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EDITORIAL

There is one particular aspect of this issue which serves as a cautionary tale to all of us involved in legal education and research. The excellent article on *sharia* law by Jeremy Gans of Melbourne Law School had a highly unusual route to publication. The piece was initially submitted to the *Journal* by a *different* academic from a *different* university. After a favourable peer review, subsequent communication between the editor and the purported author had a distinctly “fishy” feel to it; and a cursory search for some choice phrases on the internet revealed the article on the Social Science Research Network website, as well as its true author. Fortunately there was a happy ending to this tale, as Jeremy himself explains. But the outcome could very easily have been different.

This bizarre tale is a sad reflection on the ubiquity of plagiarism in the digital age. It is surely an extremely rare occurrence amongst academics but, as the educators amongst us are all too well aware, the temptation proves extremely hard to resist for an increasing number of those we teach. The moral of the story is that it behoves all of us to be vigilant.

TOM LEWIS

THE FACES OF ISLAMIC CRIMINAL JUSTICE

JEREMY GANS*

This paper assesses whether a major theory of comparative curial procedure, Damaska's *The Faces of Justice and State Authority*, can bridge the gap of understanding between common law and sharia criminal justice. The primary purpose of the study will be to test Damaska's thesis of the relationship between political arrangements and court procedure and the generality of his comparative methodology. The secondary purpose will be to obtain a better understanding of the criminal courts of Islam. These purposes are related. As will be seen, the limits of Damaska's regimen reflect a Western-oriented narrowness in his conception of law and the state. To understand the limits of Damaska's analysis is to gain an insight into the essence of adjudication in the Islamic world, and vice versa.

INTRODUCTION

The 1998 trial, in Saudi Arabia, of two British nurses for the murder of Australian nurse Yvonne Gilford was an occasion for scathing critiques of Islamic law in the Australian and British media.¹ Apart from the usual condemnation of capital and corporal punishments, there were also criticisms of Islamic criminal procedure, focusing on the closed nature of the hearings, the absence of defense rights traditionally associated with Western criminal proceedings and the accuracy of the outcome. While such criticisms sit well with the West's antipathy towards Islam, they fit a familiar pattern whereby unfamiliar criminal procedures are labeled unjust. This paper assesses whether a major theory of comparative curial procedure, Damaska's *The Faces of Justice and State Authority*, can bridge the gap of understanding between common law and sharia criminal justice.

Perhaps the chief problem facing all comparativists, particularly those whose field is the procedures of the world's courts, is that of rising above local experience. Shapiro argues that Mirjan Damaska, a Yugoslavian lawyer living in the United States, has such a "peregrine" viewpoint, allowing him to take the significant, but, to common lawyers, uncomfortable, step of perceiving the courts as part of public life, rather than separate from it.² This paper examines whether such a viewpoint is useful in understanding the procedures applied in criminal trials governed by the *sharia* (or Islamic law.)

In *The Faces of Justice and State Authority*, Damaska proposes a general framework for comparing different nations' curial procedures. He rejects the usual approach of

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This paper had an unorthodox route to publication, involving a novel instance of double-blind review: the editor didn't know the identity of the true author and the author didn't know that the article had even been submitted! The paper was actually written over ten years ago, but soon ended up in my bottom drawer (sadly exemplifying its own message about the dangers of comparative scholarship). The article acquired at least one fan when I placed it on SSRN, but he expressed it in an odd way submitting the paper to journals in his own name and with a changed title. The fraud was easily detected, thanks to usual trio of the plagiarist's ineptitude, the editors' sixth sense and google, but, in the case of Nottingham LJ, only after a referee had given it a positive review. Tom Lewis's email advising me of the skullduggery concluded with an offer to publish the article (in my name). This (presumably) rare case of publication by plagiarism exemplifies both the perils and the utility of the lawless internet.

¹ See J Gans & H Esmaili, 'Islamic Law Across Cultural Borders: The Involvement of Western National in Saudi Arabian Murder Trails', (2000) 28 *Denver Journal of International Law and Policy* 145.

² M Shapiro, "Book Review", (1987) 35 *American Journal of Comparative Law* 835, 837. The description is Damaska's own: M Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986) at 14–15, referring to P Brown, *Augustine of Hippo* (Faber and Faber, 1967).

Western legal writers, which attempts to classify every court as following either the adversarial or inquisitorial procedural models.³ This standard approach fails, in part, because there is no agreement on the two procedural systems' characteristics. Indeed, regimes that naturally fall within one camp have a beguiling tendency to evince certain features of the other.⁴ Instead, Damaska develops an alternative classification that operates by associating the adjudicative procedures of a particular state with that state's political features.⁵ Thus, Damaska holds that court procedure (and, hence, courts themselves) are creatures of politics.⁶

Not surprisingly, Damaska's chief concern is with the comparison between modern European and United States court procedures.⁷ However, he also examines historical bodies, communist courts and recent developments.⁸ Given this breadth, Damaska's failure to apply his analysis to Islamic courts, the adjudicative system of the world's third major legal system, is noteworthy.⁹ Damaska may have neglected Islamic law because of the difficulties Westerners face in studying this topic, which dwarf those that trouble cross-channel comparativists. Islam is at times a beguiling subject for outside observers; comparativists must appreciate the sectarian, pluralist and evolving nature of Islamic law while at the same time not disregarding how Islam unites people and institutions across space and time in a way that has no analogue in the West. The study of Islamic court procedures raises particular difficulties because Muslim jurists themselves have largely neglected this topic, leaving historical studies sketchy and modern analysis contaminated by Western approaches.¹⁰

This essay will attempt to apply Damaska's approach to Islamic criminal procedure. The primary purpose of the study will be to test Damaska's thesis of the relationship between political arrangements and court procedure and the generality of his comparative methodology. The secondary purpose will be to obtain a better understanding of the criminal courts of Islam. These purposes are related. As will be seen, the limits of Damaska's regimen reflect a Western-oriented narrowness in his conception of law and the state. To understand the limitations of Damaska's analysis is to gain an insight into the essence of adjudication in the Islamic world, and vice versa.¹¹

One of Damaska's main methodological tools is the construction of various 'ideal' political and procedural models representing the extremities of plausible court

³ *Ibid* (Damaska), at 3–6. See the examples from the literature cited in A Stein, "A Political Analysis of Procedural Law" (1988) 51 MLR 659, 659–660 (n 3–4).

⁴ I Markovits, "Playing the Opposites Games: On Mirjan Damaska's *The Faces of Justice and State Authority*" (1989) 41 *Stanford Law Review* 1313, 1314–1315.

⁵ He summarises his approach at Damaska, above, n 2 at 8–15.

⁶ Cf Shaprio, *Courts: A Comparative and Political Analysis* (University of Chicago Press, 1981), at 837; N Tate, "Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics" in J Schmidhauser (ed), *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis* (Lexis, 1987), at 7.

⁷ Damaska, above, n 2 at 69–70, 90–92, 189–194, 208–214, 218–226, 234–237.

⁸ *Ibid* 186–189 (Ancien Regime), 194–198 (Soviet criminal process), 198–199 (Mao's China), 200–201 (victim's rights), 201–202 (Prussia), 202–204 (Soviet civil process), 206–208 (Roman-Canonical), 228 (early jury), 228–299 (justices of the peace), 229 (grand jury), 229–231 (Assizes), 237–239 (public interest litigation).

⁹ His sole reference to the Islamic world was to note that the then Iranian regime could be characterised as a managerial state ruled by decentralised amateurs: *ibid*, at 13. However, this portrayal of the Iran as a co-ordinate, activist regime was not pursued when he discussed procedures linked to this category: at 226–239.

¹⁰ M C Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana, 1982), at xvii. An exception is the highly detailed account of Islamic court procedure in Morocco in L Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (CUP, 1989). Unfortunately, Morocco has long abandoned Islamic criminal procedure, so that Rosen's account was limited to civil procedure.

¹¹ J Schacht, *An Introduction to Islamic Law* (OUP, 1964) at 2, argues that the study of Islamic law "is indispensable in order to appreciate adequately the full range of possible legal phenomena."

arrangements.¹² These “ideals” will seldom be reflected in modern procedural systems, which reflect a haphazard historical development and the admixture of political influences.¹³ To ease the analysis of Islamic law (in light of the practical difficulties outlined), this essay will largely focus on traditional Islamic criminal procedure, based exclusively on the *sharia*, which ought to be well suited to analysis via comparison to “ideal” models. Such an analysis is important to modern comparativists for two reasons. First, the past trend to Westernise Islamic criminal courts has been reversed in recent times and, as the trial of the two British nurses in Saudi Arabia demonstrated, *sharia* procedure remains relevant today, including to non-Muslims.¹⁴ Second, as will be discussed at the conclusion, the continuing political importance of the *sharia* in Muslim-majority countries means that Damaska’s analysis cannot be applied to modern hybrid procedures without an understanding of the political basis of the *sharia* procedural model.

Much of the power of Damaska’s approach arises from his division of the political (and, hence, procedural) features of courts along two axes: first, the organisation of courts and, second, their broad adjudicative function. Thus, Damaska eschews the traditional “spectrum” analogy, instead positioning procedural systems between four “corners”, embodying the different extremes of the two political axes.¹⁵ The advantage of this approach is that it is capable of explaining both the similarities between apparently divergent structures and the differences among similar ones.¹⁶ This essay will discuss the two axes in turn.

Court Organisation: Unity in Diversity

The first step in Damaska’s approach is to ask how courts are organised. Damaska uses the term ‘organisation’ to refer to the qualifications of court officials, their interrelationship and the basis for their decision-making.¹⁷ There are two ideal types of court organisation. The first, “hierarchical”, ideal is a classical bureaucracy, where courts consist of professionals, organised in a hierarchy and making decisions according to technical standards.¹⁸ The second is a “coordinate” arrangement, with the opposite characteristics: amateur decision-makers indistinguishable in terms of authority, who apply “undifferentiated community standards”.¹⁹ This division obviously owes much to Weber’s study of bureaucracy.²⁰ Weber’s own analysis of Islamic justice is, therefore, of interest. Weber places “*kadijustiz*” at the least bureaucratic end of his organisational spectrum. He describes *sharia* judges, or *qadis*, as exercising “palm tree justice”, *ie* adjudicating local disputes entirely on their merits.²¹

¹² M Damaska, above, n 2 at 16–18, 97–98. Damaska derives this approach from Weber’s “ideal types”: at 9 citing M Weber, *Economy and Society*, at 215 (vol 1), at 1059 (vol 3) (University of California Press, 1968).

¹³ *Ibid* (Damaska) at 18, 92–93.

¹⁴ Above, n 1.

¹⁵ Damaska, above, n 2 at 181, where the model is set out in a tabular form *cf* Shapiro, above, n 6, at 1–64, who defines a single court ‘prototype’, basically as a tool of the political apparatus, and assesses various systems’ deviation from this model.

¹⁶ Above, n 4 at 1315.

¹⁷ Damaska, above, n 2 at 16–46.

¹⁸ *Ibid* at 18–23.

¹⁹ *Ibid* at 23–28.

²⁰ Weber, above, n 12. See also M Rheinstein (ed), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954).

²¹ *Ibid* (Rheinstein) at 213ff *cf* B Turner, *Weber and Islam: A Critical Study* (OUP, 1967). Western judges have relied upon Weber’s description of *qadis* to aid in discussions of the judicial role. Interestingly, in the United States, Justice Frankfurter described the Supreme Court’s decision-making as the antithesis of *qadi* justice (*Terminello v Chicago* (1949) 337 US 11) while, a few years earlier, Lord Chief Justice Goddard of the United Kingdom Court of Appeal conceded that, at times, English judges have a purely discretionary role not unlike that of the *qadi* (*Metropolitan Properties v Purdy* [1940] 2 All ER 188). See Rosen, above, n 10, at 58; J Makdisi, “Legal Logic and Equity in Islamic Law” (1985) 33 *American Journal of Comparative Law* 63.

The purpose of Damaska's distinction between hierarchical and coordinate officialdom is to link these two structures to clusters of court procedures.²² He argues that proceedings in hierarchical courts, because they are multilayered, continually reviewed and technical, will consist of several stages all centred on a detailed record or file. The bureaucratic imperative implies lengthy adjudicative processes, with decision-making divided between different specialised and public individuals or bodies. Decision-making, wherever possible, is resolved according to technical, and therefore reviewable, norms. By contrast, coordinate proceedings, predicated on a single, final adjudicator, are condensed around that adjudicator, with non-adjudicative functions, such as prosecution and investigation, left in the hands of outsiders. The main procedures to review decision-making precede, rather than follow, the adjudication; subsequent reviews are extraordinary, rather than regular. Coordinate structures do not call for an "institutional memory" and, indeed, demand powerful tests of evidence. Thus, oral, live testimony is preferred to the written file and the trial consists of the dramatic exposition of privately collected evidence, often by professional advocates. Damaska finds that coordinate decision-making involves an evaluation of the evidence without recourse to technical approaches.

If Damaska's theorising about procedure and Weber's characterisation of *qadi* justice are correct, then one would expect Islamic criminal procedure to conform to the second, coordinate ideal. A cursory examination of traditional *sharia* court procedure shows it to be consistent with this classification. Islamic criminal justice is dispensed by a single person, the *qadi*, and can be resolved in a single hearing.²³ The *qadi* ascertains the accused's response to the charge and evaluates the evidence proffered by the complainant.²⁴ If that evidence proves insufficient, the matter is swiftly resolved by an oath of denial from the defendant.²⁵ *Qadi* decisions are final and the *sharia* does not provide for any appeal or review structure.²⁶ The distinguishing feature of Islamic evidence law is its extraordinary focus on detailed testimony from eyewitnesses.²⁷ The majority of Muslim jurists hold that *qadis* applying Islamic sanctions for major crimes are forbidden from relying upon any form of indirect evidence, including all circumstantial and hearsay evidence.²⁸ For example, adultery cannot be proved by a pregnancy during a husband's absence or even eyewitness accounts of the parties in a naked embrace (unless there was a clear view of the precise act of penetration).²⁹ Thus, while Damaska clearly had the common law trial in mind when he formulated this procedural ideal type, Islamic criminal justice provides a much stronger example of a coordinate system of procedure.

However, aspects of Islamic criminal justice do not fit Damaska's coordinate procedural ideal. The *qadi* in a *sharia* court does not engage in any argumentation, either factual or legal, with the parties.³⁰ Professional advocates have no formal role; the *wakil*, or party's representative, permitted under traditional law, has little practical

²² Damaska, above, n 2 at 46–70.

²³ N Coulson, *An Introduction to Islamic Law* (OUP, 1964), 188–189.

²⁴ *Ibid* at 195.

²⁵ *Ibid*; M Lippman et al, *Islamic Criminal Law and Procedure: An Introduction* (Praeger Publishers, 1988), 71.

²⁶ N Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (University of Chicago Press, 1969), at 61; *ibid* (Coulson) at 68 but cf Shapiro, above, n 6 at 194–222 for the position in practice in Islamic jurisdictions.

²⁷ L Rosen, above, n 10 at 21–22, attributes the role of oral evidence in Islamic courts to the neglect of privileged legal instruments in favour of fact-finding techniques more suited to local culture.

²⁸ Above, n 11 at 192–195.

²⁹ N Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964), 126–127.

³⁰ M Lippman, above, n 25 at 68. Rosen, above, n 10 at 6–7, describes a considerable amount of argumentation in Islamic civil procedure, though it is not clear that this argumentation engages the *qadi*.

involvement in the proceedings.³¹ Moreover, confounding Damaska's characterisation of decision-making in coordinate structures as based on discretion and flexibility, *qadis* are in the exact opposite position. Weber was entirely incorrect when he described *qadis* as deciding on the basis of purely personal inclination.³² In fact, the Islamic law of evidence is so restrictive that proof is reduced to a mere formula.³³ Islamic fact-finding is performed through the intonation of presumptions, the attribution of burdens of proof and the witnessing of personal oaths.³⁴ The *sharia* determines the standard of evidence required for each crime.³⁵ Conformity with the criteria for witness competence, rather than an assessment of credibility, is the main test for whether a witness's statements will be accepted as fact by the *qadi*.³⁶ These aspects of traditional Islamic criminal procedure are better suited to Damaska's hierarchical, rather than coordinate, ideal.

Damaska's ideal types are used to analyse reality, rather than describe it. Accordingly, his analysis does not predict that all procedural systems will conform to the models he outlines. However, his methodology's usefulness for analysing a particular system depends upon the availability of an explanation for that system's deviation from the ideal. Damaska suggests that modern court procedures may differ from the ideal organisational types because a mixed organisational heritage might produce complex hybrid structures.³⁷ However, it is difficult to see how this explanation can account for diametrically opposed elements occurring within *sharia* criminal procedure, a historical system developed prior to the dawn of complex government.

A narrowness in Damaska's reasoning provides a better explanation for Islamic criminal procedure's failure to conform to the ideal coordinate system. As noted above, Damaska insists that technical standards for decision-making are exclusively a feature of hierarchical court organisation, whereas coordinate decision-makers always apply "undifferentiated community standards".³⁸ It is easy to see why Damaska claims that classical bureaucratic control demands technical standards for decision-making. However, his assertion that such standards are inconsistent with a coordinate organisation of authority betrays a Western bias: the assumption that popular consensus is incapable of supporting complex technical rules. This view, also implicit in Weber's inaccurate notion of *qadi* "palm tree justice", underestimates the ability of shared religious beliefs to bring about popular agreement on procedural standards.³⁹ Islamic law was developed with the aim of providing the inhabitants of ancient Arabia with a detailed and comprehensive personal code of conduct. The Islamic code of conduct, which includes standards for criminal justice decision-making, binds all Muslims, including *qadis*.⁴⁰ This is what guarantees Islamic law "its unity in all its diversity".⁴¹

³¹ N Coulson, above, n 26 at 61.

³² See F Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill, 1993), appendix B.

³³ Above, n 11 at 195 *cf* above, n 23 at 195: "The emphasis of the Islamic law of procedure lies not so much on arriving at the truth as on applying certain formal rules."

³⁴ *Ibid* (Schacht) at 191–197; Rosen, above, n 10 at 28–38.

³⁵ M Salama, "General Principles of Evidence in Islamic Jurisprudence" in Bassiouni, above, n 10 at 109, 115–119.

³⁶ The requirement that witnesses be *adil*, or pious, amounts to a formulaic test of credibility: see Rosen, above, n 10 at 22–23.

³⁷ *Ibid* at 18.

³⁸ *Ibid* at 21–23, 27–28.

³⁹ Above, n 11 at 4–5 *cf* Rosen, above, n 10 at 18, who argues that Western writers have ignored cultural determinants of regularity and over-emphasised the absence of legal controls.

⁴⁰ The *Quran* (5:49): "If any do fail to judge by [the light of] what God hath revealed, they are [no better than] those who rebel."

⁴¹ Above, n 11 at 200 *cf* above, n 26 at 20–39.

That *qadi* decision-making is governed by an imposed code does not mean that Islamic criminal procedure is properly characterised as hierarchical. In fact, Islamic law is profoundly non-hierarchical.⁴² Islamic law is based on the view that all legal norms are exclusively derived from the traditional sources, the *Quran* and the *sunna* (traditions of the Prophet).⁴³ Muslim legal jurists have long been prohibited from supplementing the traditional sources through interpretative and logical devices that amount to subtle law making.⁴⁴ Thus, in the absence of any privileged version of the *sharia*, the details of Islamic law are a matter for individuals utilising the traditional sources. While much Islamic thought has been crystallised through a notion of consensus formulated around historical schools of belief, Muslims have traditionally adopted a tolerant approach towards divergent interpretations of the *sharia*.⁴⁵ So, although *qadis* are bound to apply *sharia* law, the absence of any authoritative legal view means that the judicial organisation remains entirely within Damaska's coordinate ideal.⁴⁶

In summary, while Islamic criminal procedure provides an extremely strong example of the coordinate procedural ideal, as Damaska would predict given the non-hierarchical nature of authority under Islamic law, it nonetheless completely diverges from the predicted model in regards to the rules governing decision-making. Damaska's theory should be modified to account for the possibility that decision-making can be guided by a set of norms that are technical but non-hierarchical. If this adjustment is made, then the coordinate organisation of the Islamic judicial system does account for the procedural characteristics that Damaska attributed to particular forms of curial organisation. Indeed, the divergence of features of traditional Islamic criminal justice from Damaska's coordinate procedural type, its technical decision-making standards and the absence of legal and factual argumentation, have a uniquely coordinate explanation: Islamic law's denial of a privileged interpreter of the *sharia's* penal provisions applies to individual *qadis* as much as to any hierarchical legal authority.

