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Law's empire? *Mutua* and *Kimathi*

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Abstract

This is an analysis piece discussing the rule of law in two recent claims regarding historical abuses during the Mau Mau insurgency in Kenya by the colonial government. The piece argues that these two cases represent the tendency of the Diceyan concept of the rule of law to divide into either very strong or very weak review of government action. It urges careful consideration of the kinds of case, including those involving Britain's colonial past, where review is more likely to be of the latter character.

Keywords: Mau Mau; rule of law.

Introduction: the rule of law's imperial blindspot and the Diceyan dialectic

Most, if not all, discussions in UK public law feature the work of Victorian jurist A V Dicey. In line with that tradition, his work on the rule of law proves a useful jumping-off point for the discussion here of two recent cases wherein the courts have had to grapple with the UK's colonial past. Of particular relevance is the third aspect of A V Dicey's concept of the rule of law; that rights in the UK are those developed gradually by the courts via the common law.[1] This articulated a Benthamite mistrust of broadly defined bills of rights, preferring to place faith in the common law to provide rights protections.[2] It is pertinent here for two reasons.

Firstly, reliance on the common law to protect individual rights has been found wanting in the face of a constitution dominated by a strong executive and a periodically deferential judiciary.[3] This point bites particularly hard here, since legal scrutiny of the acts of colonial administrators has proven a blind spot for Diceyan conceptions of the rule of law.[4] Secondly, a further and more subtle problem for Dicey's broader constitutional schemata is that of what Matt Lewans terms the 'Diceyan dialectic'.[5] Comprising both a legally omnipotent supreme legislature *and* seeking to rely on rights protections within the common law, Dicey's jurisprudential outlook could bifurcate

1 See A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982).

2 J Bentham, 'Anarchical fallacies' in J Waldron (ed), *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (Methuen 1987) 29.

3 See e.g. *Liversidge v Anderson* [1942] AC 206 (HL).

4 D Lino, 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739.

5 M Lewans, *Administrative Law and Judicial Deference* (Oxford University Press 2016) chapter 2.

between strong and weak review; both judicial activism *and* deference. The ways in which this dialectical dynamic emerges within the cases is analytically useful in terms of scrutinising the rule of law itself.

In this piece I illustrate these issues in two recent cases addressing the legacies of empire; *Mutua v Foreign and Commonwealth Office*[6] and *Kimathi v Foreign and Commonwealth Office*.[7] Both cases concern the Mau Mau uprising in 1950s Kenya and the abusive counter-insurgency deployed by imperial administrators. The interplay between the two cases exposes the limits of the common law to remedy the sins of empire.[8] More specifically, while *Mutua* opened the door to legal redress for historic abuses, *Kimathi* slammed it shut again in a discursive interplay repeating the pattern of dissent and oppression seen in the uprising and the British counter-insurgency. This should, I argue, cause us to consider more broadly the identity of those whom the rule of law protects. The remainder of this piece proceeds to consider the historical background to the two cases, before considering each case in turn and offering some reflections on their implications.

1 The Kenya emergency

The early twentieth century saw European settlement of Kenya, which became a crown colony of the British government in 1920. The colonial government placed restrictions on land ownership and agriculture which promoted and protected settler interests, with particular impact on the Kikuyu tribe. The Mau Mau were a militant society, primarily receiving support from the Kikuyu people, who pursued the cause of greater political representation in the early 1950s by targeting settler farms. In 1952 the colonial governor of Kenya, Sir Evelyn Baring, faced with increasing levels of Mau Mau violence, proclaimed a state of emergency (the Emergency) under section 3 of the Emergency Powers Order-in-Council 1939 (1939 Order). The Emergency lasted until Kenyan independence in 1963. When proclaiming the Emergency, Governor Baring also issued the Emergency Regulations 1952 under powers conferred by the 1939 Order. Those regulations contained wide powers of arrest and detention of suspected persons. From 1953 onwards detention camps were built to hold large numbers of persons detained under these powers.

