine, which postulates that 'the constitutional right carried within, its own right to a remedy or for the enforcement of it'.[116] By this doctrine is established the principle of compensation for a breach of a constitutional right and the right to seek damages for such breach when no other effective or sufficient remedy existed.[117]

The European Court of Human Rights distinguished between a delay caused by the failure of an *individual* judge to deliver judgment within a reasonable time (which might incur the concept of judicial immunity held in the *Kemmy* judgment) and the 17-month period required to approve a High Court judgment, which means that the State could be found blameworthy under article 6(1) of the European Convention for unreasonable delay. In other words, there is a relevant distinction to be drawn between the personal immunity from suit of judges and the liability of the State to compensate an individual for blameworthy delay in criminal proceedings attributable in whole or in part to judges.[118] The Strasbourg Court held that the overall length of the criminal proceedings against the applicant was excessive and failed to meet the 'reasonable time' requirement and that article 6(1) of the Convention was breached.[119] The applicant was awarded damages in respect of non-pecuniary damage given the stress, inconvenience and restrictions experienced by him as well as his inability to plan for his future during the relevant period.[120]

(to be continued)

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[114]*http://www.bailii.org/ie/cases/IEHC/2009/H178.html* 21/09/201 (n 15) [2009] IEHC 178 21-22.
[115][2010] ECHR 1272.
[116]Per Walsh J, *Meskell v CIE* [1973] IR 121.
[117]See the majority judgment in *McFarlane v Ireland* [2010] ECHR 1272 para 85.
[118]*McFarlane* (n 15) para 121.
[119]*Id* para 156.
[120]*Id* para 158. It was also held in *O'Donoghue v Legal Aid Board* [2004] IEHC 413 where there was a delay in granting a legal aid certificate for 25 months when the plaintiff manifestly qualified for it was found to amount to a breach of the plaintiff's constitutional right of access to court and to fair procedures so that she was entitled to recover damages for demonstrated loss. See also *Jorsingh v Attorney General* [1997] 3 LRC 333 (PC).