Adjudicative Function: Detached Idealism

A traditional approach in comparative criminal procedure is to classify (and evaluate) different procedural systems according to how they pursue the ends of criminal justice. In the absence of common agreement on those ends, various attempts have been made to characterise the world's divergent justice systems as embodying different mixes of legal values, notably "due process" and "crime control" values.⁴⁷ However, this method cannot explain why any particular country has adopted a particular procedural model. Damaska's innovation in this regard is to eschew the assumption that all the various procedural systems are different approaches to a shared goal, such as accurate fact-finding.⁴⁸ Instead, he argues that procedural differences arise because different justice systems have different purposes, reflecting different political stances.⁴⁹

Just as Damaska distinguishes two types of court organisation, he also distinguishes two types of adjudicative functions. Some adjudicative systems, he argues, react to the

⁴² Shapiro, above, n 6 at 209–211.

⁴³ Above, n 11 at 112–115; above, n 29 at 53–61.

⁴⁴ *Ibid* (Schacht) at 67–69; 199–201.

⁴⁵ *Ibid* at 197–198; above, n 29 at 86–102.

⁴⁶ *Cf ibid* (Schacht) at 201–211, explaining the cultural and institutional barriers to appeals in Islamic court procedure that flow from the coordinate features of *sharia* law.

⁴⁷ H Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968). For later stages of this debate, see the articles cited by Stein, above, n 3 at 660 (n 7). See Lippman, above, n 25 at 59 for a discussion of Islamic criminal procedure in these terms.

⁴⁸ Damaska, above, n 2, at 11–12. For a critique of this approach, see *ibid* (Stein), at 668–675.

⁴⁹ *Ibid* (Damaska).

needs of individuals, while others actively seek to change individual behavior.⁵⁰ The reactive approach uses the courts as a means of supporting individuals in pursuing personal goals, while the activist stance relies upon courts to further the state's own policies. Damaska argues that these two different approaches require different procedures of adjudication.⁵¹ The reactive approach, championing individual goals and rights-based analysis, uses adjudication to resolve conflicts. On the other hand, the active approach, subsuming individuals to the state and eschewing legal rights, uses the courts to perform an inquest function aimed at facilitating state policy. In furtherance of his belief in the utility of theorising about "ideal" procedural types, a large part of Damaska's book consists of his attempt to discern pure "conflict-solving" and "policy-implementing" types of proceedings.⁵² Given the depth of detail of Damaska's description of these two procedural types, it is preferable to defer, for now, the question of whether Islamic criminal law reflects an "activist" or "reactive" political stance on adjudication. Instead, it is useful to consider the extent to which *sharia* procedural rules fit within either the "conflict-solving" procedural model or the "policy-implementing" procedural model.

Damaska argues that an overriding "laissez faire" ideology in reactive states mandates a norm of party autonomy and control, as well as a decision-making process that emphasises procedure.⁵³ As was the case with the coordinate procedural ideal, Islamic criminal procedure provides a more compelling instance of the conflict-solving procedural type than examples drawn from the West. In *sharia* trials, the parties, notably the victims of crime, are crucial to both the commencement of the hearing and its furtherance. For nearly all crimes, a hearing will not proceed without a complainant, who is also responsible for producing all witnesses.⁵⁴ In some cases, including murder, the victim is intimately involved in the punishment process, as sentencer or even as executioner.⁵⁵ Moreover, as argued earlier, technical rules of procedure, rather than substance, such as detailed standards of proof, witness qualification and oath-taking, completely determine the course and outcome of all criminal matters in *sharia* courts.⁵⁶ The *qadi* approaches the hearing as *tabula rasa* and must rely exclusively on the evidence.⁵⁷ Traditionally, trial court decisions are final.⁵⁸ Each of these characteristics is at odds with the policy-implementing procedural ideal, which, requiring maximum factual accuracy in order to better promote state goals, emphasises procedural flexibility.⁵⁹

However, as was the case with the organisational axis, some aspects of traditional Islamic criminal procedure nonetheless fall within the opposing ideal type derived from adjudicative function. The procedural rules that govern the role of individuals within a *sharia* court room reflect the policy-implementing ideal, which requires that the goals of parties to an adjudication be subsumed to the goals of the state.⁶⁰ The *qadi* is a state

⁵⁰ *Ibid* at 71–88. For a critique of this dichotomy, see above, n 4, at 1328–1336.

⁵¹ *Ibid* (Damaska) at 88–90.

⁵² *Ibid* at 97–180. For a critique of this aspect of Damaska's analysis, see above, n 4, at 1322–1328.

⁵³ *Ibid* at 97–146.

⁵⁴ Above, n 11 at 189–190.

⁵⁵ M C Bassiouni, "Quesas Crimes" in Bassiouni, above, n 10 at 203; above, n 14.

⁵⁶ See text accompanying nn 33–36.

⁵⁷ Cf AM Awad, "The Rights of the Accused Under Islamic Criminal Procedure" in Bassiouni, above, n 10, 91 at 92–94 describes investigatorial functions as administrative, not judicial. See also above, n 35 at 111–112.

⁵⁸ Coulson, above, n 26.

⁵⁹ Damaska, above, n 2, at 148–152.

⁶⁰ *Ibid* at 152–180.

employee who comprehensively controls all *sharia* proceedings.⁶¹ Witnesses are assessed and questioned by the *qadi* without contribution from other participants.⁶² Islamic criminal procedures do not yield to the parties' wishes. For example, if the defendant confesses, the *qadi* is still obliged to inquire into the confession and, indeed, encourage the defendant to retract it.⁶³ Parties, including the defendant, can be required to take oaths in relation to the crime, with a refusal automatically resulting in judgment for their opponent.⁶⁴ The *qadi* may take a pre-verdict stance that favours a particular outcome, such as imploring the complainant to retract an allegation or show mercy to the defendant.⁶⁵ The *qadi* can even impose punishments for crimes not anticipated by the parties that emerge during the trial or make collateral orders that directly affect non-participants' interests.⁶⁶ Needless to say, the roles of the *qadi* and other individuals under Islamic criminal procedure are inimical to the conflict-solving ideal, which envisages a neutral decision-maker responsive solely to the presentations of the parties.⁶⁷

Again, Islamic law's failure to conform to a particular ideal type does not disprove the correctness of Damaska's analysis. Indeed, in relation to the political function axis, Damaska foreshadows a prevalence of "mixed" procedural types in the real world.⁶⁸ One explanation he offers is procedural inertia in the face of a change in state approach. In this context, it is conceivable that the *sharia* court might have adopted procedural rules from the secular body it replaced, the traditional *hakam*, or voluntary dispute solver, a leftover from pre-Islamic times.⁶⁹ Damaska also suggests that different subject matters may call for different adjudicative functions operating within the same court. Indeed, Islamic criminal law is not a unified theoretical construct but rather, like all Islamic law, consists of a set of distinct doctrines applicable to particular factual situations.⁷⁰ In some areas, Islamic criminal law explicitly enforces a religious command, for example in relation to the *huddud* crimes that are regarded as offences against God and attract punishments fixed in the *Quran* and the *sunna*.⁷¹ In other areas, the *sharia* has a more limited function of drawing tribal practices into the Islamic system of values, for example the doctrine of *qisas*, which constrained but did not replace the tribal practice of retaliation in relation to personal crimes.⁷²

However, these explanations are inadequate to account comprehensively for the particular mix of procedures in traditional *sharia* courts. For example, why would the introduction of *sharia* courts by a more active state involve a greater reliance on procedure, at the expense of substance, as occurs in *huddud* crimes?⁷³ Also, why doesn't the apparent distinction in court functions as regards *huddud* and *qisas* crimes produce

⁶¹ Lippman, above, n 25 at 66–67.

⁶² See J Brand, "Aspects of Saudi Arabian Law and Procedure" (1986) 9 *Boston College International & Comparative Law Review* 1; above, n 25 at 70.

⁶³ Above, n 14.

⁶⁴ Lippman, above, n 25 at 71–72.

⁶⁵ MI Al-Hewesh, "Sharia Penalties and Ways of their Implementation in the Kingdom of Saudi Arabia" in T Asuni, *The Effect of Islamic Legislation on Crime Prevention in Saudi Arabia* (UNSDRI, 1980), 347 at 377.

⁶⁶ Above, n 11 at 188.

⁶⁷ Damaska does allow for "conflict-preserving" rules that override party autonomy, eg, to preserve equality between the parties, above, n 2, at 106–109; however, the *qadi's* intervention goes well beyond any such formulation.

⁶⁸ Above, n 11 at 92–93.

⁶⁹ *Ibid* at 10, 24–26; Shapiro, above, n 6 at 205 cf his general discussion of the substitution of "law and office" for consensual adjudicative practices: at 5–8.

⁷⁰ *Ibid* (Schacht) at 206–207.

⁷¹ *Ibid* at 178–181; a Mansour, "Hudud Crimes" in Bassiouni, above, n 10, at 195.

⁷² *Ibid* (Schacht) at 181–187; Bassiouni, above, n 55; above, n 14.

⁷³ See M S Al-Awwa, "The Basis of Islamic Penal Legislation" in Bassiouni, above, n 10, 127 at 141–147.

more distinctive trial procedures, rather than a convergence in most respects?⁷⁴ The mix between the two procedural types in *sharia* courts described above is not random; rather, procedures governing the role of individuals in the trial fit Damaska's policy-implementing model, while the remaining procedures, governing the boundaries of the trial, fit the conflict-solving model. Arguably, Damaska's approach ought to be able to explain why this particular mix occurs in Islamic courts.

In the previous section, a similar mixture of two procedural ideals, in that case derived from court organisation, was explained by a narrowness in Damaska's conception of the possible modes of organisation. Here, likewise, the admixture of opposing aspects of the conflict-solving and policy-implementing models in Islamic criminal procedure is best accounted by the presence in Islam of a stance on adjudicative function that falls outside of the range conceived by Damaska.⁷⁵

Both of Damaska's opposing adjudicative functions involve the courts facilitating someone's agenda or policy, be that the policy of state itself (under the activist model) or the desires of the parties to the adjudication (under the reactive model.) However, under Islam, both individual and state desires are entirely subsumed by the *sharia*. *Sharia* law is not a set of provisions designed to pursue the interests of society, but rather purports to define an ideal and complete way of life, applicable to all individuals. Indeed, early Muslim jurists saw no reason to develop a detailed theory of the state at all; rather, the role of the government is simply to facilitate the performance of *sharia* law, by itself fulfilling its religious duties.⁷⁶ However, it would be wrong to describe an Islamic state as active in promoting the law, because the state is not accorded any privileged role in interpreting the set of personal obligations that embody the *sharia*.⁷⁷ Likewise, Damaska's conception of a reactive state that takes a "laissez faire" approach to adjudication is inapposite, because Islam neither contemplates individual preferences independent of the law nor permits the government to waive its own obligation to enforce the *sharia*.

Just as Damaska's view of court organisational types reflects a Western conception about how laws are developed, his perspective on adjudicative functions reflects a Western assumption that all laws ultimately have a secular purpose. However, as the eminent Islamic law historian Coulson observed, Islamic jurisprudence is an "introspective science, wherein the law was studied and elaborated for its own sake" and this gives the doctrine the character of "detached idealism... in the sense of its general neglect of the subject of legal remedies and its contentment to define substantive rights and duties without concerning itself with any procedural machinery for their enforcement".⁷⁸ Coulson's description of Islamic jurisprudence, "detached idealism", is apt to describe the Islamic stance on adjudicative function in relation to the *sharia's* criminal law provisions. Under Islam, criminal law provisions have a distinctly subsidiary role. The *sharia* is a code of personal obligations, ranging from acts that are merely encouraged or discouraged to mandatory requirements, such as prayer, and forbidden acts, such as apostasy. The primary sanction for failure to conform to this code is a religious one. The handful of secular sanctions provided for in the *Quran* have

⁷⁴ *Ibid.*

⁷⁵ Bassiouni, "Sources of Islamic Law and the Protection of Human Rights" in Bassiouni, above, n 10, 3 at 6. See also Coulson, "The State and the Individual in Islamic Law" (1957) 6 ICLQ 49.

⁷⁶ Coulson, above, n 29 at 120–134; *ibid* (Bassiouni), at 13–15. This approach may also reflect Arab culture: Rosen, above, n 10, at 14 cites the comment: 'Arabs believe in individuals, not institutions.' He adds (at 49): "It has often been said that Islamic law is a law about and for individuals: like Islam itself the religious law asks whether an individual's actions are or are not permissible rather than attempting to decide whether the community at large possesses interests that differ from the moral and legal evaluation of individual acts."

⁷⁷ *Cf ibid* (Rosen) at 17, rejecting the view that the aim of the *qadi* is to invoke state or religious power.

⁷⁸ Coulson, above, n 29 at 82.

an exceptional flavor.⁷⁹ Their enforcement is seen as a desperate measure, performed against the background of the Islamic precepts of mercy and regard for all human life.⁸⁰ However, these laws' subsidiary nature in no way implies that they are optional. The detached idealism of Islamic law constrains a *sharia* court from both action and inaction that contradicts the *sharia*, regardless of the wishes of itself, its government or the individuals before it. As Coulson observes, this explains the repeated historical accounts of a reluctance on the part of Muslim scholars to become *qadis*.⁸¹

The detached idealist model of the Islamic state explains the particular division of Islamic criminal procedural rules between the conflict-solving and policy-implementing types observed above. A detached idealist state acts on the optimistic assumption that individuals will obey their personal obligations. Hence, such a state will never act unless approached with evidence of incorrect behaviour and will gladly cut short the proceedings should the complaint be withdrawn. Thus, the procedures that define the overall shape of proceedings in a detached idealist adjudication will fit the conflict-resolution model. However, detached idealist procedures, once properly activated, cannot be governed by individual desires. Accordingly, the procedures that define the role of participants and officials will fit the policy-implementation model.

In summary, Damaska's thesis that certain procedures in a court can be attributed to the adjudicative function of that court requires an alternative to the active and reactive models if it is to explain the mix of procedures from the conflict-resolution and policy-implementation ideals embodied in traditional Islamic criminal procedure. *Sharia* courts can be characterised as conforming to a detached idealist model, with the court and individuals both bound by a comprehensive behavioural code under which the criminal sanction has a subsidiary, but nonetheless mandatory role. The procedural type that correlates with this approach, with "conflict-resolution" procedures governing the boundaries of the trial and "policy-implementation" procedures governing the role of individuals in the trial, is reflected in *sharia* criminal procedure. Accordingly, the detached idealist model of the Islamic state and Damaska's theory of procedural types and political functions are both supported by the example of traditional Islamic criminal procedure.

CONCLUSION

Is Damaska's comparative methodology applicable to traditional Islamic criminal procedure? The analysis in this article suggests that it is not. For both political axes, the "ideal types" that Damaska introduced as key conceptual tools sit poorly with Islamic theory in general and Islamic criminal procedure in particular. While Damaska does not predict a congruence between the "ideal types" and the real world, the particular discrepancies in Islamic criminal procedure are not susceptible to any compelling historical or administrative explanation. Instead, Damaska's formulations fail because they rest on notions of individuals, states and courts that are incompatible with the fundamental structure of *sharia* law. Broadly, the ideal political models at the heart of Damaska's approach are incompatible with a legal system that is exclusively based on a comprehensive code of personal obligations. In particular, Damaska fails

⁷⁹ Above, n 11 at 199, Schacht argues that even provisions that attract a fixed punishment for their breach are primarily meant as "injunctions to refrain".

⁸⁰ *Ibid* at 198. Schacht writes: "in lawsuits concerning offences punishable by *hadd* it is considered more meritorious to cover them up than to give evidence on them . . .".

⁸¹ Above, n 29 at 126. Coulson quotes a newly appointed *qadi* who informs his daughter that "[t]oday your father is slaughtered without a knife".

to recognise that a dispersed court structure can nonetheless apply a single set of technical norms and that a system of adjudication can operate independently of both state and individual agendas.

However, there are two responses that can be made in defence of Damaska's thesis. First, the failure of Damaska's notions of ideal political types to encompass Islamic law (and, hence, to predict the features of Islamic criminal procedure) must be balanced against the success of the application of his comparative methodology once his models of court organisation and adjudicative function are adjusted. Damaska's primary thesis is that court procedures can be understood as a taxonomy of political characteristics of adjudicative officialdom and function. The above discussion demonstrates that the mass of procedural rules of *sharia* courts do prove capable of being classified and understood in terms of the organisation and function of the curial apparatus, just as Damaska predicted. The analysis performed above linked all the Islamic criminal procedural norms examined, classified according to the four ideal model procedural systems set out by Damaska, to the coordinate (but united) organisation of *sharia* courts and the detached idealism of *sharia* adjudication. That this occurred despite findings that Damaska's particular "ideal types" were inapplicable to Islam should be regarded as strong evidence of the generality of his thesis.

However, just as the robustness, not to mention import and intuitive appeal, of Damaska's thesis of the link between politics and procedures cannot be denied, the lack of robustness of his taxonomic method cannot be ignored. In the introduction to *The Faces of Justice and State Authority*, Damaska criticises previous literature on comparative criminal procedure for failing to produce procedural taxonomies that equate with the myriad examples of procedural systems both within and outside of the West. His goal is to produce a "unitary scheme" of procedure, by relying on political assessments that rise above "parochial legal sensibility".⁸² In this light, the failure of his methodology, not simply in misclassifying the political characteristics underlying Islamic law, but rather in failing altogether to allow for the very features that make Islam's politics (and, hence, as the above analysis showed) its procedure, unique, is disappointing. This failure implicates the utility of his comparative method in all contexts, not simply in regards to Islamic systems, as it raises the prospect that other systems of procedure, including the systems that he explained as complex anomalies or hybrids, will require the development of further conceptions of adjudicative organisation or function before they can be laid open to political analysis. It may be that Damaska's approach merely replaces the chaos of non-political classifications of procedure, such as the adversarial and inquisitorial models and due process and crime control "values", with a new chaos of political characterisations of the courts and legal systems. One may ask: what is the utility of the "peregrine" viewpoint that political analysis provides for procedural studies, if that political analysis is itself mired in local experiences, such as Damaska's Western preconceptions of the law and the state?

