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Forum Non Conveniens and the Constitutional Right of Access: A Commonwealth Caribbean Perspective

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FORUM NON CONVENIENS AND THE CONSTITUTIONAL RIGHT OF ACCESS: A COMMONWEALTH CARIBBEAN PERSPECTIVE

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I. INTRODUCTION

THE doctrine of *forum non conveniens*, whereby the local court dismisses or stays proceedings in a case on the ground that some tribunal in another country would be a more appropriate forum for trial, is widely perceived as a shining achievement of modern private international law.[1] For one thing, it offers the apparently attractive solution of referring resolution of increasingly complex transnational disputes to the country with which the dispute is most closely connected. Adjudication is generally seen here as fair and just to the parties, and convenient to the court. The marshalling of evidence, the attendance of unwilling witnesses through compulsory process, the possibility of viewing relevant sites, and generally, the analysis of the facts and application of the governing law, might all be attained with the least difficulty in the "natural" forum. The doctrine has also been used to attend to matters of public convenience. Consideration has been given to lightening the work load of members of the local court, to relieving congestion of the court's calendar, and to assisting in the overall administration of justice by the avoidance of complex exercises

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1. *See generally* Inglis, *Jurisdiction and the Doctrine of Forum Conveniens, and Choice of Law in Conflict of Laws*, 81 L.Q. REV. 380 (1965); John David McClean, *Jurisdiction and Judicial Discretion*, 18 INT'L & COMP. L.Q. 931 (1969); Michael Pryles, *Liberalizing the Rule on Staying Actions — Towards the Doctrine of Forum Non Conveniens*, 52 AUSTL. L.J. 678, 684 (1978); Adrian Briggs, *Forum Non Conveniens — An Update*, 3 LLOYD'S MAR. & COM. L.Q. 360 (1985); Aarif Barma & David Elvin, *Forum Non Conveniens: Where Do We Go From Here?*, 101 L.Q. REV. 48 (1985); Rhona Schuz, *Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass Ltd.*, 35 INT'L & COMP. L.Q. 374, 377-78 (1986); *but cf.* P.A. Stone, *The Civil Jurisdiction and Judgments Act 1982: Some Comments*, 32 INT'L & COMP. L.Q. 477, 497 (1983); David W. Robertson, *Forum Non Conveniens in America and England: A Rather Fantastic Fiction*, 103 L.Q. REV. 398 (1987).

in comparative law. In this way, the perceived danger of a large inflow of essentially foreign litigation has been averted.[2]

Based upon considerations of this nature, the "convenient" forum test has been exported from Scotland[3] and imported into the United States of America and virtually every country of the Commonwealth. Since the mid-twentieth century, the U.S. Supreme Court has decided the balance of convenience would determine the place of trial. The most complete statement of the guiding principles came in the case of *Piper Aircraft Co. v. Reyno*, where the Court said:

> [T]he central focus of the *forum non conveniens* inquiry is convenience . . . dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant *or* the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.[4]

The well-documented resistance of English courts[5] finally gave way in the 1980s. Since then, the plaintiff no longer has "an inborn right to choose his own forum . . . the decision rests with the courts."[6] In the leading House of Lords decision, *Spiliada Maritime Corp. v. Cansulex Ltd*,[7] Lord Goff of Chieveley enunciated the "basic principle" in deciding whether to grant a stay or dismissal as whether "there is some other available forum, having competent jurisdiction, which is the *appropriate forum* for the trial of the action."[8] The arrival of the "appropriate forum" test has been hailed as a welcome trend towards liberating the courts from the straitjacket of xenophobic parochialism. For Lord Diplock, the English embrace meant "judicial chauvinism has been replaced by judicial comity."[9]

Outside Great Britain and the United States, the reception has, generally, been equally warm. The Manitoba Court of Appeal in Canada

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2. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251-52 (1981); Robertson, *supra* note 1, at 400-09.

3. The doctrine is generally thought to have originated in Scotland. *See e.g.*, Société du Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Français," 1926 Sess. Cas. 13 (H.L.) (Scot.); Credit Chimique v. James Scott Eng'g Group Ltd., 1979 Sess. Cas. 406 (Outer House) (Scot.); ALEXANDER E. ANTON, PRIVATE INTERNATIONAL LAW: A TREATISE FROM THE STANDPOINT OF SCOTS LAW 148-54 (1967).

4. 454 U.S. 235, 246 (1981).

5. *See infra* notes 38-42 and accompanying text.

6. Smith Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 738 (Q.B. C.A.) (Eng.) (Lord Denning, M.R.).

7. [1987] 1 App. Cas. 460, [1986] 3 W.L.R. 971 (Eng.).

8. *Id.* at 474; [1986] 3 W.L.R. at 985 (emphasis added).

9. The Abidin Daver, [1984] 1 App. Cas. 398 (Eng.), [1984] 1 All E.R. 470.

regards the new English approach as "salutary" and one which the "Manitoba Tribunals should be ready to follow."[10] Judicial pronouncements elsewhere in Canada bear a similar message.[11]

In New Zealand, the 1988 Court of Appeal decision in *McConnell Dowell Constructors Ltd. v. Lloyd's Syndicate 396* expressly discarded other formulations, and instead stated its preference "to go straight to Lord Goff's relatively simply-worded test as the most realistic way of posing the issue."[12] Even more affirmative were statements by Barker, J., in the subsequent case of *Van Dyck v. Van Dyck*.[13] There he stated "[t]he law of *forum non conveniens* had undergone a quite dramatic change in recent years" and it was "clear that the courts in New Zealand must follow the test set down by Lord Goff in *Spiliada*."[14] The *Spilidia* test is now routinely applied.[15]

Commonwealth Caribbean (or West Indian)[16] courts have yet to engage in a full discourse of relevant principles in the post-*Spiliada* era; however, there are a few decided cases of relevance. These cases are helpful in the sense of confirming the usual assumption that English law applies, but they are entirely unsatisfactory as they relate to any real articulation of substantive principles. In *Stuart Young & Sons Ltd. v. Chase Manhattan Bank N.A.*,[17] the Barbados Supreme Court refused to stay a dispute involving a contract made in Guyana between a Guyanese and an American and which referenced American law. The simple ground for the refusal was that the conditions for a stay, as laid down in the English case of *MacShannon v. Rockware Glass Ltd.*[18] (which was, until *Spiliada*, the leading authority), had not been satisfied. Exactly the same attitude was taken in *Bank of Mon-*

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10. Burt v. Clarkson, 62 D.L.R. 4th 676, 680-81 (C.A. Man. 1990) (Can.).

11. *See* May v. Greenwood, 85 D.L.R. 4th 683 (Ontario 1992) (Can.); Amchem Products Inc. v. Workers' Compensation Bd., 65 D.L.R. 4th 567 (Brit. Col. 1990) (Can.).

12. 2 N.Z.L.R. 257, 273 (C.A. 1988) (New Zealand) (Cooke, P.); *see also id.* at 277 (Somers, J.); *id.* at 281-82 (Bisson, J.).

13. 3 N.Z.L.R. 624 (H.C. 1990) (New Zealand).

14. *Id.* at 626.

15. *See* Club Mediterranee N.Z. v. Wendell, 1 N.Z.L.R. 216 (C.A. 1989) (New Zealand); Apple Computer, Inc. v. Apple Corps, S.A., 2 N.Z.L.R. 598 (H.C. 1990) (New Zealand).

16. The expression "Commonwealth Caribbean" or "West Indian" is used in this Article to refer to those states in the Caribbean which were formerly colonies of the United Kingdom: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Jamaica, Grenada, Guyana, St. Christopher and St. Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Each has its own separate independent constitution. Note that valuable jurisprudence is to be found in the legal systems of the remaining five dependencies of the U.K.: Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands.

17. Unreported Judgment of Dec. 15, 1980 (Barbados High Court, No. 850 of 1979).

18. [1978] App. Cas. 795 (Eng.), [1978] 1 All E.R. 625.

treal v. Weston,[19] another decision where the Barbados Supreme Court refused to stay an action in respect of a contract whose governing law was that of Ontario. The Cayman Islands Court of Appeal in *Touche Ross v. Bank Intercontinental*,[20] also relying on English precedents, held that a local action should not be stayed in favor of proceedings in Florida, since the Cayman Islands was the "natural" forum for the action; justice could be done in the Cayman Islands at substantially lesser inconvenience and expense than abroad. In *Owens Bank Ltd. v. Bracco and Bracco Industria Chimica Spa*,[21] Singh, J., relying on English cases, refused to dismiss proceedings in the High Court in St. Vincent and the Grenadines in an essentially Italian action. The above indications from the local courts aside, the Privy Council quite recently, in *Société Nationale Industrielle Aerospatiale v. Lee Kui Jak*,[22] seems to have taken it for granted that the "subsequent development of the law in *The Spiliada*" applied throughout the Commonwealth, at least in respect to those countries over which the Privy Council still retains an appellate jurisdiction.

Moreover, in political terms, only Australia has sought to maintain the semblance of a distinct jurisprudence, although there too, identity is under threat. *Oceanic Sun Line Special Shipping Co. v. Fay*[23] rejected *Spiliada* as "inconsistent with what we have hitherto understood to be the function and the duty of courts."[24] Its exercise would destroy the protection given to the litigant against unnecessarily wide discretionary power: *optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi*.[25] Some subsequent cases have kept faith with this unique niche for Australian law,[26] but the effort has suffered from the inadequate juristic rationale. A real possibility now exists of assimilating English law. In discussing the principles which should govern dismissals and stays as between state courts,

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19. Unreported Judgment of Sept. 1, 1982 (High Court of Barbados, No. 203 of 1981).

20. [1986] 87 C.I.L.R. 268 (Cayman Islands).

21. Unreported Judgment of Jan. 18, 1988 (High Court of Justice of St. Vincent and the Grenadines, suit 1981 No. 287). *See also* Owens Bank Ltd. v. Bracco, [1991] 4 All. E.R. 883 (Eng. C.A.), [1992] 2 W.L.R. 127.

22. [1987] App. Cas. 871 (P.C. Eng.), [1987] 3 All E.R. 510, 519.

23. 79 A.L.R. 9 (Austl. 1988); *see also* Lawrence Collins, Note, *The High Court of Australia and Forum Conveniens: The Last Word?*, 107 L.Q. REV. 1982 (1991).

24. *Oceanic Sun Line*, 79 A.L.R. at 35, 38.

25. *Id.* at 39, quoted in BROOM'S LEGAL MAXIMS 46 (10th ed. 1939), which translates "that system of law is the best which leaves least to the discretion of the judge — that judge is best who relies least on his own opinion." The Judge then concluded, "[a]n extension of the discretionary power of judges tends to establish a government of men rather than a government of laws." *Id.*

26. *See, e.g.*, Voth v. Manildra Flour Mills Pty. Ltd., 97 A.L.R. 124 (Austl. 1991); Westpac Banking Corp. v. P & O Containers Ltd., 102 A.L.R. 239 (Fed. Ct. Aust. 1991).

Rogers, A.J.A., in the New South Wales Court of Appeal decision of *Bankinvest AG v. Seabrook*,[27] said this:

> To my mind, the relevant matters and considerations are essentially the same as were specified by the House of Lords in *Spiliada*. These considerations were criticized and held to be inapplicable, at least by Brennan, J., in *Oceanic Sun Line* on the basis that they were too uncertain. Yet in my opinion, they have already, in effect, been made applicable in Australian courts in relation to transfers between Supreme Courts by the various Australian Parliaments. As this jurisdiction comes to be exercised more frequently and the courts better acquainted with the discretion conferred (if not before), it may be that the perception in *Oceanic Sun Line* that the criteria are uncertain in content will undergo review.[28]

As it has evolved, not the least interesting feature of *forum non conveniens* is its all-pervasiveness. Orthodoxy ordains its relevance in the classical case where the plaintiff brings proceedings in the local court based on the defendant's presence there,[29] or his submission to jurisdiction,[30] and the defendant and/or the cause of action is foreign. There is also the anterior case where the litigant seeks to establish jurisdiction by petitioning the court to allow service of process outside of the territory under Order 11 of the Rules of the Supreme Court, or its equivalent.[31] It is well established that the court will only exercise its discretion to allow extra-territorial service if the court itself is the *forum conveniens*.[32]

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27. 90 A.L.R. 407 (N.S.W. St. C. Austl. 1989).

28. *Id.* at 425.

29. *See* John Russell & Co. v. Cayzer, Irvine & Co., [1916] 2 App. Cas. 298, 302 (Eng.) (at common law "whoever is served with the King's writ and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction"); Colt Ind., Inc. v. Sarlie, [1966] 1 All E.R. 673 (Q.B.D.) (Eng.), [1966] 1 W.L.R. 440; Colt Ind., Inc. v. Sarlie (No. 2), [1966] 2 Q.B. 463 (Eng. C.A.), [1966] 1 W.L.R. 1287; H.R.H. Maharanee of Seethadevi Graekwar of Baroda v. Wildenstein, [1972] 2 Q.B. 283 (Eng. C.A.) (once the defendant is physically present in the territory service of process is possible); Razelos v. Razelos (No. 2), [1970] 1 All E.R. 386 (P. Eng.), [1970] 1 W.L.R. 392 (once the court has asserted its competence over the defendant in this way it is not rendered incompetent by his subsequent departure from the country).

30. *See* Harris v. Taylor, [1915] 2 K.B. 580 (Eng. C.A.); Henry v. Geopresco Int'l Ltd., [1976] Q.B. 726 (Eng. C.A.) (because of the technical nature of submission, it is conceivable that a defendant might be deemed to have voluntarily submitted to the jurisdiction of the court even though he does not desire trial there).

31. *See* 1 The Supreme Court Practice 77 (4th ed. I.H. Jacob, LL.B., gen. ed. 1976) (referring to Rules of the Supreme Court 1965).

32. *See generally* Spiliada Maritime Corp. v. Cansulex Ltd., [1986] 1 App. Cas. 460 (Eng.), [1986] 3 All E.R. 843, [1986] 3 W.L.R. 971; J.C. Collier, Comment, *Staying of Actions and Forum Non Conveniens — English law goes Scotch*, 46 CAMBRIDGE L.J. 33, 34-35 (1987); Voth v. Manildra Flour Mills Pty. Ltd., 97 A.L.R. 124 (Austral. 1991).

The doctrine, however, now extends far beyond these circumstances. Cases of *lis alibi pendens* (i.e., where foreign proceedings are pending or have begun in respect of the action before the local court and the local court is being asked to stay its own proceedings) are governed, fundamentally, by the principles of convenience.[33] The same standard decides whether petitions in matrimonial cases ought to proceed.[34] Admiralty actions, given certain conditions, too are governed in this way.[35]

When the result is viewed in panoramic terms, only two categories of transnational litigation now remain untouched, or at least unconquered. First, where the parties to a contract agree that the courts of a foreign country shall have exclusive jurisdiction to decide disputes arising under the contract or in performance of the contract, the accepted wisdom is that the continuance of proceedings in the local court ought not to turn simply on considerations of convenience; there is the additional objective of holding the parties to their bargain. Since allowing proceedings to continue would tend to encourage a breach of contract, the local court ought to stay the action, *even where it is itself the "natural" forum.* The only exceptions arise in those rare circumstances where unforeseen and radical changes in the organization of a foreign court's administration of justice (since contract formation) amount to a virtual frustration of the exclusive foreign jurisdiction clause;[36] or the contract is void for some other reason.[37] After flirtation with the "natural" forum test,[38] the above traditional standard seems to have been reasserted.[39] Second, restraint of foreign proceedings was traditionally undertaken only in the most extraordinary circumstances. The issuance of an injunction which orders a plaintiff not to institute or pursue his action in a foreign forum has rightly been viewed as interference with that foreign court.[40] In-

33. *See The Abidin Daver*, [1984] 1 App. Cas. 398 (Eng.), [1984] 1 All E.R. 470.

