

The Trent Law Journal



Journal of the Department of Legal Studies

Volume 2

1978

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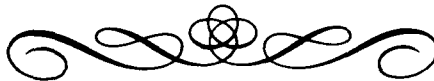
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£1

Printed by

Trent Polytechnic Central Reprographics Department

Typeset by Y. Wroughton

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APPROPRIATION IN THE LAW OF THEFT

Russell Heaton*

The aim of the Theft Act 1968 was to provide a 'simpler and more effective system of law' in relation to a broad range of offences against property involving dishonesty.¹ Although many anomalies of the old law were swept away, formidable difficulties still remain in regard to the *actus reus* of theft - "'appropriates property belonging to another.'"² The purpose of this article is to examine the case law such as it is and the main academic views on the meaning of "'appropriates'".

The Report³ expressed the sanguine view "that the concept of 'dishonest appropriation' will be easily understood even without the aid of further definition . . . It corresponds . . . to the idea in the words 'fraudulently converts to his own use or benefit, or the use or benefit of any other person' in the definition of fraudulent conversion" under the old law.⁴ Nonetheless a partial definition was recommended and enacted "'partly to indicate that this is the familiar concept of conversion'"⁵ The main part of the "'partial definition'" reads: "'(1) Any assumption by a person of the rights of an owner amounts to an appropriation, and this includes, where he has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner.'"⁶

The orthodox academic view holds that appropriation "'involves an assertion of a right in property inconsistent with the right of the person entitled to it . . . the mark of an appropriation is the exercise of dominion (whether for oneself or another) to the exclusion of the person to whom . . . the property belongs.'"⁷

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1. See Introduction to Criminal Law Revision Committee's Report: Theft and Related Offences (1966) Cmnd. 2977 (hereinafter referred to as "The Report").
2. s1(1) Theft Act 1968. All statutory references are to this Act unless otherwise stated.
3. Paras. 34 and 35.
4. s20(1)(iv) Larceny Act 1916.
5. Para. 34.
6. s3.
7. Griew: The Theft Act 1968 2nd ed. para. 2-24; See also Smith: The Law of Theft 3rd ed. paras. 31-32; The Report paras. 33-35.

This view in general conception follows the ideas underlying the notion of conversion in the law of torts⁸ but declines to accept the specific rule that an appropriation necessitates a tortious conversion.⁹ As Smith & Hogan put it, "Broadly, appropriation, in the context of the Theft Act, conveys the idea of annexing something or treating something as one's own."¹⁰

Of the cases so far decided, *Skipp*¹¹ and *Meech*¹² provide direct support for this view whilst *Lawrence v Metropolitan Police Commissioner*¹³ is arguably strong authority against.

Although the orthodox view represents the natural meaning of "appropriation", it is arguable that it fails to give sufficient weight to the partial definition in the Act where "any"¹⁴ assumption of the rights of an owner" qualifies as an "appropriation". The partial definition is far from clear for both the word "assumption" itself and the phrase "the rights of an owner" are ambiguous. "Assumption" can mean simply "adoption" or it can imply "usurpation".¹⁵ If it is the former, then it may be argued that an assumption of the rights need not involve a denial of the owner's rights nor any conduct inconsistent with those rights. Doing what the owner invites may be an appropriation. Thus the supermarket shopper would appropriate goods as soon as she takes them from the shelf and even if she subsequently returns them to the shelf having decided not to buy them.

But this takes no account of the phrase "the rights of an owner". This is no place for a discussion of the philosophical intricacies of the concept of ownership but ownership has been defined by Pollock as "the entirety of the powers of use and disposal allowed by law."¹⁶ Does "the rights of an owner" mean *all* the rights of an owner or only some of them or is the phrase to be read with "any assumption" to mean an assumption of *any* of the rights of an owner?

8. See Salmond: Torts, 17th ed., ch. 5.

9. There are a number of situations where technically there is no conversion but where on this view there is an appropriation eg *Rogers v Arnott* (1960) 2 QB 244 (attempt to sell bailed property by a bailee); *Pitham and Hehl* (1977) 65 CR. App. Rep. 45 CA (Invitation to buy goods issued while owner, ignorant of any such scheme, languished in prison); *Bonner* (1970) 1 WLR 838 CA (Taking of partnership property by one partner without the other partner's consent - but see now s10, Torts (Interference with Goods) Act 1977 though Bonner's action would still not amount to conversion).

10. Criminal Law 3rd ed. p 397.

11. (1975) Crim. LR 114 CA (Unfortunately this case has not been fully reported in the Law Reports).

12. (1973) 3 A11 ER 939 CA.

13. (1971) 2 A11 ER 1253 HL and 1970 3 A11 ER 933 CA. The decision is ambiguous - see post p.

14. My italics. 15. Shorter Oxford English Dictionary.

16. Pollock: First Book of Jurisprudence, p 179.

It is submitted that it cannot mean all the rights of an owner because, as Austin long ago pointed out, they embrace a permanent and indefinite right of user (within the confines of the general law) until disposal.¹⁷ And it is well known that appropriation requires an *intentional* assumption of the owner's rights.¹⁸ To demand an intention to assume all of the rights in the sense described above would render the further requirement of theft an intention permanently to deprive redundant.

Yet the phrasing - "*the*¹⁹ rights of an owner" does suggest a general taking over of the property so that the favoured interpretation would be to require conduct indicating that in an important respect²⁰ D is treating himself as owner of the property, at least for a time, coupled with an intention to do so. Whilst this literally falls short of a *full* assumption of *the* rights of an owner, it is suggested that it does give sufficient weight to the word "*any*" in the phrase.²¹ At the same time it avoids giving it the exaggerated emphasis of the third interpretation (viz. an assumption of *any* of the rights of an owner) which would regard any interference or dealing with the property, consensual or otherwise, as an appropriation.²²

In a series of recent articles²³ Professor Glanville Williams has argued for some restriction of the orthodox view. He is concerned that a literal interpretation of s1(1) of the Act would allow the law of theft to run "wild over the field of dishonesty". He suggests, inter alia, that "appropriates" should be confined to "acts that are in some way illegal" under the civil law e.g. a tort or breach of trust.²⁴ An act which is unimpeachable under the civil law should not become theft merely because of a dishonest intention on the part of D.

17. 2 Jurisprudence 477.

18. Griew: op. cit. paras. 2-25 and 2-26; Gordon: Criminal Law of Scotland pp 402, 421.

19. My italics.

20. A more precise formulation seems difficult.

21. Some support for this thesis is provided by analogy with the concluding words of s3(1): "... appropriation ... includes, where he (D) has come by the property (innocently or not) without stealing it, any later assumption of a right to it by keeping or dealing with it as owner." The notion is acting or treating oneself as owner. It is submitted that this argument is not invalidated by the Court of Appeal's view in *Pitham* ((1977) 65 Cr. App. Rep. 45, 47) that the general words opening s3(1) are not "limited by" the concluding words quoted, which are merely "words of inclusion".

22. This interpretation is, of course, inconsistent with *Skipper* and *Meech*. It is also right that any ambiguities in the phrase must be resolved in the light of the natural meaning of the word it is defining - "appropriation".

23. Theft, Consent and Illegality (1977) Crim. LR 127, 205 and 327.

24. Ibid. at p 207.

This view is attractive for a number of reasons.²⁵ Dishonesty, based as it is on morality, is inevitably a vague and shifting concept and this is compounded by its designation by a full Court of Appeal²⁶ as a question of fact rather than law. As a practical matter, it may be unwise to allow a conviction for theft to turn on proof of dishonesty which is based, in many instances, solely on inference from conduct, when ambiguous situations can so frequently occur. The theoretical proposition that a magistrate or jury must acquit if they entertain a reasonable doubt about the existence of dishonesty may not be sufficient to protect the innocent.

The difficulty with the argument is that the Act reads "appropriates" and not "misappropriates" and it seems to stretch the rules of statutory interpretation a little far to read the former as the latter.²⁷ It must also be said that the cases are against the view.²⁸ Though the aim is laudable the conclusion does not seem to represent the law.

Consent and Appropriation

Central to any discussion on appropriation is the relevance of the owner's consent. If the owner truly consents to D's having the property, does that negative appropriation? Does it matter whether D becomes the owner of the property or merely its possessor? Can D's apparent consent be vitiated e.g. by D's fraud? Does it matter whether D knows that the owner has consented?

The leading case is *Lawrence v M.P.C.*²⁹ where D was a taxi-driver who had picked up at London's Victoria Station a newly arrived Italian, P, who spoke little English. P indicated his destination by giving the driver a slip of paper bearing an address in Ladbrooke Grove. Regulations governing the calculation of taxi fares in London meant that it was illegal to charge more than about 10s 6d for this journey. D told P that it would cost him a lot of money. P took out his wallet and gave D £1 whereupon D, with the acquiescence of P, helped himself to a further £6

25. Ibid. at p 129.

26. *Feely* (1973) 1 A11 ER 341. And see generally Elliott: Law and Fact in Theft Act Cases (1976) Crim. LR 707 and Griew: Dishonesty and the Jury.

27. Reform in the law of conversion might make the courts more willing to make the leap. The Torts (Interference with Goods) Act 1977 does not take us very far along this road.

28. *Bonner, Pitham* - above n9. Arguably *Lawrence* is against too but it depends on how it is interpreted - post and see *Gilks* (1972) 3 A11 ER 280.

29. (1971) 2 A11 ER 1253.

Both the Court of Appeal³⁰ and the House of Lords were conscious that, whilst the old offence of larceny could only be committed if the taking was 'without the consent of the owner', this requirement was deliberately omitted from the new definition of theft. Both regarded the consent of the owner as irrelevant to the question of whether there had been an appropriation. Viscount Dilhorne put it thus: "That (appropriation) may occur even though the owner has permitted or consented to the property being taken."³¹

But it may be unwise to read too much into the words quoted since the focus in the passage from which they are taken is on the relevance of D's belief that the owner had consented, to the question of dishonesty, and the decision can be and has been interpreted more narrowly:

(1) It may simply be authority for the proposition that a consent obtained by D's fraud will not negative an appropriation since it is not a true consent.³² This view was not shared by the Court of Appeal in *Skip*³³. D, fraudulently posing as a haulage contractor, obtained instructions from P to deliver three lots of produce from London to Leicester. He collected the goods from three different locations in London in the same lorry and then, purporting to leave for Leicester he made off with the goods. The Court of Appeal held that, notwithstanding the presence of a dishonest intent from the start, D did not appropriate the goods until he deviated from the route to Leicester. Until then he had done nothing outwardly inconsistent with the owner's instructions. His secret dishonest intent had not manifested itself in action objectively capable of indicating that he was treating himself as owner. Yet there is no doubt that P's consent

30. (1970) 3 A11 ER 935.

31. (1971) 2 A11 ER 1253, 1255d. And Megaw LJ in the Court of Appeal had said: "Of course, where there is true consent by the owner of the property to the appropriation of it by another, a charge of theft under s1(1) must fail. This is not, however, because the words 'without consent' have to be implied in the new definition of theft. It is simply because, if there is such true consent, the essential element of dishonesty is not established." Loc. cit. at 936c.

If this is taken literally, two subsequent Court of Appeal decisions must be regarded as wrong, on the question of appropriation - *Meech* (1973) 3 A11 ER 939 and *Skip* (1975) Crim. LR 115.

32. See Williams: Theft, Consent and Illegality (2) (1977) Crim LR 205, 209.

33. (1975) Crim LR 116.

was obtained by D's fraud and if the passenger's consent in *Lawrence* was vitiated then *a fortiori* P's consent in *Skipp* was vitiated. If this interpretation of *Lawrence* is the correct one, *Skipp* is wrongly decided.³⁴

(2) A third possible interpretation of *Lawrence* offers a means of reconciling *Skipp*. First let us assume that the House of Lords' judgment, remarkable both for its brevity and its opacity, held that the taxi-driver did become the owner of the notes he took from the Italian's wallet.³⁵ If D became the owner of the notes, did he not, of necessity, appropriate them? He assumed the rights of an owner. That is the point of the transaction and it can surely make no difference that P is willing for him to assume those rights. In *Lawrence* P agreed to D becoming the owner whereas in *Skipp* P agreed only that D should assume possession in order to transport the goods from London to Leicester.³⁶ Even if ownership in the notes did not actually pass to D, it was clearly contemplated by both P and D that D was assuming the rights of an owner over the notes when he took them. Similarly in the entrapment situation where the owner deliberately allows his property to be taken by an unsuspecting D, the full consent of P to D's taking will not prevent its being an appropriation.³⁷ Yet D is doing what P secretly wants him to do. It is submitted that it should make no difference to the existence of an 'appropriation' whether D knows of P's consent or not.