A second defence of Damaska's methodology is that it does not purport to describe all plausible procedural systems, but rather those that have actually been applied in practice. Accordingly, it could be argued that the applicability of Damaska's thesis to Islamic criminal justice should not be assessed according to its ability to explain traditional Islamic criminal procedure and that pure system's political ideals, but rather by its ability to illuminate the criminal procedures applied in practice in Muslim-majority nations. A cynic may well argue that, regardless of the Islamic philosophy of subservience of individuals and the state to the law, historical and common sense

⁸² Damaska, above, n 2 at 13–15.

experience suggests that the law will, ultimately, become the tool of the state, its powerful individuals and their secular goals, albeit clothed in religious principles.⁸³ In fact, a consideration of more modern Islamic court arrangements clearly shows that many countries have, in practice, partially or wholly abandoned *sharia* criminal law and that governments of Muslim-majority nations, which have developed into bureaucracies like their Western counterparts, have adopted non-Islamic legal institutions.⁸⁴ In nearly all Muslim-majority nations, criminal procedure has been partially or wholly Westernised.⁸⁵ Indeed, Shapiro argues that a key characteristic of Islamic court procedure, its lack of appellate review, has waxed and waned according to political vicissitudes.⁸⁶

Nonetheless, the view that the law and the courts are creatures of politics must be applied with caution to Islamic institutions, even today. Islamic legal scholars have long been aware of the capacity for the powerful classes to twist the *sharia* to their own ends. As a result, centuries before common lawyers began to write about such matters, *sharia* lawyers developed a sophisticated understanding and awareness of the use of legal devices to co-opt traditional sources of authority and fought to control them.⁸⁷ Arguably, the individual focus of *sharia* law has saved it from politicization.⁸⁸ Moreover, the basic political philosophies behind Islamic criminal law, including the unified legal doctrine applied by coordinate judges and the detached idealism of their adjudication, outlined in this essay, remain a rhetorical ideal of political discussion of criminal justice in modern Islamic states, especially in times of turmoil.⁸⁹ One consequence is that a number of governments of Muslim-majority nations continue to regard *sharia* courts as the primary judicial instrument of the state, even when those courts' jurisdiction has been supplanted in practice by administrative bodies.⁹⁰ Another consequence is that the modern political movement to re-Islamicise legal institutions has placed tremendous symbolic importance on the re-establishment of *sharia* courts' criminal jurisdiction.⁹¹ Thus, the *sharia* continues to exert an influence on all modern Islamic criminal procedure and comparativists ignore the traditional form of that procedure at their peril.⁹² Indeed, Damaska's critics in the West argue that it is wrong to disregard the importance of legal philosophy when studying continental and common law court procedures. Markovits argues that Damaska's analysis neglects the

⁸³ Cf Shapiro's (above, n 2) disdain for Dworkin's argument that common law judges rise above politics through legal logic.

⁸⁴ This occurred roughly in three ways. First, because *sharia* law contemplated administrative government but did not purport to regulate it, Islamic states were able to bypass *sharia* courts by setting up alternative institutions to enforce criminal law, such as police and administrative courts: Shapiro, above, n 6, 206–209. Second, through a variety of measures ranging from procedural devices to quasi-legislation, the states obtained a degree of control over the content of *sharia* law's provisions relating to criminal law. Finally, and most importantly, in the name of modernisation, most Islamic states adopted Western criminal procedures: Coulson, above, n 29 at 149–162. On historical conflicts between *qadis* and the state, see Rosen, above, n 10 at 62. On Islamic law reform generally, see Anderson, *Law Reform in the Muslim World* (1976).

⁸⁵ Lippman, above, n 25 at 99–103. Saudi Arabia is a notable exception.

⁸⁶ Shapiro, above, n 6 at 211–222; cf Coulson, above, n 29 at 163–164.

⁸⁷ Above, n 11 at 4 cf Rosen, above, n 10, at 16, who rejects the Western assumption that Arab's concern for language is merely empty etiquette and rhetorical flourish.

⁸⁸ *Ibid* (Schacht) at 61: "By remaining resolutely focused on the individual the legal establishment forsook the politicization of the law; by avoiding inclusion of the law as an instrument of state policy the political authorities passed up the opportunity to use law as a vehicle of political centralization".

⁸⁹ Cf Lippman, above, n 25 at xiv, 130.

⁹⁰ Cf the Ottoman sultan's failure to seize control of the judiciary because of the overriding requirements that *qadis* be learned in the *sharia*: Shapiro, above, n 6 at 219–221.

⁹¹ Schacht, above, n 11, at 1 writes that "the Law... remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas." cf at 3; Coulson, above, n 29 at 6–7; N Coulson, "Law and Religion in Contemporary Islam" (1978) 29 *Hastings Law Journal* 1447.

⁹² Cf Coulson, above, n 29 at 7 writes: "The Muslim jurist of today cannot afford to be a bad historian." cf above, n 26, at 96–116.

importance of rights-based conceptions of the law as a determinant of the nature of court proceedings.⁹³ Accordingly, she criticises Damaska's portrayal of the procedures of various Western systems as focussing overly on physical formalities, to the neglect of their underlying natures.⁹⁴ Stein questions Damaska's claim that differing political functions will produce different procedures, arguing that the rationalist approach to the goal of factual accuracy will unite disparate systems.⁹⁵ In a later paper, Damaska himself rejects the view that cultural divergences can be treated as embodying divergent approaches to fact-finding.⁹⁶

The above points can be drawn together by suggesting that the failure of Damaska's methodology in the case of traditional Islamic criminal justice is an example of a general flaw in Damaska's approach that applies to Western and non-Western systems alike. Damaska's primary thesis is that the bulk of procedural rules in courts are political tools. Like many political scientists, he regards all state institutions as creatures of political processes. However, the political scientist's viewpoint, while indeed extending understanding of the courts, comes with a cost: it neglects the way in which political arrangements may themselves be shaped around cultural and institutional factors, such as those that can be embodied a particular jurisprudential approach. Scholars of Islam have long cautioned against ignoring the two-way relationship between law and society. Thus, Schacht, the premier Western writer on Islamic law, reversing what might be thought of as the obvious approach to his field of study, wrote: "it is impossible to understand Islam without understanding Islamic law".⁹⁷ Arguably, the peregrine viewpoint of an Islamic visitor to the West confirms what Damaska's local critiques have argued: that Damaska's attempt to understand procedures through an analysis of politics is incomplete, because a state's politics is partially determined by its laws, which in turn shape its procedures.

In summary, Damaska, by freeing himself from common law biases about the courts, has been successful in developing a political explanation for a huge variety of court procedures, one which proves applicable, with significant modifications to Damaska's methodology, to the traditional procedural system of *sharia* criminal courts. However, the example of Islamic criminal justice demonstrates that Damaska, like most Westerners, is not a "peregrine" from the Western viewpoint on law, individuals and the state. A unified theory of procedure that can encompass both the traditional and modern faces of Islamic criminal justice, and adjudicative systems more generally, will require careful attention to the two-way relationship between political and legal philosophy.

⁹³ Markovits, above, n 4 at 1315.

⁹⁴ *Ibid* at 1320–1323. Markovits cited the example of the procedural changes in United States juvenile justice proceedings, claiming that the shift from "policy-implementing" to "conflict-solving" procedures did not reflect a movement from an active to reactive function but rather a change in process values. She also argued that the hierarchical, activist West German civil code had more in common with the coordinate, reactive United States model than with the hierarchical, activist Soviet approach.

⁹⁵ Stein, above, n 3 at 668–675.

⁹⁶ Damaska, "Rational and Irrational Proof Revisited" (1997) 5 *Cardozo Journal of International & Comparative Law* 25. For an argument that Islamic fact-finding (including its presumptions and oaths) is rational in the context of its culture, see Rosen, above, n 10 at 39–57.

⁹⁷ Above, n 11 at 1; Rosen, above, n 10 at xiii, argues that, to Holmes J's statement: "If your subject is law, the roads are plain to anthropology" should be added the words "and vice versa".

MISUSE OF DRUGS LEGISLATION AND ITS EFFECTS ON PHARMACISTS SINCE 2004

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The regulation of medicines in the UK has traditionally been a somewhat piecemeal affair. For example, the Medicines Act 1968 was subject to 115 statutory instruments during the period from its enactment to the prorogation of parliament in 2004, while 31 had statutory instruments affected the Misuse of Drugs Act 1971 to that date. Typically these statutory instruments changed some small detail or definition, such as the characterisation of a homeopathic medicine.¹ Occasionally more substantial changes, such as those surrounding the carrying on of clinical trials,² have been affected by regulation. The amendment of primary legislation in this area involves approximately four to six statutory instruments per year. Typically, no more than one or two of these amendments relate to controlled drugs referred to by pharmacists by the acronym CDs. The vast majority of such changes are silent, altering only some minor detail of the law with little substantive effect. As such, these modifications have little or no effect on the day-to-day work of practising pharmacists. However, there have been periods during which more substantial changes took effect, usually in response to some political or social stimulus.

Prior to 2004, the legislation relating to controlled drugs had barely changed in 20 years,³ since the introduction of the Misuse of Drugs Regulations 1985.⁴ The murders of numerous patients by Dr Harold Shipman, using the CDs pethidine and diamorphine, suggested that the law as it stood at the time was inadequate to protect the public fully from the misuse of CDs. Consequently, the fourth report of the Shipman Inquiry made numerous recommendations to change the CD legislation. At the same time, the UK Government was pursuing a policy of widening the roles of many non-medical health care professionals to include prescribing rights. The years 2004 to 2007, therefore, saw a series of legislative changes affecting community pharmacists in their routine work. This review sets out to examine those changes, and the information made available to pharmacists by their regulatory body, the Royal Pharmaceutical Society of Great Britain (RPSGB), to help them stay compliant with the law.

The RPSGB, through its Legal and Ethical Advisory Service, issues law and ethics bulletins to highlight current problems and inquiries relating to its interpretation of medicines legislation. These bulletins are printed in the *Pharmaceutical Journal*, the official journal of the RPSGB, which is sent free of charge to all members of the Royal Pharmaceutical Society and to registered pharmacy technicians. The *Pharmaceutical Journal* has been published weekly since 1870. The RPSGB and other trade organisations, such as the National Pharmacy Association (NPA), also provide legal advice to registered members. However, this report will limit its discussion of advice relating to controlled drugs to the RPSGB's law and ethics bulletins.

The purpose of this review is to illustrate the fact that the significant legislative activity since Shipman has done little to remedy the admitted practical deficiencies in

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¹ The Medicines Act 1968 (Amendment) (No 2) Regulations 1994 (SI 1994/276).

² The Medicines for Human Use (Clinical Trials) Regulations 2004 (SI 2004/1031).

³ Bellingham C, "Impact of Shipman: how regulation of Controlled Drugs looks set to change" (2004) 273 *Pharmaceutical Journal* 109–110.

⁴ The Misuse of Drugs Regulations 1985 (SI 1985/2066).

the legal framework and that a doctor, such as Shipman, intent on harming patients would still be able to do so.

2004: THE FOURTH REPORT OF THE SHIPMAN INQUIRY

January 2004 saw a series of seminars held by the Shipman Inquiry to hear evidence from a number of expert witnesses as to the handling of CDs in the community.⁵ At that point in time, prescriptions for CDs were valid for 13 weeks from the date on which they were written, and there was no limit to the amount that could be supplied. Since 1971, pharmacies have been required to keep a record of all CDs that enter or leave their stock in a specially-formatted register maintained for that purpose. However, in 2004, there was still no legal requirement for pharmacists to keep running balances in CD registers, or for each dosage form or strength of CD to have a separate register. There was also no obligation to record the name of the person collecting the CD at the time of dispensing.

The Shipman Inquiry published its fourth report on 15 July 2004.⁶ This made a number of recommendations for the Government to consider, covering changes to prescriptions for CDs, changes to the CD register, and changes to the inspection process. The report also proposed giving pharmacists more discretion, such as allowing them to dispense CD prescriptions which contained a technical error, but where the intention of the prescriber was clear. Recommendations on destruction of CDs and on giving patients more information about CDs were also made.

The Royal Pharmaceutical Society of Great Britain published a response to the fourth report in November 2004, welcoming its findings but aiming to ensure that the pharmacy profession's views would be considered.⁷

The Government's response to the fourth report was published on 9 December 2004.⁸ This set out its plans to modify the regulations governing CDs across all health and social care environments in the UK. The legislative amendments began the following year.

2005: THE CHANGES BEGIN

Schedule 2 of the Misuse of Drugs Act 1971 lists CD in classes based on their potential harmfulness. Under the Misuse of Drugs Regulations 2001,⁹ those CDs listed in the 1971 Act are ordered in Schedules for regimes of control: Schedules 1 CDs are subject to the most stringent controls, which decrease through the Schedules to Schedule 5.

The first change, in February 2005, was unrelated to the Shipman Inquiry. The Misuse of Drugs (Amendment) Regulations 2005 were made,¹⁰ coming into force on 14 March 2005. These allowed supplementary nurse and pharmacist prescribers to prescribe and administer any CD provided they were within the terms of a clinical management plan, essentially an agreement between the patient, their doctor and the pharmacist.

⁵ Bellingham C "Shipman Inquiry: impact on pharmacy"(2004) 272 *Pharmaceutical Journal* 81–82.

⁶ The Fourth Report of The Shipman Inquiry. London: Central Office of Information; 2004.

⁷ Society's Shipman response and briefing published. (2004) 273 *Pharmaceutical Journal* 718.

⁸ Safer management of controlled drugs: the Government's response to the fourth report of the Shipman inquiry.

⁹ The Misuse of Drugs Regulations 2001 (SI 2001/3998).

¹⁰ The Misuse of Drugs (Amendment) Regulations 2005 (SI 2005/271).

A number of amendments to the 2001 Regulations were laid before Parliament in October 2005, and came into force on 14 November 2005: the requirement that prescriptions for CDs in Schedules 2 and 3 had to be in the prescriber's own handwriting was removed.¹¹ Prescriptions still had to be written indelibly, in accordance with the Medicines Act 1968 (as amended),¹² but all legal components of the prescription except for the prescriber's signature could now be computer-generated.¹³

CD registers could now be computerised provided that every entry was attributable and capable of being audited, the register was accessible from the premises to which it related, and the system was in accordance with best practice guidelines endorsed by the Home Secretary.¹⁴ The requirement for registers, requisitions, orders and private prescriptions for CDs to be preserved for two years was amended to allow the information to be preserved either in paper form or copied and kept in computerised form. Persons authorised by the Secretary of State (*ie* inspectors of the Society) could request that a copy of a computerised register was sent to them, either in computerised or other form.¹⁵

The range of CDs that extended formulary nurse prescribers (EFNPs) could prescribe was extended.¹⁶ EFNPs could now, in addition to diazepam, lorazepam and midazolam (Schedule 4), prescribe diamorphine, morphine or oxycodone (Schedule 1) for palliative care. Following further legislative changes,¹⁷ they could also prescribe: buprenorphine (Schedule 3) or fentanyl (Schedule 1) for transdermal use in palliative care; diamorphine or morphine for pain relief in suspected myocardial infarction or for relief of acute or severe pain after trauma including post-operative pain relief; and chlordiazepoxide or diazepam (Schedule 4) for treatment of alcohol withdrawal. EFNPs could continue to prescribe codeine, dihydrocodeine or co-phenotrope.¹⁸

On 2 December 2005, the Medicines for Human Use (Prescribing)(Miscellaneous Amendments) (No 2) Order 2005 was made,¹⁹ coming into force on 6 January 2006. This allowed EFNPs to prescribe the CDs provided for in the earlier regulations.²⁰ Pharmacists were advised of this change on 7 January 2006.²¹

Ascorbic acid, commonly used to convert heroin base to an injectable form, was added to the list of articles for administering or preparing CDs that pharmacists could supply to drug users.²² The same statutory instrument also amended the Misuse of Drugs (Supply to Addicts) Regulations 1997,^{23,24} by removing the exemption for preparations containing not more than 0.1% cocaine from prohibitions on import, export and possession.

¹¹ The Misuse of Drugs Regulations 2001 (SI 2001/3998) (Reg15(1)(a)).

¹² The Medicines (Products Other Than Veterinary Drugs) (Prescription Only) Order 1983 (SI 1983/1212).

¹³ The Misuse of Drugs and the Misuse of Drugs (Supply to Addicts) (Amendment) Regulations 2005 (SI 2005/2864) (Reg 9).

¹⁴ *Ibid* (Reg 3(2) and 10).

¹⁵ *Ibid* (Reg 12).

¹⁶ Nurse prescribers who have completed the necessary training and are authorised to prescribe from the Nurse Prescribers' Extended Formulary.

¹⁷ The Medicines for Human Use (Prescribing) (Miscellaneous Amendments) (No 2) Order 2005 (SI 2005/3324).

¹⁸ The Misuse of Drugs and the Misuse of Drugs (Supply to Addicts) (Amendment) Regulations 2005 (SI 2005/2864) (Regs 5, 6, 7 & 8).

¹⁹ The Medicines for Human Use (Prescribing) (Miscellaneous Amendments) (No 2) Order 2005 (SI 2005/3324).

²⁰ The Misuse of Drugs and the Misuse of Drugs (Supply to Addicts) (Amendment) Regulations 2005 (SI 2005/2864) (Regs 5, 6, 7 & 8).

²¹ (2006) 276 *Pharmaceutical Journal* 21.

²² The Misuse of Drugs and the Misuse of Drugs (Supply to Addicts) (Amendment) Regulations 2005 (SI 2005/2864) (Reg 4).

²³ *Ibid* (Regs 13 & 14).

²⁴ The Misuse of Drugs (Supply to Addicts) Regulations 1997 (SI 1997/1001).

These amendments were all explained in a law and ethics bulletin in The Pharmaceutical Journal published on 12 November 2005.²⁵ This also explained that best practice guidance on computerised systems meant that: the author of each entry had to be identifiable; entries could not be altered at a later date; a log of all data entered had to be kept and could be recalled for audit purposes; access control systems had to be in place to minimise the risk of unauthorised or unnecessary access; adequate backups had to be made; and arrangements had to be made so that inspectors could examine computerised records during a visit with minimum disruption to the dispensing process.

On 15 November 2005, The Misuse of Drugs Act 1971 (Amendment) Order 2005 was made,²⁶ which came into force on 1 January 2006. This made ketamine a Class C CD under the Misuse of Drugs Act 1971. A statutory instrument,²⁷ made on 6 December 2005 and coming into force on 1 January 2006, classified ketamine as a Schedule 4, Part 1 CD. A law and ethics bulletin in the Pharmaceutical Journal advised pharmacists of this change on 7 January 2006.²⁸

2006: STATUTE FOLLOWS GUIDANCE

In March 2006, the Department of Health issued interim guidance on the prescribing, supply and dispensing of CDs.²⁹ The arrangements came into force on 1 April 2006, although statutory backing would only follow later that year.³⁰ Pharmacists were expected to follow the guidance even though it was not enforceable. A news item in the Pharmaceutical Journal of 18 March 2006 briefly summarised the changes;³¹ the following issue, on 25 March 2006, contained a more detailed article.³² The RPSGB also published detailed guidance for pharmacists on the impending changes.³³

The guidance relating to private prescriptions made several provisions, each designed to decrease the potential for forgery (despite the fact that the Shipman case had nothing to do with forged prescriptions). The guidance provided that dedicated prescription forms would be introduced for private prescribing of Schedule 2 and 3 CDs (FP10PCD). Prior to this, such prescriptions could be written in the back of an envelope, provided the provisions of Reg 15 of the 2001 regulations were met. Additionally, the guidance forecast that private prescribers would be issued with a unique 6-digit private CD prescriber code, and that community pharmacists would have to collate the private prescriptions each month and send them to the Prescription Pricing Authority (PPA) in the same way as for NHS prescriptions. In the past, private prescriptions, had to be preserved for two years from the date on which the supply was made.³⁴ In the interim period between 1 April 2006 and the date that the guidance became legislation, community pharmacists would have to send a photocopy of the FP10PCDs to the PPA and keep the original for their own records. This would ensure

²⁵ "Amendments to the Misuse of Drugs Regulations: guidance for pharmacists." (2005) 275 *Pharmaceutical Journal* 617.

²⁶ The Misuse of Drugs Act 1971 (Amendment) Order 2005 (SI 2005/3178).

²⁷ The Misuse of Drugs (Amendment) (No 3) Regulations 2005 (SI 2005/3372).

²⁸ (2006) 276 *Pharmaceutical Journal* 21.

²⁹ Safer Management of Controlled Drugs (CDs): 2 Private CD prescriptions and other changes to the prescribing and dispensing of controlled drugs (CDs). Department of Health; 2006.

³⁰ The Misuse of Drugs (Amendment No 2) Regulations 2006 (SI 1006/1450).

³¹ "New Controlled Drug prescribing rules introduced". (2006) 276 *Pharmaceutical Journal* 307.

³² "Changes in the management of CDs affecting pharmacists in England" (2006) 276 *Pharmaceutical Journal* 355.