34. *See* de Dampierre v. de Dampierre, [1988] 1 App. Cas. 92 (Eng.).

35. *See generally The Atlantic Star*, [1974] 1 App. Cas. 436, [1973] 2 All E.R. 175 (often the provision of security is required before the release of the ship); *see also* Hazel Fox, *State Immunity: The House of Lords' Decision in "I Congeso del Parhdo,"* 98 L.Q. REV. 94 (1982).

36. *See* Carvalho v. Hull Blyth (Angola) Ltd., [1979] 3 All E.R. 280 (Eng. C.A.), [1979] 1 W.L.R. 1228.

37. *See* Trendtex Trading Corp. v. Credit Suisse, [1982] 1 App. Cas. 679 (Eng.); MacKender v. Feldia A.G., [1967] 2 Q.B. 590 (Eng. C.A.), [1966] 3 All E.R. 847, [1967] 2 W.L.R. 119.

38. *See The Fehmarn*, [1957] 2 All E.R. 707 (P. Eng.), [1957] 1 W.L.R. 815; *The Elefftheria*, [1970] P. 94 (Eng.), [1969] 2 All E.R. 641, [1969] 2 W.L.R. 1073; Aratra Potato Co. v. Egyptian Navigation Co. (The "El Amria"), [1981] 2 Lloyd's Rep. 119 (Q.B. Eng.).

39. *See The Benarty*, [1984] 2 Lloyd's Rep. 244 (Q.B. Eng.); *The Frank Pais*, [1986] 1 Lloyd's Rep. 529 (Q.B. Eng.).

40. *See* Adrian Briggs, *No Interference with Foreign Court*, 31 INT'L & COMP. L.Q. 189 (1982).

junction ought not issue merely because the foreign tribunal happens to be an inconvenient venue for trial; action should be taken only if the foreign proceedings are "oppressive and vexatious."[41] Judges in the House of Lords itself have suggested that the "appropriate" forum test should be applied in this area, but the Privy Council has quite recently reiterated that the broad *forum non conveniens* doctrine has no place here.[42] But even if these trends continue, the exclusions form a small minority of cases. As such, these exclusions represent minor pockets of resistance in a large field where the crusading zeal of the doctrine has emerged triumphant.

As thus presented, *forum non conveniens* appears to be a creature of the common law world. By way of sharp contrast, the doctrine is generally unknown in the jurisprudence of continental Europe. Continental lawyers found the defeat of the forum of the defendant's domicile and ordinary residence (as happened in *MacShannon* and *Piper Aircraft*) "astonishing."[43] The obligation of the local forum to determine litigation has been affirmed in various contexts. So, from the viewpoint of contracting states to the *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968*,[44] (Brussels Convention) the doctrine represents "a uniquely British discretion to decline jurisdiction."[45] In his official report on the Brussels Convention, Professor Peter Schlosser confirms that:

> The idea that a national court has discretion in the exercise of its jurisdiction either territorially or as regards the subject-matter of a dispute does not generally exist in continental systems. Even where, in rules relating to jurisdiction, tests of an exceptionally flexible nature are laid down, no room is left for the exercise of any discretionary latitude.[46]

Drawing a line in concrete between common law and continental jurisprudence over application of the *forum conveniens* might not, however, be the last word on the subject. The burden of this Article is

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41. *See infra* note 184 and accompanying text; *see also infra* notes 246-249 and accompanying text.

42. *See* Société Nationale Industrielle Aerospatiale v. Lee Kui Jak, [1987] 1 App. Cas. (Eng. P.C.), [1987] 3 All E.R. 510.

43. J.P. Verheul, *The Forum (Non) Conveniens in English and Dutch Law and Under Some International Conventions*, 35 INT'L & COMP. L.Q. 413, 415 (1986).

44. Incorporated into English law through the Civil Jurisdiction and Judgment Act, 1982, 52 Statutes 381, 878, sched. 1 (U.K.).

45. Adrian Briggs, *Forum Non Conveniens and the Brussels Convention Again*, 107 L.Q. REV. 180, 182 (1991).

46. PETER SCHLOSSER, O.J. 1979, (c 59) 97, 98-9, ¶¶ 76 *et. seq.*

to present the argument that *Spiliada* is currently exerting unbearable pressure, at least in some parts of the Commonwealth, upon public law guarantees of the right of access to the courts. The relevant safeguards are to be found, primarily, in the written constitutions modelled upon the so-called Westminster system,[47] the Commonwealth Caribbean constitutions being classic examples. Admittedly, the Anglo-American stamp of approval for the Scottish doctrine has virtually vouchsafed its safe passage into juridical decisions throughout the Commonwealth, but it is precisely upon Commonwealth constitutional considerations that the wisdom of reliance upon Anglo-American principles might well be debateable. The radical transformation of these principles in recent times has eroded the right of the Anglo-American plaintiff to insist upon litigation in his state. Such erosion may or may not be permissible under the existing constitutional arrangements.

The present invitation is to consider the view that the right of access might receive *additional* protection under the terms of Commonwealth written constitutions. If this proposition proves reasonable, then the further argument arises ineluctably: any self-proclaimed discretion by the judiciary to deny access merely on the ground that another (foreign) forum is better suited to hear the litigation must be examined for constitutional consistency and validity. The proclamation fails that test unless it is supported by provisions from within the four corners of the constitution.

II. Constitutional Protection of Right of Access

West Indian courts are creatures of, and subordinate to, the constitution. In the words of Luckhoo, J.A., uttered in the Guyanese case of *Inshan Bacchus v. Ali Khan*, the "[c]ourt's jurisdiction and powers are governed and controlled by the jurisdiction and powers conferred on it by the Constitution or any other law."[48] For the most part, this statement repeats the constitutional wording.[49] It might therefore be instructive to consider those provisions which guarantee (expressly or by way of implication) a right of access, assessing, at the same time, their applicability to transnational civil litigation. The relevant provi-

47. It might be difficult to argue that the constitutions of the Commonwealth are based upon that of Westminster when the United Kingdom is without a written constitution and when there are fundamental differences between the functioning of the state in both jurisdictions.

48. 34 W.I.R. 135, 153 (Guy. 1984).

49. *See, e.g.*, Barb. Const. (S.I. 1966 No. 1455, (U.K.)), § 80 (1); Trin. & Tobago Const. (Act No. 4 of 1976), § 99; Guy. Const. (Art. 123 (1)); *but see* St. Chris-Nevis Const. (Constitution Order 1983, No, 881, (U.K.)), § 96.

sions are derived from: (a) provisions protecting the fundamental rights and freedoms of the individual; and (b) the formal structure of West Indian constitutional government.

A. Protection of Fundamental Rights of Freedoms of the Individual

Under Commonwealth Caribbean constitutions, every person "in" the state concerned is entitled to certain fundamental rights and freedoms regardless, among other things, of his race, place of origin, or birth.[50] These rights and freedoms include several which abut and abound upon the right of access. The constitutions have also created enforcement mechanisms to vindicate enjoyment of these protective provisions.

1. Right of Access Where Property Is Compulsorily Acquired

There are, occasionally, express constitutional provisions which confer a right of access to the courts in civil cases. For example, many constitutions guarantee to every person whose property has been expropriated the right of "direct access" to the court for determination of compensation.[51] Elsewhere, these constitutions empower the Chief Justice to make rules of practice and procedure in relation to the jurisdiction.[52] Where the legislature has attempted to trample upon these provisions, West Indian courts have shown themselves willing to strike down the enactment for unconstitutionality. A case illustrating this point is *Yearwood v. Attorney General*.[53] Pursuant to the *Sugar Estates' Lands Acquisition Act 1975*[54] (St. Christopher, Nevis, and Anguilla), the Minister of Agriculture purported to nominate January 31, 1975, as the "appointed day" when certain sugar estates would vest in the Crown. The legislation established a limit of $10 million as compensation and laid down a ninety-day period after which all claims for compensation would be thereafter barred and precluded. In *Yearwood*, the Act was struck down at first instance and also on appeal as being unconstitutional and void. A distinction was drawn between the right of access to seek determination of compensation, and the right of challenge for constitutional infringement.[55] In relation to the for-

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50. *See, e.g.*, BARB. CONST. ch. III; ST. CHRIS.-NEVIS CONST. ch. II, TRIN. & TOBAGO CONST. ch. 1.; *see generally* MARGARET DEMERIEUX, FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS (1992).

51. *Compare* ST. CHRIS.-NEVIS CONST. § 8(2) *with* former ST. CHRIS.-NEVIS & ANGUILA CONST. § 6(2).

52. *Id.* at § 8(3).

53. 1 OECS L.R. 324 (St. Chris.-Nevis 1991).

54. Sugar Estates' Land Acquisition Act, No. 2 (1975) (St. Chris.-Nevis and Anguilla).

55. *Yearwood*, 1 OECS L.R. at 384-85.

mer,[56] Glasgow, J., at first instance, opined that the Act would "undoubtedly limit the right of the plaintiff to have direct access to the High Court," and was therefore unconstitutional.[57] In the Court of Appeal, Renwick, J., asked rhetorically "[c]an it really be seriously contended that such legislation is valid?"[58] Moreover, Peterkin, J.A., felt that the Act represents "usurpation of the jurisdiction of the Court, it precludes dispossessed owners from having direct access thereto and is accordingly unconstitutional, null and void."[59]

It is not inconceivable that litigation in the local court concerning the determination of property interests or the legality of compulsory acquisition could fail the natural forum test.[60] More probable, however, would be the attempt by the judiciary to allow or compel arbitration without legislative fiat.[61] In either case, questions of constitutional propriety are bound to arise.

As demonstrated, the courts have already passed upon the usurpation of the judicial jurisdiction by the parliament. However, the constitutions do not distinguish between this usurpation and an abdication by the judiciary itself which frustrates access — such as inheres in the search for the *forum conveniens*. Any such distinction must necessarily be irrelevant and illogical from the perspective of protection of the individual's property rights. Aspects of the discussion which follow illustrate the need for constitutional protection from the courts is no less than from the executive.

2. *Provisions Securing the Protection of the Law*

Less express but no less specific in content are those provisions securing the protection of the law. In their fullest terms, the constitutions provide that every person in the state is entitled to protection of the law.[62] Indeed, these constitutional provisions form the backbone of the right of access. Where a person is charged with a criminal of-

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56. The latter is dealt with *supra* notes 47-54 and accompanying text.

57. *Id.* at 370-71.

58. *Id.* at 440.

59. *Id.* at 417.

60. *Cf.* Revere Copper and Brass v. Overseas Private Inv. Corp., 56 I.L.R. 258 (U.S. Dist. Ct., D.C. 1978). For example, in a case where the litigant is a foreign resident (though a national of the local state), the dispute involves an interest in property compulsorily acquired, and the dispute could be referred to international arbitration in the country of residence — provided the foreign country has treaty arrangements with the local state mandating the reciprocal recognition of arbitral awards. In other words there is, at yet, no indication whether the rule in British South African Co. v. Companhia de Moçambique, [1982] 2 Q.B. 358, as an absolute exception, escaped the natural forum test.

61. *Id.*

62. *See, e.g.*, BARB. CONST. ch. III, § 11(c); TRIN. & TOBAGO CONST. ch. I, pt. I, § 4(b), ST. CHRIS.-NEVIS CONST. § 3(a).

fense, the constitution specifically provides for a fair hearing within a reasonable time by an independent and impartial court established by law.[63] In relation to civil obligations, no distinction is drawn between transnational and purely internal litigation (a similar blindness attends the common law).[64] In both circumstances, therefore, the relevant constitutional obligation is the same:

> Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; *and where proceedings for such a determination* are instituted by any person before such court or other tribunal, *the* case shall be given a fair hearing within a reasonable time.[65]

It is a little short of incredible that there has not yet been a constitutional challenge to *forum non conveniens* based upon this affirmation of access alone. All the necessary components present themselves with clarity and force. First, it is patently obvious that the constitutional regime creates a procedural right in the litigant. DeMerieux has convincingly disputed the argument that the phrase "protection of the law" in Trinidad and Tobago is to be regarded as a species of the (substantive) non-discrimination clause. That regime is "capable of standing on its own and when so considered, does not necessarily import a prohibition on discrimination."[66] The case law concurs with this principle. Speaking for the Privy Council in *Attorney General of Trinidad and Tobago v. McLeod*,[67] Lord Diplock declared that "access to a court of justice" was "*itself*, the protection of the law to which all individuals are entitled."[68] For example, for parliament to purport to make a law that is void because of constitutional inconsistency, deprives no one of the protection of the law "so long as the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of that purported law "can do so before a court of justice" in which the plenitude of the judicial power of the state is vested"[69] to make adjudication binding upon the individual and the state.

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63. *See, e.g.*, BARB. CONST. ch. III, § 18(1); TRIN. & TOBAGO CONST. ch. II, § 15(2)(f); ST. CHRIS.-NEVIS CONST. § 10(1).

64. Oceanic Sun Line Special Shipping Co. v. Fay, 79 A.L.R. at 35, 38.

65. BARB. CONST. ch. III § 18(8); *see, e.g.*, ST. CHRIS-NEVIS CONST. § 10(9) (emphasis added).

66. DEMERIEUX, *supra* note 50, at 442.

67. [1984] 1 All E.R. 694 (Eng. P.C.).

68. *Id.* at 701. His Lordship spoke in the context of the case presented to him (i.e., the right of access to challenge the validity of legislation); however nothing suggests any attempt to restrict the substantive meaning of the dictum to such a case.

69. *Id.*

Second, the procedural right supports proceedings for the "*determination*" of the dispute. A decision upon the *conveniens* of the forum is obviously not such a determination. *Spiliada* merely embodies litigation "in order to determine where [the parties] shall litigate."[70]

Third, the court is under an obligation to accede to the litigant's right, and give the "case" a fair hearing within a reasonable time. Having heard the dispute, it must be implied that there is an obligation for the court to decide upon the respective rights and obligations of the parties. Any other interpretation would render the entire provision vacuous. A perhaps weak affirmation appears in some constitutions after the statement of the right of access, which provides that "where the existence or extent of any civil right or obligation has been determined," the parties are entitled, subject to any requirement of a reasonable fee, "to a copy of any record of the proceedings made by or on behalf of the court."[71]

Fourth, *forum non conveniens* could prima facie be reconciled with the constitutional regime by attention to the "reasonable time" criterion. Abdication of jurisdiction, followed by trial in the natural (foreign) forum within a reasonable time, or failing that, a return to the local court for substantive determination is consistent with the constitutional provision. In this scenario, the appropriate decision would be the staying — rather than dismissal — of the action; this is not a distinction taken in the cases. However, it is doubtful whether the constitutional framers intended the guaranteed right of access to be so interpreted. In any event, the constitutional requirement of trial before a "court prescribed by law . . . and [which is] independent and impartial" cannot, by definition, be duplicated in a foreign state, even with an identical constitution.[72]

Protection of the right of access is clearly responsive to improper action on the part of the judiciary. A tantalizingly relevant indication of this is represented by the recent case of *Smithfield Foods Ltd. v. Attorney-General of Barbados*.[73] Here, the applicant sought to identify a contravention by the judicial arm of the state in sections 11(c) and 18(8) of the Constitution of Barbados, which provide respectively for the protection of the law and the right of access. After proceedings were commenced in the High Court of Barbados against an insurance company, the Court had, on application from the company,

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70. Oceanic Sun Line Special Shipping Co. v. Fay, 79 A.L. at 10 (citing *Spiliada*, [1987] 1 App. Cas. at 464).