The process of British counter-insurgency using these powers was systematic and brutal. In the period between declaration of the Emergency and Kenyan independence, thousands of Kenyans were placed in detention camps. Camp officials engaged in widespread acts of abuse, including systematic beatings, castration, rape and other sexual assaults. The nadir was the Hola Massacre in 1959, in which 11 camp detainees were clubbed to death and 77 others sustained permanent injuries. While for many years the extent of culpability of the British state was unclear, academic research in the 2000s directly connected the policy of counter-insurgency to the highest levels of government.[9]

6 [2011] EWHC 1913 (QB); [2012] EWHC 2678 (QB).

7 [2018] EWHC 2066 (QB).

8 On which see C R G Murray, 'Back to the future: tort's capacity to remedy historic human rights abuses' (2019) King's Law Journal 426.

9 For accounts of the period and the role of the government, see D M Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (Phoenix 2006); C Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Owl 2006).

2 *Mutua v Foreign and Commonwealth Office*

In 2009, relying on the work of academic historians, the law firm Leigh Day & Co launched five test claims in the UK High Court on behalf of victims of the detention. The claimants alleged that they had been subject to a range of abuses under the regime constituted by the proclamation of the Emergency, including torture, rape, castration and severe beatings, for which the Foreign and Commonwealth Office (FCO) was vicariously liable. The FCO vigorously resisted the claims. But, fatally as it would turn out in terms of their legal defence, the FCO did not deny that the claimants had been abused. Rather, it sought to resist the claims on two technical grounds. Firstly, that as a matter of public international law the proper defendant was the Kenya republic, which the FCO argued had inherited any legally liability on Kenyan independence.[10] Secondly, the FCO attempted to rely on the time bar in section 33 of the Limitation Act 1980, arguing that a fair trial was no longer possible.[11]

Two protracted and detailed hearings took place before Mr Justice McCombe (as he was at the time). He held that there was no argument that the claimants had been subject to torture and abuse.[12] The UK government, not the Kenyan republic, was the appropriate defendant.[13] On the limitation point, the claimants argued that the case could not have been brought sooner, given that prior to 2005 there was a lack of scholarship linking abuse in Kenya to the British government. McCombe J agreed with the claimants, finding that it was entirely possible to hold a trial that was not unduly prejudicial to the defendant's ability to resist the claim.[14] He was, it should be noted, aided on this point by the defendant's discovery during proceedings of the Hanslope archives, which provided detailed records from various colonial governments.[15]

With its back now to the wall and hamstrung by its acceptance of the factual truth of the allegations made, at this point the government agreed to pay £19.9 million damages to over 5000 claimants. The then Foreign Secretary, William Hague, made a statement to the House of Commons admitting the abuse and expressing Britain's regret:

> … Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place, and that they marred Kenya's progress towards independence. Torture and ill treatment are abhorrent violations of human dignity which we unreservedly condemn.[16]

In *Mutua* the common law method thus arguably vindicated Diceyan orthodoxy, to the extent that it urges reliance on the common law to protect individual rights. Dicey's view was that the British constitution was built upon rights developed and sustained by the common law.[17] However extraordinary, for example, the powers conferred by a statute, they will nonetheless be controlled by the interpretation imposed by judges who are 'influenced by the feelings of the magistrates no less than by the general spirit of the

10 [2011] EWHC 1913 (QB) [50]–[70] (McCombe J).

11 [2012] EWHC 2678 (QB) [68] (McCombe J).

12 Ibid [27] (McCombe J).

13 *Mutua* (n 10) [102]–[110] (McCombe J).

14 *Mutua* (n 11) [86] (McCombe J).

15 On the Hanslope archives see e.g. D M Anderson, 'Mau Mau in the High Court and the "lost" British Empire archives: colonial conspiracy or bureaucratic bungle?' (2011) 39 Journal of Imperial and Commonwealth History 699.

16 W Hague, HC Deb 6 June 2013, vol 563, col 1692.

17 Dicey (n 1) 271.

common law'.[18] In holding that the claims in *Mutua* were justiciable McCombe J opened the possibility that rights in private law could and would hold the British state to account. In turn, the possibility of a legal route of accountability spurred the political constitution into action. Yet, as noted in the introduction, the deferential face of the Diceyan dialectic rapidly showed *Mutua* to be something of a false dawn.[19]

3 *Kimathi v Foreign and Commonwealth Office*

Kimathi was on a wholly different scale to *Mutua*, in terms of the extent of the government's potential liability. In this case, a claim involving a further 40,000 victims was brought against the FCO. A claimant known as TC34 was the test case for the claim. TC34 made a series of allegations regarding ill-treatment for which he argued the FCO was legally responsible, including assault, torture, unlawful detention, detention under poor conditions, denial of medical treatment, forced labour and threats of castration.