³³ Changes in the management of controlled drugs affecting pharmacy: England, Scotland and Wales. RPSGB; 2004.

³⁴ The Misuse of Drugs Regulations 2001 (SI 2001/3998) (Reg 23).

compliance with the legislation as at 1 April 2006. After the change in legislation, pharmacists would have to send the original FP10PCDs, although they were recommended to keep a copy for their own records.

Guidance regarding dispensing of NHS prescriptions for CDs provided that NHS prescription forms (FP10) would be changed to include an additional declaration, for use when the patient, or someone acting on behalf of patient, collected a Schedule 2 or 3 CD. The new FP10 would be used for all NHS prescriptions, not just Schedule 2 and 3 CDs. The new form would be phased in gradually as stocks of the old form were exhausted.

Further guidance related to all CD prescriptions, whether NHS or private. Any person collecting a Schedule 2 CD against a prescription should be asked to provide evidence of identity and to sign the back of the prescription form. Any person collecting a Schedule 3 CD against a prescription would have to sign the back of the prescription form.

The pharmacist would have discretion to supply a Schedule 2 CD to a patient or patient's representative where no identification (ID) was presented. The pharmacist would also have discretion not to ask for ID if they felt that doing so would compromise patient confidentiality. If ID were not supplied, the pharmacist would have to record this in the CD register.

The validity period of NHS and private prescriptions for Schedule 2, 3 and 4 CDs would be reduced from 13 weeks to 28 days *ie* the prescription should not be dispensed if more than 28 days had elapsed since it was signed and dated by the prescriber. NHS and private prescribers would be strongly advised to restrict prescriptions for CDs to 30 days' supply, although a longer period would be allowed in exceptional circumstances. These new arrangements would not apply to instalment prescriptions on NHS forms (FP10 MDA), used for the treatment of drug dependency, except for the reduction in validity from 13 weeks to 28 days, which applies to all such prescriptions.

On 29 March 2006, the Misuse of Drugs (Amendment) Regulations 2006 were made,³⁵ which came into force on 1 May 2006. They changed the title of EFNPs to Nurse Independent Prescribers, and also allowed Nurse Independent Prescribers to prescribe and supply diazepam, lorazepam and midazolam for the treatment of tonic-clonic seizures. On 8 April 2006, a law and ethics bulletin in the *Pharmaceutical Journal* reminded pharmacists of the changes which came into force on 1 May.³⁶ It advised that pharmacists should follow the Department of Health guidance wherever possible, but that until the legislative changes had been made, pharmacists could, in exceptional circumstances dispense outside of the guidelines in accordance with a legally valid prescription. As not all prescribers would have their new private prescription forms immediately, a private prescription not on a designated form would still be legally valid. A further bulletin was published on 20 May 2006,³⁷ reminding pharmacists of the 28 day validity period of prescriptions for schedules 2, 3 and 4 CDs.

The Misuse of Drugs (Amendment No 2) Regulations 2006 were made on 27 May 2006.³⁸ They made several changes to the existing legislation, with effect from 7 July 2006. These changes brought into law many of the Department of Health's interim guidance. They formally introduced standardised prescription forms would have to be used for private prescribing of Schedule 2 and 3 CDs for dispensing in community

³⁵ The Misuse of Drugs (Amendment) Regulations 2006 (SI 2006/986).

³⁶ (2006) 276 *Pharmaceutical Journal* 426.

³⁷ (2006) 276 *Pharmaceutical Journal* 607.

³⁸ The Misuse of Drugs (Amendment No 2) Regulations 2006 (SI 2006/1450).

pharmacies, which would have to contain the prescriber identification number.³⁹ The validity of Schedule 2, 3 and 4 prescriptions issued on or after 7 July 2006 was restricted to 28 days from the appropriate date on the prescription.⁴⁰

The Regulations also allowed pharmacists to make certain amendments to Schedule 2 and 3 CD prescriptions except those for the sleeping agent temazepam (Schedule 3). Only minor typographical errors, such as spelling mistakes, could be corrected, and only where the pharmacist, having exercised all due diligence, was satisfied that the prescription was genuine and that he or she was supplying the drug in accordance with the prescriber's intention; he or she amended the prescription indelibly so that it complied with the CD prescription requirements; and that he or she marked the prescription so that the amendment was attributable to him.⁴¹

For Schedule 2 CDs, pharmacists had to ascertain whether the person collecting the drug was the patient, the patient's representative or a healthcare professional acting on behalf of the patient.⁴² This was more strongly asserted than in the interim guidance, which had only declared that the pharmacist *may* ask for such information. Where the person was the patient or the patient's representative, the pharmacist could request evidence of that person's identity and refuse to supply the drug if not satisfied as to the identity of that person;⁴³ where the person was a healthcare professional, the pharmacist had to obtain that person's name and address and, unless acquainted with that person, was obliged to request evidence of that person's identity. The pharmacist could, however, supply the drug even if not satisfied as to identity.⁴⁴ Finally, and as previously outlined, private prescriptions for Schedule 2 and 3 CDs, or copies thereof, had to be sent to the PPA at the end of every month.⁴⁵

The Society published guidance on the above changes in the 1 July 2006 issue of the *Pharmaceutical Journal*.⁴⁶

The same Regulations also provided that, for Schedule 2 CDs, the pharmacist should record in the CD register: whether the person collecting the drug was the patient, the patient's representative or a healthcare professional; if the person was a healthcare professional, that person's name and address; if the person was the patient or the patient's representative, whether evidence of identity was requested of that person; and whether evidence of identity was provided by the person collecting the drug.⁴⁷ This was not due to take effect until 1 January 2007 (and was not mentioned in the guidance published on 1 July 2006).

The Misuse of Drugs (Amendment No 3) Regulations 2006 were made on 3 August 2006,⁴⁸ and came into force on 1 September 2006. Like the other 2006 Regulations, they brought Department of Health guidelines into law, while clarifying perceived ambiguities. They stated that: the requirement for private CD prescriptions to be written on a standard form and to have a prescriber identification number on it did not extend to veterinary prescriptions;⁴⁹ the requirement for pharmacists to retain private prescriptions for Schedule 2 and 3 CDs on the pharmacy premises for 2 years was

³⁹ The Misuse of Drugs (Amendment No 2) Regulations 2006 (SI 2006/1450) (Reg 5).

⁴⁰ *Ibid* (Reg 6).

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* (Reg 9).

⁴⁶ (2006) 277 *Pharmaceutical Journal* 25–29.

⁴⁷ The Misuse of Drugs (Amendment No 2) Regulations 2006 (SI 2006/1450) (Regs 7(1) and 10).

⁴⁸ The Misuse of Drugs (Amendment No 3) Regulations 2006 (SI 2006/2178).

⁴⁹ The Misuse of Drugs (Amendment No 3) Regulations 2006 (SI 2006/2178) (Regs 3, 4 & 6).

removed for prescriptions other than veterinary prescriptions;⁵⁰ and that the record-keeping requirements due to be implemented on 1 January 2007 (referred to at 3.9 above),⁵¹ were deferred so as not to take effect until 1 January 2008.⁵²

These amendments were reported in a law and ethics bulletin in the 9 September 2006 issue of the *Pharmaceutical Journal*.⁵³ The bulletin reminded pharmacists that they were still obliged to ascertain whether a person collecting a Schedule 2 CD was the patient, the patient's representative or a healthcare professional. Additionally, as pharmacists could not yet send in original private prescription forms to the PPA until changes were made to the Medicines (Sale or Supply) (Miscellaneous Provisions) Regulations 1980, pharmacists were advised to continue to retain the standardised private prescription forms and send a copy to the BSA. A further law and ethics bulletin in the 23 September 2006 issue of the *Pharmaceutical Journal* reminded pharmacists of the new regulations relating to technical errors on Schedule 2 and 3 CD prescriptions.^{54,55}

On 21 November 2006, the Controlled Drugs (Supervision of Management and Use) Regulations 2006 were made.⁵⁶ These Regulations came into force in England on 1 January 2007. They provided, *inter alia*, for the appointment of accountable officers to be given a number of functions relating to the safe management and use of CDs;⁵⁷ required all healthcare providers who held a stock of CDs on the premises to have, and comply with, an up-to-date Standard Operating Procedure (SOP), covering who had access to CDs, where CDs were stored, security for storage and transportation of CDs, disposal and destruction of CDs, who to contact in the event of complications, and record keeping;⁵⁸ compelled periodic declarations and self-assessments to be made by pharmacies;⁵⁹ and obliged community pharmacies with a contract with a Primary Care Trust to undergo periodic inspections regarding CDs, carried out by Society inspectors.⁶⁰

On 9 December 2006, an article was published in the *Pharmaceutical Journal*, which summarised the new role of the Society's inspectorate, including an explanation of the accountable officers and the periodic declarations and inspections.⁶¹ It did not, however, mention the SOPs which had to be in place.

2007: THE CHANGES CONTINUE

On 6 January 2007, the *Pharmaceutical Journal* alerted pharmacists to new guidance issued by the Society on the safe destruction of CDs.^{62,63} Although recording of patient-returned CDs was not a legal requirement, the Controlled Drugs (Supervision

⁵⁰ *Ibid* (Reg 5).

⁵¹ The Misuse of Drugs (Amendment No 2) Regulations 2006 (SI 2006/1450) (Regs 7(1) and 10).

⁵² The Misuse of Drugs (Amendment No 3) Regulations 2006 (SI 2006/2178) (Reg 7).

⁵³ (2006) 277 *Pharmaceutical Journal* 322.

⁵⁴ (2006) 277 *Pharmaceutical Journal* 377.

⁵⁵ The Misuse of Drugs (Amendment No 2) Regulations 2006 (SI 2006/1450) (Reg 6).

⁵⁶ The Controlled Drugs (Supervision of Management and Use) Regulations 2006 (SI 2006/3148).

⁵⁷ The Controlled Drugs (Supervision of Management and Use) Regulations 2006 (SI 2006/3148) (Reg 3).

⁵⁸ *Ibid* (Reg 9).

⁵⁹ *Ibid* (Reg 12).

⁶⁰ *Ibid* (Reg 19).

⁶¹ Giltrow J, "Monitoring and Inspection of Controlled Drugs: role of the Society's inspectors" (2006) 277 *Pharmaceutical Journal* 702 & 707.

⁶² (2007) 278 *Pharmaceutical Journal* 29.

⁶³ Guidance for Pharmacists on the safe destruction of Controlled Drugs: England, Scotland and Wales. 2007. RPSGB.

of Management and Use) Regulations 2006 required SOPs to include maintaining a record of Schedule 2 CDs returned by patients.⁶⁴ The guidance therefore advised pharmacists to record such returns and their destruction. In May 2007, the Society published yet another new version of its guidance on CDs.⁶⁵ It covered all the recent changes in law, along with guidance on best practice and anticipated future changes in the law.

On 23 July 2007, the Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 were made,⁶⁶ which provided that, from 16 August 2007, accountable officers would be able to authorise people to witness the destruction of CDs.⁶⁷ This new appointment is in addition to the existing ones, which included Chief Executives of NHS Trusts, Medical Directors of Primary Care Trusts, and the Chief Dental Officer of the Department of Health. The same regulations also provided that original private prescriptions for Schedule 2 and 3 CDs would have to be sent to the PPA, and that copies would no longer suffice. This came into force on 1 September 2007, along with the Medicines (Sale or Supply) (Miscellaneous Provisions) Amendment Regulations 2007,⁶⁸ made on 24 July 2007. These provided that pharmacists were no longer required to keep private prescriptions for Schedule 1, 2 or 3 CDs for two years. A law and ethics bulletin in the *Pharmaceutical Journal* of 1 September 2007 discussed these amendments,⁶⁹ advising pharmacists that they would now have to send the original private prescriptions for schedule 2 and 3 CDs to the PPA, rather than a copy.

The Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 also made further changes to the Misuse of Drugs Regulations 2001,⁷⁰ which came into force on 1 January 2008: requisitions for CDs (except veterinary requisitions) had to be marked with the name and address of the pharmacy supplying the drugs, and then sent to the relevant NHS agency;⁷¹ requisitions no longer needed to be kept for 2 years;⁷² and midazolam was reclassified from a Schedule 4 to a Schedule 3 CD.⁷³

The following provisions were to come into force on 1 February 2008: the prescribed form of the CD register was replaced with prescribed headings to be used in the register,⁷⁴ presumably so that pharmacists would not neglect to record any of the new information required by recent regulations; and a separate page in the register had to be used for each strength and form of the drug. The class of drug, its strength and form had to be specified at the head of each page.⁷⁵

In September 2007, the Society also issued an updated version of its guidance on the safe destruction of CDs.⁷⁶ This included the change made by the Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 allowing accountable

⁶⁴ The Controlled Drugs (Supervision of Management and Use) Regulations 2006 (SI 2006/3148).

⁶⁵ Changes in the management of controlled drugs affecting pharmacy: England, Scotland and Wales. Version 4.0. 2007. RPSGB.

⁶⁶ The Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 (SI 2007/2154).

⁶⁷ The Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 (SI 2007/2154) (Reg 4(12)).

⁶⁸ The Medicines (Sale or Supply) (Miscellaneous Provisions) Amendment Regulations 2007 (SI 2007/2179).

⁶⁹ (2007) 279 *Pharmaceutical Journal* 241.

⁷⁰ The Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 (SI 2007/2154).

⁷¹ *Ibid* (Reg 4(8)).

⁷² *Ibid* (Regs 4(11)(a)).

⁷³ *Ibid* (Regs 4(13) & (14)).

⁷⁴ *Ibid* (Regs 4(9) & (15)).

⁷⁵ *Ibid* (Reg 4(10)).

⁷⁶ Guidance for Pharmacists on the safe destruction of Controlled Drugs: England, Scotland and Wales. September 2007. RPSGB.

officers to authorise people to witness the destruction of CDs.⁷⁷ On 15 December, a law and ethics bulletin was published in the *Pharmaceutical Journal* giving advice on the changes regarding CD requisitions due to come into force on 1 January 2008.⁷⁸ It also advised that standardised requisition forms were being introduced (in England, FP10CDF).

2008–DATE: BUSINESS AS USUAL

Community pharmacists had to cope with numerous changes in legislation from 2004 to 2007. In 2008 and 2009, the rate of change fell back in line with pre-2004 levels. Minor amendments only were made to existing CD law, including the reclassification of cannabis,⁷⁹ and the prohibition of dispensing CDs against EU-sourced prescriptions, which can now be presented in UK pharmacies.⁸⁰

IMPLICATIONS FOR PHARMACISTS

Most of the recent changes in the law surrounding controlled drugs emanated from the Shipman Inquiry, although it is apparent that, under the amended regulations, a doctor such as Shipman, intent on harming his patients, would be still be able to do so.⁸¹ Although, the RPSGB tended to support the new Regulations with timely advice, it is unclear how well this was understood by pharmacists. It would be interesting to see how pharmacists managed to deal with the changes in the law and whether they were provided with sufficient information, in sufficient time, to enable them to stay compliant at all times. The National Pharmaceutical Association provides an advice service to community pharmacists, and keeps a database of the enquiries it receives. We are currently undertaking an analysis of that database, covering legal enquiries from the period in question, with a view to mapping the volume and nature of these enquiries against the legislative changes. It is hoped that this will provide an indication of how well pharmacists understood these changes, and will help improve the legal advice service at the National Pharmaceutical Association.

⁷⁷ The Misuse of Drugs and Misuse of Drugs (Safe Custody) (Amendment) Regulations 2007 (SI 2007/2154) (Reg 4(12)).
⁷⁸ (2007)279 *Pharmaceutical Journal* 697.

⁷⁹ The Misuse of Drugs Act 1971 (Amendment) Order 2008 (SI 2008/3130).

⁸⁰ The Medicines for Human Use (Prescribing for EEA Practitioners) Regulations 2008 (SI 2008/1692).

⁸¹ Gallagher C, “New CD regulations will not obstruct “another Shipman” who intends to kill”(2006) 277 *Pharmaceutical Journal* 13–16.

CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

EXCLUDING FOR MISREPRESENTATION: WHICH LEGISLATIVE PROVISION?

Trident Turboprop (Dublin) Limited v First Flight Couriers Limited
[2009] EWCA Civ 290 (CA), (Moore-Bick, Waller and Arden LJ)

It is well established in our legal system that Parliament reigns supreme in creating statutory law (subject to, of course, directly applicable EU laws which take precedence over national laws) and it is for our courts to interpret that law in order to give effect to the intentions of Parliament. It is this interpretation of statute which both academics and practitioners look towards when seeking to ascertain the meaning and effect of a statute. The manner in which courts deal with issues of statutory interpretation is well illustrated in the recent Court of Appeal case of *Trident Turboprop (Dublin) Limited v First Flight Couriers Limited*.

Although the main issue of appeal in *Trident* was whether the particular lease agreements in question fell within section 26 of the Unfair Contract Terms Act 1977 (“UCTA”), the Court of Appeal dealt with two interesting and novel points which concerned the interpretation of section 26 of UCTA and section 3 of the Misrepresentation Act 1967 (“the 1967 Act”).

The Statutory Provisions

In order to understand the issues which arose in *Trident* and to appreciate the Court of Appeal’s ruling, one must first consider the main statutory provisions under the 1967 Act and UCTA.

UCTA applies to those terms and notices (including non-contractual terms and notices) which seek to limit or exclude liability and will generally apply to “business liability”¹. However, there are certain exceptions to the application of UCTA. One of the type of contract which is exempt from the controls of UCTA are international supply contracts.² Section 26 of UCTA provides as follows:

26. International supply contracts.

(1) The limits imposed by this Act on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (3) below.

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¹ “Business liability” is defined as “... liability ... arising – (a) from things done or to be done by a person in the course of a business (whether his own business or another’s); or (b) from the occupation of premises used for business purposes of the occupier ...” (s1(3) UCTA 1977).

² Other exempt contracts include, for example, insurance, marine salvage and employment contracts (see further Schedule 1 paragraphs 1, 2 and 4 of UCTA).

- (2) The terms of such a contract are not subject to any requirement of reasonableness under section 3 or 4. . .
- (3) . . . that description of contract is one whose characteristics are the following –
 - (a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession of ownership of goods passes; and
 - (b) it is made by parties whose places of business . . . are in the territories of different States . . .

The next statutory provision for our purposes is section 3 of the 1967 Act. The right for a party to limit his liability for misrepresentation and the limits to do this was first introduced by section 3 of the 1967 Act which stated:

If any agreement . . . contains a provision which would exclude or restrict–

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation

that provision shall be of no effect except to the extent (if any) that, in any proceedings arising out of the contract, the court or arbitrator may allow reliance on it as being fair and reasonable in the circumstances of the case.

It should be noted that section 3 did not provide for any exceptions in respect of international supply contracts. Section 3 was, however, later modified by section 8 of UCTA which introduced the test of reasonableness which is found under section 11 of UCTA.³ Section 3 now provides:

If a contract contains a term which would exclude or restrict–

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such misrepresentation

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977. . .

The facts of the case were as follows. Trident Turboprop (Dublin) Limited (“Trident”) agreed to lease various aircraft to First Flight Courier Limited (“First Flight”). First Flight failed to make rental payments under the lease agreements and Trident was successful in bringing proceedings against First Flight and, subsequently, obtaining summary judgment in its favour.⁴ First Flight appealed against the decision of the judge at first instance and argued that the aircraft were unreliable and therefore it was unable to operate them. First Flight also argued that it had a claim for misrepresentation against Trident and that it had (or was entitled to) rescind the lease agreements and, on that basis, it had a valid defence which would mean that the order for summary judgment would have to be set aside. Trident, on the other hand, contended that First Flight was prevented from relying on a claim for misrepresentation; the lease agreements had excluded First Flight’s rights to bring any claim for

³ The test of whether a term is reasonable is set out in s 11 (1) of UCTA which provides that: “. . . the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought to have been, known to or in the contemplation of the parties when the contract was made.”