The truth is that consent *per se* is irrelevant to whether or not appropriation has occurred. To hold as Professor Williams that true consent prevents an appropriation comes too near to reinstating the pre-Theft Act requirement that the taking be without the consent of the owner. As Viscount Dilhorne points

34. See Williams: Theft Consent and Illegality (2) (1977) Crim. LR 205, 209.

35. This would certainly seem to be the view the civil courts would take but the judgment is ambiguous on this point - see Griew: *op. cit.* para. 2-33. The contrary view holds that the House decided that D never at any time became the owner of the notes presumably because P's apparent consent was vitiated by D's implied representation that £7 was the correct fare.

For further implications if the view assumed in the text is correct, see Heaton: 'Belonging to Another' (1973) Crim LR 736.

36. Professor Smith offers another way of reconciling *Skipp* with *Lawrence*, namely that in *Lawrence* the taxi-driver's taking was unauthorised in that P authorised only the taking of 'the prescribed fare' ie 10s 6d. Thus the taking of the £6 from the wallet was non-consensual and therefore, on any view an appropriation. ((1975) Crim LR 116) It is difficult to disagree with Professor Williams that this view is untenable because the taking occurred with P's full knowledge and in his presence ((1977) Crim LR 208, n.11). It must be doubtful that P knew that there was a legally prescribed fare.

37. cf. *Easom* (1971) 2 All ER 945. Despite the careless wording of the Court of Appeal's judgment, it is clear that the charge of theft failed not because there was no appropriation but because there was never a firm intention permanently to deprive of the handbag or any of its contents. The case was applied recently by the Court of Appeal in *Hector* 'The Times' 18th y 1978.

out in *Lawrence*,³⁸ "I see no ground for concluding that the omission of the words "without the consent of the owner" was inadvertent and not deliberate, and to read the subsection as if they were included is in my opinion, wholly unwarranted." In other words the word "assumption" in the statutory definition seems to mean 'adoption' rather than 'usurpation'.

On the other hand it would be unfortunate if appropriation were to become a totally neutral concept as the wide interpretation of *Lawrence* might suggest. This would in practice leave the subjective question of dishonesty to be the sole determinant of guilt or innocence where D's actions are objectively quite definitely innocent. It is therefore suggested that implicit in the expressions 'appropriation' and 'assumption of the rights of an owner's conduct³⁹ from which it *may* realistically be inferred by someone without any knowledge of D's state of mind, that D is, at least for a time, treating himself as the owner of the property, or exercising dominion over the property. It will additionally be necessary to prove that D intended to treat himself as owner or exercise dominion.

Such a principle can accommodate *Lawrence*, *Skipp* and *Meech* because in the latter cases until D departs from P's instructions, there is no objective indication that D is assuming dominion over the property or in any way treating himself as its owner to the exclusion of P. In this way P's consent to D's actions may preclude any objective evidence of D's exercise of dominion. But if such exercise of dominion is present, as in *Lawrence*, consent will make no difference.

If the view is correct, no problem arises in convicting of theft in the entrapment situation because again D is objectively treating himself as the owner when he takes up the goods.⁴⁰ In the self-service shop situation, a dishonest D would not appropriate property until he did something from which it could be reasonably inferred that he was assuming ownership there and then. Clearly putting the goods in the store's wire basket or openly carrying the goods in one's arms could not reasonably

38. (1971) 2 A11 ER 1253, 1255a.

39. An act or, in the case specifically provided for in s3(1), an omission.

40. Professor Smith regards this situation as theft (see *op. cit.* para. 28) yet he regards it as not an appropriation where D "does no more than he is authorised to do by the owner." (*op. cit.* para 31). It is not clear why D's knowledge that P consents makes the difference between appropriation and no appropriation (see Williams (1977) Crim LR 330-1).

support such an inference.⁴¹ Equally clearly secreting the goods in a specially devised compartment of one's shopping bag could. It is suggested that putting goods in one's pocket or one's own bag is in itself not enough to support the inference (even where the store displays a notice requiring customers to use the baskets provided), unless and until the customer has left the store or, at least, passed the last available cash desk without paying for them or unless there are other actions or circumstances supporting the inference.⁴² Policy would surely dictate such a solution.⁴³

One suspects that swapping price tickets to obtain goods at a lower price is a fairly common occurrence in self-service stores. Professor Smith⁴⁴ argues that there is no appropriation of the goods but only of the price ticket itself. It can be argued that D here is treating himself as owner or, in Smith's terms, acting inconsistently with the rights of the owner, albeit very fleetingly,⁴⁵ over both the goods and the ticket. However it is thought that the better view is that changing the price ticket is not a sufficient indication that D is treating himself as

41. For the reasons given by Professor Williams (1977) *Crim. LR* 327, it is suggested that it is impossible to construe the shopowner's implied consent to customers' taking goods from the shelves as limited to people intending to act honestly in relation to those goods. But see Professor Smith on the analogous but slightly different situation in regard to self-service petrol (1975) *Crim. LR* 115.

Smith also regards it as burglary for a person posing as an ordinary shopper but with a definite intention to shoplift, to enter the shop. The invitation to enter is limited to honest customers and the intending shoplifter is therefore a trespasser. The view finds support in the Court of Appeal decision of *Jones* (1976) 3 A11 ER 54 but is it right that an apparent permission to enter should be vitiated by a mere intention to act in excess of it, where no *active* deception is used to obtain the permission to enter? Would the intending shoplifter cease to be a trespasser if he decided not to steal but to buy, once inside the shop? Is an intention to steal only if the opportunity presents itself a sufficient intention or only a conditional intention (as in *Easom* (1971) 2 A11 ER 945 and now *Hector* (The Times 18 January 1978) and therefore not a sufficiently definite intention?

42. As in *McPherson* (1973) *Crim. LR* 191 where D's companions distracted the attention of the shop manager whilst D put two bottles of whisky into her bag.
43. Above p
44. *Op. cit.* para. 39.
45. The fact that D later acts as though the true owner were still the owner by taking the goods to the cash desk to buy them is, of course, not conclusive that there has been no appropriation. Once completed the appropriation cannot be undone. Professor Smith's proposition that appropriation is not a continuing act (*op. cit.* para. 46) has been confirmed by the Court of Appeal in *Pitham* (1977) 65 Cr. App. Rep. 45. And see now Williams: *Appropriation: A Single or Continuous Act* (1978) *Crim. LR* 69.

owner of the goods to amount to an appropriation.⁴⁶

Resolution of the problems associated with self-service petrol stations in regard to appropriation is, it is submitted, simpler. It is clear that if D serves himself with petrol and then for the first time forms a dishonest intention not to pay for the petrol, he is not guilty of stealing the petrol.⁴⁷ Either the *dishonest* appropriation is of property belonging exclusively to D, the ownership having passed when the petrol was put into D's tank,⁴⁸ or there is no dishonest appropriation at all.⁴⁹

It is reasonably clear that if D was dishonest before he put the petrol in his tank, he would be guilty of theft.⁵⁰ He dishonestly appropriates the petrol when he passes it into his tank; it matters not that the petrol owner consents to and, indeed, impliedly invites him to do this. D intentionally exercises dominion over the petrol as it passes into his tank.⁵¹ The inference must be that he regards himself as the owner. This appropriation is coincident with the passing of the ownership in the petrol and so is of property belonging to another.⁵²

For exactly the same reasons D would be guilty of theft where the petrol is dispensed by an employee of the garage.⁵³

46. Though exactly the same might be said in respect of the price ticket. The recent case of *Pilgram v Rice-Smith* (1977) 65 Cr. App. Rep. 142 Div. Ct. where the supermarket assistant deliberately under-priced the goods for her friend who, knowing this, took them to the cash desk where she was charged the under-price, sheds no light on the problem under discussion.
47. *Edwards v Ddin* (1976) 1 WLR 942. In some circumstances he would be guilty of obtaining a pecuniary advantage by deception under s16 but more often he would not cf (1977) Crim LR 176.
48. *Ibid.*
49. However it is suggested that D can "assume the rights of the owner" even though he already is the owner cf *Turner* (No 2) (1971) 2 A11 ER 441 CA.
50. *McHugh* (1976) 64 Cr. App. Rep. 92.
51. Professor Williams would presumably say that the garage owner's full consent prevents there being an appropriation by D - (1977) Crim. LR 207-9; 327-8. See also Professor Smith - (1977) Crim. LR 175.
52. *Lawrence v MPC*. This interpretation of *Lawrence* is not accepted by all - see Heaton:- 'Belonging to Another' (1977) Crim. LR 736, 737-8 and 743-4; Griew: op. cit. para. 2-33.
53. Williams would probably regard this as an appropriation because the owner's apparent consent would be vitiated because it was obtained by D's false implied representation to the attendant that he intended to pay. It may be that such an argument could be utilised in most of the self-service situations. Normally the cashier observes the self-service customers as they drive in to fill up. There seems no difficulty in implying a representation by conduct that the customer intends to pay. If the cashier could in fact see the dishonest customer then his dishonest representation can be said to vitiate the owner's apparent consent. Were it not for the misrepresentation the cashier would prevent the dishonest motorist from filling up. See *D.P.P. v Ray* (1974) A.C. 370 H.L.

Conclusion

It is quite clear that the concept of appropriation still awaits its first serious examination by the courts. The paucity of analysis in the cases has led to apparent inconsistencies. However they can be reconciled if the view presented above is adopted. The solution lies in a more objective approach to appropriation. D must not only intend to assume the owner's rights he must *do*⁵⁴ something which shows that he intends, however temporarily, to exercise dominion, to treat himself as owner.

Although the suggested test may be criticised on the ground of its imprecision, it is in line with the concept of tortious conversion where the courts have some discretion in determining whether D's acts show a sufficient exercise of dominion to be regarded as a conversion. At least the courts are given the opportunity to deny 'appropriation' in ambiguous situations where injustice is entirely possible, without doing violence to the statutory wording or, indeed the existing case law.

54. Or omit to do something in the case specifically dealt with in the concluding words of s3(1).

NAVIGATION OF THE TRENT AD 43-1978. PAGES FROM LEGAL HISTORY

by A E Telling

Of the many thousands who cross the Trent each day in and out of Nottingham, probably only a very few realise that the river is illustrative of nearly 2,000 years of legal history. But this should not be surprising. From very early times men have used rivers for navigation, for taking water, for fishing and as a source of power. As Lord Wilberforce put it in a recent decision on rights of navigation "Rivers have, with rare exceptions, always been there, inviting use by man, and man has since long before history had the means and occasion to use them".¹ Inevitably, laws are evolved for regulating or protecting the various uses to which rivers may be put.

In pre-industrial England the right to navigate was particularly important because of the primitive state of the roads and the lack of any mechanical means of transport. The law of navigation in England arose out of the commercial needs of a primitive society.

We can conveniently begin the story with the Roman conquest of Britain in AD 43. Roman law recognised two types of river: *rivus* and *flumen*. Whether a river was *flumen* depended on its size and the opinion of those living nearby. *Flumen* were either public or private. A river was *flumen publicum* if it were perennial, that is, did not dry up in summer - a distinction which however important in Italy was not likely to be of much significance in Britain. It is clear that by these tests that the middle and lower Trent would have been a public river and as such open to public navigation.

It is likely moreover that the Trent was in fact extensively used for navigation. There was in Roman Britain a flourishing commercial life relatively to the size of the population and the rivers were used for the transport of a variety of goods, not only bulky commodities such as stone for building where this not was available locally but also pottery and grain.²

The Lower Trent indeed became part of a system of navigation linking the Fens with the Roman settlements in the north of England. A canal - still in existence - was cut from Torksey, downstream of Newark, to join the Witham near Lincoln, and another canal (the Car Dyke) linked the Witham with the Nene at Peterborough. Grain and other supplies were carried from the Fens via these canals, the Trent and the Yorkshire Ouse to the Garrison at York. The returning barges may well have carried coal to farms in the Fenland.³

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1. *Wills' Trustee v Cairngorm Canoeing and Sailing School Ltd.*
(1976) SLT 162 at p 191.

2. Liversidge, "Britain in the Roman Empire", pp 198, 401, 403.

3. Liversidge, *op cit*, p 402.

The withdrawal of the Roman legions was followed by the total disintegration of Romano-British society. With the Anglo-Saxon settlements there emerged quite different social economic and physical conditions. In attempting to assess the importance of the rivers in the Anglo Saxon period, we must be wary of generalisations. The period from the first Anglo-Saxon settlements at about the beginning of the sixth century to the Norman Conquest is as long from the times of Elizabeth I to the present day. During so long a period social, political and economic conditions did not remain static; the influence which these conditions had on the use of rivers was not static either.

The rivers such as the Trent which flow into the North Sea were the routes by which the Angles and the Saxons (and later the Danes) penetrated into England. But once settled the early communities were almost entirely self-supporting: they used no coins and trade was minimal. The political units were small tribal kingdoms. Under these conditions the rivers were not likely to be used to any great extent for commercial navigation. There was doubtless some fishing, but one may infer that there would be few if any claims to proprietary rights in rivers.