After an epic hearing lasting 233 days, Mr Justice Stewart handed down a 500-paragraph judgment.[20] In *Kimathi*, however, the claims were dismissed. This decision has since been upheld by the Court of Appeal, on the basis that it would not interfere with Stewart's J's exercise of judicial discretion unless it disclosed an error of law.[21] The remainder of the analysis here addresses only the High Court decision. As in *Mutua*, the time bar in the Limitation Act 1980 was central to the FCO's defence. Section 33 of that Act provides that otherwise time-barred claims can be heard, provided to do so is equitable. The question of equitability turns on the balance of prejudice to the claimant and the defendant.[22] Stewart J concluded, after extensive consideration of the relevant materials, that it would be inequitable to extend time in TC34's case.

A key problem for the *Kimathi* claimants was the significant delay in bringing the claim, which was heard more than half a century after the relevant events. In particular, Stewart J was rightly concerned about the effects of the delay on the possibility of hearing the claim in a way which was fair to the defendant.[23] The passage of time between the alleged abuses and the hearing was significant. More importantly, this had led to significant depletion in the cogency of the evidence available.[24] At this distant point there was, furthermore, a lack of witnesses.[25] With regard to TC34 in particular, there was a lack of evidence relating to the conditions of the claimant's detention,[26] or the medical conditions alleged to have resulted from his ill-treatment.[27]

Unlike in *Mutua*, the court was unimpressed by the explanation give for the delay in bringing the claim.[28] The claimant sought to argue that TC34 was illiterate, impecunious and a non-speaker of English. Furthermore, as a member of a proscribed organisation which had suffered significant ill-treatment at the hands of the British state, it was argued that TC34 was unsurprisingly hesitant to put himself to the fore. Stewart J gave relatively short shrift to these arguments. The key issue for him was that TC34 had provided no

18 Ibid lxii.

19 Murray (n 8) 452–456.

20 *Kimathi* (n 7).

21 *Kimathi and others v Foreign and Commonwealth Office* [2018] EWCA Civ 2213.

22 Ibid [112] (Stewart J).

23 Ibid [441] (Stewart J).

24 Ibid [188] (Stewart J).

25 Ibid [217]–[232] (Stewart J).

26 Ibid [189] (Stewart J).

27 Ibid [239]–[242] (Stewart J).

28 Ibid [144] (Stewart J).

concrete evidence explaining the delay.[29] Overall, Stewart J considered that it would be 'essentially impossible' for the FCO to have a proper opportunity to find witnesses or evidence to rebut TC34's claims.[30]

I noted at the outset that the deferential aspect of the Diceyan 'dialectic' stemmed from the supremacy of Parliament in the UK constitution, combined with reliance on the common law to protect individual rights. In that context the fact that Stewart J's concluding remarks turned on Parliament's intention in passing section 33 is noteworthy. He determines that the entire point of that section is to shield defendants from claims which it would be unjust to hear given the passage of time.[31] Statutory provisions seeking to restrict or exclude access to the courts have fallen within the dynamic interplay of deference and activism to which the Diceyan dialectic can give rise. Since the resurgence of judicial review in the 1960s, and the case of *Anisminic* in particular, it has been clear that provisions purporting to exclude review will be subjected to strict interpretation.[32] And yet the doctrine of parliamentary supremacy, in its pure form, must mean that it is legally *possible* for review by the courts to be excluded. A bifurcation between intensive judicial scrutiny and reliance solely on the political constitution thus emerges. This dialectic has been seen at the highest level in the Supreme Court's recent decision in *Privacy International*.[33] In that case, the Supreme Court considered whether the ouster clause in section 67(8) of the Regulation of Investigatory Powers Act 2000 successfully excluded judicial review of decisions of the Investigatory Powers Tribunal (which had jurisdiction to consider, *inter alia*, decisions relating to the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters). A majority of the court found, in line with the principles laid down in *Anisminic*, that section 67(8) would not exclude review on the basis of errors of law.[34] Lord Sumption and Lord Wilson, in dissent, interpreted the provision as successfully excluding review.[35] In short, differing views on the requirements of the rule of law led to starkly different readings of section 67(8); one strongly legalistic, the other rather more deferential. Indeed, more generally, the legalism of *Anisminic* has been periodically tempered by judicial deference in circumstances where the application of a statutory provision permits of a range of permissible approaches.[36] In *Kimathi*, the court arguably tacked toward the more deferential line when applying its discretion under section 33 of the Limitation Act 1980. While Stewart J structured his discretion in applying the requirements in the Limitation Act with reference to principles distilled from the relevant case law,[37] the effect was to immunise the state from TC34's claim.

