PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION

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The Relationship Between Standing and Intervention Rules and the Subject Matter of the Litigation

It is apparent from the Greenpeace examples that the standing and intervention rules in different areas of the courts' jurisdiction vary. The question to be asked here is whether those variations can be justified by reference to the subject matter falling within those discrete areas of the courts' jurisdiction. It may well be appropriate for a single legal system to operate different standing rules in relation to different substantive areas; the admission of wide standing rules in some areas is therefore not necessarily inconsistent with there being narrower rules elsewhere.[64] However, an immediate difficulty with the current situation arises from the fact that the formally separate areas of jurisdiction are in substance far from discrete. Moreover, as we have just seen, the intervention and standing rules within the *same* jurisdiction may allow for a different range of persons to be heard in court. Two areas are examined here: human rights law and EC law.[65]

Human Rights Cases

The HRA endeavours to reserve section 6 complaints to victims, but arguably fails to achieve this in substance owing to the probability that non-victims who are otherwise regarded as having a 'sufficient interest' (or, rather less likely, 'title and interest to sue') can make traditional ultra vires arguments with the assistance of section 3 of the HRA, and the likelihood that those courts will continue to allow non-victims to make arguments which turn on rights recognised at common law. If this analysis is right, then domestic law, at least outside Scotland, contains a direct conflict which Lord Lester would likely condemn as 'absurd.'

In developing a standing test to govern access to human rights arguments, it is important to bear in mind the different attitudes that may be held in relation to the nature of rights and the relationship of the rights-holder and others in relation to those rights. A comparison of individualist and communitarian approaches to rights and public law may be helpful here.[66] A narrow victim test supports the individualist view that rights are the property of their holders, and that only those persons should be entitled to move the court in relation to an alleged violation. Other than in the case where that victim is legally incompetent, as for example in the case of minor children, a 'benevolent' third party should not be permitted to bring the matter to court, unless (perhaps) it can demonstrate that it has the clear, ongoing authorisation of the victim to bring the case on his behalf. This view, (perhaps at its broadest permitting what Peter Cane calls 'associational' standing[67]), is reflected in some interpretations of 'sufficient interest' outside the

[64] P Craig, *Administrative Law* (4th edn, London, Sweet & Maxwell, 1999), 715.

[65] The different standing rules for abstract and concrete devolution review invite similar analysis.

[66] For fuller analysis, see Miles, above n 52, at 148–52. See also D Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *MLR* 44.

[67] Above n 56.

HRA.[68] By contrast, a communitarian analysis supports the broader view of 'sufficient interest' taken in non-HRA cases, and so justifies non-victims' continuing ability to make human rights arguments. On this view, the focus is not on the particular victim, but a wider concern about governmental illegality—public wrongs rather than private rights—in which anyone may assert an interest sufficient to move the court.[69] Such a wider standing rule (which may be felt to amount to no standing rule at all) would recognise a collective public right to have government held legally accountable for its actions, including in individual rights cases (and in other areas), and so permitting 'surrogate' and 'public interest' standing.[70] Cases such as *Joint Council for the Welfare of Immigrants* support this analysis in a rights context under the standard 'sufficient interest' test.[71]

The parliamentary debates do not suggest that the victim test was selected with either or indeed any such view in mind,[72] so the justification (if any) for having the different standing tests for human rights arguments is one for the courts to explore in the light of their perception of the prevailing political theory relating to rights enforcement, part of what Feldman calls the 'constitutional ethic.'[73] As the law stands, assuming that non-victims can make at least some of the human rights arguments suggested in the Greenpeace case study, there is tension between the victim test and the scope of non-victim review, betraying inconsistent views about the entitlement of non-victims to concern themselves with rights-violations. The courts cannot deal with the tension by reinterpreting the 'victim' test; whilst susceptible of quite broad interpretation, its language offers less scope than the standard test to bring *its* interpretation into line with *them*. So perhaps the common law should prefer its narrower interpretations of 'sufficient interest' over its more expansive cases in rights-based situations, effectively matching the victim test. Many would regard that as a retrograde step and one that the courts are unlikely to make, but short of legislative removal of the victim test, it may be the only acceptable means of alleviating the tension. The alternative, effectively side-lining the victim test by fully exploiting non-victim review, whilst arguably preferable on policy grounds, may give insufficient weight to the victim test's place in the HRA scheme.[74]

[68] See the discussion of standing to make a discrimination argument: *McBride*, above n 4; and *R v Legal Aid Board, ex parte Bateman* [1992] 1 WLR 711.

[69] Sedley J, as he then was, in *R v Somerset County Council and ARC Southern Ltd, ex parte Dixon* [1998] Env LR 111, at 121, though he does not advocate a completely open door—'in the majority of cases' the claimant will need an interest greater than that of the rest of the public, at 117.

[70] Cane, above n 56.

[71] Above n 31;·see also *R v Secretary of State for Social Services, ex parte Child Poverty Action Group* [1990] 2 QB 540; these cases may alternatively be justified as ensuring justice for individuals who encounter difficulty moving the court to protect themselves, and so supplements the individualist approach; the communitarian approach would not require the claimant to demonstrate victim support.

[72] For analysis, see Miles, above n 52, at 142–47. See also the *Response to the Northern Ireland Human Rights Commission's Review of Powers Recommendations* (Northern Ireland Office, May 2002), in which the Commission's recommendation that it be exempted from the exclusionary effect of the victim test is rejected at para 70–72.

[73] Feldman, above n 66.