These primitive conditions gradually improved. By the middle of the seventh century the real wealth of Anglo-Saxon England, based on an efficient agriculture, had increased considerably. Coins were used suggesting the growth of trade. The petty tribal kingdoms had been welded into the seven kingdoms of the Heptarchy. "By the seventh century the society could support a colourful aristocracy and a lively church. That fact alone speaks well for the agrarian achievements of the new settlers."⁴ The 200 years from 650 to 850 saw a great intensification of Anglo-Saxon settlement. It was during this period, for instance, that Leicestershire - hitherto unattractive to settlers - was intensively settled.⁵

All this suggests that the use of rivers for navigation must have increased. "One thing indeed is clear: while roads were few and defective it was most important to make use of river communications as much as possible."⁶ It seems clear that the more important rivers as well as roads were regarded as being under the King's peace. A modern historian has described the ability to secure safe transit throughout the kingdom as an early and virtually primary aspect of kingship. "Ideally, the King's peace lay tranquil throughout his whole realm, over coastal seaways and waterways as well as the roads".⁷ The idea of the King's peace clearly owed much to the need for safe communication in Anglo-Saxon times.

4. Loyn "Anglo-Saxon England and the Norman Conquest" p 44.

5. Loyn *op cit.* p 46.

6. Cunningham, "The Growth of English Industry and Commerce during the Early and Middle Ages" p 92

7. Loyn, *op cit.* p 98.

In all this the Trent must have been particularly significant. It was navigable for many miles upstream from the point (probably between Gainsborough and Newark) at which at that time it ceased to be tidal. It was almost certainly navigated as far as Nottingham which had been founded by the Saxons in the sixth century.

The Danish settlement, particularly those of the period from 865 to about 950, encouraged the development of agriculture and trade, and particularly so in the East Midlands. Nottingham was one of the five boroughs of the Danelaw within which, it has been said, the King's peace law heavily.⁸ We may infer therefore that navigation on the lower Trent would have been protected by law.

It is probable that by the time of the Norman Conquest, the lower Trent was recognised in law as a public highway. The introduction of feudalism however resulted in substantial changes in the law regarding navigation on rivers. All land in England (including river beds) was owned by the Crown. Some was in the actual occupation of the Crown; the rest was occupied by tenants holding directly or indirectly from the Crown. A river could no longer be regarded as common property, and the existence of public rights of navigation could no longer be assumed.

For the purpose of determining whether there were public rights of navigation, English law was henceforth to draw a distinction between tidal and non-tidal rivers. In tidal rivers there was a presumption that the public had the right to navigate and also to enjoy certain other rights notably that of fishing. Although the Crown might before Magna Carta have granted the bed of a tidal river to a subject, the grant was subservient to the public right of navigation.⁹

In non-tidal rivers the bed was presumed to be the property of the riparian owners, and there was no presumption that the public had either the right to navigate or to fish. A right of public navigation might be deemed to exist as a result of immemorial user, or by virtue of an express or implied grant. Where a right of navigation in non-tidal waters was shown to exist, it did not ipso facto include the rights to fish.

Although riparian owners were now recognised as having proprietary rights in the river, it must not be supposed that the law no longer interested in protecting rights of navigation. Rivers over which the public had the rights to navigate were known as "King's rivers" and were regarded as highways. If Bracton could write that the King's highway is "a sacred thing" and that he who encroached upon the highway encroached upon the King himself, the same was true of the King's rivers. The reality was less striking, but there is abundant evidence that both Courts and Parliament were keen to uphold

8. Loyn, *op cit*, 61.

9. *Gann v Free Fishers of Whitstable* (1865) 11 HLC 193.

the rights of the public against landowners who obstructed navigation. One serious source of complaint was the obstruction of navigation by the erection of fish weirs. Indeed, in some cases the right to erect weirs had been granted by the Crown, although this was apparently illegal. However, Chapter 23 of Magna Carta still on the statute book required that all weirs throughout the Kingdom be utterly put down save by the sea coasts, Thames and Medway. Whether all the weirs were removed is doubtful. Certainly the obstructions caused by fish weirs were sufficiently serious for fresh legislation to be passed in the reign of Edward III. The statute 25 Edward III cap 4 recited that the passage of boats and ships in the great rivers of England was annoyed by the putting up of weirs and enacted that all set up in the time of Edward I and since whereby ships and boats were impeded should be pulled out and utterly put down. This was later interpreted as legalising weirs erected before the accession of Edward I in 1272.¹⁰

All this is well illustrated by the history of the Trent. The river is tidal upstream to Cromwell near Newark, but there has always been a well recognised right of navigation as far as Nottingham. The first of the Nottingham charters, granted by Henry II *circa* 1155, required the burgesses to keep the river clear for navigation for a width of one perch (5½ yards) on either side of mid-stream. Clearly the right of navigation had existed much earlier: the charter it seems was intended to impose a duty on the burgesses to keep the fairway clear.

In 1322 a royal official was appointed to assess all those who tried to arrest traders with victuals and goods from passing up river to Nottingham. Sixty years later there was a royal proclamation against interference with haling or drawing boats over the shallows.

These measures were backed up by the appointment of royal commissions to hear complaints. Commissioners sat in Nottingham in 1378, 1382 and 1392. The commission of 1392 heard presentments by jurors of the borough complaining of the activities of Sir Richard Byron and Sir William de Colwyk. It seems that they had diverted the river into a trench, had planted trees and fixed piles so that the river totally left its old course and flowed wholly to de Colwyk's mill, and that de Colwyk had constructed a weir in the trench. The Commissioners ordered the sheriff to remove the obstruction.¹¹

Two centuries later in 1592-93 there was trouble over weirs put up by Sir Thomas Stanhope of Shelford. The inhabitants of thirty-nine villages complained that these interfered with navigation and so straitened the passage

10. *William v Wilcox* (1838) 8 A & E 314

11. Public Works in Mediaeval Law II p 112 (Selden Society Reprints vol 40).

that boats were lost and lives endangered. Some of the villagers organised a great and unlawful assembly to pull down the weir. This led to intervention by the Privy Council and the Court of Star Chamber.¹²

That as many as thirty-nine villages were moved to protest indicates the importance of navigation to the local economy. Shelford is a few miles downstream of Nottingham; but, with the growth of trade, the river was by now almost certainly being navigated for many miles upstream of Trent Bridge. In 1634 one Thomas Skipwith was empowered by Letters Patent to make the Soar navigable between Leicester and the Trent. Skipwith carried out the work for five or six miles from the Trent but was forced to give up for want of money and the navigation decayed. In 1638 Charles I showed interest in a scheme to make the Derwent navigable. These schemes make sense only if there was a right of navigation on the Trent upstream of Nottingham. Indeed the evidence shows that, during the seventeenth century, the Trent was used from Willington four miles below Burton. Pottery from Staffordshire and cheese from Cheshire were brought overland to Willington for shipment down the river to Hull and thence by sea to other parts of the country.

From the seventeenth century onwards interest centres on improving the navigable quality of rivers rather than on protecting the right of navigation. As we have seen, the Crown was ready to give its support by granting Letters Patent. In 1699 a group of entrepreneurs obtained an Act of Parliament¹³ for the improvement of the Trent from Shardlow to Burton thereby encouraging the development of that town as a centre of manufacturing and brewing. During the following century there were a number of private Acts affecting the navigation of the Trent or its tributaries: for example 1719¹⁴ to make the Derwent navigable to Derby, 1766¹⁵ to make the Soar navigable to Loughborough and 1772¹⁶ to make a short stretch of the Trent navigable past Newark (hitherto all traffic had used the Kelham channel).

By this time the great era of canal building had begun. The Trent-Mersey canal opened up the Trent to the carriage of goods by barge from the Potteries as well as from Lancashire. The Soar became part of the Grand Union canal system thus further encouraging the use of the Trent. In 1783 there was passed a private Act incorporating the Company of Proprietors of the Trent Navigation.

During the nineteenth century, notwithstanding the competition of the railways from the 1840's onwards, the Trent was a great commercial waterway, and remained so even into the twentieth century. Today much of the trade has gone, but to offset the decline in commercial navigation there is a growing interest in and demand for the use of waterways for recreational purposes. This may well necessitate a re-examination of traditional legal concepts regarding navigation on rivers and perhaps to the establishment by legislation of new legal frameworks.

12. A C Wood, "The History of Trade and Transport on the River Trent", Transactions of the Thoroton Society (1950) vol 54.

13. 10 & 11 Wm III cap 20.

14. 6 Geo I cap 27.

15. 6 Geo III cap 94.

16. 13 Geo III cap 41.

The House of Lords has already had occasion to consider the important question of whether the public right of navigation is limited to navigation for commercial purposes or whether it includes navigation for recreational purposes. In *Wills Trustees v Cairnagorm Canoeing and Sailing School Ltd*¹⁷, an appeal from the Scottish courts, their Lordships held that in the law of Scotland the public right of navigation includes a right of canoeing; commercial user was not essential to prove the existence of a right of navigation but was rather an historical accident. The decision is not, of course, binding as regards the law of England, but it is obviously of great persuasive value; indeed two of their Lordships expressly stated that the law of England was the same.

Another development of some importance has been the establishment of statutory bodies concerned with rivers. The Transport Act 1947 nationalised the canal undertakings, so that canals are now the responsibility of the British Waterways Board. The nationalisation of the company set up by private Act in 1783 means that the lower Trent, although not strictly speaking a canal, is subject to the jurisdiction of the British Waterways Board.

The Transport Act 1968 abolished any public rights of navigation created by statute over waterways controlled by the British Waterways Board, and divided these waterways into three classes: commercial waterways (to be principally available for the commercial carriage of freight); cruising waterways (to be principally available for cruising, fishing and other recreational activities); the remainder. However, the abolition of public rights of navigation created by statute does not of itself abolish the common law rights of navigation. All the evidence points to the existence of common law rights of navigation as far at least as Willington.

In addition to the British Waterways Board, there are the new multipurpose Water Authorities which came into existence in 1974. They do not have powers of control over navigation as such, but they have a duty to encourage the use of inland waters for recreational purposes.¹⁸ As recreational uses increase, so too will conflicts of interest such as those which arise between navigators and fishermen. The law will be called upon to cope with new problems or, remembering the trouble caused by fish wars in the Middle Ages, it would perhaps be truer to say with old problems in new forms.

17. (1976) SLT 162.

18. Water Act, 1973, s 20.

DO WE NEED A BILL OF RIGHTS?

MA Fazal*

This question has been discussed in recent years in the form of arguments for and against the enactment of a Bill of Rights in the United Kingdom.¹ The issue is very topical. The report of the Standing Advisory Commission on Human Rights in Northern Ireland has been published. Arguments for and against a Bill of Rights are not likely to be very enlightened unless they relate to specific models. Evidence presented so far to the House of Lords' Select Committee on a Bill of Rights suggests ideas for two distinct models. One suggestion is that Parliament should enact an ordinary Bill of Rights, preferably incorporating the European Convention on Human Rights. Such a Bill of Rights is liable to be repealed by a subsequent legislation. Nonetheless, it is argued, it could act as a source of inspiration for the judges to show more creativity in interpreting statutes and in construing the principles of common law. Canada enacted such a Bill of Rights but the expectations behind it have not been fulfilled.² If enacted in this country it would probably be no more than "a resounding piece of rhetoric hopefully aimed at exerting moral persuasion."³ The other suggestion is that of an entrenched Bill of Rights. This would stand as a higher law in relation to ordinary laws and would be enforced by the judiciary against government and Parliament. This would provide *inter alia* protection against oppressive legislation. Such a model is opposed on various grounds. In this article, it is proposed to consider some of the arguments against an entrenched Bill of Rights. Recently Lord Lloyd of Hampstead advanced the following arguments against such a Bill of Rights⁴

"The introduction of a Bill of Rights can be heralded as a sort of charter for the judges . . . it confers upon them a constitutional role of first importance in the task of determining what are the operative values in their society and as guardians of those values gives them the vital functions of invalidating any legislation that in their opinion violates those values."

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1. See Lord Lloyd of Hampstead, "Do We Need a Bill of Rights" (1976) 39 Mod LR 121; A J M Milne, "Should We Have a Bill of Rights" (1977) 40 Mod LR 389; Michael Zander, A Bill of Rights (1975); A Discussion Document on a Bill of Rights (HMSO 1976); For a comprehensive bibliography on this subject see Peter Wallington and Jeremy McBride, Civil Liberties and a Bill of Rights, Appendix 5 (1976).
2. See M A Fazal, Drafting a British Bill of Rights, pp 4-11.
3. Lord Lloyd of Hampstead at (1976) 39 Mod LR 122
4. (1976) 39 Mod LR 124.