It is also worth noting that potentially relevant provisions of international law were deemed to add nothing to the claim in *Kimathi*. The claimants asserted that there had been breaches of Articles 3, 4, 5 and 8 of the European Convention on Human Rights

29 Ibid.

30 Ibid [463] (Stewart J).

31 Ibid [451]–[452] (Stewart J).

32 See, classically, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

33 *R (Privacy International) v Foreign and Commonwealth Secretary* [2019] UKSC 22, [2019] 2 WLR 1219.

34 Ibid [105]–[112] (Lord Carnwath).

35 Ibid [206] (Lord Sumption); [224] (Lord Wilson).

36 E.g. *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557. Jack Beatson has persuasively argued that this kind of approach was the inevitable result of abolishing the distinction between jurisdictional and non-jurisdictional errors of law. See J Beatson, 'The scope of judicial review for error of law' (1984) 4 Oxford Journal of Legal Studies 22, 44–45.

37 E.g. *McDonnell v Walker* [2009] EWCA Civ 1257.

(ECHR). They also sought to bring to bear various provisions of the UN Charter, the UN Convention against Torture, and the Forced Labour Convention. The point of such material, the claimants argued, was that in circumstances where the UK stood accused of flagrant and deliberate breaches of human rights protections in international law, the section 33 time-limit should be set aside. The court held that such matters added nothing to the section 33 exercise.[38]

The point is unsurprising, perhaps. There are limits to the extent to which the ECHR will apply retrospectively in the domestic courts.[39] And Diceyan orthodoxy means that statutory provisions will not generally be superseded by provisions of international law.[40] But it is worth keeping in mind that at least one Supreme Court justice has taken a very different view, as we shall see, on the extent to which international law can and should impact upon the domestic exercise of judicial discretion (context is everything in public law, of course).

In *R (SG) v Secretary of State for Work and Pensions*, the Supreme Court had to determine whether the government's controversial 'benefits cap' policy, which fixed maximum benefit levels per household, was unlawfully discriminatory for purposes of Article 14 taken with Article 1 of the First Protocol to the ECHR.[41] The case also required the court to consider the effects of relevant provisions of the UN Convention on the Rights of the Child (UNCRC). The court held that the relevant legal standard was whether the Secretary of State's decision was 'manifestly without reasonable foundation', thus framing the case as one in which the court will afford leeway to the executive. Yet, when it came to the effects of the UNCRC, the majority and dissenting justices took radically different approaches. Lord Reed, who gave the lead judgment for the majority, took the line that, while the UNCRC may be of relevance to questions involving children's rights under the ECHR, *SG* was a question involving discrimination against women.[42] It was not open to the UK courts to interpret or apply treaties to which Parliament has not given effect.[43]

For Baroness Hale and Lord Kerr in dissent, however, the influence of the UNCRC was the determining factor. In Baroness Hale's judgment, the question of whether there had been a breach of the claimants' rights under Article 14 ECHR had to be approached with the best interests of children as an overriding principle. Applying such an approach, she found on the facts that the impacts of the policy outweighed its aims.[44] Lord Kerr went several, admittedly constitutionally significant, doctrinal steps further in finding the UNCRC to be both directly applicable and substantively breached.[45] The relevance to the current discussion here is that in *R (SG)* judicial discretion, comparing the legal analyses of the majority and the dissenting judges in terms of the effects of international law, swung between deference on questions of social policy and requiring the executive to comply with international legal norms. This will be pertinent to the discussion in the concluding section.

38 *Kimathi* (n 7)[121], [173] (Stewart J).