[74] Though victims alone could claim discretionary damages awards: HRA, s 8. A scheme offering wide access to judicial review plus victim-only damages (a sort of public/private split) is not

The clash between victim standing and wide intervention, by contrast, may be more apparent than real. There is a distinction between the question of who can bring the court's attention to an alleged illegality, and what the court does, and from whom the court hears, once that allegation is before it. So, in this context, a victim's autonomy is protected to the extent that a non-victim is prohibited from bringing his complaint to court, but if a victim chooses to move the court, he initiates a process in which others may properly become involved. David Feldman has argued that the victim test fails to recognise the 'collectivist' philosophy which informs the content of many of the Convention rights, which may accordingly be perceived as satisfying public as opposed to purely individual purposes and requiring a balance to be struck between individual and wider public and social interests.[75] However, even if we are stuck with victim standing, third party interventions may help ensure that courts are better equipped to address those wider, collective issues which are central to determining the success of victims' complaints; and, as we shall see, such interventions may also better equip the courts to develop and expound the law more generally.

European Community Law Cases

The European Community context generates a similar tension, here deriving from the mismatch between national and supranational levels. As the case study showed, a challenge to the validity of a measure of the EC institutions may reach the European courts via several routes, one of which allows (in England, if not Scotland) very broad standing, the other extremely narrow standing. Damages actions brought in the European courts against Community institutions under EC Treaty Articles 235 and 288 may also involve impugning the validity of an EC measure, and yet there a straightforward victim standing test applies. The inconsistencies are exacerbated by the fact that access to the Article EC Treaty 234 route is determined by different rules in each Member State.

Since identical legal issues can find their way to the European courts by all of these routes it is impossible to find any rationale for the variety of standing tests in the subject matter of the litigation.[76] The rationale for the narrow EC Treaty Article 230 rule might be to preserve the European courts' resources by giving national courts primary responsibility for resolving EC law disputes. But where the national court is minded to rule the challenged EC measure invalid, it is obliged to make a reference.[77] The European Court of Justice thus has no control over the number

inconsistent, but it seems clear that that was not the scheme intended; the pervasive force of s 3, denying victims much of their exclusivity, was perhaps overlooked. Thanks to Tom Hickman for this point. See cases above n 33a.

[75] D Feldman, 'The Human Rights Act and Constitutional Principles' (1999) 19 *LS* 165, 173–78, 193–94.

[76] Craig has identified a rationale for the varying approaches taken by the European Court of Justice to its own Article 230(4) standing rule: 'Legality, Standing and Substantive Review in European Community Law' (1994) 14 *OJLS* 507; but that does not account for the divergence of standing rules at issue here.

[77] Case 314/85 *Foto-Frost* [1987] ECR 4199.

of Article 234 references that it receives and so its resources may be drawn upon in any event.

One way of resolving the tension between national jurisdictions, and between national and supranational levels, would be to harmonise the national rules governing standing and procedure for the bringing of EC law claims, and, where the case involves a challenge to the validity of an EC measure, to tie in such rules with those governing direct access to the European Court of Justice under Article 230. The Court is unlikely to encroach on domestic autonomy in this area, and the Commission's suggestions for harmonisation specifically in standing to argue environmental matters were not well received.[78] But it is the Court's own Article 230 standing rule which is out of line with the generally more open rules found in many national jurisdictions and even in its own Article 235 jurisdiction,[79] so if any change is to be made, it should perhaps be in the Court's own practices; but given the outcome of the recent flurry of judicial activity in this area, that seems unlikely to occur by way of judicial re-interpretation of the test. We are therefore likely to be left with a mismatch between jurisdictions that cannot be explained by reference to the issues being litigated.

STANDING AND INTERVENTION RULES AND THE CONSTITUTIONAL ROLE OF THE COURTS

A second perspective from which the appropriateness of standing and intervention rules may be judged relates to the constitutional role of the courts, the associated issue of the public's right to participate in legal proceedings, and the limits of the courts' practical competence.[80] Two closely related questions help frame this debate: (1) are the courts rights defenders only, or law enforcers generally? (2) are the courts essentially dispute-resolvers or more generally expounders of the law?

Rights Defenders or General Law Enforcers?

The traditional model casts courts as resolvers of bipolar disputes between directly affected parties. The victim test reinforces this orthodoxy, though as we have seen is accompanied by the possibility of wide intervention and sits rather uncomfortably alongside the opportunities for human rights review potentially open to non-victim claimants. However, one effect of a *generally* narrow standing rule (as opposed to one that operates exclusively in the *human rights* field) premised on

[78] Himsworth, above n 51, at 214–17; C Harlow, 'Access to Justice as a Human Right', in P Alston, M Bustelo and J Heenan (eds), *The European Union and Human Rights* (Oxford, Oxford University Press, 1999), 200.

[79] See AG Jacobs' Opinion in Case C-50/00P *UPA v Council*, above n 20, at para 85.

[80] Many of the issues explored here have also been canvassed recently by Carol Harlow, below n 111, who takes a more sceptical view of the ability of the legal system to accommodate wide standing and intervention.

the model of a bipolar dispute initiated by a materially affected claimant[81] is that several key areas of modern governmental activity may thereby be excluded from the scope of judicial review, at least that instigated by private persons.[82] Complaints relating to environmental, cultural, economic or international matters[83] may involve no individuated claimant, or class of claimant, who satisfies such a standing rule. The flexible sufficient interest test can accommodate these cases; a more restrictive rule, based on individual rights or material interests, as opposed to the vindication of some broader public or ideological interest, may not.