Lord Lloyd referred to the American experience of the Bill of Rights and said

“One only has to think of a court of law being called upon to decide burning policy issues on such matters as racial segregation, the lawfulness of the Communist Party, or of capital punishment to realise the way in which a Bill of Rights serves to put the judiciary right in the centre of the arena where fundamental issues of policy are determined. Once established there the judges will then possess and exert the power to impose on legislature, government and citizens alike their own conception of how such issues are to be resolved”.

The statement that a Bill of Rights transfers to the judiciary decision-making powers over policy issues suffers from both under-estimation and over-estimation of the role of the judges. In the common law tradition the judges are used to having to make policy decisions even in the absence of a Bill of Rights. This happens where a judge has to interpret a statute⁵ as well as in expounding the principles of common law. In *Shaw v DDP*⁶ the judges openly declared their intention to act as the guardians of moral values while expounding a principle of common law. Indeed in the common law tradition the judges and legislators are partners in the law-making.⁷ However, Lord Lloyd seems to give the impression that this is something new that will come only with “the introduction of a Bill of Rights”.

Lord Lloyd equally over-estimates the role of the judges in the event of a Bill of Rights. In this context the question is: what lesson do we learn from the American experience? Lord Lloyd seems to think that the judiciary takes over the major policy-making decisions. Thus he says referring to the well-known decision of the US Supreme Court in *Brown v Board of Education*⁸

“The court strikes down the country’s entire education system as not conforming with the requirements of equal opportunities for black and white citizens.”

5. See for instance *Roberts v Hopwood* (1925) AC 578; *Presscott v Birmingham Corporation* (1955) Ch 210.

6. (1962) AC 220.

7. See Louis L Jaffee, *Judicial Control of Administrative Action* (1965)

8. 347 US 483 (1954).

For one thing the court did not strike down the country's entire education system in that case; it merely condemned arbitrary and unconstitutional discrimination in education on racial grounds. This is something that the courts in this country will do without a Bill of Rights. Thus Lord Denning MR said in *Cummings v Birkenhead Corporation*⁹

“... if this education authority were to allocate boys to particular schools according to the colour of their hair or for that matter the colour of skin, it would be so unreasonable, so capricious, so irrelevant to any proper system of education that it would be ultra vires altogether, and this Court would strike it down at once”.

Secondly cases such as *Brown v Board of Education* do not illustrate the fact that a Bill of Rights enables the judiciary to assume the policy-making functions of government and Parliament generally. Two propositions may be laid down. First, judges administer negative corrections rather than promoting positive policies. Secondly, their functions are limited to restraining unlawful, arbitrary and unconstitutional actions. These occur in exceptional cases only and, consequently, their role remains peripheral. Normal and constitutional functions of the executive and legislature remain with these bodies. It is only when they transgress the limits of their constitutional authority that the courts have to intervene. Admittedly some of these cases where judicial intervention occurs are politically sensitive. In American politics these happen to be racial segregation in education, housing and electoral process, lawfulness of the Communist Party, capital punishment etc. In Britain there are similar politically sensitive issues. But judicial intervention in these exceptional but politically sensitive cases do not make judges masters over resolution of all issues.

What the American experience shows is something contrary to what is commonly asserted. That is this: while the activist judicial intervention in the sphere of civil liberties is quite proper (because that is the legitimate field of judicial adjudication) the courts should not seek to impose their policy on economic and social issues (because normally these spheres fall within the proper jurisdiction of the executive and legislature). The American courts attempted to determine issues on social and economic matters during the 1930's but these attempts failed. As a result the courts withdrew from these fields and began to address themselves to matters of civil

9. (1971) 2 ALL ER 881 at 885.

liberties. Their record is one of undoubted success in the areas of civil liberties. The original decision of the US Supreme Court in *The Poultry ('Sick Chicken') case*¹⁰ (in which the New Deal legislation entitled the National Industrial Recovery Act was declared unconstitutional) and its reversal in *Jones-Laughlin case*¹¹ (upholding the Federal Labour Relations Act 1935 which required the employers to permit the employees to organise and bargain with them collectively) testify to the fact of initial judicial intervention on social and economic issues and subsequent withdrawal from them. Other cases on these matters prove the same point.¹²

This was the background to the initial judicial disapproval and subsequent upholding of the New Deal measures. The New Deal measures were devised by President Franklin D Roosevelt to combat the Great Depression and economic crisis the symptoms of which were a sharp drop in employment, production, income, business failures and home mortgage foreclosures. The most controversial of these measures was the enactment of the National Industrial Recovery Act 1933 which authorised the President to promulgate "codes of fair competition for trade or industry". Its invalidation by the Supreme Court¹³ led President Roosevelt to propose his famous court-packing plan¹⁴ to appoint additional judges so as to outnumber the existing judges. The President in his radio broadcast to the American people on 9 March, 1937 spelt out the issues in dispute between the Judiciary on the one hand and the Legislature and the Executive on the other. He said

"The American people have learnt from the depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection - not after long years of debate, but now.

The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern *social and economic conditions* . . .

10. *Schechter Poultry Corporation v United States* 295 US 495 (1935).
11. *National Labour Relations Board v Jones and Laughlin Steel Corporation* 301 US 1 (1937).
12. In *Hammer v Dagenhart* 247 US 251 (1918) the Supreme Court invalidated legislation designed to regulate the employment of child labour. In *United States v Darby* 312 US 100 (1941) the Supreme Court expressly overruled *Hammer v Dagenhart* and upheld the Fair Labour Standards Act 1938, a much more stringent legislation against employment of child labour.
13. The National Industrial Recover Act was invalidated in the *Schechter Case* 295 US 495 (1935). Congress responded by enacting a similar regulatory scheme for the bituminous coal industry. This was declared unconstitutional in *Carter v Carter Coal Co* 298 US 238 (1936).
14. For the literature of this see Gerald Gunther, *Constitutional Law - Cases and Materials* (1975) pp 167-171.

I want to talk with you very simply about the need for present action in this crisis - the need to meet the unanswered challenge of one third of a nation ill-nourished, ill-clad ill-housed

When the Congress has sought to stabilise national agriculture, to improve the conditions of labour, to safeguard business against unfair competition, to protect our national resources, and in many other ways to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress - and to improve or disapprove the public policy written into these laws

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution - not over it

My plan has two chief purposes: By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first to make the administration of all Federal justice speedier and therefore less costly; secondly, to bring to the decision of *social and economic problems* younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our National Constitution from hardening of the judicial arteries.’¹⁵

The court-packing plan was in the end rejected by the Congress.¹⁶ However, President Roosevelt claimed that he had lost the battle but he won the war.¹⁷ The statement is vindicated by the decisions in subsequent cases in which the Supreme Court upheld practically all the New Deal measures thereby leaving social and economic issues to the Legislature and the Executive. British experience of judicial intervention in matters of industrial relations through the machinery of the Industrial Relations Act 1971 tells the same story.

15. Radio Address by President Roosevelt, 9 March, 1937 quoted in Gerald Gunther, *Constitutional Law - Cases and Material* (1975) pp 169-170.
16. See for the reasons of the Congressional rejection the Conclusions of Adverse Report of the Senate Judiciary Committee, June 14, 1937.
17. Gerald Gunther op cit 170.

Judicial intervention in the sphere of civil liberties tells a different story. A leading American work evaluates the role of the US Supreme Court in the following words:

“The Court’s work of the ‘fifties’ and ‘sixties’ was genuinely as revolutionary as that of the Hughes Court in the late ‘thirties’; in both instances the Court acted to integrate what had therefore been outgroups into the political system and to extend to them fuller protection and participation in society. In the days of the New Deal these groups had been labor and the urban based ethnic minorities the working class generally; in the second constitutional revolution of the twentieth century these groups were black people, poor people, radicals, urbanites, juveniles, people accused of crime and religious dissenters.”¹⁸

For a detailed account of the judicial intervention in the United States in the sphere of civil liberties the readers are referred to pp 14-21, 28-30, 37-54 of this author’s work entitled “Drafting a British Bill of Rights”. There is no sign of judicial withdrawal from the field of civil liberties in the United States. One could safely predict that so long as the problems that called for judicial intervention remained the Court will continue to play a vital role and its work will remain as the record of monumental success. This is because civil liberties form the legitimate sphere of judicial creativity.

This is, however, not to say that economic and social matters should be completely immune from judicial review. If a government were to assume drastic powers to control the economy and to require persons to obtain licences as a condition of engaging in economic activity the courts should not seek to inhibit the government from pursuing certain economic policy or strategy. However, if the government were to use its licensing powers, for instance, to deprive certain racial groups the right to earn their living and thereby seek to achieve their compulsory repatriation¹⁹ the courts should be able to invalidate such a measure as being contrary to the anti-discrimination clause, equal protection clauses etc of the Bill of Rights (assuming that the Bill of Rights is an entrenched one and does contain such clauses). For similar reasons the courts should be able to restraint ‘oppressive, arbitrary and unconstitutional actions’²⁰

18. Edward S Corwin, *The Constitution and What It Means Today* (1974) p 245.

19. The economic programme of the National Front includes the provision of licensing of economic activities generally.

20. In *Rookes v Barnard* (1964) AC 1129 at 1226 Lord Devlin used the words “oppressive, arbitrary or unconstitutional action by servants of the government”.

generally. This would be judicial intervention on social and economic matters in exceptional but politically sensitive cases (and therefore peripheral) but would not amount to usurpation of executive or legislative functions by the judiciary.

Lord Lloyd would regard "a democratically elected Parliament invested with sovereign legislative powers" as the best safeguard of human rights.²¹ Presumably he means that Parliament, although endowed with sovereign legislative powers, would be responsive to public opinion which would not approve of any infringement of basic human rights.²² This argument rests on the support of public opinion as the surest guarantee of human rights. The question is: can public opinion be relied on to guarantee human rights under all circumstances? In a climate of passions and commotions public opinion could be whipped up to demand from the sovereign Parliament measures of the kind that would involve gross violations of human rights. Public opinion, so led, would not hesitate to return to power a regime that is pledged to trample upon every conceivable right that is revered by civilised societies. This is how in contemporary history authoritarian regimes came to power, ie by being "democratically elected".

The way Parliament can respond to public opinion in times of commotion to authorise measures derogating from basic rights is shown by the circumstances in which the Prevention of Terrorism Act 1974 was enacted. Bombings in certain Birmingham public houses aroused strong feelings and created a demand for stern measures against terrorist activities. The then Home Secretary visited the bombed sites and the persons affected over the weekend following the bombings. He announced that a Bill would be introduced in Parliament the following Monday. The Bill went through all its stages and passed the Commons on Monday evening. Next day all the stages were completed in the Lords in ten minutes and the Royal Assent to the Bill was announced twenty minutes after its introduction in the Lords. Press reports of the parliamentary proceedings on the Bill spoke of utter confusion and bewilderment among the MPs as to the implications of various clauses in the Bill. Both the deterrent effects and the adequacy of the measures authorised by the Bill to combat terrorism are debatable. Parliament was merely reacting to the pressure of public opinion in an extraordinary haste. The victim of such a hurried action was the right of the individuals not to be detained without trial

21. (1976) 39 Mod L Rev 125.

22. Michael Zander develops this point in his A Bill of Rights (1975)

(for up to seven days). This has been a clear principle of English law since the time of Magna Carta.²³ Yet its a peace-time violation occurred under sheer force of public opinion. This is not to say that Government and Parliament should not adopt measures to deal with emergencies, but the way this was done in 1974 demonstrates the point.

Another reason why public opinion cannot be relied on to protect human rights is that the preservation of the rights of individuals who belong to a minority group might not be popular with the majority opinion. One needs only to look at the situation in Northern Ireland to realise the truth of this statement. Public opinion would be the least reliable guarantee of minority rights. This is the reason why the Standing Advisory Commission on Human Rights has been actively considering the question of a Bill of Rights for Northern Ireland.

An alternative view is that there are certain basic human rights that are so sacred that they should not be subject to vote or debate by majority or otherwise. This is the premise on which the UN Declaration on Human Rights (as well as other declaration of Rights of Man) is based. This author subscribes to the latter view. The experience of mankind is that human rights are more savagely violated by a majority than by an absolute ruler. This explains the well-known statement of John Stuart Mill that majority tyranny is much worse than the tyranny of one man.

Lord Lloyd poses the question that if a Bill of Rights were to declare a right to exist "is a judge the best person to decide (and if so on what basis) whether such a right is to be absolute?"²⁴ Whether a right guaranteed by a Bill of Rights is to be qualified, and if so how far, is a problem that can be mainmised by a drafting technique but cannot be altogether eliminated. However, this is a task in which a judge is constantly engaged while construing a statutory provision or expounding common law. A right created by a statute has to be defined, qualified (if at all) and clarified by a judge in every possible case. The task involved in interpreting a Bill of Rights would not be a novel one.