⁴ See Part 24 of the Civil Procedure Rules as to the test for Summary Judgment.

misrepresentation and, in any event, section 26 of UCTA excluded the test of reasonableness from applying as the leases were international supply contracts for the purposes of section 26 of UCTA.

Apart from considering whether the lease agreements fell within the scope of section 26 of UCTA, the Court of Appeal dealt with two novel points which counsel for First Flight raised on appeal. The first point concerned whether the limits (*ie* the test of reasonableness) imposed on Trident's rights to rely on a clause excluding any remedy for misrepresentation were imposed by UCTA itself or by the 1967 Act. The second point centred on whether any liability for misrepresentation in this case was liability "under a contract" within the meaning of section 26(1) of UCTA.

UCTA or the 1967 Act?

Counsel for First Flight contended that the words "The limits imposed by this Act . . ." which are contained in section 26(1) actually referred to limits which the 1967 Act imposed and not the limits imposed by UCTA. Counsel for First Flight also maintained that the original section 3 did not exclude international supply contracts from the application of the 1967 Act and that there was nothing in the legislative background to UCTA which indicated that Parliament wanted to exclude international supply contracts from the 1967 Act. By advancing these arguments of statutory interpretation and in an effort to succeed in having the lease agreements questioned on the grounds of reasonableness, Counsel for First Flight sought to persuade the Court that the lease agreements were subject to the statutory control of the 1967 Act even though it appeared from the wording of section 26 that they may be exempt from the controls of UCTA.

Moore-Bick LJ, giving the leading judgment of the Court, rejected this analysis. According to his Lordship, one had to look at the wording of subsection (1) and (2) of section 26 as a whole rather than simply concentrating on the opening words of section 26. Having considered these two subsections in the light of the whole of section 26, Moore-Bick LJ found that the wording of section 26(1) of UCTA excluded or restricted liability by reference to contract terms in general and was not limited for breach of contract and as such it was capable of extending to liability for misrepresentation. He argued that section 26(2) was also worded generally and also extended to any contract which contained terms purporting to exclude liability and excluded from the requirement of reasonableness any contract which fell within subsection 26(3). Finally, Moore-Bick LJ held that the wording in section 26 which states "The limits imposed by this Act . . ." actually referred to the requirement of reasonableness as embodied in UCTA and, by operation of section 8 of UCTA, to terms excluding liability for misrepresentation. In his Lordship's opinion, this interpretation of the statutory provisions gave effect to Parliament's intention:

In my view this interpretation is also to be preferred as giving effect to the policy of excluding international supply contracts from this type of statutory control . . . I am satisfied that the purpose of section 26 was . . . to exclude such contracts altogether from the requirement of reasonableness . . . it reflects Parliament's intentions to exclude international supply contracts from this kind of statutory control.

Agreeing with Moore-Bricks LJ's interpretation of the statutory provisions, Arden LJ also reasoned that the statutory purpose of section 26 was to exclude international supply contracts from UCTA and that this was evident from section 1(2) of UCTA which provides that Part I of UCTA "is subject to Part III of the Act" (Part III contains section 26).

Liability under or outside Section 26?

In a further attempt to bring the lease agreements within statutory control, Counsel for First Flight submitted that liability for misrepresentation arises outside rather than under a contract and on this basis does not fall within the wording of section 26(1) which states “liability arising under such a contract as is described in subsection (3) below”. This submission was dismissed by Moore-Bick LJ who argued:

... I think that the purpose of section 26 as a whole is to exclude international supply contracts from the statutory regime governing exclusion clauses. If that is right, there is every reason to interpret the expression “liability arising under such a contract” as extending both to liability for damages for misrepresentation and to the right of the injured party to rescind the contract where that remains possible.

Although the Court went on to find that the lease agreements did, in fact, fall within the scope of section 26 of UCTA, it dealt with important issues of statutory interpretation. One must recognise and, to an extent, admire, the great lengths to which Counsel for First Flight went to drag the lease agreements within the controls of the 1967 Act. However, setting these admirations aside, the interpretation propounded by Counsel for First Flight would have had, if accepted, a number of wholly undesired consequences. Firstly, it would mean that one would have to look at the 1967 Act when considering issues of excluding for misrepresentation despite the fact that section 8 of UCTA was specifically enacted in order to introduce the test of reasonableness and amended the original section 3 of the 1967 Act. This would have the effect of frustrating Parliament’s intention which was to bring the law relating to excluding liability for misrepresentation in line with excluding liability for breach of contract. Moore-Bick LJ’s well reasoned judgment avoided such a conclusion. Secondly, Counsel for First Flight’s interpretation would have meant that all contracts, including those within section 26(3), would be subject to the statutory controls of the 1967 Act. This would have had the effect of rendering UCTA useless as all contracts would be controlled by the 1967 Act. Thirdly, the 1967 Act would apply to those contracts which Parliament intentionally wanted to exclude from UCTA on policy grounds.⁵ Again, this would have led to Parliament’s intention being frustrated and the power of the legislature being severely undermined. Moore-Bick LJ’s interpretation of section 26 not only reaffirmed Parliament’s intentions to exclude international supply contracts from statutory control but also clarified that the general wording found in section 26 included terms which purported to exclude or restrict liability for misrepresentation as well as for breach of contract.

MASOOD AHMED*

⁵ Law Commission Reports published in 1969 and 1975 relating to exemption clauses in contracts identified sound policy reasons for excluding international supply contracts from statutory control.

TENANCY DEPOSIT SCHEMES IN THE COUNTY COURT

Harvey v Bamforth

[2008] 46 EG 119 (C.C.) (Judge Bullimore)

The Housing Act 2004 implemented a Tenancy Deposit Scheme (hereafter “TDS”) which came into force on 6 April 2007. The scheme was introduced in response to concerns regarding landlords’ handling of deposits on termination of residential tenancies; landlords were often wrongly retaining money. The TDS, as implemented by sections 212–214 and schedule 10 of the Housing Act 2004 (hereafter “HA 2004”), seeks to put an end to this practice. There are two types of TDS: the custodial scheme and the insurance scheme. Under the former, deposit money is paid by the landlord to the scheme provider and is held until the conclusion of the tenancy. Under the latter, an insurance premium is paid by the landlord to the scheme holder. If a dispute as to the deposit arises at the conclusion of the tenancy, the tenant is able to contact the scheme provider and resolve the issue (the providers have a dispute resolution service). Therefore the tenant is able to retrieve his/her deposit without court proceedings. Section 213(3) states that the landlord must comply with the initial requirements of a scheme within fourteen days of receiving the deposit. Section 213(5) provides that certain prescribed information must be given to the tenant. This includes information such as the details of the scheme provider and the procedures that apply under the scheme.¹ This information must be provided by the landlord in the prescribed form (section 213(6)(a)) and within fourteen days of receipt of the deposit by the landlord (section 213(6)(b)).

Section 214 provides for the enforcement of the TDS in court proceedings. A tenant may apply to the court if the initial requirements of a scheme have not been complied with, or if section 213(6)(a) has not been complied with. If the court is satisfied as to non-compliance it *must*: (a) order either the return of the deposit or the payment of the deposit into a custodial scheme; and (b) order the landlord to pay the applicant a sum of money equal to three times the amount of the deposit.

Section 214(1) provides the county court with jurisdiction for proceedings relating to tenancy deposits. In addition, claims are likely to involve relatively small sums of money and are therefore unlikely to be appealed to the higher courts. The role of interpretation of the HA 2004 will inevitably fall on the county courts. One interesting issue of interpretation arose in *Harvey v Bamforth*.² Briefly, the facts are as follows. The claimant landlord instituted legal proceedings against the defendant tenant for payment of rent arrears amounting to £2,970. The tenancy, having been entered into on 19 June 2007, was subject to the TDS provisions of the HA 2004. The claimant had lodged the £525 deposit in an insured scheme within 14 days of receipt, but failed to provide the defendant with the prescribed information until 22 February 2008. The defendant counterclaimed on the basis that the information had not been provided within fourteen days in accordance with the HA 2004; he claimed the return of the deposit and payment of three times the deposit, totalling £2,100. He sought to set-off against the main claim for rent arrears. The main issue involved interpretation of the HA 2004. The defendant argued that the court should make the order under section 214 because, whilst section 213(6)(a) had been complied with, section 213(6)(b) had not, as the information had not been provided within fourteen days. However, it was the claimant’s case that section 214 only made reference to non-compliance with section

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¹ See further, the Housing (Tenancy Deposits) (Prescribed Information) Order 2007 (SI 2007/797).

² [2008] 46 EG 119.

213(6)(a) as a ground for issuing proceedings. Therefore, if the information was provided before the proceedings took place, no order could be made. Deputy District Judge Revitt ruled in favour of the defendant. He considered that subsections (6)(a) and (6)(b) were so closely connected that they could not be divorced from each other and should be read together. The decision was appealed.

On appeal Judge Bullimore reversed the decision of Deputy District Judge Revitt. In Judge Bullimore's view the draftsman, in respect of court proceedings, was very clear in distinguishing between providing the information and doing so within fourteen days.

After all, they are very serious powers to be exercised against a landlord; doubtless in some cases they are well justified, but they are very punitive indeed and one can well see that in the minds of the legislators, it was one thing to deal in that way with a landlord who had not provided the prescribed information at all and to deal in that way with a landlord who had provided the prescribed information but had not done it within that short period laid down by the Act.³

Whilst this is only a County Court decision, which has no precedential value, it demonstrates how the provision is likely to be interpreted by the courts. The decision in *Harvey v Bamforth* comes to the right conclusion regarding the provision of information. The penalty would be far too severe in cases where a landlord has complied with the primary principle of the scheme (*ie* securing the deposit), but has merely failed to provide the information, which is effectively a secondary principle.

However, section 214 also imposes the penalties on the landlord if the initial requirements of a scheme have not been complied with. Therefore, what happens if the landlord has not secured the deposit under a TDS within fourteen days, but does so before the proceedings? Should the same distinction be made as in *Harvey v Bamforth*?

The problem lies with the definition of "initial requirements" in section 213(4): "such requirements imposed by the scheme as fall to be complied with by the landlord on receiving such a tenancy deposit". Section 213(3) states that the initial requirements must be complied with within fourteen days. Is this fourteen days requirement an initial requirement under section 213(4)? The answer must be affirmative. Firstly, the fourteen day requirement must be fulfilled by the landlord on receiving the deposit and therefore it arguably falls directly within section 213(4). Secondly, if the courts do not enforce the fourteen day requirement even after the money has been placed in a scheme, section 213(3) effectively becomes redundant; there is no time limit for securing a deposit under a scheme because the landlord can hold off until proceedings are issued, if in fact they ever are. Therefore tenants who are unaware of their legal rights or do not have the resources to pursue a claim may be disadvantaged. The fourteen day requirement must be enforced in all cases to ensure ubiquitous compliance with the scheme. Further, if the fourteen day requirement becomes redundant in respect of claims by tenants, then its only use is to impose a converse limitation period on tenants because they will have to wait fourteen days to make a claim; this is clearly not the stated intention under the statute. Thirdly, cases in which the landlord has not secured the deposit under a scheme should be distinguished from *Harvey v Bamforth* type cases. Section 214(1) clearly makes a distinction between sections 213(6)(a) and 213(6)(b) in respect of the latter cases, but no such distinction is made in respect of the former cases.

The TDS clearly envisages strict penalties for non-compliance. Where the deposit has not been secured under a scheme within fourteen days section 214(1) compels the court to make an order for the return of the deposit, plus an amount of money equal to three

³ *Ibid* paragraph 23.

times the deposit. Whilst the HA 2004 should be interpreted in favour of the landlord in respect of the fourteen day period for the provision of information, it should not be so interpreted in respect of the securing of the deposit with a scheme within fourteen days. In cases where the landlord has failed to secure the deposit within fourteen days, but does so before proceedings, the court must make the penal order; otherwise the integrity of the scheme will be threatened.

DANIEL METCALFE*

BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

SELF-DETERMINATION, AND KOSOVO

Escaping the Self-Determination Trap by MARC WELLER, Leiden, Boston: Martinus Nijhoff Publishers, 2008, 144pp + 2 Annexes + Bibliography, Hardback, Euros 50, ISBN 978-90-04-17488-7

Contested Statehood: Kosovo's Struggle for Independence by MARC WELLER, Oxford, Oxford University Press, 2009, xxviii + 321pp (including Bibliography + 2 Appendices + Index), Hardback, £40.00, ISBN 978-0-19-956616-7

The right of peoples to self-determination, like the right of revolution from which it springs, is a doctrine dating back to time immemorial. Although packaged and sold tightly as a vehicle with which to end colonialism during much of the Cold War, the dissolution of the former Socialist Federal Republic of Yugoslavia has given self-determination something of a new life, in that the doctrine no longer fits its former straightjacket. For example, roughly one half of all ongoing armed conflicts today are purportedly in pursuit of one or other form of self-determination, and the recent claims to territorial independence asserted by Kosovo, South Ossetia and Abkhazia, to name but a few, have placed the self-determination of peoples squarely in the international spotlight once again. In particular, much doctrinal discussion has been generated ever since the non-Serb majority in Kosovo voted for and issued a “unilateral declaration of independence” (UDI) from Serbia on 17 February 2008,¹ so much so that the United Nations General Assembly on 8 October of that same year requested an advisory opinion from the International Court of Justice (ICJ) as to the legality in international law of the Kosovo UDI.² At the time of writing, the ICJ proceedings are pending,³ but the request itself underscores the deep ambivalence of states in the post-Cold War era in relation to issues such as self-determination, terrorism, and secession.

These two succinct monographs by Dr Weller address these and other topics thoroughly and with clarity.⁴ The author is a Reader in International Law and International Relations at Cambridge University, and is a Fellow of its Lauterpacht Centre for International Law. He is also Director both of the European Centre for Minority Issues and the Cambridge Carnegie Project on the Settlement of Self-Determination Disputes through Complex Power-Sharing. He is thus extremely

¹ “Full text: Kosovo declaration”, 17 February 2008, news.bbc.co.uk/1/hi/world/europe/7249677.stm.

² “Request for an advisory opinion of the ICJ on whether the unilateral declaration of independence of Kosovo is in accordance with international law”, UNGA Resolution 63/3 of 8 October 2008, UNDoc A/RES/63/3, Agenda item 71.

³ Public hearings on the matter are to begin on 1 December 2009, at the Peace Palace in The Hague. “ICJ Press Release (Unofficial)”, No 2009/27, 29 July 2009, www.icj-cij.org.

⁴ Location page and chapter numbers are for indicative purposes, only, as the given topics are discussed at many points in each monograph.

well-placed to illuminate the phenomenon of self-determination in general, and the many new developments in the doctrine during the post-Cold War era specifically.⁵ Moreover, as Dr Weller participated in most of the international settlement attempts on the future status of Kosovo, including the Carrington Conference, and the Rambouillet and Ahtisaari negotiations, he is well-equipped to provide an analytical, eye-witness account of the wider potential for peaceful resolution of such disputes, as well as of the causes for failure in high-level international diplomatic interventions and engagements concerning secessionist self-determination.

Since the advent in 1945 of the United Nations Charter,⁶ the right of peoples to exercise their self-determination has held a place for individual group aspiration within the structural tensions created between the twin over-arching international principles of the maintenance of international peace and security, and of the non-intervention by states in the internal affairs of each other.⁷ While the principle of self-determination certainly has a pre-Charter existence,⁸ the United Nations effectively elevated the principle, albeit somewhat rhetorically, as a foundation stone on which to build future friendly relations between states, and equal rights. However, while one may speak safely today of the acceptance in customary international law of a right to self-determination,⁹ and more controversially perhaps, of a “right” in the sense of *jus cogens*, it soon became apparent in the post-war era that there were three main difficulties with the principle of the self-determination of peoples: which peoples are so entitled, which rights may be exercised, and whether a subject people can secede territorially. The Charter is silent on all three points, and states have struggled ever since to contain exercises of self-determination within existing state boundaries – a task that continues to impose practical challenges to states in that, on the one hand, a violent secessionist movement can destroy existing state boundaries, while on the other, the state is under a fundamental international duty to keep the peace internationally.

The solution during much of the Cold War era became an attempt to differentiate between “internal” and “external” exercises of self-determination. Internal self-determination could be employed to address such issues as good governance, equal rights, and forms of devolution. In contrast, a “right” to exercise external (or secessionist) self-determination was cast in territorial terms, and confined legally to those peoples inhabiting former colonies and certain non-self-governing territories, as such territories are deemed to have a “status separate and distinct from the territory of the state administering it”.¹⁰ In this way, any putative right to struggle, and to use force to achieve secessionist self-determination could be contained within a wider anti-colonial agenda, designed as much as for anything else to provide a vehicle to certain states with which to gain access more quickly to former colonial resources and other trade concessions. Nonetheless, as former colonies and non-self-governing territories slowly regained their independence during the 1960s and 1970s, the membership and voting patterns in the UN General Assembly began to alter, such that support for self-determination in UNGA resolutions slowly gained in momentum to

⁵ See www.intstudies.cam.ac.uk/staff/weller-marca.html.

⁶ UN Charter Articles 1(2) and 55 (“principle(s) of equal rights and self-determination of peoples”).

⁷ UN Charter Articles 2(4) and 2(7), respectively.

⁸ *Eg*, the principle of self-determination was proclaimed in the French Revolution, and developed during the nineteenth and twentieth centuries. See also *Aaland Islands* [Spec Suppl 1920] 3 LNOJ 3.

⁹ E A Laing, “The Norm of Self-Determination, 1941–1991” [1993] 22 *International Relations* 209, at 222, quoting I Brownlie in 1973: “self-determination [is] a legal principle” (citation omitted).

¹⁰ UNGA Resolution 2625 of 24 October 1970, adopted by consensus.

favour, first, the right of peoples to use all available means to achieve it,¹¹ and secondly, the entitlement of “all peoples” to self-determination.¹² However, while this change in political attitude seemingly provided a means of redress for peoples inhabiting territories far beyond so-called “salt-water” imperialism, if not yet all subjects of historic conquest or other perceived injustice, case law did not quite yet follow suit.

On the other hand, the ICJ may have only ever confirmed the right in the context of colonialism, but it has never expressly so confined the principle.¹³ It is thus of note that the Kosovo UDI has recently afforded the UN General Assembly with a prime opportunity to seek advisory guidance from the ICJ which might shed light on the future practice of entitlements to self-determination, for example, as to whether a growing recognition of individual rights entitlements has effected readjustments to the former importance of inviolable state territorial boundaries and the non-interference principle. Further, with the end of the Cold War, it has today become arguable that a less-centralised international environment is in fact more conducive to a greater pace of settlement in many older liberation conflicts, such as that in Northern Ireland, and this argument forms one thread of Dr Weller’s approach in *Escaping the Self-Determination Trap*. It is equally arguable that a more flexible world has instead facilitated a new generation of “liberationist” struggles, such as those waged in the former territory of Yugoslavia throughout the 1990s. For this reason, the author seeks not only to demonstrate a tendency to failure of the strict, classical approach to self-determination in resolving liberation struggles peacefully, but further, to present the wide range of settlement options which actually do exist, as based on real case examples.

In *Escaping the Self-Determination Trap*, the author, in terming the principle a “privilege” rather than an enforceable “right”, begins by highlighting the many pitfalls of a strict approach by focussing on the alienating effects of a narrow, legalistic confinement of self-determination, in that, rather than prevent conflict, a narrow approach has instead served to generate it. For example, the doctrine was “framed to apply only in the . . . narrowly-defined circumstances of salt-water colonialism that practically no longer exist”, “there is no secession from secession” (p 16), and “groups fighting . . . outside of the colonial context are classified as secessionist rebels and, potentially, terrorists” (p 17). Therefore, in cases arising outside the colonial context (Chechnya, the Basque country), or where a sub-unit or minority in control of territory wishes to secede again (Sri Lanka, the Philippines), or where the very implementation of colonial self-determination is challenged (Mayotte, Eritrea, Kashmir), “the international system is structured in such a way that actually assists the central state in ensuring their defeat” (p 17). Nonetheless, the reality is not always (or indeed, ever was) so straight-forward, so the adoption of any particular legal approach to one or other form of self-determination pertaining “only” to one or other people means little if anything to the approximately 30 on-going liberationist conflicts at present, the additional 55 or so campaigns that might yet become violent, and a further 15 settled conflicts which could re-ignite at any point (p 13).