So narrow standing rules effectively put some issues beyond the courts' reach, and so, it might be said, beyond legal as opposed to political accountability. Commentators such as Trevor Allan would not regard that as a bad thing.[84] For Allan, judicial review should be concerned primarily with individual right and interest, as protected by the rule of law principles of due process and equality; beyond that, he would allow for judicial review only to resolve 'general questions of constitutional authority,' such as jurisdictional disputes between different levels of government.[85] It is from that primary focus on individual rights that the institution of judicial review derives its legitimacy, and as a result of which the judiciary can claim a constitutional function distinct from and balancing those of the political arms of government. That focus does not steer the judiciary clear of political controversy, and the courts must not shirk their constitutional responsibility to adjudicate on the individual's claim just because the case is controversial.[86] Indeed, the fact that an individual right is at stake is all that is required to render the matter justiciable; there is no need or justification in Allan's view for any separate 'political question' or justiciability doctrine.[87] Moreover, save for allowing representative standing to enable some claimants to assert the rights of others, this understanding of judicial review would largely dispense with the need for rules of standing.[88]

This view deprives the courts of any basis on which legitimately to adjudicate on cases raising no question of individual right, such as the *Fire Brigades Union*[89] and 'Pergau Dam' cases.[90] The propriety of judicial review in cases such as these, and the standing of the claimants to bring them, has attracted a range of academic comment. Allan maintains that judicial review is out of place here, even where there may be concern about the adequacy of the mechanisms supposed to ensure

[81] Contrasted with a purely 'ideologically' motivated claimant: see Stewart, below n 122.

[82] On the relevance of Attorney General relator actions, see below n 98.

[83] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] QB 552; *R v Her Majesty's Treasury, ex parte Smedley* [1985] QB 657; *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 WLR 386; *R v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* [1990] QB 504. For discussion of utilities regulation, a sphere where these sorts of claims may arise, particularly on environmental grounds, see Peter Leyland, ch 8 above.

[84] TRS Allan, *Constitutional Justice* (Oxford, Oxford University Press, 2001).

[85] *Ibid* at 172.

[86] TRS Allan, *Law, Liberty and Justice* (Oxford, Oxford University Press, 1993), 225.

[87] Above n 84, at 163.

[88] Above n 86, at 234; see *ibid* n 98 regarding representative standing, which he would at least allow for bodies such as the Equal Opportunities Commission.

[89] *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

[90] *World Development Movement*, above n 83.

political accountability for the challenged decision.[91] If the courts adjudicate in cases where no question of individual right is at stake, they allow themselves to become a surrogate political forum for those who lost their battle in the political process and so stray into a non-justiciable mire. Absent a claim of individual right, the court has no readily defensible, specifically 'legal' as opposed to simply 'political' basis for deciding the case, and so for asserting that its interpretation of the relevant statute should be regarded as any more authoritative that than of the executive or legislature.[92] So although government must at all times act in accordance with the law, for Allan and others *judicial* review will not always be an appropriate control mechanism.[93]

However, other commentators argue that, even assuming that the orthodox mechanisms of political accountability worked (and so excluding any argument for judicial review based on a perceived need to compensate for a democratic deficit), there remains a distinct function properly to be played by the courts in policing the limits of governmental powers even where no individual is directly or singularly affected. And with that function necessarily comes a wider standing rule to ensure that the matter can be brought before the court. In Lord Diplock's words, it cannot be said:

> that judicial review of the actions of officers and departments of central government is unnecessary because they are accountable to Parliament for the way they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.[94]

The disagreement turns on the fundamental issue of what counts as a 'legal' and in that sense justiciable dispute. Allan describes the 'Pergau Dam' case as one where 'it is not clear that legal and political objections could be sufficiently distinguished' to justify judicial review,[95] such that the court arguably found itself improperly encroaching on executive discretion. By contrast, Ivan Hare, an advocate of broad standing rules, says of the case that 'it would be difficult to think of a challenge more closely formulated in rigorous legal terms,' the only point involving 'one of strict statutory construction.'[96]

Approaching the issue from a slightly different tack, perhaps intended to be more sympathetic to Allan's theory of individual rights, Peter Cane has advocated a theory of *public* rights, on the basis of which a 'legitimate area of activism' might be carved out for the courts, and corresponding limits on the competence of the political arms of government might be created.[97] The vindication of such public

[91] Above n 84, at 172–73, in relation to the *Fire Brigades Union* case; cf Feldman above n 66, at 50 regarding the use of judicial review to support representative democracy.

[92] Above n 84, at 195–96.

[93] Above n 86, at 223. See also Harlow, below n 111, at 5.

[94] In the *IRC* case, above n 5, at 644.

[95] Above n 84, at 195. See also the view of Carol Harlow that this case constitutes 'a new high watermark in the substitution of legal for political accountability,' below n 111, at 5.

[96] Above n 51, at 309.

[97] Cane in Loveland (ed), above n 56, at 142–45.

rights should be open to private citizens under broad standing rules.[98] However, this approach is problematic. Identifying what 'rights' might fall within the scope of such a theory is contentious, Cane's criterion being that the importance of the rights and interests in question is such that they should be judicially protected against undue governmental encroachment except by express legislative provision.[99] Suggested examples include freedom of information, basic constitutional principles such as 'no taxation or expenditure without Parliamentary approval,' and possibly environmental rights. As Cane acknowledges, the identification (and content) of rights which can and should be afforded judicial protection would have to rest on some underlying, inevitably contested, political theory regarding the appropriate division of judicial and executive/legislative competence.