The argument that a Bill of Rights introduces relative inflexibility is a valid one. However, a certain amount of inflexibility must go with certainty and guarantee of any kind. One cannot be separated from the other. A decision such as the adoption of a Bill of Rights, like any other decision involves weighing up advantages and disadvantages. A preference for certainty and guarantee involves some sacrifice of flexibility. What should weight more with the decision-makers is what is more conducive to public well being.

23. See *Secretary of State v O'Brien* (1923) AC 603.

24. (1976) 39 Mod LR 126.

Lord Lloyd said

“the vital area of human rights concerned with racial discrimination is far better dealt with by a Race Relations Act than by a resounding and over-riding statement of principle contained in a Bill of Rights.”²⁵

It is true that both in the United States and in Britain racial discrimination practised by private persons is dealt with by Race Relations legislation. Such legislation has proved its utility against discrimination by private individuals. However, if there exists a threat of the state power being used against racial minorities that calls for safeguards very different from those of the Race Relation legislation which is liable to be repealed by the ordinary process of legislation. It is this that calls for the safeguards of minority rights by means of an entrenched Bill of Rights.

25. (1976) 39 Mod LR 128.

MODERN LEGAL STUDIES

Modern Legal Studies was a new concept in law publishing when the series was launched in March 1973. One of its principal aims was to complement existing textbooks by giving deeper consideration to particular subjects within existing courses than they have received hitherto in the standard textbooks. By providing these inexpensive monographs the breaking of boundaries between traditional courses, such as Contract and Tort, has been facilitated, this leading in some cases to new courses based on individual titles in the series.

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CRIMINAL NEGLIGENCE

A J Ashworth*

Recent cases in both the Law Reports and the Press have focused attention once again on the problem of criminal liability for neglect. The reported cases typically involve either the failure of parents to provide their child with food or with medical aid, or the situation of an old person who is allowed to die from starvation or from some form of illness. It seems that prosecutions are only brought where a person actually dies as a result of neglect, although there is no legal reason why prosecutions should not be brought where a lesser offence against the person such as causing grievous bodily harm is committed. Of course it is true to say that in many cases the prosecution might feel incapable of proving the necessary intent for such an offence, and therefore in practice it is more common to charge an offence such as manslaughter, for which intention is not necessary. It is interesting to note that both of the terms commonly used to describe these cases in the books - neglect and omission - may be used in common speech to refer either to a deliberate neglect or deliberate omission to perform a duty or equally to a careless failure to perform a duty. It may well be that this ambiguity in the two central terms, neglect and omission, is responsible for some of the loose thinking which is too frequently found in discussions of this topic.

Cases on homicide by criminal neglect raise two distinct questions. First of all, there is the question of whether a duty was imposed on the accused. Only if we can find some duty in the accused to provide for the victim can we begin to discuss the question of his criminal liability for neglect. Secondly what mental element is required for criminal liability? Obviously this will differ according to the offence charged in our case, between murder and manslaughter but we shall find that there are still some general issues to be discussed. The article will end with some discussion of the social and moral problems raised by cases of neglect, a discussion of the approach to sentencing in these cases, and some reference to the problem of reforming the relevant parts of the criminal law.

Establishing the Duty Relationship

The clearest example of a duty relationship is that between parent and child. Where a parent is charged with causing the death of his child by neglect, there will rarely be any difficulty in establishing the duty relationship and the sole question for decision will be the required mental element. Statute has in fact taken this duty towards children a little further, for Section 1 of the Children Act and Young Persons Act 1933 provides that it is an offence for any person over 16 who has the custody charge or care of a child under that age to neglect that child "in a manner likely to cause him unnecessary suffering or injury to health".

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Difficulties in establishing the existence of a duty relationship are much greater when the victim is a person over the age of 16. Many of the cases here concern old people or members of a person's family who are incapable of looking after themselves. It seems from the case of *Instan*¹ that a contractual liability will suffice to establish a duty; this was confirmed by the later case of *Pittwood*². In all other cases it is necessary to establish the assumption of an obligation towards the victim, in order that the accused should be guilty of an offence committed by neglect. In the early case of *Smith*³, which is one of the rare cases in which the charge was not homicide but assault and false imprisonment, the court was unwilling to look for an obligation outside the legal obligation. Since in that case there was no legal obligation, the accused was acquitted. The judge stated that "omission without a duty will not create an indictable offence". In subsequent cases, however, courts began to look further than the established legal duties. In *Nicholls*⁴, a grandmother took charge of her daughter's illegitimate child when her daughter died, and when the child subsequently died the grandmother was charged with manslaughter. Brett J directed that "if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence that person is guilty of manslaughter". That decision was probably influenced by the fact that the victim was a child, and it is possible to say that the later decision in *Instan* should be seen, not as a case which establishes that the assumption of a moral obligation to provide for the victim creates a sufficient duty, but as a case turning on the existence of a contractual duty. If the early cases are distinguished in this way, then the recent decision of the Court of Appeal in *Stone and Dobinson*⁵ assumes particular importance.

The material facts of *Stone* were that the defendant and his mistress received Stone's sister into their house in 1972. The sister had left the house of another relative and had come to occupy the small front room at Stone's house. She was known to be eccentric, she kept very much to herself, and she also suffered from anorexia nervosa (which meant that she was morbidly anxious about putting on weight). Early in 1975 the sister was found wandering about the streets apparently lost, and this incident led Stone and his mistress to make a rather feeble attempt to try to find her doctor. The sister had refused to tell them the doctor's name, fearing that she might be "put away". The sister's condition gradually deteriorated thereafter and she rarely left her bed. In July 1975 the mistress and a neighbour went into the sister's room and washed her. The conditions in which they found the sister were appalling, and led them to make a further feeble and unsuccessful attempt to get medical aid. Two weeks later the sister was found dead in bed. The facts of the case are appalling, and it is clear that the low intelligence and other disabilities of the two defendants (however irrelevant these might be to any moral estimation of their conduct) were insufficient to affect their legal liability.

¹. (1893) 1 QB 450

². (1902) 19 TLR 37.

³. (1826) 2 C & P 449

⁴. (1874) 13 Cox, 75

⁵. (1977) 2 ALL ER 341

First of all then, it was necessary to find a duty relationship here. In the Court of Appeal, the defence counsel argued that this case was unlike any other reported case. He pointed out that Stone's sister came to the house voluntarily as a lodger, and that it was largely due to her own eccentricity that her condition subsequently deteriorated so that eventually she was unable to look after herself. He therefore suggested that this was one of the cases where English law casts no legal duty on a person to care for the other. The Court of Appeal however rejected that argument. Their main ground for rejecting it was that the defendants had assumed a duty towards the sister by trying to wash her, by taking food to her when she required it, and indeed by making attempts to discover her doctor. From these actions, held Geoffrey Lane LJ, "the jury were entitled to find the duty had been assumed". The Court of Appeal also gave a second reason, which was that "she was a blood relation of the appellant Stone; she was occupying a room in his house", but it is difficult to see that on the authorities either of these circumstances should be sufficient to impose a duty upon the relative or householder. It therefore seems from the key passage in the Court of Appeal's judgment⁶ that the making of some efforts to care for a victim may establish a duty to make greater and successful efforts. Inevitably this branch of the law must develop case by case, but it is hard to avoid the conclusion that this particular decision represents a considerable extension of the duty relationship which had previously operated in this type of case. What the boundary between a legal duty and a moral obligation should be is of course a difficult question. Perhaps the appalling facts of this case influenced the Court in coming to its conclusion. To the question of fixing the limits of the legal obligation to care for a person we shall return in the final section of this article.

The Mental Element

Clearly the mental element required will depend on the offence charged. The mental element required for murder differs from that required for manslaughter, whether by neglect or by any other means. But before proceeding to consider the general distinction between murder and manslaughter, it is perhaps appropriate to consider the peculiar English doctrine of manslaughter by an unlawful act. According to this doctrine, a person may be guilty of manslaughter if death results from the doing by him of an act which is in itself unlawful. In practical terms that act must constitute a criminal offence. In the cases commonly cited in the books - *Larkin*, *Church*, *Lamb* - the unlawful act concerned is usually the crime of assault. But the case of *Senior*⁷ shows that the crime of wilful neglect may also be a sufficient unlawful act. In that case a father failed to call the doctor to his child because this was contrary to the father's religious beliefs. The child died and on appeal it was held that, once it was proved that the father had committed the offence of wilfully neglecting the child (the offence now contained in section 1 of the Children and Young Persons Act 1933) and once it was proved that the commission of that offence caused or accelerated the death of the child, a manslaughter conviction was inevitable. In the years since the decision in *Senior*, the Courts have added further requirements in an attempt to restrict this rather abhorrent doctrine of constructive manslaughter. In this respect the most notable decision is *Church*⁸, where the Court of Appeal added the requirement

6. (1977) 2 All ER at p 346b.

7. (1899) 1 QB 283.

8. (1966) 1 QB 59.

that "the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm." It is interesting to note that the decision in *Senior* was quoted as an authority for this new requirement, and it is fairly clear that cases of neglect will easily fulfil the requirement. It was for example plain in *Senior* that all sober and reasonable people would have realised the risk of some harm resulting from the father's failure to call medical aid to his child. The decision of the House of Lords in *DPP v Newbury and Jones*⁹ serves only to give greater authority to the *Church* requirement.

It is therefore strange to find that in a recent decision the Court of Appeal has failed to apply this clear (even if morally abhorrent) doctrine. In *Lowe*¹⁰, the defendant had been charged with the offence of wilfully neglecting his child and with the offence of manslaughter. The crime of wilful neglect was taken to be established, since he had failed to call a doctor to his daughter of nine weeks when she became ill and she died some ten days later from dehydration and gross emaciation. In these circumstances it would seem that a conviction for manslaughter would necessarily follow, since all sober and reasonable people would have foreseen that the failure to call medical aid would once again subject the child to "at least the risk of some harm resulting therefrom, albeit not serious harm." The Court of Appeal held however that the conviction for manslaughter did not follow in this case, and their zeal for restricting the unlawful act doctrine of constructive manslaughter may well be applauded. Unfortunately the reasons they adopted for restricting the doctrine are in one case irrelevant and in the other case unconvincing. The first reason they gave came from the well known speech of Lord Atkin in the House of Lords in *Andrews v DPP*.¹¹ In *Lowe* Phillimore LJ stated that the speech of Lord Atkin was clearly intended to apply to "every case of manslaughter by neglect": but of course this was a confusion between neglect and negligence as the passage quoted by Phillimore LJ clearly shows.¹²

The Court of Appeal's second reason for declining to apply the doctrine of unlawful act manslaughter to this case was that cases of omission differ in a material respect from cases of commission. The Court's argument in favour of treating this class of case differently appears from the following passage in the judgment of Phillimore LJ:

"We think there is a clear distinction between an act of omission and an act of commission likely to cause harm. Whatever may be the position in regard to the latter, it does not follow that the same is true of the former. In other words if I strike a child in a manner likely to cause harm, it is right that if the child dies I may be charged with manslaughter. If, however, I omit to do something with

9. (1976) 2 ALL ER 365

10. (1973) 1 ALL ER 805

11. (1937) AC 576.

12. see (1973) 1 ALL ER 808f

of Criminal Appeal in *Gibbins and Proctor*¹⁴. In this case Gibbins and Proctor had several children. One of them, Nelly (who was the child of Gibbins and not of Proctor) was not fed and eventually died. It seemed that Proctor did not like this particular child, since all the other children were adequately provided for. The prosecution were probably led to charge the defendants with murder by the fact that the defendants buried the child's body and subsequently told lies in order to cover up her disappearance. At the trial for murder, Roche J directed the jury to return a verdict of murder "if you think that one or other of those prisoners wilfully and intentionally withheld food from that child so as to cause her to weaken and to cause her grievous bodily injury". The Court of Criminal Appeal approved this as a correct direction. It is possible that this direction might have to be changed slightly, depending on the interpretation of the decision of the House of Lords in *Hyam v DPP*¹⁵, but in principle it seems satisfactory for the present day. If a defendant knows that the result of his failure to provide food or medical aid for someone to whom he owes a duty is likely to be either death or serious harm, and nevertheless he fails to remedy the situation and death ensues, then according to the present law of murder he should be convicted. If this is correct, then it seems probable that a charge of murder would have succeeded in the cases of *Senior*, *Lowe* and *Stone and Dobinson*, for in these cases it is arguable that the defendants appreciated the likelihood of death or serious harm to the victim and were nevertheless prepared to risk those consequences.