71. ST. CHRIS.-NEVIS CONST. § 10(9).

72. *See supra* notes 63-64 and accompanying text.

73. [1992] 1 W.L.R. 197 (P.C. app. taken from Barb.).

ordered the applicant to provide security for any costs awarded against him. It was the judicial staying of the proceedings until the amount of such security was paid into court which constituted, in the applicant's view, the violation of his constitutional right. The application for constitutional redress was dismissed in the High Court,[74] the Court of Appeal,[75] and the Privy Council;[76] but it was not asserted anywhere or implied that the staying, let alone the dismissal, of proceedings could not amount to a constitutional infringement. The way in which the issue was discussed and decided instead supports the contrary assumption.[77] But if violation of the right of access by the judicial staying of proceedings be admitted, it then becomes just a very short step to challenging the judicial staying or dismissal of an action in deference to a foreign tribunal.

It is possible to go so far as to say the right of access conferred by the "protection of the law" clause gives meaning and substance to every other fundamental right and freedom embodied in the constitution. Under modern conditions, the right to enjoyment of property and the right not to be deprived thereof except by due process of law, and the right of the individual to respect for his private and family life, are empty promises in the absence of the ancillary right to a system of binding adjudication. Vindication of rights depends upon the declaration of rights. To deny an action for divorce in a society where the legal requirements are satisfied is to violate several fundamental rights, including the right to respect for private and family life and the right of association. Even against the background of an unwritten constitution, the petitioner in the English case of *Sealey (otherwise Callan) v. Callan*,[78] boldly argued that under the terms of the Matrimonial Causes Act of 1950, a spouse has the right to present a petition; if the spouse exercises that right, the court is then under a duty to pronounce a decree if the statutory conditions are satisfied, and that the court cannot interfere by staying the suit. Unhampered by a written constitution, the court rejected this contention.

Within the context of American law, *Corfield v. Corfield*[79] held, with regard to a civil matter, that the constitutional right of access to

74. Unreported Judgment of Sept. 16, 1987 (Barbados High Court, No. 838 of 1987).

75. Unreported Judgment of Feb. 26, 1990 (Barbados High Court, Civil Appeal No. 1 of 1989).

76. [1992] 1 W.L.R. 197 (P.C. app. from Barb.).

77. *Id.* The reason given by the Privy Council for the rejection of the application was that another remedy, other than the constitutional challenge, was available to the applicant; he could have appealed the judge's order for security for costs. That being the case, the courts were barred by section 24(2) of the Barbados Constitution from giving Constitutional redress.

78. [1953] P. 135 (Eng. C.A.), [1953] 1 All E.R. 942, [1953] 2 W.L.R. 910.

79. F. Cas. (E.D. Pa. 1825) (No. 3230).

the court was among the fundamental rights of the citizen. In *Hughes v. Fetter*[80] it was held that a Wisconsin statute embodying a local public policy against Wisconsin courts entertaining suits brought under the wrongful death acts of other American states was unconstitutional. A resident of Wisconsin was entitled to bring such a suit there, since the state could not validly escape its constitutional obligation to enforce rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent. Most recently, the court in *Marschalk Co. v. Iran National Airlines Corp.*[81] held that the executive, acting alone, could not "nullify the act of Congress giving the courts jurisdiction over commercial claims and do away with the constitutional rights of citizens to bring suit in a federal court to enforce their rights under a contract."[82]

After all, it would be most extraordinary and quite unacceptable for the citizen or resident to be denied access to the local court when seeking a declaration upon his criminal responsibilities. The only circumstances in which the forum might decline to pass upon criminal liability are covered by extradition arrangements with foreign states, which must conform to strict legislative and constitutional guidelines. Typically, extraditable offenses are those crimes committed against the laws of the foreign state and crimes which therefore cannot be adjudicated locally given the territorial nature of criminal law.[83] Justification for mandating local trial of crime is grounded in notions of sovereignty and the establishment and structure of the courts for this purpose. In this regard, there has been an express assimilation of adjudication upon "criminal responsibilities" with adjudication upon civil responsibilities.[84]

It is precisely upon the point of ensuring the protection of the law to citizens and residents that European jurisprudence becomes material. In Germany, the principle of *Treupflicht* (faith-duty between citizen and state) translates into the state having a special obligation to protect all its subjects. As Meyer wrote in 1953, "the state has a duty to extend to its citizens protection in every measure, especially legal protection."[85] This principle of faith-duty is founded on particular

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80. 341 U.S. 609 (1951).

81. 518 F. Supp. 69 (1981).

82. *Id.* at 90, 91 (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952)); *but see* Dames & Moore v. Regan, 453 U.S. 654 (1981).

83. Based upon the prescriptive theory of jurisdiction, states may hold that action abroad infringes on their criminal law.

84. *See, e.g.*, Hinds v. The Queen, [1977] 1 App. Cas. 195, 221 (Lord Diplock) (P.C. on app. from Jam.) (Eng.).

85. I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 105 n.5 (1971).

provisions in general constitutional law.[86] In public law, a sharp edge was given to this doctrine in the European refusal to surrender nationals to trial in foreign countries. To the Italian state, the national dignity "cannot consent that a citizen . . . should be compelled to bow his head in obedience to the commands of a foreign authority."[87]

At the civil law level the principle has assumed several manifestations. For example, in Austria special statutory enactments allow the citizen or resident to ask the Supreme Court to designate a local court to be considered as having jurisdiction, where legal proceedings in the relevant foreign country to vindicate private rights would be impossible or unreasonable.[88] Article 14 of the French Civil Code gives French courts jurisdiction in civil matters if the plaintiff has French nationality,[89] a rule which has been transplanted to Haiti and Quebec, and exists in Luxembourg and Romania.[90] The principle appears also to have influenced the refusal to countenance *forum non conveniens*, especially when the parties were suing, or being sued, in the state of their nationality or residence.[91]

Then again, there are examples of Commonwealth statutory law enacted specifically to provide protection to litigants in transnational disputes. The *Unfair Contracts Terms Act* of the United Kingdom[92] and Trinidad and Tobago[93] seeks to regulate the kinds of exemption clauses which might be inserted in certain consumer contracts; a regime which cannot be avoided by the choice of a foreign system (without equivalent safeguards) as the governing law of the contract.[94] Frustration of this protection by the courts' refusal to hear a relevant dispute would seem to be equally impermissible.

A similar point arises in relation to legislation governing insurance contracts. Certain restrictions are imposed upon the financial, administrative and policy content of the operations of insurance companies in the interest of the insured. It is then provided that policies issued locally "shall, notwithstanding any agreement to the contrary, be gov-

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86. *Id.*

87. *Id.* at 107 (citing RAFUSE, THE EXTRADITION OF NATIONALS 94 (1939)).

88. *See, e.g.*, Judgment of Feb. 23, 1988 (Nuclear Power Plant Injunction case) (OGH [Supreme Court], Aust.), 86 I.L.R. 575 (1991) (discussing Jurisdictional Statute, sec. 28 [JN] [Aust.]).

89. Michael Akehurst, *Jurisdiction in International Law*, BRIT. Y.B. INT'L L. 165, 170-71 (1972-73).

90. *Id.*

91. *See infra* notes 99-107 and accompanying text.

92. Unfair Contracts Terms Act, 1977, c. 50 (Eng.).

93. Unfair Contracts Terms Act, 1985, no. 28 (Trin. & Tobago).

94. Unfair Contracts Terms Act, 1977, c. 50, § 27(2) (Eng.); Unfair Contracts Terms Act, 1977, § 17(2) (Trin. & Tobago).

erned by the laws . . . and shall be subject to the jurisdiction of the courts of" the state concerned.[95] Likewise is the regulation of contracts concerning the carriage of goods by sea. In *The Hollandia*,[96] the English court refused to stay its proceedings in deference to the parties' contractual agreement to refer disputes to the Dutch courts. They — really the carrier — would thereby be enabled to avoid operation of the English Carriage of Goods by Sea Act, since the statute would not be applicable before the courts in Holland.[97]

In this regard, two aspects of the modern doctrine raise particular concerns for guarantees of protection of the law. First, although the constitutions have been taken to sanction prejudicial treatment against non-nationals,[98] the view is rapidly gaining ground that no distinction is to be drawn between dismissals and stays involving citizens and residents as contrasted with cases concerning only "foreigners." Consider, for instance, the evolution in United States law. At first, the convenience test was rejected precisely because it was seen as infringing upon the right of access to seek protection of the law. In *Gregonis v. Philadelphia & Reading Coal & Iron Co.*,[99] the court denied the existence of any power to decline jurisdiction in the case of a plaintiff who was a resident. However, the temptation of self-regulation of the judicial workload proved irresistible. By the mid-twentieth century, the U.S. Supreme Court held that the balancing of convenience decided the venue of litigation where the plaintiff was a foreigner,[100] and later, in every case.[101]

Nevertheless, until recently it was possible to detect a certain lack of warmth in application in the international arena when the plaintiff

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95. *See, e.g.*, Insurance Act 1980 (No. 6 of 1980) § 96 (Trin. & Tobago); *compare* Insurance Act (1972 Rev.) (Jam.) (embodying a choice of law clause only).

96. [1983] 1 App. Cas. 565 (Eng.), [1982] 3 All E.R. 1141, [1982] 3 W.L.R. 1111.

97. *Id.*

98. *Cf.* Fernandez v. Wilkinson, 87 I.L.R. 445 (1992). The West Indian position fairly is well represented in the discussion by Alexis concerning the Guyanese provisions:

> Although the Bill of Rights extends to 'every person in Guyana' it does distinguish citizens from non-citizens. Thus, the guarantee, in Article 5, to personal liberty excepts a law authorizing deprivation of liberty based on expelling one from Guyana, which, manifestly, relates to non-citizens since citizens are immunized against expulsion. Likewise, Article 12's freedom of expression excludes a law reasonably required for defence and public safety, which exception is considered as including a law for expelling non-citizens for the public good. Again, the immunity from expulsion, granted by Article 14(1), excludes a law restricting freedom of movement of non-citizens, as well as one imposing restrictions reasonably required for defence and public safety.

Francis Alexis, *When Is an 'Existing Law' Saved?*, PUBLIC LAW 256, 278 (1976).

99. 139 N.E. 223 (N.Y. 1923).

100. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

101. *Piper Aircraft Co.*, 454 U.S. at 241, 255 n.23.

was American. *Gulf Oil Corp. v. Gilbert*,[102] widely regarded as the fountainhead of the doctrine in America, was itself a domestic *forum non conveniens* case but, ironically, had its greatest impact in the international area.[103] In the first thirty years after *Gulf Oil Corp.*, cases dismissed involved mostly alien plaintiffs: "the courts insisted that a bona fide resident of the United States had a virtually indefeasible right to litigate at home."[104] However, modern decisions have all but abandoned that approach. *Piper Aircraft* held merely that an American plaintiff suing at home was entitled to "greater deference" than the foreign plaintiff.[105] Subsequent litigation upon the Bhopal disaster followed *Piper* in holding that since the plaintiffs in *Bhopal*[106] were foreign, their choice of an American court was due less deference than had they been American citizens suing at home. However, what is clear is that this "greater deference" due to the resident or citizen does not now permit trial in the United States if a foreign forum is "clearly more appropriate." Considerations of nationality and political allegiance go merely towards supplying the factual and legal nexus tending to make local trial appropriate.[107]

A minority of states appear not to have arrived at this position, at least not just yet. Thus, Canadian courts have held repeatedly that trial in the natural forum might be defeated if dismissing or staying the local action would inflict damage on the plaintiff's interests. In *Skagway Terminal Co. v. The Ship "Daphne,"*[108] it was admitted that Alaska was the more convenient forum, but the plaintiff could recover damages in the Canadian federal court which could not be re-

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102. 330 U.S. 501 (1947).

103. One year after *Gulf Oil Corp.*, its application in the domestic context became virtually obsolete with the enactment of a federal statute which provided that for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. 28 U.S.C. § 1404(a). As a matter of course, whenever a federal court is convinced that a case before it should be tried elsewhere in the United States, it will transfer the case to a federal court in that location. Dismissal is no longer appropriate, except in the rare circumstance in which the only appropriate place for trial is a distant state court. Domestic application of *forum non conveniens* as between state courts remains a potentially significant area of application, but the power to dismiss is tightly governed by the constitutional obligation to give citizens in each state the same "privileges and immunities of Citizens in the several states" and the duty to "full faith and credit" to the laws and judgments of sister states. Decisions not to hear actions occurring in other states have repeatedly been struck down as unconstitutional and invalid. *See* Robertson, *supra* note 1, at 402-05.

104. Robertson, *supra* note 1, at 403.

105. 454 U.S. at 265-66.

106. *In re* Union Carbide Gas Plant Disaster at Bhopal, India in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195, 202 (2d Cir. 1987).

107. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 18-19 (1929).

108. 42 D.L.R. 4th 200 (Fed. Ct. Can. 1988).

covered in Alaska. On that basis, the court refused to stay the Canadian proceedings. Similarly, *Westminer Canada Holdings Ltd. v. Coughlan*[109] expressed refusal to stay Toronto proceedings since the plaintiff, a company incorporated in Canada with headquarters in Toronto, would thereby be deprived of a juridical advantage in that the alternative forum might not apply Ontario legislation or the rules of the Toronto Stock Exchange.

Second, an absence has developed of any serious attempt by the local court to help ensure trial in the alternative forum. Under *Spiliada* reasoning, the court is overwhelmingly concerned with whether it is the natural forum for trial in terms of the preponderance of connecting factors. However, the court is not at all concerned with whether there is "equivalent" litigation in the foreign forum. The court rarely seeks undertakings from the defendant as to his proposed conduct in the foreign forum. Specifically, it does not tarry upon any examination of the defenses which he plans to raise. This lack of interest has several manifestations. It is now established that the mere fact that litigation cannot be pursued in the natural forum is not reason enough not to dismiss for *forum non conveniens*. For example, it could be appropriate to dismiss proceedings even though the limitations period has run in the natural forum;[110] the plaintiff will lose other procedural advantages;[111] or the plaintiff might not have a cause of action there or in any other alternative forum.[112] Dismissal has also been sanctioned even though the foreign tribunal could be exposed to political pressure to decide against the plaintiff of a kind not present in the forum.[113]

The combination of dismissals and stays without differentiation among citizens, residents and "foreigners" — regardless of trial elsewhere — is the best defined of the problems inherent in reconciling the constitutional protection of the law and the convenience doctrine. But this combination articulates forcibly the kinds of pressure being put on the right of guaranteed access to the court.

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109. 73 D.L.R. 4th 584 (Ont. Can. 1990). The Ontario court felt it was not even necessary for the plaintiff to prove or for the court to determine what law would be applied in the alternative forum.

110. *Spiliada*, [1986] 3 All E.R. at 846.