Whatever is the proper answer to this question regarding the scope of the courts' jurisdiction, it should be addressed head on, as commentators discussed here have done, via a theory of justiciability or carefully reasoned theory about the purpose of judicial review, and not evaded by unreflectively adopting a standing rule whose *effect* is to exclude these controversial areas from judicial review. However, it is important to note that wide standing rules per se are not a cause of justiciability problems. One could (subject to one's view of the issues addressed in the previous section) have a wide standing rule to allow non-victim claimants to make perfectly justiciable human rights arguments, but accompany that with a justiciability rule which excluded from court cases not involving individual rights. Conversely, claims brought by individual victims may take the courts into highly contentious political territory that, absent the human rights dimension, might have been regarded by some as non-justiciable.[100] But it is the subject matter of the application, and the argument which it is proposed to be made, that determines justiciability, not the identity of the person making it.

Dispute Resolvers or Expounders of the Law?

As the foregoing discussion implies, whether the courts are confined to the vindication of individual rights or enforce the law more generally, the breadth of standing and intervention rules may also depend upon the characterisation of the courts' role and their relationship with the other branches of government. This perspective on standing and intervention has received considerable attention in the American literature. Giradeau Spann used the term 'expository justice' to describe a model of the US federal courts' function which could be contrasted with the traditional 'dispute resolution' model.[101] Under the traditional model, the

[98] The availability of actions by the Attorney General may be more apparent than real, particularly where the putative defendant is a part of central government: *ibid.*

[99] *Ibid* at 150. Cf the restricted scope of public right actions such as the Scottish *actio popularis*: Clyde and Edwards, above n 13, at para 10.23.

[100] eg *Hatton v United Kingdom* (2002) 34 EHRR 1.

[101] G Spann, 'Expository Justice' (1983) 131 *UPa LR* 585; see also O Fiss, 'The Forms of Justice' (1979) 93 *Harv LR* 1.

courts' role is perceived as being primarily that of resolving bipolar disputes, only incidentally expounding the law and then only to the extent necessary to deal with the individual cases before them. By contrast, the expository justice model views the courts' primary function as being to give 'operational meaning to principles that would otherwise remain abstract, rhetorical and elusive,'[102] in particular where those principles are the very broad statements found in constitutional documents such as a Bills of Rights, or in this jurisdiction the ECHR.[103] It is necessary for the courts to ensure that those principles are understood in a way that is relevant to current social conditions, at least keeping pace with social evolution.[104] The courts' exposition of the law is therefore crucial, governing not just the immediate dispute before the court, but having wide-ranging implications for a number of groups within society beyond those represented by the immediate parties to the claim. It may accordingly be desirable for the courts to be equipped with information and argument from sources other than the immediate parties.

It has been said that whenever the public perceive that governmental power is being exercised over them—here by what may be felt by them to amount to judicial law-making—they will seek involvement in the relevant decision-making process. The nature of the issues before the court often reflects the pluralist nature of modern society. Judicial decisions about the meaning and proper application of a given legal principle—which will often involve weighing the claims of two or more sets of rights or interests—may therefore be felt to enjoy greater legitimacy if participation by a wide range of parties and interests in the courts' proceedings is permitted.[105]

In the EU context, the population governed by the European Court of Justice's decisions is especially large and diverse, so opportunity to intervene in proceedings before the Court may be regarded as particularly important. Seen in this light, the rules regarding intervention in cases brought by way of a reference under EC Treaty Article 234 (in particular) are too restrictive. It will be recalled that only those private persons who appeared in the national proceedings are permitted to make representations to the European Court of Justice. This exclusion of newcomers is ostensibly based on the view that Article 234 proceedings are non-contentious, designed simply to ensure a uniform interpretation of Community law.[106] But this characterisation of the proceedings surely understates the significance of Article 234 decisions. Given the declaratory, and sometimes prospective[107] nature of the judgments, it might be thought that a wider circle of non-governmental interests should be represented in court than those which

[102] *Ibid* at 592.

[103] In cases described by Spann as 'statutory' rather than 'constitutional' (a dichotomy that does not as easily translate into the UK context), the courts' function is seen as key to the operation of the separation of powers.

[104] *Ibid* at 600. Cf the 'living instrument' approach to the interpretation of the ECHR: *Tyrer v United Kingdom* (1979–80) 2 EHRR 1.

[105] P Bryden, 'Public Interest Intervention in the Courts' (1987) 66 *Can Bar Rev* 490.

[106] Case C-181/95 *Biogen v Smithkline Beecham* [1996] ECR I-717, paras 4–6, quoted by Denman, above n 48.

[107] Case 149/77 *Defrenne v SABENA* [1978] ECR 1365; Spann identifies prospectivity as characteristic of an expository system.

fortuitously appeared at the national level, not least since different national systems will have standing and intervention rules of varying degrees of generosity.

In this jurisdiction, cases in which the courts have been receptive to broader standing have often turned on 'legislative' rather than 'adjudicative' facts,[108] where the case concerns the validity of some general measure or policy in its application to a wide class of persons, rather than on the particular treatment of one individual. Contrast abstract devolution cases, where a peculiarly narrow standing rule applies.[109] Legislative facts will be central in any references made by the law officers to the Privy Council. The court's role here may be regarded as particularly expository, such cases often requiring interpretation of broadly framed provisions, for example where it is argued that the legislation is incompatible with Convention rights. The standing rule may accordingly be felt to require counter-balancing by non-governmental intervention to provide wider interest representation before the court and so, it might be felt, better exposition of the law.