Turning from murder to manslaughter by gross negligence, we must first discuss the decision in *Lowe* once again. Although Lowe might have been charged with manslaughter on the ground of gross negligence, it appears that the prosecution argued their case solely on the unlawful act doctrine, which we have already considered. However we saw that when the Court of Appeal came to discuss manslaughter in Lowe's case, they quoted extensively from Lord Atkin in the leading case of *Andrews*. The passage which they thought particularly appropriate to cases of neglect was where Lord Atkin stated that "a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied reckless most nearly covers the case." The court in *Lowe* did not pursue this point, since it was not necessary to their decision, but the passage suggests that what is necessary to establish manslaughter by gross negligence in a case of omission or neglect is an extreme lack of care by the defendant towards the person to whom he owes a duty. If the defendant was aware of the risk of death or serious harm to this victim, then we have seen that in theory liability for murder might be possible. In this context we may consider the remarks of the Court of Appeal in *Stone* on the question of the mental element in manslaughter by neglect.

The argument of defence counsel in *Stone* was that the prosecution must show that the defendant foresaw the likelihood or possibility of death or serious injury and nevertheless persisted in their failure to provide care. After refer-

14. (1918) 13 CAR 134

15. (1975) AC 55

the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate."

The terms of this paragraph are difficult to follow. The learned judge refers twice to the question of charging a person with manslaughter, when the question before him was whether a person who *had been* charged should be convicted of that offence. More important however is the Court of Appeal's argument that there is a moral distinction between liability for omissions and liability for acts done. Perhaps an example would help to illustrate the Court's argument. Let us suppose that there is an intentional striking of a child in case A, and an intentional failure to feed a child in case B. Let us also suppose that in case A the striking was likely to cause harm, and in case B the starving was likely to cause harm. Is there any reason for treating the behaviour in case B as less morally culpable than the behaviour in case A? Granted the duty of the defendant towards the child, it seems hard to discern any relevant moral distinction between the cases. Indeed, far from arguing that neglect deserves lenient treatment because the harm arises from an omission, the circumstances of many neglect cases indicate just as much malevolence as is to be found in some cases of actual violence. As one eighteenth century writer remarked, "this mode of killing is of the most aggravated kind because a long time must unavoidably intervene before the death can happen, and also many opportunities for deliberation and reflection."¹³ The above passage from the judgment in *Lowe* suggests the direct opposite: for in the last sentence, Phillimore LJ said that a charge of manslaughter should not be inevitable even where the omission is deliberate. It is surely arguable that in some cases of deliberate neglect, even a charge of murder would be proper, let alone manslaughter. It is to this question that we now pass.

We have dealt first of all with manslaughter by unlawful act because the doctrine is anomalous. If we now leave that doctrine aside, we can see that the principal distinction between murder and manslaughter at common law resides in the degree of foresight of the defendant. In broad and general terms, we can say that where the defendant intends to cause death or serious harm or alternatively where he knows that death or serious harm is likely to follow from his conduct or from his failure to act and nevertheless goes through with it, he will be guilty of murder; if on the other hand he is merely grossly negligent as to the possibility of death ensuing from his conduct or failure to act, so that a reasonable man would have foreseen the great risk of death and would have taken some precautions, he may be guilty of manslaughter. Let us now consider each offence in a little more detail.

It seems that for a considerable time it was not thought possible to commit murder by neglect or by omission, but this view was changed by the Court of

13. 1 Hawkins, *Pleas of the Crown*, 119 (6th edition) 1787

ing to *Lowe* - which, as we have seen, was in fact a decision on manslaughter by unlawful act and not on manslaughter by gross negligence the Court in *Stone* formulated its own test of the mental element in manslaughter by omission or neglect:

“The duty which a defendant has undertaken is a duty of caring for the health and welfare of the infirm person. What the Crown has to prove is a breach of that duty in such circumstances that the Jury feel convinced that the defendant’s conduct can properly be described as reckless. That is to say a reckless disregard of danger to the health and welfare of the infirm person. Mere inadvertence is not enough. The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it.”

This passage¹⁶ once again drags the term “reckless” into the law manslaughter. This is unfortunate, if only because of the different connotation which the term has in *mens rea* generally and in the law of murder particularly. Furthermore, the last phrase of the quoted passage, “or actually to have foreseen the risk but to have determined nevertheless to run it” seems at the very least to blur the dividing line between murder and manslaughter. It might well be better if the term reckless were kept out of the law of manslaughter altogether.

Degrees of Culpability

If a defendant is convicted of murder by neglect, then the sentence is mandatory. However if his conviction is for manslaughter, the sentence is at the discretion of the Court, and the question arises of what factors the court should properly take into account when sentencing for neglect. Clearly the subjective culpability of the offender is the main matter for discussion here. This will depend not only on the degree of his knowledge about the medical condition of the victim and about the likelihood of the victim’s suffering serious harm or death, but also upon the offender’s own capacity for remedying the situation. It is only at this point that the deficient intelligence and evident social inadequacy of the defendants in *Lowe* and *Stone and Dobinson* becomes relevant as a mitigating factor. Thus in the case of *Stone* he was sentenced to a term of three year’s imprisonment, but the Court of Appeal reduced that sentence to one year’s imprisonment in view of the fact that *Stone* was greatly handicapped. A further matter of relevance would probably be the contribution of the victim to her own predicament. In the case of *Stone and Dobinson*, there was no doubt that the woman was eccentric and difficult to help, as is shown by her refusal to reveal the name of her own doctor. A similar situation occurred in the case of *Wilkinson and West*¹⁷, where a man and his daughter were convicted at Birmingham Crown Court of the manslaughter of an elderly relative living in their home. In passing sentences of eighteen months’ imprisonment on both offenders, the trial judge commented that the deceased was undoubtedly “a dominating and tyrannical

16. At (1977) 2 ALL ER 347g

17. Reported only in the newspapers for October 8th, 1977.

woman", and he clearly took this into account, although in other respects the mitigating factors in this case were rather less, since one of the offenders had nursing experience. That case also brings up the question of the precise nature of the responsibility of someone who takes on a duty towards a dependent person. In that case the two offenders had refused to accept the help of a doctor and a social worker. It is quite clear from that case and from *Stone* that the obligation taken on by the defendants could have been discharged by contacting social workers and a doctor, and was not necessarily an obligation which demanded personal attendance.

The Question of Reform

In this article we have discussed some appalling cases of neglect of a human condition. But an equally appalling case of neglect in another sense was the attitude of the Criminal Law Revision Committee to this form of homicide in their recent Working Paper on "Offences against the Person". The Committee only acknowledged the existence of any problem arising from homicide by neglect or by omission in two casual sentences in paragraph 36 - "we did not intend thereby to exclude the possibility of murder being committed by an omission as opposed to an act. Any formulation of a definition of murder should presumably provide for this possibility." In their section on manslaughter, the Committee do not even refer to neglect or omissions as a separate problem. Their proposal to abolish the doctrine of manslaughter by unlawful act would probably reduce the number of cases in which homicide by neglect came before the courts, and would certainly remove the need for the kind of unfortunate reasoning to which the Court of Appeal in *Lowe* were driven. The Committee propose that there should be a new offence of causing death recklessly (a proposal which is facilitated by their recommendation that recklessness should no longer be sufficient for murder), and that "the offence should require that the offender was reckless whether death or serious injury (and not lesser degree of injury) resulted from his actions." Whilst the application of this proposal to homicide by neglect would lead to considerable simplification in the law, and would also bring the law closer to the moral distinctions which apparently influence the judges, there is nowhere in the Working Paper a consideration of the circumstances in which a duty to provide for someone is established. It has often been said that the notion of neglect or omission makes no sense at all without proof of a pre-existing obligation or duty, and the failure of the Criminal Law Revision Committee to discuss this problem is a sad lacuna. The problems here are just as difficult as the problems encountered in many areas of the law of murder, and the differences of opinion evident from the authorities discussed above clearly make it imperative that any new code of offences against the person should make clear and specific provision for cases of homicide by neglect.

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CONSTITUTIONALITY AND LEGALITY IN THE USSR AND YUGOSLAVIA*

by Professor Ivo Lapenna

1 INTRODUCTION

The leaders of the so-called socialist countries in Eastern Europe maintain that their respective systems are based on Marxist ideology which claims to give a clear explanation of all social phenomena including state and law. According to Marxism, law is an expression of the will of the ruling class as determined by the mode of production. This means that the ruling class is not able arbitrarily to create law as it pleases but necessarily sets up such a system of law as corresponds to the conditions of production existing at a given historical epoch. In any society based on private ownership of the means of production, while law corresponds primarily to the interest of the ruling class, it also corresponds to the existing mode of production, at least in periods of equilibrium between the forces of production and the relations of production (class relations).

This is one of the most important parts of the Marxist theory of law and it is very often misunderstood. It is essential for a proper appreciation of Marx to grasp that, in making the above statement, he is not concerned with value judgments of an ethical or moral nature but what he conceives of as an historical necessity. It is also necessary to observe, in this connection, that according to Marx, all social and economic formations based on private ownership of the means of production, namely slavery, feudalism and capitalism are similarly an historical necessity. Again, according to Marx, this means that it is impossible to jump from one socio-economic formation into another without going through an intermediate state in between. Hence, it is impossible to jump from feudalism, illiteracy and backwardness into socialism, without going through the stage of capitalism, whether of private or state capitalism. In ancient Egypt, the majority of slaves were owned by the state but no one ever claimed that because of this Egypt was a socialist state.

It is in this sense, and in these circumstances, that law corresponds to the general needs of society or, as Engels put it in one of his letters, "to the general economic condition". Even

* Abridged version of a lecture by Professor Lapenna of the University of London School of Economics to the Law Department, Trent Polytechnic, Nottingham in May 1977 and reproduced with the kind permission of the author.

in periods of balance between forces of production and the class relations, the state can be the only dictatorship of the ruling class. In this context, dictatorship does not mean the dictatorship of one single person or of a small organised group of people. Nor has it at all the traditional meaning given to the term. In the theory of Marx and Engels, every state, even a state possessing the most democratic political institutions are, according to Marx, possible when there is a balance between the productive forces on the one side and the class relations on the other) is a state in which the ruling class exercises dictatorship because it owns the means of production. In Marx's and Engels' theory, the ruling class utilises the state and law to serve its own class interests whatever the political form of government. Therefore, the dictatorship of proletariat is not the reverse of democracy, but the reverse of dictatorship of the bourgeoisie.

The Marxist concept of law implies the enforcement of law and does not exclude legality but legality in the sense of the implementation and strict observance of the law in conformity with the principles of the legal system in question. The issue of legality has been a recurrent theme of Soviet considerations of state and law, from the revolution to the present day. What is *legality* is an important question in all countries, but a further question may be posed. What exactly is *socialist* legality? Some observers in Western countries believe that socialist legality means legality in a system of law which is socialist in character, precisely as legality in a bourgeois state means legality in a system of law which is bourgeois/capitalist in character. But in Soviet conditions this was *never* so.

2. ON "SOCIALIST" LEGALITY

Socialist legality meant something different from the very earliest times in Russia, ie from the October Revolution of 1917 onwards. It has meant that law must be applied according to the socialist consciousness of the people. Now this is not necessarily a bad thing, because in every system of law, judges and other officials of the legal system apply law in accordance with the social consciousness of the society in which they live. It is impossible to expect an English judge to apply law according to some alien consciousness, but in the Soviet Union and to some extent also in Yugoslavia, socialist legality meant implementation of law according to the "Socialist consciousness" as defined by party officials. This led to terrible illegalities and arbitrariness especially under Stalin, and, to an extent, under Tito in Yugoslavia until the early 1950's.

Lenin derived his understanding of the word dictatorship from

Marx but to Lenin it includes direct violence. In his book, "The State and Revolution", Lenin explains that the doctrine of the class struggle leads inevitably to the recognition of the dictatorship of the proletariat - namely, "of the power shared with none and relying directly on the armed forces of the masses". Since the proletariat as a class in the Marxist sense of the word represented in 1917 an insignificant minority of the population of Russia, Lenin had to put forward the well-known thesis that the leading and organising role of the proletariat served the interests of all the toiling masses who were exploited by the bourgeoisie but incapable of achieving freedom by themselves independently. They had to be guided, taught and organised and that was precisely the task of the most conscious part of the proletariat, i.e. the Bolsheviks, later the Communist Party. In Lenin's theory and, even more, in his revolutionary activities, the Marxist dictatorship of the proletariat was transformed into the dictatorship of the Community Party. Owing to the highly centralised nature of that organisation with its strict internal discipline and defined hierarchy, this meant, in fact, dictatorship and the most horrible despotism of a single person over the masses, over the proletariat, and his own party members.

So we may ask the question, what was Lenin's view of the place of law in such a system of direct violence?