111. Rhona Schuz, *Controlling Forum-Shopping: The Impact of MacShannon v. Rockware Glass Ltd.*, 35 INT'L & COMP. L.Q. 374, 387-93 (1986).

112. Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 (1984).

113. *Cf.* Muduroglu Ltd. v. TC Ziraat Bankasi, [1986] 1 Q.B. 1225 (Eng. C.A.), [1986] 3 All E.R. 682, [1986] 3 W.L.R. 606.

3. *Protection Against Deprivation of Property*

It can scarcely be denied that mandating trial in the (foreign) *forum conveniens* affects substantive rights. A hidden premise behind all the representations seeking to influence the exercise of the assumed judicial discretion is that the foreign forum favors the party desiring adjudication there. Directing litigation there is the very means by which that party's interests are preferred over those of the party wanting local determination. In truth, the local tribunal is involved in the creation, modification, or abolition of substantive rights and liabilities by a kind of delegation to a surrogate — albeit by the very act of delegation. Questions concerning whether a claim is time-barred,[114] whether[115] damages should be assessed at a higher or lower level,[116] and the construction of a contract,[117] or the extent of tortious liability are a few of the many substantive issues decided in this way. The conclusion which follows from the premise of judicial discretion was well stated in the syllogism of Justice Brennan:

> Once the court assumes a wider discretion to refuse to exercise its jurisdiction, as the English cases show, there is no turning back short of the point where the court, guided by no more specific touchstone than the ends of justice, assumes the power to affect the parties substantive rights.[118]

And according to Justice Gaurdon:

> A doctrine which confers upon a court a discretion to decline to exercise its regularly invoked jurisdiction and thereby decline to participate in the application of its own substantive law (whether by operation of its choice of law rules or directly of its own force) raise[s] fundamental problems. The principles enunciated in *St. Pierre*, and those applicable to foreign jurisdiction clauses, already permit of that possibility: the former operating upon considerations of justice, and the latter, by reason of the agreement of the parties. However, I do not think that possibility should be extended, whether by adoption of the doctrine as enunciated in *Spiliada* or by reformulation of existing principle.[119]

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114. *Spiliada*, [1986] 3 All E.R. at 844.

115. Cocoran v. Cocoran, [1974] V.R. 164 (Austl.).

116. *Compare* Castanho v. Brown and Root (U.K.) Ltd., [1981] App. Cas. 557 (appeal taken from Eng.) *with* Smith Kline and French Lab. Ltd. v. Bloch, [1983] 2 All E.R. 72 (Eng.).

117. Oceanic Sun Line Special Shipping Co. v. Fay, 79 A.L.R. at 10.

118. *Id.* at 39.

119. *Id.* at 58.

The constitutions expressly provide against deprivation of property except under the authority of a written law which prescribes the principles and the manner in which compensation is to be determined, and which gives a right of access to the court for a determination of, *inter alia*, the compensation.[120] Therefore, the question to be explored is whether denial of access violates the provisions ensuring protection against deprivation of property.

In the least, an arguable case must be conceded. The Privy Council has recently held that no distinction is to be drawn between the acquisition of property and destruction of rights in property by public authority.[121] Therefore, it is arguable that a refusal to hear and determine a civil dispute does, prima facie, amount to a deprivation of property — either because the cause of action is itself property,[122] or because such refusal frustrates the procedure by which interest or ownership in the property is established.[123] The proposition is not as far-fetched as it may at first appear. Sir Neville Peterkin, C.J., indicated in *Attorney-General of St. Christopher and Nevis v. Lawrence*[124] that the concept of property is to be interpreted broadly. It applies to any contract or agreement which a person might have with another. Specifically, it "applies equally to concrete as well as to abstract rights of property."[125] *Société United Docks*[126] is relevant here. In 1981, the Government of Mauritius procured the enactment of the *Code of Civil Procedure (Amendment) Act*,[127] which purported to bar the enforcement of an arbitral decision made in favor of the appellant. The Privy Council decided that the amending Act was unconstitutional. The statute's deprivation of property, specifically the appellants' cause of action, without provision for compensation, was intolerable. In the words of the Court, the Act "has thus deprived and was intended to deprive [the appellant] of a chose in action, namely the right to sue for and recover damages for breach . . . of [the] contract of employment."[128]

In *Dames & Moore v. Regan*,[129] the constitutional validity of the suspension by the Executive of claims brought in U.S. courts by

120. *E.g.*, BARB. CONST. § 16(1).

121. Société United Docks v. Mauritius, [1985] 1 App. Cas. 585 (P.C. appeal from Mauritius), [1985] 2 W.L.R. 114, [1985] 1 All E.R. 864.

122. *Id.* at 876.

123. *See infra* notes 125-132 and accompanying text.

124. 31 W.I.R. 176 (1983) (East. Carib. States).

125. *Id.* at 185.

126. [1985] 1 App. Cas. 585.

127. Mauritius Code of Civil Procedure (Amendment) Act of 1981 (No. 1 of 1981), §§ 2, 3.

128. [1985] 1 App. Cas. 585, 590.

129. 453 U.S. 654 (1981).

American citizens was considered. The Supreme Court decided the action taken was not outside the constitutional or statutory power of the President. However, the Court left open the possibility that the suspension of claims constituted a "taking" of property within the Fifth Amendment to the Constitution for which compensation was payable.[130] The decisions of lower courts holding the Executive action invalid adopt an even stronger stance. *Marschalk v. Iran National Airlines Corp.*[131] held that there was "no doubt" that the extinguishing of the plaintiff's right to enforce its contract claim against Iran "constituted a taking," since

> valid contracts and the rights arising out of such contracts are property and protected by the Fifth Amendment. When the right to enforce a contract in the United States courts is taken away or materially lessened, the contract and the rights thereunder are taken within the meaning of the Constitution.[132]

4. *Constitutional Redress for Breach of Right of Access*

In Caribbean Commonwealth countries, the constitutions provide the means whereby violations of the right of access might be remedied. The method of challenge is by way of a constitutional motion: any person who alleges that any of these provisions "has been, is being or is likely to be contravened in relation to him" may apply to the High Court for redress.[133] It is then provided that this court "shall have original jurisdiction . . . to hear and determine" such an application.[134] An appeal lies from the decision of the High Court to the Court of Appeal, and thence to Her Majesty in Council. Utilization of this mechanism involves both private law and public law dimensions. In the first place, the litigant would be complaining a doctrine existing in private law (i.e., *forum non conveniens*) has violated his public law entitlements to a fair trial before the local tribunal within a reasonable time. That assertion involves an allegation of a breach of constitutional protection which, as a proposition in logic, no longer concerns merely a private law right.

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130. *Id.* at 688-89 (Powell, J., dissenting in part) (preferring a stronger statement on the payment of compensation).

131. 518 F. Supp. 69, (S.D.N.Y. 1981) (Duffy, J.). *See also* Electronic Data Sys., Inc. v. Social Sec. Org. of Iran, 508 F. Supp. 1350 (N.D. Tex. 1981).

132. *Marschalk*, 518 F. Supp. at 93.

133. *See, e.g.*, BARB. CONST. § 24; TRIN. & TOBAGO CONST. § 14; ST. CHRIS.-NEVIS CONST. § 18.

134. BARB. CONST. § 24; TRIN. & TOBAGO CONST. § 14; ST. CHRIS.-NEVIS CONST. § 18.

The significance of this point is that the High Court cannot refuse to hear and decide the constitutional challenge simply on the basis of convenience or on the ground that the dispute is one of a private law character. In *Yearwood*, Peterkin, J.A., described the sanctity attending the right of constitutional challenge available to litigants in their civil dispute with the state in the following terms:

> The learned trial judge . . . mentioned . . . the question of the right of access to the court for the enforcement of the protective provisions. Section 8 (3) of the Constitution provides that the Chief Justice may make rules with respect to the practice and procedure of the High Court which may include rules with respect to the time within which applications to the High Court may be brought. At the moment there are no such rules. I would agree that in the absence of any such rules the right must remain unfettered and cannot be circumscribed by any prerequisites. Any provision to the contrary would be struck down as being unconstitutional.[135]

The entitlement to constitutional redress is not absolute. In the first place, it is made subject to the Parliamentary power to make provisions regarding the practice and procedure in respect of the jurisdiction of the court. This power relates to the formal mechanism for enforcement of the constitutional motion, not with the substantive right of access itself. The latter is not subject to the Parliamentary intervention indicated; although, Parliament always retains the power to alter the constitution in accordance with the terms of the constitution. More formidable is the provision that the court with original jurisdiction "shall not exercise its power" to grant constitutional review "if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."[136] This was the basis of the dismissal of the *Smithfield Foods* application.[137] Instead of a constitutional challenge, the applicant ought simply to have appealed the judicial order requiring security for costs. Prima facie, an adverse ruling on the natural forum test could similarly be reviewed on appeal; however, such a route does nothing to challenge the validity of the underlying doctrine itself. Where, for instance, the relevant *Spiliada* considerations are properly taken into account and the judge has exercised his purported discretion in granting a stay or dismissal, an appeal is futile. The practice of deferring to the *forum con-*

135. 1 OECS L.R. at 324, 406-407.

136. *See, e.g.*, BARB. CONST. § 24(2); ST. CHRIS.-NEVIS CONST. § 18(2). The constitution of Trinidad and Tobago does not have an equivalent provision.

137. [1992] 1 W.L.R. 197.

veniens is so widespread as to forego an appeal on this basis. In these circumstances, a constitutional challenge might be the only available means of redress.

B. Formal Structure of Constitutional Government

A second possible ground on which to rest the constitutional right of access to the courts in transnational cases derives from the formal structure of constitutional government as practiced under the Westminster system. Freedom of access is itself derivative and imperative from the notion of limited government. There must be implied, in the constitutional establishment of the Supreme Court or High Court as a superior court of record, an obligation of adjudication in civil matters. Particularly, this obligation flows from the doctrine of separation of powers, the insulation of the court from political pressures, and the conferral of exclusive original jurisdiction "in all substantial civil cases." As much has been said by Lord Diplock when passing on the constitutionality of legislation from the Commonwealth Caribbean.[138]

Moreover, the constitutionally guaranteed power to appeal from decisions at first instance "as of right" to the Court of Appeal, and from there again, "as of right," to the Privy Council — except in those countries which have abolished such appeals[139] — would be considerably undermined, and to a large extent negated, if there were no obligation to hear the dispute in the first place. Such an intention should not be imputed to the framers of the constitutions except upon the clearest evidence.

The inviolability of the citizen's safeguard to have the Supreme Court decide "important questions" affecting his or her civil and criminal rights and responsibilities has been affirmed time and again. *O'Flaherty v. Attorney-General of St. Christopher and Nevis*[140] is one of many cases[141] that have discussed the entitlement to trial within the criminal context. Admittedly, this bland assertion of jurisdiction does not confirm a right of access in transnational cases. For example, the general unfettered right of access in criminal matters does not necessarily obtain, in at least one respect, that of the free choice of a legal representative as regards civil proceedings.[142] On the other hand, Lord

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138. *See generally* Hinds v. The Queen, [1977] 1 App. Cas. at 221.

139. For example, in the Commonwealth Caribbean, Guyana has abolished the latter right.

140. 38 W.I.R. 146 (1986) (East. Carib. States).

141. *See also* R. v. Edwin Ogle, 11 W.I.R. 439 (1968) (Guy.); Halstead v. Police Comm'r, 25 W.I.R. 522 (1978) (Gren.); Gondon Sandiford v. Director of Public Prosecutions, 28 W.I.R. 152 (1979) (Guy.); Director of Public Prosecutions v. Feurtado, 30 W.I.R. 206 (1979) (Jam.).

142. Inshan Bacchus v. Ali Khan, 34 W.I.R. 135 (1982) (Guy.).

Diplock's omnibus exposition was expressly adopted and civil authorities cited in *R. v. Trevor Stone* to illustrate the almost exclusive power of the court "to deal with *and decide the dispute.*"[143] When placed alongside the provisions on the fundamental rights and freedoms of the individuals,[144] the rights of citizenship,[145] and of the public service,[146] the inference is undeniable: entitlement to the courts for the determination of all aspects of one's legal position is an essential feature of Western-styled democratic government.

However, the pride of place thus given to the Supreme Court in the structure of Commonwealth government might, it is suggested, be undermined in at least two respects by mandating reference to the *forum conveniens*. First, its authority might be improperly eroded by pressure exerted upon the court by parliament or the executive which results in litigation before a tribunal not similarly established to deal with the dispute. Second, the jurisdiction of the courts could be eroded by recantation of competence by the courts themselves.

1. Usurpation by Parliament or the Executive

The law governing the jurisdiction of the Supreme Court occupies a special and sensitive place in the psyche of Commonwealth Caribbean jurisprudence due, in no small measure, to the Jamaican case of *Hinds v. The Queen*.[147] Although a case on the vindication of public law rights consequent upon a criminal trial, *Hinds* has a relevance in the present context which will soon become apparent. The Privy Council accepted that section 25 of the Jamaican constitution gave the Supreme Court original jurisdiction to hear and determine claims relating to fundamental rights and freedoms, and that section 44 conferred original jurisdiction regarding disputes about membership of either House of Parliament.[148] In addition, the Court was said to possess such other jurisdictions as are "characteristic" of such a tribunal, namely: (a) unlimited original jurisdiction in all substantial civil cases;

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143. 25 W.I.R. 458 (1977) (Jam.) (emphasis added).

144. *See infra* notes 150-155 and accompanying text.

145. *See, e.g.*, BARB. CONST. ch. II; TRIN. & TOBAGO CONST. ch. 2; ST. CHRIS.-NEVIS CONST. ch. VIII. Note that citizenship depends in particular circumstances upon private international law concepts such as domicile, residence, and nationality.

146. *See, e.g.*, BARB. CONST. ch. VIII; TRIN. & TOBAGO CONST. ch. 9; ST. CHRIS.-NEVIS CONST. ch. VII; *see also* Hinds v. Director of Public Prosecutions, [1977] 1 App. Cas. 195 (relevance of protection of property rights as concerns salaries and emoluments receivable from the public service); King v. Attorney Gen., Unreported Judgment of May 15, 1992 (Barbados High Court, No. 1878 of 1991).

147. [1977] 1 App. Cas. 195 (P.C. 1975) (appeal taken from Jam.).