So the expository nature of many judicial decisions and the consequent claim of civil society to be involved in judicial decisions affecting it has clear implications both for the scope of standing rules—unlike the dispute resolution model, the expository justice model does not suggest any particular relationship between claimant and issue[110]—and, perhaps more so, for the nature of the evidence which courts are willing to admit and for the nature and scope of interventions which they allow. But allowing wider participation and evidence is far from uncontroversial. As Carol Harlow has recently demonstrated, the difficulty lies in managing an opening-up of the courts' procedures in a way which will enhance, rather than undermine, the legitimacy and quality of their decisions, and improve rather than stultify their processes.[111]

The Democratic Implications of Wider Participation in Judicial Proceedings

An initial judgment has to be made about the constitutional appropriateness of the courts embracing their (inevitable) expository function by developing their procedures in this way; and this gives us a slightly different perspective on the issues raised by Trevor Allan, viewed not from the bench, but from the place in the democratic system, and in the judicial system, of individual members of civil society.

David Feldman has argued that the law relating to standing and intervention must be developed compatibly with the wider constitutional context, in particular the scope afforded to members of civil society to participate in formal political debate.[112] Where a dispute concerns the scope and enforcement of individual

[108] For this distinction see KC Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55 *Harv LR* 364, 402–3. For an example, see *R v Secretary of State for Employment, ex parte the Equal Opportunities Commission* [1995] 1 AC 1.

[109] See Page, above n 40, at 16–18.

[110] Even in a traditional system, the concept of 'dispute' may be contentious, turning on a determination about the types of 'injury' cognisable for these purposes: Spann, above n 101, at 624–27.

[111] C Harlow, 'Public Law and Popular Justice' (2002) 65 *MLR* 1. See also S Hannett, 'Third Party Intervention: In the Public Interest?' [2003] *PL* 128.

[112] Above n 66.

rights and material interests, there is no constitutional difficulty in allowing affected individuals, or their representatives, to assert those rights in court, whether by initiating proceedings or by intervening in proceedings already begun.[113] Matters become more complicated where the claimant is purporting to act in the name of the 'public interest' or to assert an ideological interest.[114] If the political system is firmly rooted in representative democracy and responsible government, claims by private individuals or groups either to be heard directly in the political forum (rather than through an elected representative) and to litigate matters of public or purely ideological interest in court may be viewed with suspicion. Such claims become 'an alternative or supplement to orthodox political processes, taking the courts beyond their core function of adjudicating on individuals' rights and duties'[115] and, we might add, using access to the courts to give the claimants a powerful, direct voice which the representative political system has deliberately denied them.

However, he goes on to observe that a given political system, the product of years of evolution, is unlikely to adhere uncompromisingly to a single theory. So, for example, where a formally representative/responsible political system is nevertheless receptive to public involvement in policy-making, the prevailing political theory may be more accommodating of participation than the formal understanding of the constitution implies, and so participation by the wider public (usually in the form of interest groups) in court—whether to challenge the manner of the group's consultation by a policy- or decision-maker, or to challenge the substance or implementation of policy—may be regarded as being more consonant with the prevailing 'constitutional ethic,' properly understood.[116] Moreover, if the system permits public interest claims to be made by private claimants not materially affected by the matters under dispute, it must perforce afford similarly interested groups and individuals the opportunity to seek permission to intervene in those proceedings since the claimant can claim no greater right (than promptness) to put his arguments before the court than any other person.[117]

This approach may be compared with that of commentators and judges[118] who have argued that the courts should widen opportunities for participation in their proceedings precisely in order to compensate for 'democratic deficit' and so for lack of popular participation elsewhere in the system. This argument has been

[113] The propriety of *surrogate* claimants turns in part on whether an individualistic (what Feldman calls a 'liberal individualistic') or communitarian view of rights enforcement is taken.

[114] Assuming for the sake of argument that Allan's objections to this sort of litigation can be overcome. The concept of 'public interest' is problematic. It may be more accurate to talk not of a single 'public interest', but of a compromise amongst a plurality of affected interests: Stewart, below n 122, at n 371. Some 'public interest' claims may therefore amount to 'maxi-private-interest litigation', though for some claims, for example those relating to impact of government action on future generations, 'whose interests may not be represented under a strictly liberal individualist regime,' the concept of 'public interest' may remain apt: Feldman, above n 66, at 55.

[115] Feldman, above n 66, at 48.

[116] *Ibid.*

[117] Bryden, above n 105, at 527.

[118] Lord Mustill, in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, at 567F-H.

particularly prevalent in the European context.[119] However, Feldman allows room for this sort of argument, such evolutive challenges to current practices being necessary to allow for constitutional development.[120] Changes in one part of the system—whether in the judicial or another branch of government, may trigger change elsewhere.

For example, moves by the European Commission to enhance participation by civil society, in particular non-governmental organisations, in European policy-making[121] may place irresistible pressure on the European Court of Justice, or failing that,[121a] the Inter-Governmental Conference, to expand standing under EC Treaty Article 230(4). The link between wider participation at the policy formation or decision-making stage and increased standing and intervention rights has been argued many times before.[122] At the very least, it might be argued that the existing category of individual concern covering those involved by right in a consultation process should be expanded to cover consultees more generally, to achieve compatibility with the wider participation at the policy-making stage.