He gave a very clear answer in "The Proletarian Revolution and the Renegade Kautsky": "Dictatorship is rule based directly on force and unrestrained by any laws. The revolutionary dictatorship of the proletariat is rule-based and maintained by the use of violence by the proletariat against the bourgeoisie, rule that is unrestricted by any law." On another occasion, Lenin wrote: "Dictatorship signifies notice once and for all, gentlemen (when he was angry he used to call his his opponents "gentlemen"), unlimited power which rests upon force and not upon law". In spite of this negative attitude towards law Lenin was also wont to claim legality in the USSR and on many occasions he ordered the state organs and party authorities to observe legality. The Yugoslav leaders had approximately the same approach until about 1950. For example, the Yugoslav Constitution of 1946 was almost a copy of the Soviet Constitution of 1936. The General Part of the Criminal Code of Yugoslavia of 1946 was practically identical with the Criminal Code of the Soviet Union. These and many other normative enactments did not correspond to the consciousness of the people - to the legal feeling of the people. As an example we may cite the concept of the "material definition of crime". This was contrary to the Latin maxim *nullum crimen, nulla poena sine lege*, (there is no crime and no punishment

without law), and contrary to the social consciousness and legal traditions of Yugoslavia. The principle *nullum crimen nulla poena* means that the law must, in advance, describe something as a criminal offence and say that whosoever commits this criminal offence will be punished accordingly. This is one of the cardinal principles of liberal criminal law and legislation, but it was rejected and in its place was introduced the material definition of crime according to which not only acts described in the criminal code as criminal offences are criminal offences, but any act which is found by a court to be "socially dangerous" is such an offence; so that a person does an act, and the courts find that it is "socially dangerous" and therefore a criminal offence because it is contrary to the basic (ie political) principles of the particular system. Of course, this opened the door to arbitrariness and illegality. The material definition of crime was abolished in Yugoslavia in 1953 when the new Criminal Code came into force, but in the USSR it was only abolished on December 25th 1958, when they introduced the principle of the formal definition of crime in addition to the material definition of crime.

Under Stalin, socialist legality became a cover for the most horrendous crimes, and was transformed into a true system of lawlessness, but immediately after his death discussion on legality was reopened. However, a genuine discussion, based on a more realistic appraisal of lawlessness, began only after the Twentieth Party Congress (1956) called for the strengthening of Soviet legality. Articles on the implementation of Soviet law began to appear in one issue after another in the main Soviet periodicals. The majority of them urged the necessity of a vigorous and precise implementation of laws in all circumstances.

Professor Strogovitch, one of the outstanding Russian exponents of liberal concepts, has sharply criticised all elastic interpretation of the law, especially that of another professor, Professor Denisov, according to whom law must be "dialectically" applied as circumstances require because, Strogovitch said, such interpretation necessarily leads to lawlessness. The prevailing view of the doctrine both in Yugoslavia and Russia (practice is another matter) on socialist legality is best summarised in the Encyclopaedic Dichotomy of Legal Knowledge as follows: "Socialist legality is the strict and firm adherence to, an execution of, Soviet law by all organs of the Soviet state, by social organisations, officials and citizens". Practically the same definition is given in Yugoslavia.

3. ESSENTIAL ELEMENTS OF LEGALITY

Such an academic approach, which in fact equates legality with a strict observance of law by all, although very progressive, because it implies a rejection of the "Korrektirovka" approach through socialist consciousness, still disregards certain essential elements of legality. At least 3 of these elements must be taken into account, namely

- 1 a system of law
- 2 a system of guarantees for correct implementation of law;
- 3 minimal legal standard.

In my opinion these are inherent in the modern concept of legality. Only if legality contains these elements does legality provide the stability, security, predictability and freedom which are its main aims. Only in this case does strict observance of law receive its true legal meaning and full human value. Let us look at these points in connection with the USSR and Yugoslavia.

3.1 SYSTEM OF LAW

Legality pre-supposes the existence of a legal system which provides adequate and clear solutions for all possible legal relations. Where there is no legal system there is no legality. Both a legal vacuum without law and a legal jungle with an over-abundance of rules and necessarily internal inconsistencies - are sources of arbitrariness.

In the discussion which followed the 20th party congress in the USSR, it was pointed out, inter alia, that the obsolescence of many laws, the obscure language in which the rules were formulated and many internal contradictions have contributed to the regime of illegality under Stalin. In approximately the last 20 years, several branches of law in the Soviet Union have been codified and in this respect the situation has certainly improved, but only in part, because some important sections such as administrative procedure have not yet been codified, whereas those already codified often failed to reach the required standards of legal technique. This is particularly dangerous in the field of criminal law.

In the USSR, since the death of Stalin, and especially since 1958, a considerable number of branches of law have been codified. A system of law means that the entire law of a coun-

try is divided into a number of branches depending on the subject matter regulated by the law; that these branches are reciprocally connected and do not contradict each other. In the Soviet Union and Yugoslavia, the whole of the domestic legal system is divided into 12 branches, for example constitutional law, civil law and procedure, criminal law and procedure, land law, labour law etc. Incidentally, family law in the USSR and Yugoslavia and all socialist countries is a special branch of law and is not, unlike most Continental countries, part of civil law. In socialist countries, it (ie family law) is considered to be nothing to do with the proprietary character of civil law. In the Soviet Union since 1968, a considerable amount of work has been done on codification and basic legislation. However, there is not yet a code of administrative procedure. Yugoslavia has one of the longest constitutions in the world, ie to say 406 articles entailing some 300 pages, and it is, technically, a good constitution. There is a code of criminal law and a code of criminal procedure, a code of civil procedure; indeed much of the law has been codified but there is not yet a civil law code. The Constitutional Court of Yugoslavia can make proposals to the National Assembly, ie, the Yugoslavian Parliament, for legislation. The Court has recently proposed to the Assembly that a civil law code should be enacted to replace such old and fragmented legislation as still exists, in some cases, from the early 19th century, when some parts of what is now Yugoslavia were part of the Austro-Hungarian empire.

Yugoslavian legal technique is superior to Soviet legal technique due to stronger legal traditions based upon strict legal training of a length greater than the current in the West, ie a 4 year study in the equivalent of a University or Polytechnic and a further 5 year study in practice, with a professional examination at the end. Then and only then, can the person practice law or become a judge of only the lowest court. Today the practical period has been reduced from 5 years to 3.

Twenty per cent of professional judges in the USSR are not legally trained, so that in applying law they have many difficulties. The present policy of the Party is aimed at gradually eliminating professional judges without legal training. Accordingly, Yugoslav professional standards are considerably higher than those in the USSR.

Again, draughtsmanship in Yugoslavia is of a higher standard combining knowledge and experience, and the result is a higher standard of legal technical product. By way of example, in the

criminal codes of the 15 Soviet Union Republics theft is defined as follows: "theft, namely stealing will be punished" What kind of definition is that? On the other hand, in Yugoslavia, the definition is as follows: "whoever takes from another, a moveable thing, in order to procure for himself or to another an illegal material gain shall be punished" The effect here is similar to English law in which the absence of proof of a constituent element in the crime is fatal to the prosecution case. Inadequate legal technique evident in bad draughtsmanship opens the door to illegality. Even the move from the material to the material-formal definition of crime is not wholly beneficial in the absence of proper and full definitions.

3.2 SECOND ELEMENT OF LEGALITY - SUPERVISION

This implies a system of guarantees against arbitrariness and abuse. The system of supervision will vary according to the constitutional structure of the state. The structure of the state depends upon many factors in the existing relations of political forces within the state, the degree of democracy, legal traditions, accepted concepts of justice etc. The instruments for the supervision of legality differ not only from one country to another but also from one field of law to another, in the same country

There are 3 basic fields: the judiciary, normative enactments and state administration.

As regards the judiciary, the remedies are appeals to higher courts, usually two levels, but in most important cases, three levels. In the USSR, the Fundamental Principles of Criminal Procedure dated December 1958 retained the system of two levels but, most extraordinarily, precisely in the most important cases, whenever the Supreme Court of a Union Republic or the Supreme Court of the USSR act as a court of first instance, the Soviet system deprives the accused of any right of appeal. Since in such cases also, the bench consists of one professional judge and two people's assessors, the defendant is, at the same time, deprived of having his case reviewed by a bench comprised of 3 professional judges; this is extraordinary. All courts, when they act as first instance courts, consist of one professional judge, who may not be a lawyer, and two people's assessors who are not lawyers. But the appeal court will consist always of three professional judges. There is no possibility of further appeal. The Soviet Criminal Procedure Codes establish which courts should act as courts of first instances for the different criminal offences. However, higher courts may take a case from a lower court and act as a court of first instance. The Supreme Courts of the Union Republics and even the Supreme Court of the USSR may do so on occasions and, again, the bench consists of one professional judge and

two people's assessors. However, no right of appeal against the decision of any Supreme Court of the Union Republics may be made in these cases.

In all civilized systems of law the more important the offence, the more severe the punishment, the more guarantees exist for the accused. However, in the USSR, this is not so, and in certain instances the opposite is true. There is, however, the system of the procuracy's extraordinary appeal. The procuracy may intervene and lodge an extraordinary protest for the protection of legality both in favour of an accused and against his interests. But this is not an ordinary procedure, and in any event, the individual has no such right.

In Yugoslavia, the situation is very different. For example, the lowest courts is the commune court, the next level is the county court. The Supreme Courts of the Republics or Autonomous Provinces and the Supreme Court of Yugoslavia cannot oust their jurisdiction. For important cases, for example, in criminal law an offence carrying the death penalty or a term of imprisonment of 20 years, the bench of the county court consists of 2 professional judges and 3 people's assessors. The prosecution and the defence have a right of appeal to a higher court which consists of 5 professional judges. There is a further right of appeal to the Supreme Court of Yugoslavia also consisting of 5 professional judges. Therefore, in the most important offences, there are 15 judges potentially involved. Twelve of the 15 are professionally and legally trained.

In the field of normative enactments legality simply means the conformity of any normative act with all higher normative acts. In this sense, legality comprises constitutionality, namely the conformity of the law with the constitution. In an organised system of law, the hierarchy of legal norms is clearly defined and therefore legality or illegality of an act is established relatively easily by examining the higher normative act.

In the both the Soviet Union and Yugoslavia, such legality is provided for. But whereas in Yugoslavia the hierarchy of legal acts is clearly stated, in the USSR it is not. In both countries, at the top, is the constitution. Under the constitution, since both countries are federal, are the constitutions of the Union Republics. Under these are the statutes and under these the various decrees issued either by the Council of Ministers in the USSR or the Federal Executive Council in Yugoslavia; and, additionally, in Yugoslavia, all lower enactments down to the general acts of the so-called organisations of associated labour. This is a new, interesting and important experiment in Yugoslavia. An organisation of associated labour, includes all the basic organisations in the field of the economic and social

life. Before the Constitution of 1974 there were two groups in which self-management was carried out. On the one hand, there were enterprises in economic affairs, for example factories, and on the other hand, there were institutions in all other fields, for example, education and health, so that a faculty of law or a university would be such an institution. These two are now combined into what are known as organisations of associated labour and they are entitled to issue acts.

Constitutionality and legality in Yugoslavia means that every lower normative enactment must be either in conformity with or not contrary to higher normative enactments. This is similar, but is not the same thing. The constitutions of the six Republics must not be contrary to the Constitution of the Federation and the statutes of the Federation and of the Republics, must be in conformity with the respective constitutions. It is not the easiest system to understand, but the Constitutional Court of Yugoslavia decides upon contentious matters.

In the USSR, the Constitution is different. Under the Soviet constitution, the supervision of all normative enactments, including the decrees of individual ministries, is vested in the Procurator-General of the USSR and his subordinates. This means that supervision is in the hands of an institution which, since its creation in 1922 by Lenin, has committed numerous illegalities and contributed to the general state of lawlessness particularly under Stalin. The Praesidium of the Supreme Soviet of the USSR has the right to annul decrees and regulations of the Council of Ministers of the USSR in the event that they do not conform with the law. In addition, the Praesidium has the right to give interpretations of the current law of the USSR.

Apart from Czechoslovakia, only Yugoslavia, in the socialist world, has a system of constitutional courts to check the constitutionality or otherwise of acts. It functions properly and deals with up to 40,000 cases a year. There are 9 constitutional courts, ie as follows:-

- 1 Constitutional Court of Yugoslavia
- 6 Constitutional Courts of the Union Republics and;
- 2 Constitutional Courts of the provinces.

The Constitutional Court of Yugoslavia deals with violations of constitutionality and legality of all federal law. If a statute of a socio-political community or of an organisation of associated labour is contrary to the federal constitution, the case will be dealt with by the constitutional court, but if a statute is contrary to one of the Republic's constitutions, it will be dealt

with by the constitutional court of the relevant Republic.

It can, and has happened, that the Constitutional Court of Yugoslavia believed that a statute of a Union Republic was contrary to the federal constitution, and that the Republic's statute conformed to the federal constitution. It was, accordingly, valid.