Accordingly, the author proceeds with some care in *Escaping the Self-determination Trap*, the first sentence of which states “self-determination kills”. After introducing the concept of self-determination itself, and addressing the content of the narrow, classical

¹¹ See, eg, UNGA Resolutions 3070 (XXVIII) Article 2 of 30 November 1973, and 3246 (XXIX) Article 3 of 29 November 1974.

¹² UNGA Resolution 2625 of 1970, on Friendly Relations.

¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding S C Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, at 31 (principle of self-determination held applicable to all the UN, specifically, all peoples and territories which “have not yet attained independence”).

right initially attached to it in the UN era, he reviews other, equally viable frameworks for exercises of self-determination which not only have proved successful in helping to restore both domestic and international peace and security, but further, which have come to form a much wider set of options for future reference than one might otherwise have thought. In recognising that most post-Cold War liberation conflicts usually range far beyond the colonial context, he posits that those groups involved in them are almost invariably reaching to the rhetoric of self-determination to rationalise their violent actions. In so doing, he refers to case examples which elsewhere might be viewed as an overly-broad inclusion within the principle, presumably in an effort to locate additional settlement tools. This broad approach does, however, approach the essence of the more timeless goal self-determination represents far better than the early post-1945 anti-colonial confines, and simultaneously encourages a more penetrating consultation of local and international practice to date for purposes of application in less traditional contexts. The result is a very broad range of choice indeed of otherwise-ignored settlement tools.

The presented structure of these different state approaches ranges from “constitutional” rights and procedures (however unsuccessful in reality, *eg*, Burma, the USSR, the former Yugoslavia) (pp 46–58), “remedial” self-determination to redress gross state oppression (usually involving the intervention of third states, *eg*, Kosovo, Bangladesh) (pp 59–69), through to “conditional” forms of self-determination (triggered by specified external or internal events, *eg*, Moldova – Gagauzia, Papua New Guinea – Bougainville) (pp 123–125). He spends several short chapters on “deal-making” arrangements, in which a bargain of sorts has been struck between the warring sides, such as relinquishing claims to a right to self-determination in exchange for guarantees of greater autonomy (*eg*, Spain – the Basque Country, Ukraine – Crimea, China – Hong Kong) (pp. 78–90), deferrals of substantive settlements (time-buying, essentially, *eg*, South Ossetia, Abkhazia, Western Sahara, East Timor) (pp 113–118, 126–135), and the better-known formats of federalisation, confederation, or union in one or other form of regionalism (*eg*, Chechnya, Quebec, Nagorno-Karabakh) (pp 91–112). There is also a chapter devoted to “effective” entities, which are described as existing either with the “consent of the relevant central authorities” (*eg*, Malaysia – Singapore, the former Czechoslovakia) (p 70), or, as in Somaliland, where an effective independence, albeit one unrecognised by the international community, has lasted for nearly 20 years on the basis of prolonged separate existence.

Approximately 55 states to date have afforded their recognition of the effectiveness of Kosovo’s UDI (p 70). However, even should one or other form of self-determination become effective *de facto*, it is noted at several points in *Escaping the Self-Determination Trap* that any notional claim to independence achieved by means which violate rules of *jus cogens*, such as the perpetration of genocide, can never attract outside state recognition, whether based on declaratory or constitutive recognition factors, as being in violation of international law. As for the opposite situation (independence declared to escape gross oppression), the highly-controversial deployment of NATO in 1999 to prevent the ethnic cleansing of Kosovo’s Albanian population led to on-going UN control and administration of all civil and military functions in the former Serbian province in order to guide Kosovo eventually to its own form of self-government. Kosovo, having already declared its independence (ineffectively) in 1991, certainly made it clear throughout the following decade of high-level negotiations that the eventual restoration of Serbian control was undesirable. However, after the Kosovar UDI in early 2008 (also opposed, predictably, by Russia, a long-time Serbian ally), and referral of its legality to the ICJ, Russia became

embroiled in an armed conflict between itself and Georgia over South Ossetian claims of self-determination,¹⁴ ostensibly to prevent alleged ethnic cleansing by Georgia. Whether or not utilised by Russia to communicate a warning to the ICJ of the dangers of Kosovar independence,¹⁵ any suspicion of manipulation makes equally clear that controversial aspects of self-determination are capable of inhibiting progress between states in many areas of international life.

Nonetheless, the “fact” of Kosovo’s unilateral action in the face of vociferous Serbian opposition makes it equally imperative that wider extra-legal dimensions of international life are also taken into account when the time arrives to assess what it is exactly the self-determination of peoples means, and what it is exactly that existing state territorial borders do, if the latter are not simply to demarcate the boundaries of a prison. Due to its breadth of case examples, *Escaping the Self-Determination Trap* is ideal for use by students and researchers alike, as well as for students and practitioners who wish to grasp the subject rapidly by means of a well-structured and completely appropriate approach to conflict-settlement in today’s world. The monograph would work well as a required text for a self-contained post-graduate module in law or international relations, or for use as quick reference. Many chapters are brief and to the point, and provide the necessary background, terms and framework of analysis, and case examples with which to illuminate the various dimensions of self-determination. It also has two extremely useful annexes. Annex I outlines the distinct rights claims pertaining to (1) colonial and analogous self-determination entities, (2) remedial exercises, (3) the constitutional parameters of entitlement, (4) effective (unprivileged) entities, and finally (5) unlawful entities (violators of *jus cogens* rules) regarding which third states should afford no recognition and work instead to restore the previous situation. Annex II is longer, and lists in bullet point form the many self-determination settlements per continent, and the steps taken to achieve them. There is an extensive bibliography (pp 171–224), where the interested reader can obtain further source materials.

The author’s subsequent monograph, *Contested Statehood: Kosovo’s Struggle for Independence*, deals specifically with the struggle for independence which has been waged for two decades by the majority in Kosovo, and is a different kettle of fish entirely. While somewhat longer than the monograph just reviewed, *Contested Statehood* is far from a quick read (and is in smaller font size). However, in view of the specific technicalities entailed by the Kosovo struggle, it is useful to have some background knowledge to and basic overview of the events which have transpired in the former Yugoslavia since the Cold War ended,¹⁶ the most recent of current note being the UDI highlighted above. It is also useful to have some acquaintance with Public International Law, Constitutional Law, and International Humanitarian Law. In overview, Yugoslavia was constructed for largely political imperatives after the first world war; from 1941–1945 it was bitterly divided within by Axis occupation, pockets of armed resistance by nationalist and communist forces to occupation, and a civil war.¹⁷ Once reunified, Yugoslavia’s first Federal Constitution of 31 January 1946

¹⁴ See, eg, E Barry and J Kanter, “Report on Georgia War Faults Both Sides”, 29 September 2009, www.nytimes.com/2009/10/01/world/europe/01russia.html?_r=1.

¹⁵ Cf the Council of Europe Independent Fact-Finding Commission on the Conflict in Georgia (30 September 2009), para 11, p17 (“[r]ecognition of breakaway entities such as . . . South Ossetia by a third country is . . . contrary to international law in terms of an unlawful interference in the sovereignty and territorial integrity of the affected country, which is Georgia”), news.bbc.co.uk/1/shared/bsp/hi/pdfs/30_09_09_iifmgc_report.pdf. No UK legal academic was on the Commission.

¹⁶ A useful account, albeit in the context of the lead-up to the war in Bosnia-Herzegovina, is provided in *Prosecutor v Dusko Tadic aka/la “Dule (Opinion and Judgement)*, Case No IT-94-1-T (7 May 1997), paras 55–79, 85–96.

¹⁷ In 1945, order was re-imposed by the Serb Partisan Josip Broz Tito, later known as Marshal Tito. He died in 1980.

provided for six republics (Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Serbia, and Montenegro), and two autonomous regions (Kosovo and Vojvodina) associated with Serbia. The constituent parts of each administrative unit had experienced security-related population transfers over centuries, many of them forced, but certainly between 1946 and 1990, overt or blatant nationalist or religious tendencies were generally suppressed.

Yugoslavia was structured constitutionally with a dual concept of sovereignty: the sovereignty of the republics, and the sovereignty of the “nations”, or peoples. During the second world war, national liberation forces allegedly promised Kosovo its self-determination, but Dr Weller notes that the decision by Kosovo to associate with Serbia as an autonomous province was “expressly conditional upon a ‘federal’ Serbia, *ie*, Serbia, and hence also Kosovo as part of a federal structure” (p 32), as provided for in the 1946 Constitution. Comprising an area of approximately 10,887 square kilometres (p 28), the Kosovo Albanian population, always the majority, have had a long experience of Serbian repression, and it was only with the coming into force of the new 1974 Constitution, and a strengthened devolution of power, that Kosovo was fully recognised as a highly-autonomous federal entity with strong representation in the federal institutions – a position rather less than a full republic but much more than mere autonomy (p 34). This latter point is crucial in that, to modern legal traditionalists, classical international law requires stability in external state territorial boundaries in order to maintain stable inter-state relations, and hence to form the bedrock of sovereign equality and peace. As for internal boundaries, it is Dr Weller’s position that the federal, highly-autonomous status attributed to Kosovo in the 1974 Constitution would tend to imply that Kosovo, too, had a similar constitutional right to independence as did the other republics at the point of Yugoslavia’s dissolution (*passim*), and that accordingly, Serbia could have no possible right constitutionally to abrogate Kosovo’s federal status.

Further, and in light of the anti-colonial agenda of the post-1945 era, a former federal or similar internal status indicates a definable territory, the importance of which cannot be over-estimated should independence be contemplated. This is the doctrine of *uti possidetis*,¹⁸ without which there is no arguable “entitlement” to secede, as was discovered by the Bosnian Serbs in their attempt to secede from Bosnia-Herzegovina after the independence of the latter had been recognised by third states. In other words, any potential “right” to secede territorially from a state beyond the colonial context is also made dependent on whether there are pre-existing, territorially-defined administrative units of a federal nature, which alone might “acquire the character of borders protected by international law”.¹⁹ More importantly, should such a definable territory exist, it then becomes arguable that a seceding entity may request (and obtain) the assistance of outside third states. Without such territory, there has traditionally only been civil war as a means of redress,²⁰ at which point, international law requires strict non-assistance to either side. Nonetheless, while it is of course true that the key to independence may indeed appear to lie in successful revolutionary violence, and while there is no express international law prohibiting secession *qua* secession, it should equally be remembered that the risk of a wider war explains the grudging international

¹⁸ See *Burkina Faso v. Republic of Mali* [1986] ICJ Reports, pp. 554, at 565, in which the Court noted that the principle of *uti possidetis* was not affected by rights to self-determination.

¹⁹ “Conference on Yugoslavia, Arbitration Commission Opinions 1–10 on Questions arising from the Dissolution of Yugoslavia [11 January and 4 July 1992], Opinions 2 and 3”, reprinted in [1992] 31 ILM 1488, 1497–1498, and 1499–1500, respectively.

²⁰ As noted by Shaw “international law treats civil wars as purely internal matters, with the possible exception of self-determination conflicts”. MN Shaw, *International Law* 6th ed (Cambridge University Press, 2008) at 1148.

acknowledgement of a narrowly-construed entitlement to self-determination in situations involving *only* colonialism or at a stretch, alien occupation, or racist regimes. Therefore, the status of Kosovo as both a federal entity and a province within a republic rather complicated matters.

The devolution of power provided for in the 1974 Constitution had another unfortunate side effect: it facilitated the growth of nationalism and ethnocentrism. With grave economic problems emerging by the late 1980s, and the growing decline of Communism in Eastern Europe generally, Yugoslavia, and Serbia in particular, moved quickly towards major political crisis. In 1989, Serbia attempted to alter the voting equality of the republics, and took action to strip Kosovo of its autonomy.²¹ In 1990, multi-party elections were held for the first time in the separate republics: nationalist parties emerged victorious. When coupled with the widespread economic difficulties and a growing sense of political crisis, it quickly became obvious the federation was headed for a break-up, which indeed occurred soon after Serbia unilaterally revoked Kosovo's autonomous status, an act deemed vital to Serbia's policy to restore a 'Greater Serbia'. This threatened, wider Serb autocracy, led by the Serb nationalist president Slobodan Milosevic, effectively spooked the other Yugoslav republics into declaring their independence from the federation (Chapter 3). Years of armed conflict ensued, as first Slovenia, then Croatia, Bosnia-Herzegovina, Macedonia, Montenegro, and finally Kosovo, declared their independence and left, or struggled to do so. With a "mixed" war (civil and international) erupting in Bosnia-Herzegovina, and the establishment of the ICTY in The Hague,²² a short NATO campaign in September 1995 was finally required to stop the ethnic cleansing of the Muslim population, effectively forcing an end to hostilities, and the signing of the Dayton Peace Accords on 14 December 1995.²³

Milosevic could now direct his attention to the "Kosovo problem", about which international concern had been expressed for some time due to the deteriorating situation there. The key lay in the population mix. Some 90 percent of the population of Kosovo are ethnic Albanian, the Serbs form seven or eight per cent, and the rest are comprised of small groups of Gorani, Roma, Bosniaks and others. In contrast, Albanians comprised only a minority overall within Yugoslavia as a whole, so a federal status for Kosovo was needed in order to satisfy the Albanian desire to preserve their identity, and hence permit their self-determination. A first Kosovo declaration of independence, issued on 22 September 1991, naturally was rejected by Serbia. Kosovo organised a policy of passive resistance, a government in parallel under its chosen president, Ibrahim Rugova, and the Kosovo Liberation Army was formed (p 39). By 16 June 1998, Russian President Boris Yeltsin had invited Milosevic to Moscow in order to attempt to discourage further military intervention in Kosovo by Serbia, and UN Security Council Resolution 1199 (1998) of 23 September 1998 affirmed that the situation in Kosovo constituted a threat to peace and security in the region. Meanwhile, high-level negotiations to address the situation in Kosovo had begun largely after the London Conference in late August 1992 (at which Kosovo was all but ignored) (p 47), with the Hill negotiations (Chapter 6), and Holbrook Mission of 1999 (Chapter 7), the Rambouillet Accords of 1999 (Chapter 8), and the Ahtisaari

²¹ 1989 was the anniversary of the Battle of Kosovo Polje (Field of the Blackbirds) on 15/28 June 1389 (St. Vitus Day), at which Serbian independence was lost to the Ottomans until 1878.

²² "International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", UNSC Resolution 827 of 25 May 1993 (adopted unanimously).

²³ "The General Framework Agreement for Peace in Bosnia and Herzegovina, and Annexes, 14 December 1995", www.ohr.int/dpa/default.asp?content_id=380.

Comprehensive Proposal (Chapter 12), and it is largely the detail and outcomes of these negotiations which form the overall subject matter of *Contested Statehood*.

Throughout the many efforts made by the UN, the EU, NATO, the OSCE, sub-groups such as the International Contact Group (the US, the UK, France, Germany, Italy, and Russia), humanitarian organisations, NGOs, and others, to resolve peacefully the situation between Serbia and Kosovo, Kosovo suffered from its uncertain legal personality, and thus from inequality as a negotiating partner (p 201). Serbia resented the external interference in what it considered to be an “internal matter” (p 84), while the growing list of atrocities perpetrated against the Kosovars demanded international attention and involvement. Kosovo was often hard-pressed to compromise on its own demands, yet whenever a deal seemed to have been struck, Serbia (usually with Russian support) could and would counter-propose and/or make changes to agreed terms, often at the last minute. By 20 October 1998, NATO was once again threatening to use armed force both to stop the perpetration of violence against the majority in Kosovo and to “encourage” a more-focussed Serbian participation in the international negotiations to resolve the conflict. Despite these many efforts, matters moved finally to a semblance of resolution only after NATO had again felt forced to launch a bombing campaign on the basis of humanitarian intervention in the Spring of 1999, in order to put a stop to the ethnic cleansing of the Kosovo Albanian population by Serbia (Chapters 9 and 10).²⁴ Milosevic, head since 15 July 1997 of what was now the Federal Republic of Yugoslavia, would in turn find himself indicted on 24 May 1999 by the ICTY, along with four other of the most senior leaders of the FRY and Serbia, on the basis of command responsibility.²⁵

The NATO campaign in 1999 resulted in the UN assuming overall control of Kosovo. UNSC Resolution 1244 of 10 June 1999²⁶ provided a mandate under Charter Chapter VII to a NATO peace force under UN oversight, with a view to “tutelage” for eventual self-government. Kosovo began work on the process of “standards before status”, crucial to which was respect for human and minority rights, and on drafting a constitution (Chapter 11). Negotiations led by the International Contact Group to solve the issue of Kosovo’s status recommenced, initially with the participation of Serbia and Montenegro, and subsequently, with Serbia alone, after Montenegro, too, left the federation. Milosevic resigned on 6 October 1999, having finally acknowledged the victory of Vojislav Kostunica after heavily-rigged elections were annulled in Kostunica’s favour by the Yugoslav Constitutional Court, which certainly helped to remove one major impediment to settling the Kosovo peace negotiations. Even then, however, status could not be agreed. The UN Special Envoy, Martti Ahtisaari, invited the parties to further discussions in Vienna on 12 January 2006, and presented his plan to the UN Security Council on 26 March 2007, recommending what in effect was independence in all but name.²⁷ After this, it could be argued (if not sincerely hoped), the game was up for Serbia, but it was not yet to be: Russia (and other states) objected to the Ahtisaari Comprehensive Proposal, began directing personal attacks at the Special Envoy, and alongside Serbia, demanded a new round of negotiations. No doubt

²⁴ The NATO bombing campaign lasted from 24 March–11 June 1999. The use of force for humanitarian intervention is highly controversial in international law. See M Weller, *Contested Statehood, Kosovo’s struggle for Independence* (Oxford University Press, 2009) at 164 (notes), for citation to the different authorities.

²⁵ See, eg, “Prosecutor’s Statement, ‘Jurisdiction over Kosovo’, 10 March 1998”, Fifth Annual Report of the ICTY, UN Doc. A/53/219, S/1998/737 (10 August 1998), para. 118, p 31; UNSC Resolutions 1203 of 24 October 1998, and 1207 of 17 November 1998.

²⁶ Passed 14 votes to 0 (China abstaining).

²⁷ The formal report included a separate recommendation for full independence.

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in a spirit of “generous negotiation”, the US, EU and Russia commenced by 9 August a further 120 days of negotiations, extended again until 7 December. With the presentation of their final report to the UN Security Council, the EU apparently indicated it would “promptly” recognise a Kosovo UDI, which Kosovo proceeded to issue on 17 February 2008.

Thus it is that despite the many opportunities afforded to Serbia over the last two decades to settle the dispute with Kosovo, in particular, and ahead of the latter’s claimed independence, for example, by respecting Kosovo demands for self-determination and restoring its high-level autonomy, “Serbia’s actions in relation to the crisis were not just one, but possibly two steps out of sync” (p 280). To no small extent, Serbian foot-dragging and general intransigence reminds this reviewer of Bertolt Brecht’s play *Mother Courage*, in which the wilful blindness of a self-obsessed mother led to the loss of her children, her means of living – all, in fact, except herself, as she chased the profits of war. Be that as it may, *Contested Statehood* provides a fascinating insider’s account of what no doubt will remain a topic of huge interest and debate for many years to come among those with an interest in “matters Kosovo”, not least due to the uncertainties at this point of the outcome of the advisory proceedings before the ICJ. As noted earlier, Dr Weller is extremely well-placed to provide such an account, and has done so in a highly-detailed and well-resourced manner, along with the occasional *leitmotif* note provided as to the demeanour and *bona fides* of certain personalities, the décor and entertainment provided at certain chateaux or conference centre, *etc.* He is undoubtedly pro-Kosovo, but provides frequent, and easily digestible, digressions into the relevant international law, such as the on-going debate surrounding humanitarian intervention, the legality of the NATO threats and use of force, and the activities and contributions of international institutions and NGOs alike.