In the domestic context, Harlow notes consultation by government in relation to the development of policy, seen as a key aspect of the 'modernising government' programme, which is being deployed in an increasing range of areas, supplementing representative democracy.[123] Furthermore, it can be argued that the Government's express endorsement of intervention in judicial proceedings as an appropriate tactic for interest groups deprived of the right to move the court under the HRA[124] justifies extending participation in this sphere and endorses the courts' receptiveness to such applications. Even outside the human rights context, Harlow diagnoses the courts' acceptance of broad standing and intervention in cases not involving individual rights as indicative of a developing form of 'public interest litigation' of the type described by Abram Chayes, in which it is implicitly regarded as constitutionally appropriate for civil society to litigate rather than lobby.[125]

So, to summarise the position thus far. In proceedings relating to individual rights and interests, matters falling squarely within the jurisdiction of the courts as

[119] C Harlow, 'Towards a Theory of Access for the European Court of Justice' (1992) 12 *YEL* 213, and 'Public Law and Popular Justice,' above n 111, at 13; contrast her view of the propriety of NGO involvement in domestic litigation: since the domestic democratic deficit is less acute, it is asked whether interest groups, whose own democratic nature might be questionable (see Cane, above n 56) ought to be granted standing. This concern seems to be downplayed in the international sphere on the basis that some input from civil society in the otherwise state-dominated arena is better than none.

[120] Above n 66, at 51.

[121] *European Governance: a White Paper* (COM (2001) 428 final); *Consultation Document: Towards a Reinforced Culture of Consultation and Dialogue* (COM (2002) 277 final). The absence of discussion in these papers of NGOs' participation in judicial proceedings to determine the validity of EC measures is striking, given the emphasis otherwise placed on the rule of law, NGOs' central role in the functioning of civil society and representative democracy, and the concern to bring the people closer to Europe.

[121a] Albors Llorens suggests that prospects of judicial reform are now non-existent, above n 20.

[122] Classically, by R Stewart 'The Reformation of Administrative Law' (1975) 88 *Harv LR* 1667; see Craig, above n 64, at 715–16.

[123] Above n 111, at 11.

[124] Eg Lord Chancellor, Hansard, HL Deb, 24 November 1997, vol 583, col 832.

[125] Above n 111.

it is traditionally understood, there is no constitutional difficulty in allowing those individually affected to participate in court. The expository nature of the court's function may make it desirable that the variously affected individuals (ie perhaps including those affected by the legal point, if not the particular facts, in dispute) be involved as interveners. Whether persons other than those individuals (and their duly authorised representatives) can intervene or bring a claim as ideologically-motivated surrogates will turn on the debate between individualism and communitarianism (or collectivism) and on the arguments surrounding participation considered here. Once we enter the sphere of pure 'public interest' litigation, those latter arguments, together with the debate between Allan and others, come to the fore.

The Institutional Problems of Wider Participation in Judicial Proceedings

However, even if a sound case can be made for widening participation in the courts' proceedings in the various terms discussed above, there may remain problems relating to the courts' institutional competence which justify further caution. Lon Fuller's classic discussion of the problems created by polycentric disputes is important here.[126] Many public law cases involve polycentric issues, which raise problems for courts called upon to expound the relevant law, because their traditional (dispute resolution model) procedures are better suited to handling bipolar disputes. It is said that in order to appreciate the full implications of the decision it is called on to make, a court would have to transform itself into something more like a Royal Commission or public inquiry, or indeed a Parliament, than a court of law; at its worst, the 'freeway' would become a political 'free-for-all.'[127] Such a transformation would, it is said, render any procedural distinction between the judicial and the political forums of government rather thin. Moreover, it would also be likely to fail in its goal of ensuring adequate participation by *all* interested parties. The net result would be similar to that produced by the traditional system—an ill-informed decision reached on the basis of incomplete participation and which has unforeseen repercussions for some of the many affected individuals—but at the further cost of undermining the distinctiveness and legitimacy of the courts' function. So, Fuller would argue, the court must exercise restraint by deciding cases on bases which do not demand an appreciation—which the court cannot have—of likely external repercussions.

However, John Allison claims[128] that the suggested restraint may not be a virtue, since however restrained the court may be, its decision will necessarily have ramifications that it cannot foresee. Cases brought by individual victims and which therefore appear on their face to be bipolar may on closer examination involve genuinely polycentric problems. The problem of polycentricity is insidious; a court may fail to appreciate the polycentric nature of the case before it and so be

[126] L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harv LR* 353.
[127] Harlow, above n 111, at 17.
[128] J Allison, 'The Procedural Reason for Judicial Restraint' [1994] *PL* 452.

unaware of the need to exercise the recommended restraint. Indeed, Allison argues that Fuller's concept of adjudication—an adversarial contest based on the proofs and arguments of the two parties, the old 'dispute resolution' model—itself actually *aggravates* the problem, by depriving the courts of the wherewithal to detect these aspects of a case. The central complaint—ill-informed judicial decision-making—must be addressed either way. One way of ameliorating the situation would be to introduce 'correctives' to the system of a type advocated by the promoters of the expository justice and public law litigation model (notably third party intervention and Brandeis briefs) which allow information to be brought before the court from sources beyond the immediate parties.[129] Where that information includes non-legal, for example socio-economic data, it will additionally be necessary to ensure that it is properly interpreted by judges, whose background as lawyers (rather than as administrators) may not previously have exposed them to these sorts of materials.