148. *Id.*

(b) unlimited original jurisdiction in all serious criminal cases; and (c) supervisory jurisdiction over the proceedings of inferior courts. The Gun Court Act of 1974,[149] passed by the Jamaican Parliament to combat "serious gun crimes," was condemned as unconstitutional and invalid to the extent that part of the existing jurisdiction of the Supreme Court became vested in a new court composed of members of the lower judiciary. In delivering the judgment of the majority, Lord Diplock stated that if Parliament could, by ordinary legislation, strip the court of all jurisdiction or encroach upon the exclusivity of that jurisdiction, save for that reserved by sections 25 and 44, then what would be left "would be a court of such limited jurisdiction that the label 'Supreme Court' would be a false description."[150] "But more important," continued Lord Diplock:

> for this is the substance of the matter, the individual citizen could be deprived of this safeguard, which the makers of the Constitution regarded as necessary, *of having important questions affecting his civil . . . responsibilities determined by a court, however named, composed of judges whose independence* from all local pressure by Parliament or by the executive *was guaranteed* by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.[151]

Similarly, in *Forbes v. Forbes*,[152] the Land Adjudication Ordinance of 1970[153] (British Virgin Islands) imposed a stay on High Court Proceedings concerning certain land disputes and transferred the disputes to an Adjudication Officer for determination. Hewlett, J., held the legislation to be unconstitutional as it was a perpetual ouster of the court's jurisdiction. This decision was overturned on appeal, but only on the basis that the Judge had misconstrued the purpose of the Ordinance; as soon as adjudication proceedings were final, the litigants could appeal therefrom to the Court. No attempt was made to disturb the learned Judge's statement of principle:

> I am satisfied that although the Legislature, under its Constitution, can make laws for the generality of its subjects for the peace, order and good government thereof, this cannot be taken to mean that it can pass legislation that erodes the powers of the High Court. Such

149. Gun Court Act of 1974, (No. 8 of 1974) §§ 3, 4, 8, 13(n), 22 (Jam.).
150. *Hinds*, [1977] 1 App. Cas. at 221 (emphasis added).
151. *Id.*
152. 1 OECS L.R. 460 (H.C. 1991) (Virgin Is.); 1 OECS L.R. 466 (C.A. 1991) (Virgin Is.).
153. Land Adjudication Ordinance (No. 5 of 1970) §§ 4, 7, 15, 20, 21, 23 (Virgin Is.).

> would be destructive of the very foundation on which the rule of the law is built. The separation of powers between the judiciary, the legislature and the executive is undeniably present in the fabric of the constitution of the Virgin Islands and, therefore, I hold that the factual ousting by the Legislature of the jurisdiction of the High Court . . . is a repugnancy that renders . . . the Ordinance null and void.[154]

It is tolerably clear then that there is no power in the legislature or the executive, without an appropriate constitutional amendment, to by pass the jurisdiction of the Supreme Court by the simple expedient of vesting competence to decide substantial civil disputes in a tribunal not demonstrated to enjoy the same protection and independence.[155] *A fortiori*, there can be no power to preempt local litigation in favor of a determination by a foreign tribunal since, by definition, such a tribunal cannot be shown to be likewise protected. In other words, the constitutional principles as stated in *Hinds* prohibit the exercise of any power by the legislature or executive which pursues the goals of *forum non conveniens*.

However, if this is so, then a distinction of the first importance must be admitted in relation to the law practiced in the United States, and possibly, in England. In the words of the U.S. Supreme Court, the questions presented in *Dames & Moore* "touch[ed] fundamentally upon the manner in which our Republic is to be governed."[156] The case arose within the context of the international crisis precipitated in 1979 by the seizure of the U.S. embassy in Tehran, Iran, and its monumental importance justifies a full recount.

Acting pursuant to the International Emergency Economic Powers Act[157] (IEEPA), President Carter declared a national emergency on November 4, 1979, and blocked the removal or transfer of all property and interests of the Iranian government in the United States. Subsequently, a general license authorized certain judicial proceedings against Iran, but did not allow the entry of any judgment or decree. On January 20, 1981, the American hostages were released by Iran pursuant to an international agreement entered into with the United States. To implement the terms of this agreement, President Carter

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154. *Id.* at 466.

155. *See* PROF. A.R. CARNEGIE, MEMORANDUM TO THE BARBADOS CONSTITUTIONAL COMMISSION REPORT (1976) (Professor Carnegie has argued that the conferral of statutory power upon Magistrates to impose major fines, sometimes amounting to thousands of dollars, might be open to challenge for constitutional propriety).

156. *Dames & Moore*, 453 U.S. at 659.

157. 50 U.S.C. §§ 1701-1706 (1988).

(and later President Reagan) issued a series of Executive Orders which variously provided for (i) the establishment of an Iran-U.S. Claims Tribunal in the Hague before which all claims by Americans against Iran were to be litigated, (ii) the nullification of all attachments and judgments obtained against Iranian government property, and the transfer of such property to the Federal Reserve Bank of New York (for onward transmission abroad mainly to satisfy the judgments of the Claims Tribunal); and (iii) the "suspension" of all claims by American citizens which could be brought before the Tribunal, providing further that all such claims "shall have no legal effect in any action now pending in any court of the United States."[158]

It was the validity of this latter provision, in particular, which was challenged in a series of cases as impinging on the separation of powers doctrine. The American courts reached conflicting conclusions on the validity of the President's actions. The United States Court of Appeals for the First Circuit in *Charles T. Main International Inc. v. Khuzestan Water & Power Authority*,[159] and the Court of Appeals for the District of Columbia Circuit in *American International Group, Inc. v. Islamic Republic of Iran*,[160] both upheld the President's authority to issue the Executive Orders and regulations.

Similarly, the petitioner in *Dames & Moore*, having been awarded nearly $3.5 million in damages against the Iranian Government for breach of contract by the United States District Court for the Central District of California,[161] filed an action in that court for declaratory and injunctive relief against the United States.[162] The petition sought to prevent enforcement of the Executive Orders as beyond the statutory and constitutional powers of the President and in any event as unconstitutional to the extent they adversely affected petitioner's final judgment against Iran.[163] The District Court denied the petitioner's motion for failure to state a claim upon which relief could be granted.[164] The decision of the Supreme Court in *Dames & Moore* was a watershed development, because the Court therein admitted that no

158. *Dames and Moore*, 453 U.S. at 666.
159. 651 F.2d 800 (1st Cir. 1981).
160. 657 F.2d 430 (D.C. Cir. 1981).
161. 453 U.S. at 664.
162. *Id.* at 666.
163. *Id.* at 667.
164. *Id.* However, on petition to the United States Court of Appeals for the Ninth Circuit, the District Court did enter an injunction, pending appeal, prohibiting the United States from requiring the transfer of Iranian property that is "subject to 'any writ of attachment, garnishment, judgment, levy, or other judicial lien'" issued by any court in favor of the petitioner. *Id.*

express constitutional or statutory power existed for such a Presidential right of preemption.[165]

However, Justice Rehnquist, in delivering the opinion of the Court, found two statutes which were "relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[166] One statute was the IEEPA, which delegated power to the President to act in times of national emergency with respect to property of a foreign country.[167] The other statute was the Hostage Act,[168] which similarly indicated congressional willingness to give the President broad discretion when responding to hostile acts of foreign sovereigns.[169] Thus, the extent of the relevance had to be buttressed by reference to Congress:

> Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims . . . we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. . . . Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.[170]

And, as a sop to the American litigant, Justice Rehnquist continued:

> Our conclusion is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief. The Solicitor General also suggests that the provision of the Claims Tribunal will actually *enhance* the opportunity for claimants to recover their claims, in that the Agreement removes a number of jurisdictional and procedural impediments faced by claimants in United States courts . . . . Although being overly sanguine about the chances of United States claimants before the Claims Tribunal would require a degree of naivete which should not be demanded even of judges, the Solicitor General's point cannot be discounted. Moreover, it is important to remember that we have already held that the President has the *statutory* authority to nullify attachments and to transfer the assets out of the country. The President's power to do so does not depend

165. *Id.* at 676-77.
166. *Id.* at 677.
167. *Id.*
168. 22 U.S.C. § 1732 (1988).
169. *Id.*
170. *Dames & Moore*, 453 U.S. at 678, 680.

> on his provision of a forum whereby claimants can recover on those claims. The fact that the President has provided such a forum here means that the claimants are receiving something in return for the suspension of their claims, namely access to an international tribunal before which they may well recover something on their claims.[171]

The conclusion that the President, by suspending the petitioner's claim, had not circumscribed the jurisdiction of the United States courts in violation of Article III of the Constitution, also turned upon the terms of the Executive Order. As stated by Justice Rehnquist,

> [W]e do not believe that the President has attempted to divest the federal courts of jurisdiction. Executive Order No. 12294 purports only to "suspend" the claims, not divest the federal court of "jurisdiction." As we read the Executive Order, those claims not within the jurisdiction of the Claims Tribunal will "revive" and become judicially enforceable in United States courts. This case, in short, illustrates the difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law. The President has exercised the power, acquiesced in by Congress, to settle claims and, as such, has simply effected a change in the substantive law governing the lawsuit.[172]

It is hard to accept, in relation to the claims which fell within the purported gambit of the Claims Tribunal, that there was not a change in choice of forum in addition to a modification in the choice of law. In any event, it is suggested such a decision could not, under present conditions, be taken under West Indian constitutional law. The exercise of any executive power to curtail the Supreme Court's jurisdiction has been shown to be intolerable. Granted, in *Dames & Moore* the action was taken during a national crisis and involved major foreign policy decisions,[173] but in the West Indies, socio-political expediency is not a permissible basis for the formation of legal principles; the legislative intent in *Hinds* was clearly based on the most laudable of grounds.

However, this absence of legal power could certainly not be cured either by Parliamentary "acceptance,"[174] or "inertia, indifference, or

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171. *Id.* at 686-87.

172. *Id.* at 684-85 (citation omitted).

173. *Id.* at 660. The Supreme Court gave its reason for the unusual procedure of granting certiorari before judgment in the case, and for setting the expedited briefing and argument schedule, the fact that "lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement." *Id.*

174. *Cf. supra* note 136 and accompanying text.

quiescence."[175] Indeed, it could not be remedied by the legislature's express authorization. The Commonwealth Caribbean Parliament is a creature of the state's constitution and is therefore subordinate to the terms thereof. Furthermore, the provision of an alternative forum cannot justify the abridgment of local jurisdiction unless the *Hinds* criteria are met. Any compulsion of litigation in a forum falling short of that mark might well further infringe upon the Supreme Court's jurisdiction. In this way the decisions in *Electronic Data Systems, Inc. v. Social Security Organization*[176] and *Marschalk*[177] are more in line with the likely West Indian response. In *Electronic Data Systems*, Porter, J., proclaimed that Congress "could not and did not intend to grant the President power to nullify or void exercises of the judicial power by Article III courts"; the President's action placed the "finality and independence of judicial action in jeopardy."[178] Duffy, J., in *Marschalk*, was even more blunt. He was "at a loss to understand much of the reasoning" which suggested that the President's action did alter the courts' jurisdiction; that action "violate[d] both the words and the objectives of our Constitution," and in particular, the separation of powers doctrine.[179]

In any event, *Dames & Moore* appears bound up with the prerogative of the American Executive Office in international law. The Supreme Court felt that the competence to divert American litigation to a foreign tribunal was incidental to the President's statutory powers to handle foreign relations in times of emergency.[180] Not only are there no equivalent statutory provisions in the West Indies, there are well-established and fundamental differences between the two legal systems regarding the relationship between national and international law.[181]

On the other hand, the American courts might not be alone in sanctioning executive and legislative efforts to void local litigation. English and West Indian law are, for present purposes, identical as regards to their relationship to international law, but the English courts have come perilously close to sanctioning an American-type exclusion by the executive. In *Dallal v. Bank Mellat*,[182] the same American plaintiff — whose petition had been rejected in *Dames & Moore*, and whose substantive breach of contract action had been dismissed by the Claims Tribunal in the Hague — sought the assistance of the English

175. *Cf.* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. at 637.
176. 508 F. Supp. 1350 (S.D.N.Y. 1981).
177. 518 F. Supp. at 69.
178. 508 F. Supp. at 1361, 1363.
179. 518 F. Supp. at 84, 91.
180. 453 U.S. at 673.
181. *See infra* notes 299-308 and accompanying text.
182. [1986] 1 Q.B. 441 (Q.B. Eng.), [1986] 1 All E.R. 239.

courts in his battle with Iranian government entities.[183] The decision to strike out the English action as "vexatious and an abuse of process"[184] appears reasonable with regard to the principles of res judicata. From an English viewpoint, the decisions of these foreign tribunals generally must be taken as binding. But in coming to this conclusion, Hobhouse, J., in the Queen's Bench Division of the High Court, made the following disconcerting remark:

> [w]here a court or other tribunal has been set up by a subject's own sovereign government, albeit within the territory of another state, that subject cannot be heard to say that the act of his own government was incompetent.[185]

Perplexing questions arise concerning whether such a statement was meant to be taken literally. On the one hand, it would completely nullify the advance made in *Hinds*. On the other, both the decision and the dicta in the more recent Court of Appeals decision in *Muduroglu*[186] appear to bear out the prima facie interpretation. The suggestion seems to be that the local court might itself compel — or defer its jurisdiction in favor of — litigation before a foreign tribunal operating under different political conditions than found in the local jurisdiction.

2. *Abdication by the Courts*

The written constitutions do not expressly provide against judicial abdication of jurisdiction. Also, judicial pronouncements upon the subject are not commonplace. However, neither of these two factual propositions is in any way surprising. Given the nature of things, the framers of the constitutions, and Lord Diplock as well, might readily be forgiven for anticipating usurpation of the judicial function by "Parliament or the Executive," rather than renunciation by the courts themselves. However, it would be quite another thing to suggest that the constitutional protection described in relation to the fundamental rights of the person and deriving from the form and structure of constitutional government, as interpreted by the law lord, did not prohibit improper decisions by the judiciary. These premises — the judicial assumption of unauthorized and unreasonably wide discretion

183. *Id.*
184. *Id.* at 444.
185. *Id.* at 456.
186. [1986] 1 Q.B. 1225, [1986] 3 All E.R. 682.

to deny a hearing at the seat of justice — tend to infringe upon those constitutional and fundamental rights, including, preeminently, the right of access.

The above notwithstanding, abdication by the Court is an everyday occurrence.[187] For immediate purposes, it should be noted that judicial abstinence is frequently practiced, despite the attendant consequence of compelling litigation in a forum over which the executive might exercise greater influence than he obtains locally. In *Moduroglu*, the foreign plaintiff company was controlled by British shareholders who were residents of England.[188] The action was commenced against a state-owned Turkish bank on the ground that the bank had wrongly made payment under a guarantee agreement covering the plaintiff and was therefore not entitled to indemnification.[189] The defendants applied for and obtained a stay of the English proceedings on the basis that Turkey was the appropriate and natural forum for the dispute, by reference to connecting factors such as the place where the cause of action arose, the applicable law, the availability of witnesses, and the savings of costs.[190]

Forum non conveniens was applied by this court, even though the court appeared to have accepted aspects of the plaintiff's contention that the political nature of the case implied dangers of not obtaining a fair trial in Turkey.[191] One suggestion was that the Turkish judiciary was undermanned and that the terms of service were so poor that the correct recruits could not be found, with many of those in judiciary posts leaving to better themselves in private practice.[192] Most important was a recently introduced scheme for grading judges.[193] Senior members of the judiciary had complained publicly that the vagaries of the scheme were such that they could be used to give practical effect to the executive's displeasure at a judge's decision in a case in which the executive was interested.[194] These considerations are the same concerns identified in *Hinds*. But they were brushed aside with cavalier abandon in the English Court of Appeal. Sir John Donaldson, M.R., declared

> I am not particularly surprised to find judges voicing complaints of one sort or another and do not think that this necessarily points to

187. *See supra* note 1 and accompanying text.
188. [1986] 1 Q.B. 1225, [1986] 3 All E.R. 682.
189. *Id.*
190. *Id.*
191. *Id.* at 698.
192. *Id.* at 699.
193. *Id.*
194. *Id.* at 714.