39 On which see *Re McCaughey* [2012] AC 725.

40 J Bell and G Engle, *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995) 23–31.

41 [2015] UKSC 16, [2015] 1 WLR 1449.

42 Ibid [86]–[89] (Lord Reed).

43 Ibid [90] (Lord Reed).

44 Ibid [229] (Baroness Hale).

45 Ibid [254], [257] (Lord Kerr).

Discussion and conclusion: relativity and the Diceyan dialectic in the rule of law

Returning to our two Kenyan cases, the question is how to distinguish *Kimathi* from *Mutua*. It is important to note that the claims were of a different order, and that the government's litigation strategy in the second claim learned the hard lessons from the first. *Mutua* was a much narrower claim than that in *Kimathi*. Vitally, and conclusively in the event, in *Mutua* the FCO did not deny that abuse had taken place.[46] Without any issue of fact to decide, the government's section 33 arguments in *Mutua* were rather easier for McCombe J to dismiss than they had been for Stewart J. There is a wider issue here which warrants reflection, however, in terms of the interplay between the two claims and their implications in terms of the rule of law.

At the outset I described a dialectical dynamic inherent in the Diceyan view of the rule of law, wherein the standard of review can shuttle between strong rights protections and deference to state actors. The claims in *Mutua* and *Kimathi* demonstrate that movement in practice. Without prejudice to Stewart J's careful and extensive review of the evidence underpinning TC34's claim, it is worth taking a global view of the classes of person whose claims tend to be treated with suspicion by the courts. A series of high-profile cases involving historic abuses by the British colonial regime have failed in recent years. The Chagos islanders have notoriously received raw treatment not only by the British government but by the courts.[47] In *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* the Supreme Court rejected a claim seeking an inquiry into events occurring while the UK was the colonial power in the Federation of Malaya.[48] In short, while the British Empire extended to such places and peoples, law's empire more often than not will stay its hand.[49] The deferential aspects of this movement of bifurcation would appear to de-privilege, *inter alia*, the victims of empire.

For some commentators the law's reticence in this area, and the rejection of the Mau Mau claims in particular, is a necessary protection for the government against unfair judicial proceedings.[50] Indeed, on this view it is a vindication of the rule of law itself. Yet, there is something of an accountability gap here.[51] Of course, the accountability of the present for historic abuses is a fraught area. One only need contemplate the vigorous debates over reparations for slavery in the USA to understand the complexities.[52] And one has to keep in mind the limits to what the courts can achieve in this context. The bipolar nature of the process of adjudication is designed for a particular purpose,[53] and cannot be expected to remedy every wrong, however morally reprehensible. As Stewart J was careful to point out in his judgment, civil proceedings are not and cannot approximate a public inquiry, and TC34's claim had to be assessed under normal principles of civil litigation.[54] Further, it is impossible to disagree, in practical terms, with Stewart J's conclusions about the significant evidential difficulties that the *Kimathi* claims would have posed for the FCO. It would, in terms of due process and the rule of law,

46 *Mutua* (n 11) [16] (McCombe J).

47 *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

48 [2015] UKSC 69, [2016] AC 1355.

49 The reference is, of course, to R Dworkin, *Law's Empire* (Hart 1988).

50 J Duke-Evans et al, T*he Collapse of the Kenya Emergency Group Litigation* (Policy Exchange 2018).

51 Murray (n 8) 445–449.

52 See e.g. B Bittker, *The Case for Black Reparations* (2nd edn, Beacon Press 2003); R Robinson, *The Debt: What America Owes to Blacks* (Plume 2001).

53 See L Fuller, 'The forms and limits of adjudication' (1978–1979) 92 Harvard Law Review 353.

54 *Kimathi* (n 7) [20]–[21] (Stewart J).

have posed significant practical unfairness on the department for the claim to proceed. Yet, when applying the test in section 33, the nature and impacts of that unfairness need to be balanced against the demands of justice in holding states accountable for documented historic violence. It is clearly not good enough to suggest that the nature of the British state's (admitted) abuses in Kenya should mean that any and every claim should proceed. However, the dynamics here put an onus on us to reflect with care on the idea of the rule of law itself; the kinds of case, and kinds of applicant, that are likely to enjoy its protection.[55]

55 On the ideologies of the rule of law, see M Loughlin, *Public Law and Political Theory* (Clarendon 1992).