It is important to bear in mind in this debate what the substantive law invoked by the claimant in each type of case requires of the court, and to note in doing so that the suggested interventions will not take the courts into non-justiciable subject matter. Rather, they will provide information essential to proper resolution of the issues squarely before the court. The standard of review has in recent years become increasingly intensive, both under the HRA, under EC law and at common law: the former two involve proportionality review; common law review also shows signs of accepting a true proportionality test within the scheme of, or alongside, *Wednesbury*. Certainly, the admission into domestic law of a proportionality doctrine has been accompanied, under the HRA in particular, by the concept of a discretionary area of judgment for executive decision-makers and legislators.[130] However, even allowing for that self-denying ordinance, the courts cannot abdicate their responsibility to police the limits of that area, and to do so sufficiently closely to satisfy the demands of the ECHR.[131] If they are to engage sensibly in proportionality review, however intensively applied,[132] the courts may need relevant specialist information which the immediate parties to the claim may not be equipped to put before the courts themselves. For example, a court may be unable properly to determine the justifiability of a prima facie infringement of a victim claimant's Convention-protected interest, and so the scope of his Convention right, if it does not have before it information pertinent to weighing that interest against the legitimate aim, such as the rights of others, sought to be pursued via the infringement.[133]

[129] A Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harv LR* 1281; 'Public Law Litigation and the Burger Court' (1982) 96 *Harv LR* 4. For English proposals, see Allison, above n 128, at 468–72.

[130] eg *R v DPP, ex parte Kebilene* [2000] 2 AC 326, 381A-E, per Lord Hope.

[131] *Smith v United Kingdom* (2000) 29 EHRR 493; Article 13 was not incorporated by the HRA, but the courts are likely to have regard to it in fashioning the standard of review, since they may otherwise incur criticism from Strasbourg.

[132] See Allison, above n 128.

[133] See Loux, above n 46, 335–38; see also Feldman's arguments re the collective nature of Convention rights, above n 75.

The substantive grounds of review themselves may therefore make the courts more receptive to third party intervention, especially by way of written submission, and may also demand a more favourable attitude towards evidence generally in judicial review cases.[134] The courts' experience of proportionality in EC law has encouraged a more generous approach to disclosure in that field.[135] Some judges clearly consider that recent developments in the nature of judicial review, not least their freeing from the '*Wednesbury* straitjacket,' mean that a different approach to evidence will be required. Munby J adverted to such developments to support the existence of a power to order cross-examination and receive oral evidence in judicial review proceedings.[136] It seems likely that the domestic courts will continue to encourage interventions and allow wide standing where the rules permit them to do so. Even before the HRA came into force, the English courts had indicated a willingness to broaden their information base by accepting interventions.[137] The House of Lords recently endorsed the value of third party interventions in a case concerning the Northern Ireland Human Rights Commission's capacity to intervene in legal proceedings involving Convention rights.[138] Lord Woolf remarked that 'the successful introduction of human rights into ... domestic law ... is substantially dependent upon the courts giving proper effect to those rights,' a task in which the Commission and other interveners would be able to give 'substantial assistance to enable the courts to fully appreciate what is involved in properly applying human rights in the litigation which comes before them.'[139] Whilst the power to admit interveners may be exercised sparingly,[140] and when allowed generally confined to paper, interventions have been permitted in a number of recent high profile cases.[141]

[134] For the standard position on disclosure see: *R v Secretary of State for Home Affairs, ex parte Harrison* and *R v Secretary of State or the Environment, ex parte London Borough of Islington and the London Lesbian and Gay Centre* reported at [1997] *JR* 113 and 121; *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386, at 396–97.

[135] N Green, 'Proportionality and the Supremacy of Parliament in the UK' in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999), 157–63.

[136] *R (on the application of G) v Ealing London Borough Council (No.2)* [2002] EWHC Admin 250, *Times*, 18 March 2002, especially paras 14–15, though he felt that rarely would oral evidence be required.

[137] See eg comments of Henry LJ in *R v Ministry of Defence, ex parte Smith* [1996] QB 517, at 564E-F. Cf reservations regarding use of Brandeis briefs: A Henderson, 'Brandeis Briefs and the Proof of Legislative Facts in Proceedings under the Human Rights Act 1998' [1998] *PL* 563.

[138] *In re Northern Ireland Human Rights Commission* [2002] UKHL 25; [2002] HRLR 35. This power is important given the express legislative prohibition on the Commission making Convention-based arguments as a claimant (save where it can itself claim victim status): Northern Ireland Act 1998, s 71(1), which preserves for the Commission the power to bring proceedings relating to the law and practice of human rights which do *not* involve the type of argument falling within the preserve of the victim test.

[139] *Ibid* at para 34.

[140] *Ibid* per Lord Slynn at para 25.

[141] Eg *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2002] UKHL 61, [2002] 1 AC 800, see para 51 for list of non-governmental interveners. For analysis of this development see Hannett, above n 111.

The recent, pre-HRA, *Source Informatics* case provides an interesting illustration of some of the potential benefits of allowing intervention.[142] Various parties sought to intervene in a judicial review of the lawfulness of Department of Health guidance regarding the legality of doctors and pharmacists selling anonymised prescription data to pharmaceutical companies. The claimants had failed at first instance, and several interested parties applied to intervene in the substantive appeal in order to introduce public interest and human rights arguments that the claimants were not proposing to put. The Court of Appeal allowed the interventions on the ground that it ought not to decide the case on as narrow a basis as had the court of first instance; it was in no one's interests for the Court of Appeal to give a decision leaving as many unanswered questions and uncertainties as had the first instance decision. It was recognised that, despite careful case management, the Court may simply not have the time to produce a definitive ruling on all the issues. However, the interventions would at least provide the Court with information which would better qualify it to identify what those issues *were*, and so which would enable the court to state clearly the limits of the decision that it *was* able to make and to indicate what were the remaining areas of uncertainty. The interventions put the Court of Appeal in the position that Allison would wish it to be, better able to appreciate and respond to the nature and extent of the polycentric problem before it.