> any lack of independence. The most cogent criticism of course is that which relates to grading, but some grading is probably inherent in any system involving a career judiciary and there is no evidence of any improper use of grading. The complaint is at the introduction of grading or greater grading and not to abuse of such a system, although the possibility of abuse may well be used as an argument against the whole system.[195]

This gratuitous affirmation of the integrity of the Turkish judiciary must, from a Turkish standpoint, be regarded as a mixed blessing. Certainly the affirmation was not helped by this court's rejection of the assertion that a Turkish judge could not be guaranteed to have the "intellectual integrity and moral firmness" to resist political pressures,[196] on the basis that an English court would not "adopt any line of reasoning which involves a finding or assumption of impropriety or unfairness on the part of an organ of a friendly foreign state without solid evidence to support it."[197] It is unclear why the friendship of the foreign state is relevant in the evaluation of the plaintiff's allegations; the very reference weakens the credibility of the evaluation.

A similarly patronizing tone attended other allegations raised. The court admitted there was "a very real question mark over what may be loosely termed civil rights in Turkey," offering the conciliatory view that "things are not now as bad as they were."[198] A possibility existed that Mr. Muduroglu — the executive director, main shareholder, and chief witness for the plaintiff company — would be criminally prosecuted under Article 159 of the Turkish Code for "acts against the Turkish state." These "acts" were allegations contained in the affidavits supporting the case of his company;[199] these allegations bore "no risk of attracting . . . personal sanctions [in England] . . . ."[200] But this was not sufficient to displace the "natural" forum test, especially since there had been no recent evidence the Turkish authorities would call him to account.[201] Taken seriously, this approach could supercede the earlier position that political influence over the foreign judicial process, however veiled, was not to be countenanced.[202]

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195. Muduroglu Ltd. v. TC Ziraat Bankasi, [1986] 3 All E.R. at 714 (Stocker, L.J., was "wholly in agreement" with the judgment of Sir John Donaldson, M.R.); *id.* at 710 (Mustill, L.J., delivered an opinion to the same effect).

196. *Id.* at 698.

197. *Id.*

198. *Id.* at 699.

199. *Id.*

200. *Id.* at 700.

201. *Id.*

202. *Cf.* Carvalho v. Hull Blyth (Angola) Ltd., [1979] 3 All E.R. 280.

In reality, any essay which evaluates the judicial systems of a sovereign foreign state borders upon the improper and harkens back to negative neo-colonialist traditions and tendencies. To the extent *forum non conveniens* encourages and mandates this type of evaluation, the doctrine is profoundly defective; odious assessments of the chances that foreign systems would dispense "justice" to the litigants are likely to result.[203] Not the least satisfying aspect of finding a constitutional right of access is the consequential focus upon justifying confidence in the local judiciary, rather than any investment in an analysis of the integrity of foreign systems.

III. Legal Basis for Forum Non Conveniens

The constitutional right of access in transnational cases necessarily implies that *forum non conveniens* cannot be adopted in Western democracies that operate under the Westminster system of government, without examining the constitutional implications. The measure of validity is the extent to which *forum non conveniens* is based upon legal rules and principles whose hierarchical position and substantive content transcend the litigants' constitutional protection. Far from offering such a juridical explanation, the promotion of self-abdication of jurisdiction is distinguished by a lack of discussion of any supporting legal foundation. Nowhere, in the multitude of judgments or the mountain of literature, is a proper analysis of these underlying legal rules and principles made.

Five main possible bases for *forum non conveniens* can be gleaned from inferences and implications found in extant material: (1) the convenience of the parties and the courts; (2) the prevention of forum shopping; (3) the principle of comity; (4) the inherent power of the court to regulate internal processes; and (5) the international law obligations of the local jurisdiction. The first three points can be dispensed with quite easily, but the latter two present more formidable arguments.

A. Convenience, Forum Shopping, Comity

Historically, convenience of the parties was the first rationale offered for adopting the natural forum test and is still mentioned in most cases.[204] Factors of convenience include the cost savings,[205] the

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203. Oceanic Sun Line Special Shipping Co. Inc. v. Fay, 79 A.L.R. at 39-40.

204. *See supra* note 1 and accompanying text.

205. Sanofi v. Parke-Davis Proprietary Ltd., 149 C.L.R. 147 (1981) (Austl.); *cf.* Smith Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 738 (Q.B. Eng. C.A.) (holding that other factors may negate convenience).

defendants' travel expenses to reach the local forum,[206] the residence abroad of the legal advisers[207] and the witnesses,[208] the presentation of the evidence,[209] and the different language used in the local forum.[210]

Quite properly, these factors are no longer decisive. Lord Brandon, in *The Abidin Daver*,[211] made the judicious observation that the advantages of convenience to one party translated immediately into disadvantages to the opposing party.[212] Consequently, Lord Wilberforce's attraction to the "critical equation" of balancing the relative advantages was irrelevant.[213] *Forum non conveniens* is ultimately the means by which one litigant's convenience is preferred over that of the other party.

Consideration of the convenience of the court came later, but is now rapidly becoming the more dominant factor. Not surprisingly, the most definitive statements have been made by courts in the United States that are internationally popular centers for litigation, such as New York.[214] English courts are now advancing similar principles to guard the commercial courts of London against overload.[215] On the other hand, polemic conclusions have been drawn from this stream of foreign litigation. Cheshire and North suggest there is a public interest

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206. *Cf.* Muduroglu Ltd. v. TC Ziraat Bankasi, [1986] 3 All E.R. at 682 (traveling expense not an exclusive test).

207. Spiliada Maritime Corp. v. Cansulex Ltd., [1986] 3 W.L.R. at 971.

208. *Cf.* Maharanee of Baroda v. Wildenstein, [1972] 2 Q.B. 283; Muduroglu Ltd. v. TC Ziraat Bankasi, [1986] 3 All E.R. 682.

209. [1972] 2 Q.B. at 286-290.

210. *Cf. The Wladyslaw Lokietek*, [1978] 2 Lloyd's Rep. 520 (Q.B. Eng.).

211. [1984] 1 App. Cas. 398, 419; *see also* Smith Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. at 738 (Lord Denning, M.R.).

212. [1984] 1 App. Cass. at 420.

213. Adrian Briggs, *Forum Non Conveniens — Now Are We Ten?*, 3 LEGAL STUDIES 74 (1983).

214. See *Smith Kline*, [1983] 2 All E.R. at 74, where Lord Denning, M.R., stated:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say, or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40% of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40% before the plaintiff gets anything.

215. *Id.*; *see also* MacShannon v. Rockware Glass Ltd., [1978] 1 App. Cas. at 811-29; A.G. Slater, *Forum Non Conveniens: A View from the Shop Floor*, 104 L.Q. REV. 554, 562 n.33 (1988).

in handling such litigation locally: the adjudication is both an invisible export and a confirmation of the local legal system.[216] Academic writers make similar points.[217] There has been, however, no glaring overcrowding of West Indian courts from foreign litigation.

Transnational cases in West Indian courts typically involve West Indians or companies incorporated there. *Touche Ross v. Bank Intercontinental*[218] involved a bank incorporated in the forum; in *Owens Bank Ltd. v. Bracco*,[219] the plaintiff was a St. Vincent company, albeit controlled by Italians. In those rare cases that involve only nonnationals and non-residents (such as *Stuart Young*,[220] a Barbadian case concerning a Guyanese and an American), local litigation has proceeded either because the parties expressly chose the local courts in their contract (which tends to rule out *forum non conveniens*), or because the *lex cause* was local law, which tends to eliminate complex exercises in comparative law. To the extent administrative arrangements remain a problem, the solution might be to simplify rules of civil procedure and appoint more judges. Considerations of judicial workload and docket congestion are "not, however, of the kind which are usually taken into account by Australian courts in formulating principles of law."[221] West Indian courts, hopefully, take a similarly principled stand.

The prevention of forum shopping found advocacy in the infamous case of *Chaplin v. Boys*.[222] In *Chaplin*, Lord Pearson railed against the "plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits . . . not . . . available to him in his natural forum."[223] However, in this case, the British plaintiff *was* allowed to sue in England notwithstanding the fact the cause of action arose in Malta and was governed, at least in part, by Maltese law.[224] In a Court of Appeal decision two years later, Lord Denning threatened a *coup d'etat* in *The Atlantic Star* case, when he commended England as a good forum in which to shop

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216. GEOFFREY CHEVALIER CHESHIRE & PETER MACHIN NORTH, PRIVATE INTERNATIONAL LAW 233 (Butterworths ed., 11th ed. 1987).

217. Slater, *supra* note 215, at 562; J.J. Fawcett, *Forum Shopping — Some Questions Answered*, 35 N.I.L.Q. 141, 146 (1984).

218. 87 C.I.L.R. 156, (1986) (Cayman Islands); 87 C.I.L.R. 268 (1987) (Cayman Islands).

219. Unreported Judgment of Jan. 18, 1988 (High Court of Justice, St. Vincent and the Grenadines, suit 1981 No. 287).

220. Unreported Judgment of Dec. 15, 1980 (Barbados High Court, No. 850 of 1979).

221. Oceanic Sun Line Special Shipping Co. v. Fay, 79 A.L.R. at 50 (Deane, J.).

222. [1971] App. Cas. 356 (appeal taken from Eng.).

223. *Id.* at 401.

224. *Id.* at 393.

"both for the quality of the goods and the speed of service."[225] Although his efforts were thwarted in the House of Lords by Lord Reid, who regarded forum shopping as "undesirable,"[226] and by Lord Diplock, who noted Lord Denning's approach reminded one of Kipling's phrase — the "lesser breeds without the law"[227] — the underlying tenet of his position nevertheless bears examination. Schuz has shown that devices other than dismissals exist to deal with the perceived evils of forum shopping.[228] Because the primary undesirable aspects of forum shopping are presumed unfairness to the defendant, and lack of connection between the case and the local court, nothing is really added to the convenience rationale advanced earlier. Therefore, the same critique of convenience can be applied to forum shopping.

Comity raises slightly different concerns. Comity, in contrast to "chauvinism,"[229] implies a respect for foreign judicial proceedings. The underlying belief is that foreign litigation, particularly by foreigners who perceive advantages in litigating in the local forum, is somehow "derogatory of foreign courts" or foreigners in general.[230] Under these circumstances, declining jurisdiction is thought to further mutual respect between tribunals and enhance the credibility of individual administrations of justice. Such considerations surfaced in the *Dallal v. Bank Mellat* case: principles of comity suggested with "particular force" that the Claims Tribunal in the Hague should have jurisdiction, since the arrangement represented an international attempt to settle claims arising from the Iranian revolution.[231] However, comity historically played no part in eighteenth-century Anglo-American decisions, where courts heard and determined cases arising out of for-

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225. [1973] Q.B. 364, 381-82 (Eng. C.A.).

226. *The Atlantic Star*, [1974] App. Cas. at 453-54. Lord Reid suggested that Lord Denning's dictum reminded him of "the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races." *Id.*

227. *The Abidin Daver*, [1984] All E.R. at 407.

228. Rhona Schuz, *Controlling Forum-Shopping: The Impact of* MacShannon v. Rockware Glass Ltd., 35 INT'L & COMP. L.Q. 374, 375 (1986). These faults primarily involve modification of choice of law rules to reduce the substantive advantages gained by suing in the local forum (e.g., by providing that: (1) the *lex fori* never governs the substantive issue; (2) as few issues as possible are categorized as procedural; and (3) there is greater harmonization between the choice-of-law rules of different countries). The procedural advantages could be minimized by statutory modification of jurisdictional rules, such that jurisdiction is only established in cases which are closely related to the local forum.

229. *See* Slater, *supra* note 215, at 562.

230. *Id.* at 562 nn.212, 214.

231. [1986] 1 Q.B. 441, [1986] 1 All E.R. 239.

eign transactions. On the contrary, choice of jurisdiction rules were developed precisely to *extend* the protection given to citizens and residents in their dealings with foreigners, by subjecting the foreigners to local jurisdiction.[232] As early as 1793, American judges refused to hear cases between aliens involving foreign transactions.[233] In 1804, Chief Justice Marshall held that federal courts sitting in admiralty cases did not have to adjudicate disputes between aliens.[234] Subsequently, the greater access by aliens to the courts was based not upon the need for equality of treatment, but rather upon the inherent superiority of the local judicial system. Again, comity has long been recognized as an uncertain guide in the treacherous waters of private international law and has been abandoned as the *raison d'etre* of the subject.[235] The extent to which it is permissible to smuggle the concept through the back door to support individual doctrine is therefore questionable.

Furthermore, it is not easy to understand how comity, which implies reciprocity of treatment, is necessarily fulfilled by the unilateral decision of the local court about whether to allow litigation in the foreign tribunal. Such a decision is made without any reference at all to the likely attitude of that foreign tribunal in the equivalent case if litigation were to originate there. One should note a Canadian case which made an honest attempt to grapple with these aspects. In *Amchem Products Inc. v. Worker's Compensation Board*,[236] a British Columbia court considered whether to grant an injunction staying an action in Texas. It decided to do so partly because British Columbia was the natural forum, and also because the Texan court had issued an injunction against the action in British Columbia, thus revealing that it "did not recognize the basic considerations of comity inherent in the doctrine of *forum non conveniens*."[237] The strongest adherent of comity would confess this decision, completely ignoring the interests of the parties, is grotesque. It is, indeed, a matter of supreme irony and paradox that the very doctrine which seeks to promote comity recalls unsavory images of nineteenth-century imperialism. As presently formulated, the litigant is allowed to adduce evidence that a

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232. *See* Edward L. Barrett, Jr., *The Doctrine of Forum non Conveniens*, 35 CAL. L. REV. 380, 387 (1947); R.H. Graveson, *Choice of Law and Choice of Jurisdiction in the English Conflict of Laws*, 28 BRIT. Y.B. INT'L L. 273 (1951).

233. *See, e.g.*, Robertson v. Kerr (1793), *reported in* Rea v. Haydon, 3 Mass. 24, 25 (1807).

234. *See* Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 920 (1947) (*citing* Mason v. Ship Blaireau, 2 Cranch 240, 264 (U.S. 1804)).

235. *See* CHESHIRE & NORTH, *supra* note 216 at 4.

236. 65 D.L.R. 4th 567 (B.C. Sup. Ct. 1990) (Can.).

237. *Id.* at 595.

fair trial is unlikely in the foreign forum, but the local court cannot pass on the issue without making the very "invidious" comparisons which comity is designed to prevent. Academic writers have explored fully the reasons for avoiding the debacle that cases such as *Muduroglu* present.[238] However, the real solution might lie in the abandonment of the appropriate forum test.[239]

As driving forces behind the adoption of the modern doctrine, then, considerations of convenience, forum shopping, and comity each suffer from internal inconsistencies and contradictory judicial assessments. They provide no sure foundation for the modern movement. But there is another, more profound element that makes them entirely irrelevant to the present inquiry. Nowhere has it been, or can it be, asserted that either or all of these principles constitute a basis in the law for overriding fundamental constitutional rights. In fact, they embody no statutory or common law precepts. At best, these principles reflect practical or emotional considerations, not substantive legal principles. In short, they constitute the ideological rationale for choosing the *forum conveniens*. Nevertheless, a crucial distinction exists between political theory and constitutional reality. The former provides a theoretical critique, but can never be a prescriptive test of validity for the latter.

A. Power of the Court to Regulate Process

The court has the statutory power to strike out any pleading or indorsement on the ground that it is (a) scandalous, frivolous, or vexatious, or (b) otherwise an abuse of process of the court.[240] Further, the court may "order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."[241] Apart from the statutory source, the court has an inherent jurisdiction to stay or dismiss actions that are vexatious or frivolous, or in any way abusive of process. The statutory and inherent power has long been applied in transnational cases. Here, the court would stay an action brought within the jurisdiction in respect of a cause of action which arose out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in the defending the action as would amount to vexation and oppression,

238. *See* Barma and Elvin, *supra* note 1, at 48-67.