This monograph is unlikely to be used as a textbook, but would certainly be useful in terms of reference for students, researchers, academics or practitioners in the fields of international law, politics, history, international relations, and government. There is in particular an overwhelming amount of detail regarding the structure and operation of this or that framework agreement or proposal, the counter-proposals and compromises, and those otherwise “final” documents which never actually were. It is not always an “easy read”, as Dr Weller adopts a more themed approach (history, human rights violations, shuttle diplomacy, the law on secession and the use of force, *etc.*), than a strictly chronological one, but this reviewer is all-too-aware of the necessity to weave back and forth when attempting to pick up the disparate and conflicting threads of accounts of events in the Balkans. Further, students of history, for example, are familiar with synchronous chronology charts, which detail events occurring simultaneously at any given point in time, and something similar would perhaps prove beneficial to such works as *Contested Statehood*. Having said that, a short bullet-point chronology and the detailed table of contents were invaluable throughout, as were the index and extensive bibliography. In conclusion, the slice of time addressed in *Contested Statehood* illustrates the political cauldron the Balkans has long represented; if the problems, challenges, and troubled history there are not to plague the region forever, such contemporary accounts as the struggle for Kosovo expounded in *Contested Statehood*, and the ways of seeing them provided in *Escaping the Self-Determination Trap*, need to continue to be written, and read.

ELIZABETH CHADWICK*

PRACTICAL APPLIED LEGAL THEORY

As anticipated, Professor Taylor's article on the Relevance of Faith Integration in Legal Education which appeared in the last edition of *Nottingham Law Journal* has led to a great deal of debate within the Law School. Erika Kirk, a Senior Lecturer in Law at Nottingham Law School and also an ordained priest in the Church of England, has penned an equally thought provoking response.

THE RELEVANCE OF FAITH INTEGRATION IN LEGAL EDUCATION – A RESPONSE

REVEREND ERIKA KIRK*

The purpose of Professor Taylor's essay is to consider "whether faith integration in a legal education is worthwhile". Professor Taylor's answers to this question are based on his experience of working at a Catholic Law School (the University of St. Thomas (Aquinas), in Minneapolis, Minnesota (USA)). The evidence presented, and some of the assertions made about the nature of legal education, could be contentious, but the issues considered raise interesting and important questions.

In fact, the title of Professor Taylor's article does not tell the whole story, as his argument is as much about the place of ethics in legal education, as it is about the relevance of faith to the study of law. Herein lies one of the difficulties in assessing the importance of his study, as he appears to conflate two main propositions, which do not need to be considered together, and which can legitimately be examined separately.

Professor Taylor's first proposition relates to one of the central educational goals of the University of St. Thomas, which is that students should be helped to integrate their religious identities into their developing professional identities as future lawyers. But he moves quickly from here to a second proposition, that the core definition of the work of a lawyer is "problem solving with a moral compass in a legal context".

Whilst this moral compass would necessarily have a particular orientation at a Catholic University, moral teachings of other faiths and traditions would presumably lend a different flavour, and so reinforce the possibility that faith integration and the awareness of ethical principles can occur independently of each other. This brief commentary attempts to examine these two aspects of Professor Taylor's work separately, and also highlights some of the other issues raised in passing.

Professional identity and faith

Professor Taylor observes that traditional law schools treat religious identity as though it were a personal interest such as music or sport, and therefore irrelevant to a student's legal education and training. The University of St. Thomas, by contrast, creates an environment that is explicitly "faith-friendly". There is a timetabled period for worship and reflection, a Catholic mass takes place every day in the college chapel, and numerous student prayer and meditation groups exist.

Professor Taylor also reports that he has, over the years, had many illuminating conversations about religion with his students, and listened to their faith stories.

However, he admits that this, in itself, does not connect legal education with religious identity. His experience also reveals that in spite of this “faith-friendly” environment, students are reluctant to acknowledge their faith identity in classroom discussion. He links this with what he perceives to be the cultural social norm in the United States, that religious identity is not openly disclosed except in the company of fellow believers, because religious differences can provoke conflict. He acknowledges the truism that learning and talking about religious differences should enable us to practice tolerance, but on his own admission, the “civil discourse” that takes place does not lead to religious self-identification in the classroom.

This raises doubts about the extent to which integration of faith is achieved in the learning process, and it is therefore difficult to evaluate the assertion that considerations of faith and religion enhance teachers’ teaching and students’ learning. Professor Taylor does make reference to a national Law School Survey of Student Engagement conducted across numerous educational institutions in the USA in 2008, which indicated that law students at St. Thomas reported higher ethical moral and spiritual development than their peers. But the outcome of this self-assessment need not necessarily be a result of the efforts of the law school; students who make a conscious decision to attend a Catholic University may have developed these characteristics before arriving at the institution.

Other questions may be raised by this attempt on the part of the Law School to link professional identity with faith. For example, why should religion be accorded this privileged position? Are there other aspects of identity such as politics, race, gender or sexuality, which might be integrated into the professional formation of the lawyer? And would students trained in such a way be more effective professionals as a result? Or might these traits influence professional decision-making for the worse? It might be argued that, far from integrating these characteristics into professional practice, the aim of training should be to eliminate the bias that they might cause.

Ethical reasoning and legal advice

Since the First Report of the Lord Chancellor’s Advisory Committee (ACLEC) in 1996,¹ the significance of the ethical dimension of the law and its connection with personal and professional values has come to increased prominence in the English legal system. In 1999, Roger Brownsword² purported to identify an emerging consensus that law schools should take ethics seriously, and that many academic lawyers had begun to realise that the study of ethics has a legitimate place in the syllabus.

Brownsword perceived “both high roads and low roads to the view that ethics should figure in the law school curriculum”. It might be said that an institution such as the University of St. Thomas takes the high road, giving prominence to moral reasoning in the search for solutions to legal problems. This is reflected in the underlying philosophy of law that is adopted at the University of St. Thomas, and in the opportunities for discussion that are afforded to the students.

Professor Taylor reports that the Catholic Intellectual Tradition and principles of Natural Law (rather than the Positivist tradition) inform the teaching and analysis of the substantive legal subjects. Thus gender and race equality under the law, human rights, and even subjects such as Taxation law, can be studied against the backdrop of Natural Law, and the moral foundations of these laws examined in this context. Discussion of these moral foundations, it is argued, gives law students the

¹ First Report on Legal Education and Training, London, ACLEC 1996.

² (1999) 33 *The Law Teacher* 1.

opportunity to develop their moral reasoning and enhance the growth of their own moral compass.

Professor Taylor acknowledges the fact that some students question the use of Catholic Social teaching as a starting point, but responds that students can hardly be surprised by this, having chosen to study at a Catholic institution. What is missing from his essay is a detailed examination of the assertion that a strong moral compass makes a better lawyer. Critics of this view could argue that the quality of the legal advice could then depend on the particular moral system adopted by the lawyer, and could even be subject to unhelpful bias.

However, as far as the English legal system is concerned, in the debate that has followed the ACLEC report (above), there is important support for Professor Taylor's standpoint. Donald Nicolson³ writes that public concern about the integrity of lawyers has resulted in much academic interest in how lawyers understand morality and justice, and how practitioners resolve the ethical issues that they face in their work. Further, Nicolson argues⁴, although professional codes of conduct can provide an enforceable means of ensuring ethical behaviour, "their impact is likely to be limited if individual lawyers are not committed to acting ethically".

If, therefore, Professor Taylor is correct in asserting that the moral quality of legal advice is better when lawyers use their moral reasoning, how is this best taught? How can law students be trained to use moral reasoning as a necessary part of differentiating good solutions from bad solutions when giving advice to clients?

Nicolson's response is that this is a matter of character formation. His view is that to ensure moral behaviour in the long term, lawyers must be committed to acting ethically, and possess "the sort of character which regards doing the right moral thing . . . as important . . .". But does character formation or moral formation feature in the curriculum of any law school?

This brings us full circle to Professor Taylor's vision of legal education, as practised at the University of St. Thomas. At the Catholic law school, he argues, students can "nurture the religious part of their moral compass", a fact which in his view, will make his students better lawyers. Such a large statement might require further justification, but the issues that are raised by his article are certainly worthy of further debate.

³ (2005) 25 SLS 601.

⁴ At 605.

NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

This edition's Nottingham Matters takes the form of the text of an inaugural professorial lecture given by Professor Rebecca Parry, who joined Nottingham Law School in September 2007. Professor Parry is a member of the Insolvency and Corporate Law Research Group within Nottingham Law School the members of which have research and teaching interests in corporate insolvency law, personal insolvency law, cross border insolvency law, insolvency and creditors' rights systems in transition economies, secured transactions, general corporate law and business regulation.

The inaugural lecture was given on 22 April 2009 on the day of the Budget announcement. The timeliness of the lecture was highlighted by the announcement in the Budget of a consultation exercise on UK insolvency law. A number of points to be dealt with under the consultation exercise were considered in the inaugural lecture, although few details of the proposals were known at that time. The consultation exercise subsequently took place, closing in September 2009, although the outcome of this exercise was not known at the time of going to press.

IS UK INSOLVENCY LAW FAILING STRUGGLING COMPANIES?

INTRODUCTION

This inaugural lecture is the third insolvency related inaugural lecture to be held at Nottingham Trent University in the space of a year. During that time the impact of sub prime lending has caused devastating impacts on the credit market with significant knock on effects for the retail sector and for other types of business. In consequence we have seen the disappearance of Woolworths, MFI and Zavvi from high streets and retail parks whereas many other businesses, such as Whittards, have swiftly emerged from administration by means of an arrangement referred to as prepack. The UK's insolvency laws have come under scrutiny as a result of these developments and there is now a real prospect of reform: a consultation exercise on UK insolvency law was announced on the afternoon of this inaugural lecture.¹ The aim of this lecture is to consider whether criticisms of the UK insolvency system are fair and whether, as has been suggested by some, the US system might be a suitable model for reform.²

¹ This consultation exercise was subsequently opened in June 2009 and the deadline for responses passed on 7 September 2009. The consultation document, "Encouraging Company Rescue" is available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf.

² See for example See M Scibor-Rylski, "UK needs its own Chapter 11 for recession", letter published in *The Times*, January 15 2009 and the submissions of the European High Yield Association to the UK Treasury, <http://www.ehya.com/media/press-releases/26-february-2008.shtml>. In July 2008 the Conservative Party leader David Cameron made a speech

To provide a bit of context, I will begin by examining the potential outcomes where a company is insolvent, before outlining the procedures that UK insolvency law contains that enable these outcomes to be achieved. I will then address two main criticisms. The first is that prepacks, which have attracted a great deal of press attention lately, have harmed the interests of creditors. The second is the criticism that UK insolvency law is inferior to US insolvency law. In order to address this second issue there are many points which might be addressed. However, to limit the discussion of the US system a little, four points in particular will be highlighted, and I will explain why it does not necessarily present the best way forward for UK insolvency law.

WHAT CAN HAPPEN TO INSOLVENT COMPANIES?

As we will see, there are many insolvency procedures and many strategies that can be adopted under UK law but the basic outcomes that may be achieved relate to whether the company, an artificial legal person, can continue in existence or whether its business and/or its assets should instead be sold, either collectively or individually. There are therefore three distinctions that we have to make: between the company, its business and its assets. We can see the distinction between the company, its business and its assets by means of a simple example involving Widgets R Us Ltd, a manufacturer of widgets with a side line in the manufacture of hula hoops. In law, Widget R Us is a legal person which can hold property, enter into contracts and be involved in legal proceedings in its own right. If facing financial difficulties there are three main things that can happen. The company itself may survive in its present form, or with some modifications *eg* dropping the manufacture of widgets to concentrate on hula hoops. Alternatively it may be that the company cannot continue and a sale of its business may be the most economically wise way forward. The business is comprised of its means of production and sale of widgets and hula hoops collectively. Alternatively it may be the hula hoops business and the widgets business will be sold separately. Where no business sale is possible, the company's property can be sold as individual assets. This is the option that is likely to realise the least value.

The possible outcomes can therefore be narrowed down to three:

- The company is saved, as a whole or in part;
- The company's business, or part of it, is transferred;
- The company's assets are sold.

Only in the first of these circumstances does the company itself survive. This outcome is the primary objective of the insolvency procedure of administration and yet it is statistically uncommon.³ It is far more likely to be the case that the company's business, or part of it, will be sold, or that its assets will be sold.⁴ It is often the case, therefore, that the company itself will be wound up upon the conclusion of the rescue proceedings and in such circumstances the term "corporate rescue" is really a misnomer. While this outcome may be surprising it should also be remembered that not all companies can be saved. Another important point is that some companies now enter administration in circumstances where they would previously have gone into

advocating Chapter 11 style reforms. See <http://conservativehome.blogs.com/torydiary/files/2008-07-14%20Employment%20plan%20-%20press.pdf>

³ See S Frisby, *Report on Insolvency Outcomes* <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf>, at 39.

⁴ For a detailed and insightful review of insolvency outcomes see Frisby, above.

liquidation.⁵ They do this, not to be rescued, but to have their affairs wound down, therefore in many cases where companies enter administration they will never have been intended to be rescue cases.

The examples of Woolworths, MFI, Zavvi and Whittards, although admittedly a very small sample, show a fairly clear pattern whereby business are either sold, if buyers are able to identify some aspect of the company worth preserving; or closed down, where no buyer is found. One question is whether there is a middle way, which would see more companies being saved without a business sale.

OVERVIEW OF UK INSOLVENCY LAW

A point in need of clarification is, what do we mean by UK insolvency law? Firstly, there are many insolvency procedures to be found in the statute book. Most people might be able to identify liquidation and administration, but in fact there are over twenty different procedures. Although this is a surprisingly high number, many of the procedures relate only to particular industries, such as public utilities,⁶ which are unsuitable for conventional insolvency procedures, since their activities must be continued.

Besides the formal procedures outlined here, it must be added that a significant role is played by workouts which take place outside this statutory framework.⁷ It is just as important for the law to support informal rescues as it is for the many formal procedures to function effectively, since much of the successful rescue activity in recent years has been through these informal mechanisms. One important activity has been the appointment of turnaround specialists by banks, an activity that has prevented the failure of many companies. Indeed, so successful have informal rescue efforts been in the past that it may reasonably be contended that the bulk of companies that previously ended up in formal procedures have been lame ducks. It is also notable that in the past the most high level restructurings have taken place on a confidential and consensual basis outside of the statutory framework.⁸ Unlike formal insolvency processes, such informal restructurings receive no publicity, a factor that may be one of its strengths. However as lending has changed and diversified in recent years, these workouts are becoming more difficult.

Arguably, therefore, any evaluation of the UK system should take account, not only of the formal procedures but also of the informal mechanisms. Unfortunately in a lecture of this length there is insufficient scope to consider in depth all aspects of formal and informal mechanisms. Since the main criticisms have been aimed at administration I will be focussing tonight on that procedure.

⁵ See L Linklater, "New Style Administration: A Substitute for Liquidation" (2005) 26 *Company Lawyer* 129 and A Keay, "What Future Liquidation in Light of the Enterprise Act Reforms" [2005] JBL 143.

⁶ See for example Banking Act 2009, s 141; Building Societies (Insolvency and Special Administration) Order 2009/805; the PPP Administration Order Rules 2007/3141; Energy Administration Rules 2005 (SI 2005/2483); and Railway Administration Order Rules 2001 (SI 2001/3352).

⁷ Indeed it is arguable that the most meaningful efforts at corporate rescue take place outside the context of formal insolvency proceedings. In many instances the problems of companies have been resolved by intervention by their clearing banks: See S Frisby, note 3 above, at 21–22 and V Finch, "Doctoring in the shadows of insolvency" [2005] JBL 690–708. See also JAA Adriaanse, *Restructuring in the Shadow Of Law, Informal Reorganisation in the Netherlands* (2005, Kluwer Law International).

⁸ See J Flood, R Abbey, E Skordaki and P Aber, *The Professional Restructuring of Corporate Rescue: Company Voluntary Arrangements and the London Approach* (1995, ACCA); A Belcher, *Corporate Rescue* (1997, Sweet and Maxwell), at 117–122; V Finch, *Corporate Insolvency Law* (2nd edn, 2009, Cambridge University Press), at 307–317; JH Armour and S Deakin, "Norms in Private Insolvency: the 'London Approach' to the Resolution of Financial Distress" (2001) 1 JCLS 21.

Administration

Of the insolvency procedures available, administration has in recent years risen in profile enormously. In its early years it was a process that was known only to insolvency professionals and a few academics. Then it became known to every lower division football fan, in particular following the collapse of ITV Digital, which saw many football clubs enter administration. In the last few years, however, it has been regularly in the news headlines and much of the recent newspaper criticism has been levelled at administration.⁹ So what does administration entail?

Administration is primarily a facilitative procedure, intended to operate in a manner that provides the company with a period of moratorium protection from the claims of creditors while a qualified insolvency practitioner investigates its position and devises proposals to be put to creditors for their approval, often through the sale of the company's business as a going concern, or the implementation of an agreement with creditors. As originally enacted administration could only be opened by court order,¹⁰ however the procedure has changed in recent years. Most notably, in addition to the process of appointment through the courts it is now possible in some circumstances for an administrator to be appointed out of court,¹¹ provided that an administrator can be found who is willing to act and to confirm that he thinks that the circumstances of his appointment are appropriate, specifically whether the appointment is being made for an acceptable purpose of administration.¹²

One variety of administration, the "prepack", has grown in use as an expedited way to achieve a business sale in administration. We might note that prepacks are a variety of administration proceedings which is not to be found in the statute book. This does not mean that prepacks are illegal but rather they may be regarded as something of a loophole.

Prepacks

In recent months, much criticism has concentrated on prepacks, with critics contending that this form of administration has been used to rip creditors off.

- *Daily Mail* (5 January 2009) – "Prepack deals risk cheating creditors".
- *Daily Telegraph* (12 January 2009) – "MPs to investigate loopholes exploited by businesses going bust" – highlighting government action in respect of prepacks.
- *Norwich Evening News* (15 April 2009) – "Suppliers angry at prepack administrations" – interviews with aggrieved local traders who feel that they have been swindled by prepacking companies.

So what is a prepack and why are people unhappy about them? Prepacks operate in a different manner to the form of administration proceedings set out in the statute book. The conventional process is that, after an administration appointment is made, an administrator will take office, spend a period of time assessing the company, and he will then present proposals for creditors to consider at a meeting. The creditors can decide whether or not they want to accept these terms. The basic function of administration is therefore to allow the company a bit of breathing space while the administrator devises plans for the company's future, bearing in mind that the primary purpose of administration is for the company to be saved.

⁹ There was much criticism of UK law by the EHYA, note 2 above, in particular relating to three points: that formal procedures are perceived as failure mechanisms; that the administration moratorium does not prevent abandonment of contracts, which may deter filing; that difficulties in obtaining finance may hamper continued trading.

¹⁰ Insolvency Act 1986, s 8.

¹¹ By a floating charge holder, or the company, or its directors: Insolvency Act 1986, Sch. B1, paras 14 and 22. Appointment by court order is still possible under para 12 and is the only appointment option available in some circumstances.

¹² Insolvency Act 1986, Sch. B1, paras 18(3) and 29(3).

A prepack operates differently.¹³ Prior to the administration proceedings being opened, the company will agree a sale of its business. It will then enter administration, following which a sale of its business will immediately take place. The administration process is therefore severely truncated and creditors are not presented with alternative options. The streamlining of the administration procedure under the Enterprise Act 2002, introducing provision for the appointment of an administrator to be made out of court, has contributed to a sharp rise in the numbers of prepacks in the years since the reforms came into effect.¹⁴ For example, prepacks have been used recently, for example, in relation to Whittards, USC, Officers Club, and Rileys snooker halls.