In developing their procedures in this way, the courts of course need to be aware of their inherent institutional limitations. Deciding where and on what basis the line between legitimate and excessive intervention in court proceedings should be drawn is very difficult, something that it is not readily susceptible to a priori rules, but rather a matter for the court to regulate in its discretion. It is unfortunate then that the courts do not more regularly make their decisions about applications to intervene explicit; we are often left with what Sarah Hannett describes as a 'justificatory vacuum'.[142a] Carol Harlow cautions that intervention cannot legitimate judicial law-making[143] and that it is 'fallacious' to suppose that the populace can participate in all decision-making.[144] But the line between legitimate, ie (in this context) informed, exposition and development of existing legal principles, and undemocratic judicial legislation is a difficult and delicate one to identify: one person's policy leap will be another's development of existing principle.[145] Moreover, the courts remain distinct from the legislature by virtue of various, characteristically *judicial* constraints on their activities: they are politically independent, obliged to reach substantively rational, expressly justified decisions in response to applications initiated without their control; they cannot choose issues that they address or reach decisions simply on the basis of personal preference; they cannot

[142] *R v Department of Health, ex parte Source Informatics Ltd* [2000] COD 114 for a report of the intervention applications; substantive appeal reported at [2001] QB 424.

[142a] Above n 111.

[143] Above n 111, at 11. For a contrary view in the human rights context, see Loux above n 46, 340–41.

[144] Above n 111, at 14.

[145] Contrast Lord Woolf's view of the Court of Appeal's activities in *Heil v Rankin* [2001] QB 272 with that of Carol Harlow [2001] QB 272, paras 41–48; (2002) 65 *MLR* 1, at 11.

take huge leaps into the dark, being constrained by the incremental common law method and the doctrine of *stare decisis*.[146] The doctrines of ripeness and mootness generally steer them clear of making advisory declarations, though there will be some occasions in public law cases where there is deemed to be good reason in the public interest for making such declarations, cases turning on legislative rather than adjudicative facts being particularly likely to fall into this category.[147] As for the scope of the participation afforded, even with improved mechanisms for alerting putative interveners to impending litigation in which they might wish to intervene,[148] allegations of selectivity in the interests represented before the court may be unavoidable.[149] However, given the inevitably expository nature of the courts' judgments, wider interest representation in court, albeit necessarily incomplete, is arguably better than none. As Abram Chayes pithily remarked, the court is probably in no worse position than the legislature itself in this regard, and to suggest otherwise 'is to impose democratic theory by brute force on observed institutional behaviour'.[150]

CONCLUSION

If standing and intervention rules, and associated procedural rules regarding disclosure of evidence and cross-examination, are to be developed and applied on other than purely pragmatic grounds, some clear understanding of the purpose of these rules must be reached. They must be developed coherently with an understanding of the nature of the substantive law to which they relate, and so of the proper relationship of putative claimants and interveners to the subject matter of the claim, and with an understanding of the nature of the courts' constitutional function generally, and particularly in the public law context.[151] Of course, many of the issues discussed in the course of this chapter are not unique to public law. As Peter Cane notes,[151a] cases in the private law courts will often raise polycentric issues too, not least in the human rights sphere. The scope for representative claims to be made in private law, and under the victim test, is currently far more restricted[152] than is effectively allowed for by the non-victim sufficient interest test in public law cases, though *intervention* in private law cases is possible at the courts' discretion. Nor are human rights claims, in particular, unique to the jurisdiction of the various divisions of the High Court—the HRA can be invoked at

[146] Fiss, above n 101, at 12–17; Spann, above n 101, at 647 *et seq.*

[147] *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450. Cf varying attitudes towards the declarations sought in the *Rusbridger* context, above n 26 (HL).

[148] As proposed by the Public Law Project, see above n 54.

[149] The court does not ultimately control the appointment of *amici* to redress imbalance in the interest representation before the court: Loux, above n 46 at 337 and Justice/PLP, above n 54, at 35.

[150] Chayes (1976), above n 129, at 1311.

[151] See Miles, above n 52, for an attempt to examine current judicial review and HRA review in the context of some of the models discussed here.

[151a] See ch 10 above.

[152] Civil Procedure Rules, Part 19.6.

any time in any court. Harlow concludes that it is illogical in these circumstances to develop the procedures of the Administrative Court alone, and in the absence of a constitutional court, whose procedures could perhaps have been satisfactorily tailored to accommodate wide opportunities for intervention, allowing intervention in all courts may be too unwieldy unless they are carefully controlled and confined largely to paper.[153] Such interventions ought at any rate to be permitted in those courts whose judgments have precedential value, in particular in the appellate courts, since it is there that exposition of the law is paramount and it is those decisions which will guide those of the lower courts and tribunals.

In the public law context, the current patchwork of rules faced by those who wish to appear before public law courts in UK jurisdictions, particularly in the human rights context, is somewhat difficult to reconcile by reference to the criteria suggested here. Lord Lester's admonition of the resulting absurdity was not adequately addressed during the parliamentary debates on the Human Rights Bill. His concerns may find support from the judiciary who, if experience of the reception into English administrative law of the demands of EC remedial law is any indication, might be expected to do their best to eradicate the inconsistencies.[154] We will see over the next years whether and to what extent the courts' interpretation and application of those rules alleviate the tensions.

[153] Above n 111.
[154] See *M v Home Office* [1994] 1 AC 277.

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