239. *See* Oceanic Sun Line Special Shipping Co. v. Fay, 79 A.L.R. 9 at 40 (Brennan, J.).

240. Rule 19, Order 18, Rules of the Supreme Court. *See* Supreme Court Act, 1981, 1 Statutes 17, 11 Statutes 756, 17 Statutes 37 (U.K.). Equivalent legislation exits throughout the common law world.

241. *Id.*

to which he would not be subject if he were sued in another accessible Court, where the cause of action arose.[242]

In 1929, Paxton Blair suggested that the power of self-regulation could provide the basis for *forum non conveniens*.[243] Since then, increasing attention has been paid to basing the doctrine on the regulation of process. Many cases openly found jurisdiction in this manner,[244] and it is the suppressed premise behind all the other cases. Admittedly, some compatibility of goals can be identified. In particular, one of the *Spiliada* concerns is to ensure a trial in the natural forum "for the interest of all the parties *and the ends of justice*."[245] On the other hand, several important difficulties arise from proceeding in this manner. First, the traditional application of the regulatory function within the private international law context is far removed from the modern doctrine of the natural forum. Historically, the power to regulate process was limited to dismissals or stays, where the plaintiff was acting in a way which could fall within the meaning of oppression, vexation, or abuse of process.[246] "Oppression" was held to connote "deliberate acts of moral, though not necessarily legal, delinquency," and "vexation" was said to have "overtones of irresponsible pursuit of litigation by someone who either kn[ew] he ha[d] no proper cause of action, or who [wa]s mentally incapable of forming a rational opinion on that subject."[247] Stays were granted where the action was brought to vex or harass the defendant,[248] or otherwise brought in bad faith.[249] An action brought on a plaintiff's bona fide belief of an advantage to suing in England was a sufficient answer to the defendant's application for a stay, even though the belief was, objectively, unsubstantiated and unsustainable. As Bowen, L.J., ex-

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242. THE SUPREME COURT PRACTICE 314, 315 (J.H. Jacob, et al., eds., 1976) (citing Logan v. Bank of Scotland (No. 2), [1906] 1 K.B. 141; Egbert v. Short, [1907] 2 Ch. 205; Limerick Corp. v. Crompton, [1910] 2 IR. R. 416).

243. Blair, *supra* note 107, at 18-19. Blair stated that

> [a]t the outset it should be noted that new legislation is not needed before any benefit can be expected to flow from the remedies we propose; for the doctrine in question involves nothing more than an appeal to the inherent power possessed by every court of justice — powers, that is to say, which are incontestably necessary to the effective performance of judicial functions.

244. *See* Spiliada Maritime Corp. v. Cansulex Ltd., [1986] 3 All E.R. at 843.

245. *Id.* at 854 (Lord Goff) (emphasis added).

246. Logan v. Bank of Scotland (No. 2), [1906] 1 K.B. 141 (Eng. C.A.).

247. *The Atlantic Star*, [1974] App. Cas. at 477; *but cf.* Imperial Life Association v. J.G.C. Goldings, Unreported Judgment of Apr. 22, 1991 (Supreme Court of The Bahamas, No. 102 of 1990) (broadly interpreting, *inter alia*, the power to strike out proceedings for vexation).

248. *Logan*, [1906] 1 K.B. at 142; Egbert v. Short, [1907] 2 Ch. 471; *In re* Norton's Settlement, Norton v. Norton, [1908] 1 Ch. 471.

249. *The Christiansborg*, 10 P.D. 141 (Eng. C.A. 1885).

plained in *Peruvian Guano Co. v. Bockwoldt*,[250] the basic principle was that the court was bound to hear the case, and could not put the litigant "under difficulties in the way of having his action brought to a conclusion."[251] When he dismissed the English action in *Egbert v. Short*[252] because the preponderance of connection between the case and India helped to evidence *mala fides* in the plaintiff, Warrington, L.J., suggested that even if "a grievous injustice" was occasioned to the defendant, a dismissal would yet not have been granted if "at the same time [it causes] a[n] injustice to the plaintiff."[253] It therefore came to be widely agreed that the plaintiff must have been abusing the forensic process before he could be denied access. The mere fact the case could be more conveniently handled in a foreign forum was not enough to warrant trial elsewhere. In one of the famous rejections of *forum non conveniens*, the plaintiff in *Maharanee of Baroda v. Wildenstein*[254] was ensured entitlement to proceed to judgment in England, even though the action was one overwhelmingly connected with France. The only ostensible link with England was that the service of a writ on the defendant while visiting the Ascot races gave English courts jurisdiction.[255] The classical statement of the traditional attitude belongs to Lord Denning, M.R.:

> When a plaintiff comes as of right to the courts of this country — without having to ask for leave of anyone — and seeks redress from a defendant who is here, or whose ship is here, it is the *duty* of the courts to award him the redress to which he is entitled. . . . It may be that the plaintiff is able to catch the defendant here when he is on a short visit, as at the Ascot Races . . . . But so long as he can catch him here, or his ship here, *he is entitled as of right to bring his action here: and to pursue it to its conclusion*. No one who comes to these courts asking for justice should come in vain.[256]

Further, the best-known statement of the rule upon which the traditional principles were founded was delivered by Scott, L.J., in *St. Pierre v. South American Stores*[257] in the following words:

> The true rule about a stay . . . may I think be stated thus: (1) *A mere balance of convenience is not a sufficient ground for depriving a*

250. 23 Ch. D. 225 (Eng. 1883).
251. *Id.* at 233.
252. [1907] 2 Ch. 205.
253. *Id.* at 212.
254. [1972] 2 Q.B. 283 (Eng. C.A.).
255. *Id.* at 285-86.
256. *The Atlantic Star*, [1973] 1 Q.B. at 381 (emphasis added) (citations omitted).
257. [1936] 1 K.B. 382.

> *plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought.* The right of access to the King's court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.[258]

It follows from this that any failure by the defendant to demonstrate oppression, vexation or other abuse of process, meant necessarily the first condition was unsatisfied and that a stay would be refused. A need did not exist for the plaintiff to show that trial in England would occasion an advantage to him.

On this basis, stays and dismissals are still being granted in modern conditions,[259] but the convenience test goes far beyond this. The turning point in English jurisprudence came with the House of Lords decision in *The Atlantic Star.*[260] There, overturning a Lord Denning Court of Appeal, a majority of their Lordships granted a stay of proceedings in favor of litigation in Belgium. In so doing, they chose to jettison established principles. It was accepted that no stay should be granted unless the plaintiff acted vexatiously, oppressively or in abuse of process, but the majority held that those words were to be interpreted liberally; a view which ignores Lord Salmon's subsequent warning this would result in emasculation and destruction of meaning.[261] Then came *Spiliada*, which expressly assimilated *forum non conveniens* as applied in Scotland, and "in other commonwealth jurisdictions and in the United States."[262] Since then, the doctrine has become the one intimated above (i.e., whether there is a foreign tribunal which is the more "appropriate" or "natural" for the action in the sense of being the "center of gravity" of the dispute), the only remaining issue concerns how far the courts would go. So far the courts have gone far enough.

Secondly, the power to regulate process had never been used, upon the orthodox interpretation, to defeat a substantive interest which proceedings before the court was *bona fide* intended to vindicate. By way of contrast, *forum non conveniens* achieves precisely that result

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258. *Id.* at 398.
259. *E.g.*, Muduroglu Ltd. v. TC Ziraat Bankasi, [1986] 3 All E.R. at 682.
260. [1974] App. Cas. 436.
261. MacShannon v. Rockware Glass Ltd., [1978] App. Cas. at 819.
262. [1986] 3 All E.R. at 853.

although it is possible to identify some disagreements between the various jurisdictions on this score. Under American law, the voiding of established property rights and expectations has been undertaken without fuss or bother. The extreme case is perhaps *Dames & Moore* where the Presidential relocation of litigation resulted in the negation of the plaintiff's judgment debt.[263] Others have sanctioned dismissals even where no alternative forum exists,[264] and where litigation in the natural forum results in the application to the plaintiff of an unfavorable law.[265]

English law appears to have undergone a metamorphosis on this point. A necessary corollary of the jettisoning of the traditional principles for granting a dismissal or stay was the de-emphasizing of the importance of juridical evaluation of the plaintiff's property interests. In *MacShannon v. Rockware Glass Ltd.*,[266] Lord Diplock stated that refusal to hear the dispute must not deprive the plaintiff of a "legitimate personal or juridical advantage."[267] However, His Lordship made it abundantly clear that the advantage had to be real and objective;[268] the sufficiency of a subjective assessment was no longer acceptable.

In *The Abidin Daver*, Lord Brandon went so far as to state that the defendant no longer had to satisfy the court that the action would be oppressive or vexatious to him since "the exercise of the court's discretion in any particular case necessarily involves the balancing of all the relevant factors on either side, those favoring the grant of a stay on the one hand, and those militating against it on the other."[269] *Spiliada* further decreased the importance of advantage to the plaintiff,[270] and in *de Dampierre* the point was finally put to rest: mere deprivation of a personal or juridical advantage of suing in England is not now sufficient.[271]

As we have seen, the Canadian courts appear to have balked at this final denuding of the plaintiff's rights, notwithstanding their overall embrace of *Spiliada*.[272] The most strident criticism of the Anglo-

263. *See supra* notes 158-165 and accompanying text.

264. Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 (1984).

265. Piper Aircraft Co. v. Reyno, 454 U.S. at 430 (suggesting that the "possibility of a change in substantive law should not be given conclusive or even substantive weight in the *forum non conveniens* enquiry"). *Id.*

266. [1978] App. Cas. 795.

267. *Id.* at 814.

268. *Id.* at 812.

269. [1984] App. Cas. 398 at 419.

270. *See* Collier, *supra* note 32, at 34-5.

271. [1987] 2 All E.R. 1.

272. *See supra* notes 161-162 and accompanying text.

American approach, however, was made in *Oceanic Sun Line*. Justice Brennan rejected the approach as inconsistent with the judicial function of enforcing rights and responsibilities according to the law of the forum (including private international law);[273] for Deane, J., the "natural" forum test had not been traditionally encompassed in the judicial discretion to dismiss or stay proceedings, and "cannot readily be fitted into the 'vexatious or oppressive' qualification";[274] and according to Gauldon, J., the doctrine raised fundamental problems.[275] In *Westpac Banking Corp. v. P. & O. Containers Ltd.*,[276] Pincus, J., dismissed the facts that the alleged wrongful acts had occurred abroad, and that the co-respondents and witnesses were foreigners as meaning necessarily that trial in Australia would be "oppressive and vexatious." The Australian plaintiffs were entitled to local trial notwithstanding the practical inconvenience of "contesting a matter in the antipodes."[277]

Third, the exercise of the power to regulate process has traditionally been used to further the ends of justice as *between* the parties. This power has never been used to attend to the convenience of the court per se. Yet the latter has become central to the rationale of *forum non conveniens*. *Islamic Republic Bank of Iran*[278] is an extreme example of the results that may occur when the promotion of public interest in administrative convenience is allowed to ride rough shod over justice between the litigants. There, a New York Court dismissed an action based on a relative lack of connection with New York and also on a fear the case would prove burdensome for the courts of New York, even though there was no other forum in the world where the action could be brought. Other cases take a more balanced view,[279] but the overall doctrinal flow is not encouraging.

Fourth, and not unrelated to the foregoing considerations, there is the question of constitutional validity. Establishment of a contradiction between the fundamental right of access and the power to regulate process is not, *ex facie*, enough. There is the question of the "existing law" clause. Speaking generally, the Constitutions of Jamaica,[280]

273. Oceanic Sun Line Special Shipping Co. v. Fay, 79 A.L.R. at 35, 38-39.
274. *Id.* at 49.
275. *Id.* at 55.
276. 102 A.L.R. 239 (1991).
277. *Id.* at 244.
278. 62 N.Y.2d 474.
279. British Airways Bd. v. Laker Airways Ltd., [1984] 1 Q.B. 142.
280. JAM. CONST. § 26(8).

Trinidad and Tobago,[281] Barbados,[282] Guyana,[283] Bahamas,[284] and Belize[285] provide that "[n]othing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions" ensuring fundamental rights and freedoms. The parallel in the island-states formerly in association with the United Kingdom is a general savings clause that preserves pre-existing laws. This is no place to become enmeshed in the subtle mysteries of the existing law clause,[286] although it should be observed the provision has been very active in adjudication upon governmental abridgement of individual rights; most recently the provision to justify was used in an 8% reduction in the salaries and emoluments of civil servants in Barbados.[287]

Furthermore, real doubts surround whether the convenience test, being a creature of very modern times and post-dating all present Commonwealth Caribbean constitutions, was "saved" by those constitutions.[288] It is here that some mention of *Nasralla v. Director of Public Prosecutions*[289] becomes inescapable. The constitutions of Jamaica and Trinidad and Tobago speak of the saving of "any law"; those of the Bahamas, Barbados, and Guyana refer to "any *written* law." Thus the view in relation to the latter constitutions that common law rules are not saved,[290] but in relation to the former, at least, *Nasralla* retains a power to mesmerize.

On an appeal from Jamaica, the Privy Council, through Lord Devlin, took the position the fundamental rights and freedoms found in the Bill of Rights "were already secured to the people of Jamaica by

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281. TRIN. & TOBAGO CONST. § 6.

282. BARB. CONST. § 26.

283. GUY. CONST. art. 152.

284. BAH. CONST. art. 30(1).

285. BEL. CONST. sec. 21 (now repealed).

286. For excellent discussions, see A.R. Carnegie, *Constitutional Law*, ANN. SURVEY COMMONWEALTH L. 1, 121 (1968); Francis Alexis, *When is an "Existing Law" Saved?*, PUBLIC LAW 256 (1976); DEMERIEUX, *supra* note 50, at 54-69.

287. King v. Attorney Gen., Unreported Judgment of May 15, 1992 (Supreme Court of Barbados, No. 1878 of 1991); *see also* Michael De Freitas v. George Ramoutar Benny, 26 W.I.R. 523 (1974); Hope v. New Guyana Co., 26 W.I.R. 233 (1979); Richard and Browne v. Attorney Gen., Unreported Judgment of Sept. 28, 1992 (Court of Appeal of St. Christopher and Nevis, Civil Appeal No. 1).

288. MacShannon v. Rockware Glass Ltd., [1978] App. Cas. 795 at 817B. Long after the establishment of independent constitutional government in the West Indies, the English courts were of the view that new legislation was required for its operation in that jurisdiction. As recently as 1978, Lord Salmon declared that "[t]his doctrine however, has never been part of the law of England. And, in my view, it is now far too late for it to be made so save by Act of Parliament." *Id.*

289. 6 W.I.R. 305 (Sup. Ct. Jam. 1963); 9 W.I.R. 15 (Jam. C.A. 1965); *see also* Director of Public Prosecutions v. Nasralla [1967] 2 App. Cass. 238 (appeal from Jam.), 10 W.I.R. 299 (1967).