One important point to remember is that the primary purpose of administration is to rescue the company¹⁵ and this is not something that is achieved under a prepack, which is a business sale. If it is not reasonably practicable to save the company¹⁶ the administrator can instead try and achieve a better outcome for creditors than they would get if the company were liquidated¹⁷ and the use of a prepack may enable this purpose to be achieved. This means that where the administration takes the form of a prepack the administrator must explain why that route has been taken.

There may be good reason for using a prepack. Such sales often take place for sound commercial reasons, since insolvency procedures, once opened, can have a negative impact on goodwill and on the value of the business. Where a business is built upon the skills of employees and on knowhow the opening of insolvency proceedings can be devastating, since key members of the workforce may choose to take up employment elsewhere to avoid the uncertainty of remaining with the company. In addition, a prepack is often the only viable option, since there may be insufficient funds available to enable a company to continue trading. In these situations, and others, the professional opinion of a licensed, experienced and unbiased insolvency practitioner may be that the prepack is the best way forward. An important point is that prepacking can often enable better outcomes to be achieved for creditors than would be possible in liquidation and the record of prepacks in preserving jobs is notable.¹⁸

The court is therefore unlikely to refuse to make an administration order where a proposed prepack is supported by the reasoned and objective opinion of an insolvency practitioner who has carried out his duties properly. There have been few examples of prepacks coming before the courts, however in *DKLL Solicitors v Her Majesty's Revenue and Customs*¹⁹ the court granted an administration order in relation to an insolvent law firm where a prepack was intended, in spite of the objections of the law firm's major creditor. Persuasive factors were that the prepack would safeguard the jobs of the firm's employees and that it would ensure minimal disruption to the affairs of the firm's clients.

¹³ See V Finch, *Corporate Insolvency Law* (2nd edn, 2009, Cambridge University Press), Chapter 10; L Qi, "The Rise of Pre-Packaged Corporate Rescue on Both Sides of the Atlantic" (2007) 20 *Insolvency Intelligence* 129; S Harris, "The Decision to Pre-Pack" (2004, Winter) *Recovery* 26; J Moulton, "The Uncomfortable Edge of Propriety – Pre-Packs or Just Stitch Ups?" (2005, Autumn) *Recovery* 2; M Ellis, "The Thin Line in the Sand" (2006, Spring) *Recovery* 3; P Walton, "Pre-Packaged Administrations – Trick or Treat?" (2006) 19(8) *Insolv. Int.* 113; D Flynn, "Pre-Pack Administrations – A Regulatory Perspective" (2006, Summer) 16 *Recovery* 3; S Davies, "Pre-Packs – He Who Pays the Piper Calls the Tune" (2006, Summer) 16 *Recovery* 16; A Kastrinou, "An Analysis of the Pre-Pack Technique and Recent Developments in the Area" (2008) 29 *Company Lawyer* 259.

¹⁴ S Frisby, *A Preliminary Analysis of Pre-Packaged Administrations* (2007, R3).

¹⁵ A hierarchy of objectives is set out under Insolvency Act 1986, Sch B1, para 3, under which "rescuing the company as a going concern" is of greatest priority.

¹⁶ Or if such efforts would leave creditors worse off.

¹⁷ Insolvency Act 1986, Sch B1, para 3(3).

¹⁸ S Frisby, note 14 above.

¹⁹ *DKLL Solicitors v Her Majesty's Revenue and Customs* [2007] EWHC 2067 (Ch), para 10.

This is not to say that all prepacks should be free from criticism. Undoubtedly in some instances prepacks have lacked objectivity and have been subject to abuse by business managers and by a small number of insolvency practitioners, who initially act as adviser, then organise and implement the prepackaged administration. In such circumstances the administrator may be considered to lack the independence and objectivity that may be expected of an administrator. For this reason, the standards applicable to prepack sales were tightened up in January, under Statement of Insolvency Practice 16, requiring greater levels of information to be given.²⁰ Although no obvious case of an abusive prepack has therefore yet come before the courts, it can be anticipated that if one was to be challenged in future the courts would make a stand against bad practices.

Of course the sale is to business insiders particular care must be taken. Creditors' suspicion of abuse will be most keenly aroused in such circumstances as on occasion prepacks have been used as a vehicle for what is referred to as phoenix trading. Phoenix trading arises where the managers of a company that has been, or is being, liquidated, set up a new company with the same name, or a similar name, often operating from the same business premises and with the same assets. Such activities give the impression that the first company has continued to trade.²¹ There are instances where there have been chains of phoenix companies: where a company fails its business will be bought by a new company, no lessons will have been learned and the second company will then repeat the cycle. The lines between phoenix companies and prepacks are becoming blurred in some instances but it is important to be clear that in most instances a prepack will entail a legitimate and open use of the procedures to achieve a fresh start, and will not necessarily involve any wrongdoing. Arguably attentions should be focussed on the old company and whether there has been any wrongdoing²² and not on the new company. In many instances we may regard the emergence of the new company as an appropriate preservation of the economic value of the assets concerned.

IS THE UK SYSTEM INFERIOR TO THE US?

Having considered what is arguably the most contentious issue in UK insolvency law at the moment, we will now consider suggestions that UK law should borrow features of the United States Chapter 11:

- European High Yield Association – an open letter to the Treasury, primarily relating concerns regarding restructurings at the very top end of the scale.²³
- David Cameron/George Osborne – July 2008 proposals indicating proposals which will adopt the best features of Chapter 11 for UK law.²⁴
- Letters in the Times, January 2009: two letters recommending Chapter 11, one arguing that the present system is fit for purpose.²⁵

²⁰ See also now Insolvency Service, *Report on the First Six Months' Operation of Statement of Insolvency Practice 16*, available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/sip16-final.pdf>; and *Re Kayley Vending Limited* [2009] EWHC 904 (Ch); [2009] BCC 578.

²¹ See eg, *Re Travel Mondial (UK) Ltd* [1991] BCC 224. Some restriction on phoenix companies arises under restrictions on the reuse of company names: see Insolvency Act 1986, s 216.

²² Such as fraudulent trading or wrongful trading, under Insolvency Act 1986, ss 213 and 214, or matters that would merit the disqualification of director under the Company Directors Disqualification Act 1986.

²³ See the European High Yield Association, note 2 above.

²⁴ See Cameron, note 2 above.

²⁵ M Scibor-Rylski, "UK needs its own Chapter 11 for recession" *The Times* 15 January 2009; I Williams, "Chapter 11 is better than UK system" *The Times* 23 January 2009; IM Fletcher, "Insolvency practice" *The Times* 20 January 2009.

The suggestion made by the Conservative Party raises the prospect that some version of US law might be transplanted into UK law if this party is to form the next government. Might such reforms enable an alternative to prepacks to be found? Might they see a greater percentage of companies being saved?

What does US law have to offer?

It is notable that over thirty years ago there were similarities between the US and UK systems, with receiverships holding sway in both jurisdictions.²⁶ Although receiverships were focussed on the interests of creditors, they could result in a company being preserved as a going concern, provided that this was in the interests of creditors. They performed a valuable role in that means of restructuring companies were at that time otherwise unavailable in the US. This is not to suggest that receiverships operated in both countries in the same manner. Notably the appointment of a receiver in the US was made by the court, whereas in the UK it was made by a creditor according to the terms of his contract with the debtor. This distinction between the US system, based on court control, and the UK system, based on creditor control, was reflected in reforms that followed and arguably remains one of the major differences between the two systems.

In 1978 the US decided to carry into effect a sweeping and controversial reform, introducing what are referred to as “debtor in possession” proceedings where the company’s management remained in charge but with strong court oversight in place of insolvency practitioner control.²⁷ In contrast, in the UK system, reform came later and it was less drastic, since the procedures introduced under the Insolvency Act 1986 were designed to supplement, not replace, administrative receiverships with administration. Subsequently, the Enterprise Act 2002 modified this system in the interests of collectivity, diluting the level of control that creditors may exert. We therefore have in this country a system that has evolved gradually. However might the opportunity have been taken, instead, to take the steps that the US reformers had taken in the 1978 reforms?²⁸ Might such reforms be attractive now? In fairness, the present financial crisis is the first major test for the post-2002 system and it is important that it should be assessed in a cool and rigorous fashion. Commendably the Insolvency Service has funded a series of studies that provide a goldmine of information on the strengths and weaknesses of the present system and it has compiled a report which contains much reflection upon the strengths and weaknesses of the present system.²⁹ As announced by the Chancellor today, however, a consultation exercise will be undertaken. It is important that there should not simply be a knee jerk reaction to high street insolvencies that might have happened whatever insolvency system was in place.

Before considering potential attractions of the US system, some criticisms must briefly be considered.

²⁶ See eg, D Baird, *Elements of Bankruptcy* (4th edn, 2006, Foundation Press), at 69–74 on the development and influence of equity receiverships in the USA.

²⁷ Notably the US was not the pioneer in modern corporate rescue law, since the French had beaten them to it, although until recently French insolvency law has failed to get the details right, resulting in a 90% failure rate.

²⁸ See also G Moss, “Chapter 11 – an English Lawyer’s Critique” (1998) 11 *Insolvency Intelligence* 17–20; C Sharp, “English Insolvency Law – Does it Require American Amendments?” (2008) 6 *Corporate Rescue and Insolvency* 174; J Townsend, “Comparing UK and US Business Rescue Procedures: are Administration and Chapter 11 Perceived to be Workable and Affordable?” (2007) 23 *Insolvency Law and Practice*; R Broude, “How the Rescue Culture Came to the United States and the Myths that Surround Chapter 11” (2000) 16 *Insolvency Law and Practice* 194.

²⁹ Insolvency Service, *Enterprise Act 2002 – Corporate Insolvency Provisions: Evaluation Report* (January 2008), available at: <http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/EA02CorporateInsolvencyReport.pdf>.

Comparative performance of the UK system

Firstly, we should take account of how the UK system has fared in international comparisons. As part of the World Bank's "Doing Business" study, account was taken of business closures in 127 countries (countries where at least 60 insolvency cases had been concluded).³⁰ This study took account of:

- The average time to complete a procedure,
- The cost of the bankruptcy proceedings, and
- The recovery rate: specifically how many cents on the dollar claimants (creditors, tax authorities, and employees) would recover from an insolvent firm in a hypothetical case.

The UK system was ninth quickest in duration, tenth in terms of the amounts recovered for creditors. Its lowest ranking was 24th, in terms of costs. The UK system beat the US system in all three categories. However this outcome should not be unduly celebrated. The three features that were examined are not of course the only relevant ones to which regard might be paid and arguably place too much emphasis on liquidation outcomes. Also, the results are based on a hypothetical case study, rather than on an average of a significant number of cases, and so the outcomes need to be treated with appropriate caution.

Legal transplants

Another thing to note is that a system that works well in one country will not necessarily work effectively if transplanted into another legal system.³¹ There may be all sorts of factors, such as employment law and social security law, that lead to the success of a regime in one country but if these factors are absent in another country the law may not work as well. This does not mean that other systems should not be studied but rather that we should be aware of the dangers of naïve comparisons and inappropriate transplants. One important difference to bear in mind about the US and UK systems is that in the courts are in control of the process in the US, whereas in the UK the key decisions are often taken by insolvency practitioners, subject to court oversight. The key features of Chapter 11 rely on court intervention, and US bankruptcy judges will make business decisions, therefore if UK law was to be reformed along the lines of Chapter 11 the whole governance model would need to change and judges might need to acquire a new skill set.

Features of Chapter 11

So what are the perceived advantages of Chapter 11 that critics contend will provide a suitable model for reform of UK law? It is not possible to consider every feature, so four will be highlighted here.

- DIP nature
- DIP Financing
- Valuation
- Ineffectiveness of contractual termination provisions

Debtor in possession, "DIP"

The US system emphasises "debtor in possession" proceedings,³² where the company's existing management remain in place and oversee the rescue effort. The starting point

³⁰ See further S Djankov, O Hart, C McLiesh and A Shleifer, "Debt Enforcement around the World" (2008) 116 *Journal of Political Economy* 1105.

³¹ See A Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, 1993, University of Georgia Press).

³² On this difference between the two systems see L Qi, "Managerial Models During the Corporate Reorganisation Period and their Governance Effects: the UK and US Perspective" (2008) 29 *Company Lawyer* 131 and G McCormack, "Control and Corporate Rescue – an Anglo American Evaluation" (2007) 56 *ICLQ* 515.

in the US is that a supervising insolvency practitioner will not be appointed. It follows that there is less insolvency practitioner control under the US system. A similar model is to be found in the UK, the company voluntary arrangement, although the voting procedures are different, as are some other features. Critics of the US system have pointed out that it is not a good idea to allow those who may have been responsible for the company getting into such difficulties to be left in charge.³³ However this criticism is not necessarily fair, since directors are often replaced once the company enters Chapter 11. In some instances it may be desirable to allow existing management to remain in charge, to take advantage of their knowledge of the business and their contacts. They will have less to fear from debtor in possession proceedings which may encourage them to apply for protection at a sufficiently early stage for the company to have a chance of recovery. In contrast, an administrator will require time to familiarise himself with the business and it may be that the board of directors will have some reluctance to give him their full assistance. Perhaps trying to have the best of both worlds, both Germany³⁴ and China³⁵ have provided for the appointment of an administrator in the first instance but enable the debtor to apply to handle the case itself. Arguably however the UK system already allows sufficient flexibility through the procedures that are already on offer. The main thing that may be lacking is an effective debtor in possession procedure for medium and large companies, since they are unable to benefit from a company voluntary arrangement moratorium and this is something that will be addressed with the results of the consultation exercise are considered.

DIP Financing

A feature of US law that has attracted attention is DIP financing.³⁶ The legislation here is relatively complex. We need to bear in mind here a distinction between unsecured credit and secured credit. If a creditor's claim is secured and the debtor fails to pay, the creditor will be able to claim the assets over which he holds security. This will put him at the head of the queue for payment in insolvency proceedings. In contrast, an unsecured creditor simply has a claim for payment and he will have to line up alongside other unsecured creditors for payment. Since the debtor will not have sufficient assets to pay all of its creditors what they are owed, it is quite possible that an unsecured creditor will not get back all of what he is owed. Naturally, therefore, creditors are more likely to lend if their claim will be secured.

The US financing provisions are complex. However attention has focussed on one aspect which enables a creditor to advance fresh monies on a secured basis with priority over existing secured creditors – a priming lien.³⁷ Therefore it is possible for a creditor who advances fresh monies to support the rescue effort to leapfrog a secured creditor who advanced monies during happier times. It must be added that this leapfrogging is only permitted if financing would not be otherwise forthcoming. However in practice, this leapfrogging finance is often granted by the courts. The rationale for permitting this leapfrogging is that the financing of the rescue effort is in everyone's interests, since it supports the rescue effort and lowers the risk of liquidation, where everybody would lose out.

³³ Such arguments are considered in G Moss, note 28 above, at 19.

³⁴ Insolvenzordnung, Art. 270.

³⁵ Enterprise Bankruptcy Law 2006, article 73.

³⁶ See L Qi, "Availability of Continuing Finance in Corporate Reorganisations: the UK and US Perspective" (2008) 29 *Company Lawyer* 162.

³⁷ US Code, Title 11, s 364.

The position in the UK is somewhat different. Although, in the UK, post petition financing will gain priority under s 364(a) it is notable that it does not gain priority over the claims of secured creditors. Therefore in reality the chances of a company gaining finance will depend on either it having a proportion of its assets that are free of security or on an existing secured creditor being willing to lend further monies.

The possibility of priority finance is a further matter that will be considered as part of the consultation exercise. Were the UK system to introduce provision for leapfrogging finance this would be both a bold step and also something that would be resisted by the banks. The advantage of leapfrogging finance would be that it might make it easier for some companies to trade their way out of administration, rather than immediately prepacking. This could go some way to easing the impact of administrations on other businesses and addressing public unease about administration. It might also encourage existing secured creditors to advance further funds in order to avoid being leapfrogged. Of course these advantages must be weighed against possible disadvantages. Perhaps the most important question would be what effects this might have on lending to solvent companies, since such lending would inevitably become riskier. This reform would arguably not be worth it if it jeopardised the ability of healthy companies to gain finance at a suitable rate.

Valuation

There is not as yet any clear approach in the UK to the valuation of an insolvent company or its business. There are two basic options: either the company should be valued according to the value that it would have in liquidation, or it should be valued as a going concern. The going concern value is higher and this can have importance as it will mean that more creditors are likely to be paid.

A going concern approach to valuation has been taken under United States Chapter 11, where claims are valued by reference to the future earning capacity of the debtor.³⁸ In contrast there has been no clear UK guidance on the position. The main criticism of an approach of valuation by reference to the liquidation value of a company is that such a valuation ignores any going concern value which may be present, and which obviously exists, as evidenced by the desire of the company's investors to pursue rescue proceedings, rather than liquidation.³⁹ In contrast, it must be pointed out that a liquidation valuation will potentially lead to more businesses being saved.⁴⁰

Moratorium

Upon entering administration, or a small company CVA, the company will have the benefit of a moratorium, restricting the ability of creditors to enforce their claims. One thing that the moratorium does not prevent is the exercise of contractual termination provisions. In contrast, in the US an "ipso facto clause", which is a provision in a contract that enables a person who has contracted with the debtor to terminate the contract on the grounds of the debtor's insolvency, will be invalid.⁴¹ The effectiveness of such clauses in the UK can make companies vulnerable and this may have been what caused the Woolworths spin off Entertainment UK to collapse, taking with it Zavvi. The moratorium should perhaps be extended to prevent contractual termination

³⁸ N Segal, "Schemes of Arrangement and Junior Creditors – Does the US Approach to Valuations Provide the Answer?" (2007) 20 (4) *Insolv. Int.* 49. On valuation issues see further M Crystal and R Mokal, "The Valuation of Distressed Companies: A Conceptual Framework" (2006) 3 *International Corporate Rescue* 63 (Part One) and 123 (Part Two).

³⁹ M Crystal and R Mokal, note 38 above.

⁴⁰ It can be an important factor in a restructuring by means of a scheme of arrangement.

⁴¹ US Code, Title 11, Chapter 3, §365(e)(1).

without the permission of the court. However it must also be remembered that suppliers themselves may have shaky finances and such a provision might create strains on their ability to control their exposure to risk. A prohibition on contractual termination would also conflict with the strong emphasis placed on freedom of contract in the UK.

Conclusions regarding the US system

In conclusion therefore, there is no compelling case for any of the features of Chapter 11 to be brought to the UK and if any thought is to be given to adding yet another procedure to the present armoury the likely impact of such reform must be carefully evaluated from all aspects. Arguably the majority of companies in the UK do have suitable means at their disposal, with prepacks giving them more options in spite of the bad press that they have received.

CONCLUSIONS

In conclusion, it should not be inferred from isolated cases that the UK system is failing. It should not be expected that every struggling company can be saved. In some instances, while there may be creditor dissatisfaction, this is likely to be inevitable, since there is never going to be enough money to go round in an insolvency. There will always be hard luck stories, in particular in a recession. Nor should it be assumed that the solutions to any weaknesses that may be found in the UK system are to be found in the United States, although criticisms of that system have in some instances been overstated. One observation that might be made is that within Europe sympathetic attitudes to failing businesses have been notably lacking, in contrast to the position in the US. Indeed in a European Union survey it was noted that throughout the EU that public attitudes represented the biggest hurdle in the way of successful corporate rescue. Negative press focussed on isolated cases may therefore lead to a lack of confidence in a system that is working well as a whole, necessitating reforms that would not otherwise have been required.

Of the areas that we have considered, are there any improvements that might be made? There is far from any consensus on any suggested improvements, but particular consideration might be given to extending the scope of the moratorium, so that administration offers more effective protection. In addition, a clearer approach to valuation is needed. However it is easy to overstate criticisms and it may be best to work with the system that we have. Certainly, in the absence of any urgent issue that emerges, it is arguable that reform should not be on the agenda until the economy has emerged from the present turmoil.

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