290. DEMERIEUX, *supra* note 50, at 57.

existing law,"[291] in particular, the common law. Accordingly, the laws in force "are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions."[292] In an extreme view, the common law "saved" in this way is the "living" law, i.e., including all prospective changes.[293]

Whether a West Indian court would go this far out on the juridical limb to rescue *forum conveniens* remains to be seen. In any event, the following points merit consideration: (1) there are trends in the common law itself that are in dispute with the basic *Nasralla* thesis of supremacy of the common law; rights have been found in the Constitutions that had no existence at common law,[294] (2) the caricature of *Nasralla* herein presented has never been expressly adopted by any court; any such adoption, indeed, "threatens the Constitutions with destruction,"[295] (3) saving of the "living" common law would dramatize differences of epic proportions between the constitutions of the two Caribbean states with clauses that save pre-existing common law and those in the others that do not,[296] and (4) saving of the law in this way is difficult to reconcile with the actual wording of the clause that refers to laws "in force immediately before" independence, and would also be incompatible with the more comprehensive, and arguably superior,[297] savings clause in the Order to the Constitutions. The latter requires that the saved law be construed with such modification, adaptations, qualifications and exceptions as may be necessary to bring them "into conformity with . . . the constitutional instruments."[298] In any event, the existing law clause is inapplicable to the second source of the right of access. To the extent this right has been shown to have evolved from the form and structure of Westminster-style constitutional government, it clearly overrides an inconsistent pre-existing law.

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291. *Nasralla*, 10 W.I.R. 299, 308 (1967).

292. *Id.* at 303.

293. *Cf.* CARNEGIE, ANN. SURVEY COMMONWEALTH L. 1 (1968). Note the use by Lord Devlin of post-Independence common law authorities to determine the content of the relevant common law rule debated before the court. *See* 10 W.I.R. 299, 305 (1967).

294. Maharaj v. Attorney Gen. (No. 2), [1979] App. Cas. 385 (P.C. 1978 appeal from Jam.); Thornhill v. Attorney Gen., [1981] App. Cas. 61 (P.C. 1981 appeal from Trin. and Tobago).

295. FRANCIS ALEXIS, PUBLIC LAW 256, 270-71 (1976). Admittedly, the constitution also "saves" laws which alter an existing law but the requirement then is that the altered law is not rendered inconsistent with the provisions protecting fundamental rights. *See also* Trinidad Island-Wide Cane Farmers' Ass'n Inc. v. Prakash Seereeram, 27 W.I.R. 329 (1975).

296. ALEXIS, *supra* note 295, at 270-71.

297. *Id.* at 274-81.

298. *Id.* at 282.

C. *International Law Obligations*

A possibility that is reflected only darkly in the concept of comity is that *forum non conveniens* might be mandated by international law obligations. Dicta in *Dallal v. Mellat Bank* based dismissal of the case upon "international law and international comity."[299] American cases provide stronger support. *Dames & Moore*, for example, can be interpreted as holding that the valid conclusion of an Executive Agreement created domestic obligations which necessitated the voiding of local adjudication.[300]

The difficulty of this argument comes about when considering whether international law does in fact impose obligations of this nature. The author knows of no express treaty provision mandating application of *forum non conveniens*, although some agreements touching upon human rights might bear such a construction.[301] On the other hand, there is treaty practice *against* such application. The most striking example is the *Convention on Jurisdiction and Judgments in Civil and Commercial Matters of 1968*[302] (Brussels Convention). There is general agreement that the Convention prohibits *forum non conveniens* when the case is being heard in the court of one contracting state and the "natural" forum is that of another contracting state of the European Community.[303] It was thought that the extent of the damage of the convention was based on the *Civil Jurisdiction and Judgments Act, 1982*,[304] enacted to implement the Brussels Convention. Section 49 provided that nothing in the Act prevented a U.K. court from staying or dismissing an action "on the ground of forum non conveniens or otherwise where to do so is not inconsistent with the 1968 Convention."[305]

Recently, however, there have been two first-instance decisions in England holding the adoption of the Convention means the court of a contracting party no longer has the power to stay or dismiss proceedings for reasons of *forum non conveniens*, even if the alternative forum is the court of a non-contracting state.[306] Although the Court of

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299. [1985] 1 All E.R. 239, 255 (Hobhouse, J.).

300. 453 U.S. 654 (1981).

301. *E.g.*, Fernandez v. Wilkinson, 87 I.L.R. 445 (1992).

302. Civil Jurisdiction and Judgment Act of 1982, sch. 1 (52 Statutes 381, 878) (U.K.).

303. *See generally In re* Harrods (Buenos Aires) Ltd., [1991] 3 W.L.R. 397 (C.D. Eng.); S. & W. Berisford Plc. v. New Hampshire Ins., [1990] Q.B. 631 (Q.B. Eng.), [1990] 2 All E.R. 321, [1990] 3 W.L.R. 688; Arkwright Mutual Ins. v. Bryanston Ins., [1990] 2 Q.B. 649 (Q.B. Eng.), [1990] 3 W.L.R. 705; LAWRENCE COLLINS, 106 L.Q. REV. 535 (1990).

304. 52 Statutes 381, 878.

305. *Id.*

306. *S. & W. Berisford*, [1990] 3 W.L.R. 688; *Arkwright*, [1990] 3 W.L.R. 705.

Appeal has expressed disagreement on this latter point,[307] this is unlikely to have been the last word on the subject.[308]

Apart from the question of substantive content, the place that treaty law holds within the national system raises other obstacles. Obligations flowing from validly concluded treaties bind Commonwealth states at the international law level, but have no force in national systems without express statutory transformation. This dualistic approach has been confirmed time and again both in the common law[309] and, recently, by way of legislation in the Commonwealth Caribbean.[310] Radically different is the monism of United States law. Treaties ratified in accordance with the Constitution become part of national law:[311] a difference which probably explains why the *Dames & Moore* approach currently is impossible in West Indian law.[312]

Another possibility, that of customary law having formulated relevant obligations, could not be defeated, without more, on the ground just met. The dominant view is still sympathetic to that of Lord Denning, M.R., who in *Trendtex Trading Corp. v. Central Bank of Nigeria*,[313] suggested that customary law forms part and parcel of national law and could be applied by the local court without statutory intervention. No less universal, however, is the *Chung Chi Cheung* principle: incorporation of custom into domestic law is allowed "so far as it is not inconsistent with rules enacted by statute or finally declared by [local] tribunals."[314] On this basis, the Jamaican case of *R. v. Director of Public Prosecutions ex parte Schwartz*[315] rejected a particular application of the clean slate principle of customary international law as inconsistent with the saving of pre-existing law provisions in the constitution. Arguably, another illustration of the constitution being at variance with customary law is provided by Carnegie in the field of recognition of diplomatic immunities.[316] Under

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307. *In re* Harrods (Buenos Aires) Ltd., [1991] 3 W.L.R. 397.

308. Briggs, *supra* note 45, at 182.

309. *The Parlement Belge*, 4 P.D. 129 (1878-79); Attorney General for Canada v. Attorney Gen., [1937] App. Cas. 326 (appeal from Can.); Acting Chief of Police v. Bryan, [1985] 36 W.I.R. 207.

310. Ratification of Treaties Act 1987, (No. 1 of 1987), Antigua and Barbuda.

311. Asakura v. City of Seattle, 265 U.S. 332 (1924); Fernandez v. Wilkinson, 87 I.L.R. 446 (1992); United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

312. The Agreement with Iran was held to be an "Executive Agreement" within the executive powers of the Presidency. *See generally* J.H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 A.J.I.L. 310 (1992).

313. [1977] Q.B. 529.

314. Chung Chi Cheung v. The King, [1939] App. Cas. 160 (Eng. P.C.) (1938) (Lord Atkin, delivering the opinion of the Privy Council).

315. [1976] 24 W.I.R. 491.

316. A.R. Carnegie, *The Interface between International Law and National Law: A West*

this premise, the constitutions, in their form and content, would appear to be hostile to the incorporation of any customary rule requiring application of *forum non conveniens.*

In any event, it is extremely doubtful that customary law has generated the kinds of substantive obligations being considered. International law regulations of criminal jurisdiction is well established, the principal tenet being prohibition of extra-territorial jurisdiction, the evils of which were well articulated by Judge Moore in the *Lotus* case.[317] Some aspects of that prohibition could by parity of reasoning be held relevant in the present context: the focus on the plaintiff's right of access to the court implies a foreign defendant might have to suffer the disadvantage of an English-like forum rule for costs, the defendant having to pay the plaintiff's costs if he loses, which might be inflated by the inconvenience of the plaintiff's choice of forum. These considerations are in some degree analogous to the well-known problem of extravagance of jurisdiction asserted by the United States in anti-trust matters.

The peculiar rule of nationality in the law of extradition is contrary to such jurisdiction claims. The overwhelming majority of extradition treaties permit the sending state to decide whether to extradite its nationals to a foreign place for trial;[318] the recent U.N. Security Council Resolution requiring the Libyan government to hand over Libyans accused in the Lockerbie incident is without obvious precedent.[319] In the United States and the Commonwealth, there is widespread readiness, in principle, to surrender nationals;[320] but this contrasts sharply with general European practice. In France, the Circular of the Minister of Justice prohibited surrender of French nationals in 1841;[321] in Germany, the special duty of the state to protect its nationals required the non-extradition of German nationals;[322] in Italy, it was said the state "owes protection to its sons, and cannot abandon them to their lot, if charged with crime, to the mercy of the foreign law and judges."[323]

Indian Perspective (unpublished paper comprising the edited text of the first J.O.F. Haynes Memorial Lecture, delivered at Turkeyen, the University of Guyana, on January 8, 1991). Carnegie cites Article 139 (5) of the Guyana Constitution as providing possible support for his argument. *Id.*

317. The Steamship Lotus, P.C.I.J. (ser. A) No. 10 (1927); JOHN BASSETT MOORE, DIGEST OF INT'L. L. II, 233, 242.

318. *See generally* I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW ch. 4 (1971); EUROPEAN COMMITTEE ON CRIME PROBLEMS, COUNCIL OF EUROPE, STRASBOURG, LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES 32, 33-34 (1971).

319. S.C. Res. 731, 3033rd mtg., U.N. Doc. S/23547 (1992). It is much too soon to say whether this incident will ripen into a practice of any general significance.

320. SHEARER, *supra* note 318.

321. *Id.* at 104.

322. *Id.* at 105.

323. *Id.* at 107.

On the other hand, it is true that international regulation of civil jurisdiction has not been established to the same extent as governance of criminal jurisdiction. One hundred years ago, A.V. Dicey suggested the principle that rendered a civil court competent under international law was in fact effectiveness.[324] More recently, Ian Brownlie has asserted that "[e]xcessive and abusive assertion of civil jurisdiction could lead to international responsibility or protest at *ultra vires* acts."[325] But these comments reflect a minority position. Akehurst has suggested that apart from cases of sovereign and diplomatic immunity, "international law does not seem to impose any restrictions on the jurisdiction of courts in civil cases; it restricts jurisdiction only in criminal cases."[326]

Writers on private international law tend to agree with this assessment given the widespread acceptance of differing bases for the assumption of jurisdiction over the defendant, such as temporary presence, habitual residence, submission, nationality, domicile; the situs of property; and the place where the cause of action arose. Jurisdiction has even been based on the nationality of the plaintiff. Several states allow the assumption of jurisdiction over non-nationals and non-residents in cases having no real connection with the forum, but this practice has seldom, if ever, given rise to diplomatic protest. The problem appears to have been resolved by sovereign powers refusing to recognize judgments given in latter situations, rather than by recourse to identifying a breach of international law.

In empirical terms, there is significant state resistance to the convenience test. Acceptance of the doctrine by the United Kingdom and Ireland is unique in Europe. The view of the other contracting parties is that their continued incorporation into the European Community will gradually lead to the atrophying of *forum non conveniens*.[327] Neither state is on record as objecting to this assessment.

V. CONCLUSION

It might be useful to close this Article by passing briefly over the consequences which might ensue from any rejection of *forum non conveniens*. Since, arguably, there are no repercussions for breach of legal rules and principles, it follows that the undesirable resultants are to be found in the socio-economic and political spheres only. Practical

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324. ALBERT VENN DICEY, CONFLICT OF LAWS xxxi (2d ed. 1908).

325. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 292 (4th ed. 1990).

326. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 103 (1987); *see also* Michael Akehurst, *Jurisdiction in International Law*, 45 BRIT. Y.B. INT'L L. 165, 170-77 (1972-73).

327. SCHLOSSER, *supra* note 46, at 97-99.

problems might be presented from the forum hearing an essentially "foreign" dispute. The acquisition of *in personam* jurisdiction by Commonwealth courts on the basis of temporary presence and "technical" submission does enable the state to exercise jurisdiction over cases and parties having no real connection to the state. Real problems of inconvenience would ensue if there was no discretion to decline jurisdiction in such instances.

Additionally, the plaintiff might seek local litigation merely to harass the defendant. Mechanisms are available to deal with these situations apart from the convenience test: for example, the inherent power of the court to stay or dismiss proceedings for oppression, vexation or other abuse of process provides the flexibility required. As we have seen, this regulatory power has been used precisely to this effect.[328] The danger is allowing the discretion to be swallowed up and lost in the wider and more uncertain doctrine of *forum non conveniens*, a theory under which the courts assume extraordinarily wide powers to defeat the legitimate interests of litigants, including citizens and residents, in an attempt to enforce the protection provided by their own local law.

Put another way, amelioration of any perceived defects in the bases of the assumption of jurisdiction carries important legislative implications. The advent of more efficient rules of original jurisdiction, such as the general continental practice of basing competence on the habitual residence of the defendant, is pre-eminently a matter for the Legislature.[329] In the United Kingdom and Ireland, this was achieved through treaty arrangements with the European Community; hence the use of *forum conveniens* "to correct rules of jurisdiction in a particular case . . . will . . . be largely unnecessary."[330]

Convenience aside, an unstated fear exists that a decision given in the local forum will somehow not be as "just" as the one given in the "natural" forum. Such a view appears misplaced. It tends to overemphasize the importance of how foreign tribunals regard local decisions. To the extent foreign courts choose to distrust a local judgment, they have it within their power to refuse recognition to that judgment according to their national law.[331] Properly advised, the liti-

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328. *See* Egbert v. Short, [1907] 2 Ch. 205; Dallal v. Bank Mellat, [1986] 1 Q.B. 441, [1986] 1 All E.R. 239.

329. Although it should be remembered the mere fact that the local court is the home state of the defendant is, apparently, not enough reason not to dismiss for *forum non conveniens*.

330. SCHLOSSER, *supra* note 46, at 99.

331. *See* JOURNAL DE DROIT INTERNATIONAL 464 (1889) (in 1883, an Italian court held that Article 14 of the French Civil Code (giving jurisdiction where the plaintiff is a French national) was contrary to the law of nations); *but see* AKEHURST, *supra* note 326, at 170-177 (Italian

gant will, where such recognition and enforcement might be necessary, give due attention to these considerations before embarking on a course of action. Scrupulous adherence to constitutional protection of the right of access allows the real decision concerning the vindication of private rights to be left squarely with the litigant, both a function and corollary of the modern trend towards individual autonomy. This approach removes the dead hand of the state, albeit in the beguiling form of a well-intentioned judiciary, from a critical area of private enterprise.

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courts, however, usually hold that it is merely contrary to Italian public policy, as a reason for not recognizing French judgments based upon nationality; outside the common law world, recognition might be withheld from judgments based upon the temporary presence of defendant in the original forum).