The system is complex but, as I have said, it works, though possibly not as well as some Yugoslavian commentators would have us believe. The majority of decided cases relate to the enactments of organisations of associated labour and communes (the lowest territorial-administrative unit). However, there were 50-60 decided cases where the Constitutional Court of Yugoslavia decided that a statute of the federal assembly of Yugoslavia was unconstitutional and the federal assembly had to change the statute. If the statute had not been changed, then the constitutional court would have declared it to be illegal. This is an enormous change and represents great progress compared both with other socialist countries and with the position in Yugoslavia before 1964. It must be borne in mind that Yugoslavia is a one-party state and the Constitutional Court of Yugoslavia has this exceptionally important power, ie to declare unconstitutional - the enactments of the highest legislative body in the country.

Certain complications may follow. A clear one is the issue of what happens, should a statute be declared void and illegal, to those legal transactions and relations created in the period between enactment and annulment. The answer is this instance is that such relations have to be abolished and new ones created in accordance with the pre-existing legislation.

Amongst socialist countries, Yugoslavia has the most sophisticated legal system. We may illustrate this by reference to constitutionality and legality, by the clearly defined hierarchy of legal acts. By the high technical standard of the legislation and good definitions in substantive, especially criminal law, by the clear codes of administrative procedures and the right of appeal to administrative courts in administrative matters and by the right to bring an action against an administrative body which has been found wanting by a higher administrative tribunal.

3.3 MINIMUM LEGAL STANDARD

It does not work 100 per cent. Whereas in Western countries there is a distinction between law in the books and law in action, in Yugoslavia, precisely as in the USSR there is a further dimension: law theory, law in the books and law in practice. The books are removed substantially from the theory and the

practice is removed substantially from the books. It is easy to envisage the gulf between practice and theory. It is, nevertheless, the best legal system in the socialist world and with further democratization, it can be improved even more. The lynch-pin of legality is basic human rights and their protection. These minimum standards should be observed everywhere as laid down in the Universal Declaration of Human Rights and in the two Covenants of Human Rights to which both Yugoslavia and the Soviet Union are signatories. A large gulf between the observance of these international documents on human rights on the one hand in Yugoslavia and on the other hand in the USSR may be observed. For instance, practically all Yugoslavian citizens can obtain a passport and travel abroad without further formality.

The road to socialism taken by Yugoslavia following the split between Tito and Stalin in 1949 has manifested itself in the growth of a different legal system in Yugoslavia and this, as I have tried to point out, has had many practical and important consequences for the citizens of Yugoslavia.

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FINING THE OFFENDER: An Examination of the Enforcement and Administration of Fines in the Criminal Justice System

D T Davies*

Introduction

Although the fine is regarded as being one of the least sophisticated sanctions in The Criminal Justice System, it is still the most frequently imposed penalty for both indictable and non-indictable offences.¹ Fines, in addition to their basic simplicity, also possess an unusual characteristic which differentiates them from other punishments in the criminal process. Unlike a probation order, suspended sentence or term of imprisonment which remains unaltered by economic fluctuations, fines are directly affected by inflationary trends with regard to their current monetary value in society.

Although fining offenders is a relatively straightforward sentencing task, determining the size of the fine and its method of enforcement is much more complex. Indeed, the number of offenders who default in paying fines and are subsequently imprisoned is significant enough to warrant a re-evaluation of this pecuniary sanction and its potentially inequitable application on offenders.

As several studies have already focused on probation, imprisonment and comparable traditional penalties utilized by the courts, it is unfortunate that criminologists have not provided a more comprehensive analysis of the fine and its effectiveness as a deterrent. This problem is even more disturbing when one considers the empirical evidence available from the few studies which have been conducted on the fine. These findings have consistently demonstrated the superiority of the fine as a reductivist criminal sanction.

This paper attempts to provide a brief introductory survey to the fine, its administration and enforcement in the criminal justice system. The paper examines (1) The historical background of the Fine, (2) The advantages and disadvantages of fining offenders, (3) The nature and extent of Fine Default and (4) Present and alternative methods of Fine Enforcement.

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1. Nigel Walker, 'Crime and Punishment in Britain' (University Press 1973) at 164. See also 'Criminal Statistics, England and Wales' (HMSO 1975) at 30-35; N Bishop, 'Aspects of European Penal Systems' in 'Progress in Penal Reform' (Clarendon Press 1974) at 86

Finally, the paper stresses the importance of subjecting fines to a critical analysis through empirical research. The continued utilization of financial penalties by the courts in the Twentieth Century indicates the confidence the courts have in this pecuniary penalty. It is extremely important therefore that we obtain more knowledge about the court's use of the fine and its effectiveness as a specific deterrent when sentencing offenders.

Historical Background of the Fine

From an historical point of view there have not been any major changes in the fine's administration throughout the centuries. However, the function of the fine as a form of retribution has been given more emphasis than its role as a means of indemnification.

Until feudal law came into being, punishments in Anglo-Saxon society were based on tribal justice and family vengeance. This was considerably altered in feudal law with the development of a system of penalties known as the 'wer', 'wite' and 'bot'.² The 'wer' represented a cash payment by one tribal clan to the relatives of the victim in another tribe in order to prevent retaliation. The 'wite' was a form of compensatory redress to the injured party and the 'bot', the equivalent to the modern fine, a cash payment to the King by the offender for breaking the law.

It is interesting to note that the original use of the fine was confined initially only to the civil law.³ During this rudimentary stage of its evolution, redress rather than punishment was the fine's primary objective. It was not until the reign of King Henry II (1154-1189) that fines were formally institutionalized into the criminal law as a mechanism both for keeping the King's Peace and replenishing the royal purse.⁴

In the 18th century, rationalism and the doctrine of free will comprised the essential ingredients of the emerging classical school of criminology.⁵ Exponents of this view, often referred

2. Clarence Ray Jeffery, 'The Development of Crime in Early English Society' in 'Crime and The Legal Process' edited by William J Chambliss (McGraw Hill, 1969) at p 20.
3. Edwin Hart Sutherland and Donald R Cressney, 'Principles of Criminology', (J P Lippincott 1974) at p 316.
4. Ralph Davidson, 'The Promiscuous Fine', Criminal Law Quarterly, 1965, at p 78.
5. See Sir Leon Radzinowicz, 'Ideology and Crime: A Study of Crime in its Social and Historical Context' (Heinemann Education Books 1966), particularly chapter 1.

to as the 'liberal philosophy', held man to be a free thinking individual who was capable of distinguishing right from wrong and therefore strictly liable for his behaviour. Punishment according to this approach was thus inflicted on the wrongdoer in accordance with the nature of the crime. The fine, like other penalties at that time, was used simply for deterrent purposes.

As most legal systems based their criminal codes on the tenets of the classical school, the single and most important factor in choosing a particular sanction was the gravity of the offence. Thus, the fine's suitability for redress was ignored in favour of its retributive function. Jeremy Bentham's prudent observation that financial penalties were valuable "since all the evil felt by him who pays, turns into an advantage for him who receives" seemed to attract little notice at that time in man's social history.⁶

Evaluating the Fine

When compared to other punishments available to the court, the fine is perhaps the most important sanction for several reasons. Economically it is the cheapest penalty to impose. Sentencers resort to the fine more frequently than any other penalty. Furthermore, the fine sets a retributive limit to the amount of suffering than an offender must undergo to satisfy the aims of deterrence and denunciation expected by society for breaking the law.⁷ For example, the fine does not impose additional restrictions on an offender such as a court order to report to the police. Once the fine is paid the penalty terminates. Another advantage of the fine is that it can be rechannelled back into the Treasury thus reducing the social costs incurred from criminality.

Evaluating the fine's effectiveness as a deterrent is rendered somewhat easier by the fact that it readily lends itself to the research process. To illustrate this point, the fine is a graduated and relatively flexible penalty. For this reason, legislative and judicial increases or decreases in the amount of the fine can be tested directly for all kinds of offences and offenders. As a result, variations in the size of the fine can be correlated to match the nature of the offence and its perceived seriousness by the court.

6. Jeremy Bentham, 'The Theory of Legislation' (Oceana publications, 1975) at p 208.

7. 'Provincial Offences: Tentative Recommendations for Reform'; paper prepared by Darryl T Davies for The Law Reform Commission of Saskatchewan, April 1977, at 32.

Second, the function of the fine is not as ambiguous in its objectives as is the case with other criminal sanctions.⁸ Whether in drachmas, roubles, pounds or dollars the purpose of the fine is to act not as a rehabilitative mechanism but as a deterrent.

Finally, fines are not as complicated as penalties which involve a variety of extraneous variables in their administration and enforcement. Probation and imprisonment for example expose the offender to an array of factors and influences which are exceedingly different to control and subject to measurement (such as probationary supervision, inmate subculture). Also, once the fine is paid the courts do not require the assistance of other criminal justice agencies to ensure its enforcement.

In *The Principles of Criminology*, Sutherland and Cressey outlined some of the major reasons for using a fine. They point out that fines are remissable and once they have been paid can be repaid; that fines do not carry public stigma to the same degree as imprisonment and that the fine causes a kind of universal suffering when imposed.⁹ As Keith Devlin observed:

It is possible to argue that for every individual for whom a fine is considered appropriate, there is a notional fine: a fine which in some cases is leniency which falls short of "letting off" and thus encourages reformation, a fine which in other cases is within the capacity of the offender to pay and yet deterrent enough to discourage further crime, and finally, in the appropriate case, a fine which is retributive enough for society to be assured that justice is being done.¹⁰

Another important function of the fine is its potential usefulness as either a non-custodial or displacement sanction to imprisonment. Countries such as Holland, Germany, Sweden and Denmark rely on fines as a substitute for the short-term prison sentence.¹¹ Holland, which makes use of the fine on a large scale, has a prison population of less than 3,000 in a

8. Nigel Walker, *op cit*, at 143.

9. Edwin Hart Sutherland and Donald R Cressney, *op cit*, at 317-318.

10. 'Sentencing Offenders in Magistrates Courts', Keith Devlin, (Sweet & Maxwell, 1970) at 62-63.

11. 'Norman Bishop, *op cit*, p 88.

country of over thirteen million people. In Germany, prison terms which are less than six months in duration, can, in certain instances, be replaced by an appropriate fine.¹²

The most encouraging empirical evidence concerning the fine's effectiveness is found in '*Sentence of The Court*.' In this study, directed by Dr W H Hammond in England, the fine, along with the absolute discharge, proved to be the most successful sanction for lowering reconviction rates. The data suggested, that, regardless of age, fining the first offender or recidivist was more effective than imprisoning the offender or placing him on probation. The data also revealed that heavy fines were followed by lower recidivism rather than smaller fines.

The evidence from '*Sentence of The Court*' has not been immune to criticism. Professor A G Bottoms has challenged these findings on several grounds.¹⁴ First, he argues that the data from the study which suggest that small fines were less effective than heavy fines, may have nothing to do with the question of the fine's effectiveness *per se*. Rather, it may simply reflect the courts tendency to impose a small fine against "inadequate offenders" who they do not wish to apply some other penalty against (ie probation).

Second, the results of the study which show that heavy fines are more effective than smaller fines might be explained by Professor Nigel Walker's view that the "larger fines may well be levied on the men with the better jobs, who may well be less likely to be reconvicted anyway." Third Professor Bottom's scepticism about the study's findings were reinforced by Martin Davies' work on financial penalties for the Home Office. In that study Bottoms points out that probationers who were fined tended to have a relatively high default rate when compared to probationers who were not fined.¹⁵

With reference to Professor Bottom's criticisms a number of comments are in order. First, Bottoms does not distinguish between the inadequate and adequate offender. Assuming that an 'inadequate offender' is a person who is in a higher risk category because of a poor social environment (ie being unemployed or an alcoholic) it would be difficult to make such a distinction especially in the case of a first offender. Where it was possible to make such a distinction the courts might be inclined to impose a probation order so that the offender would be helped through supervision. Imposing a small fine on this offender would serve little purpose.

12. Norman Bishop, *op cit*, p 84.

13. Dr W H Hammond, '*The Sentence of the Court, A Handbook for Courts on the Treatment of Offenders*.' (HMSO) 1969 at 6 and 72.

14. Bottoms, A G, '*The Efficacy of the Fine: The Case for Agnosticism*' (1973), *Criminal Law Review* at 548-549.

15. For a more comprehensive analysis of Martin Davies' findings, see the report '*Financial Penalties and Probation*' (Home Office Research Unit Report, 1970) at 28.

Furthermore, as a study by the Cambridge Institute of Criminology has shown, the validity and reliability of information to the court concerning an offender's background is always open to criticism.¹⁶ Also, sentencing decisions are influenced by numerous variables such as the nature of the offence, the judge's particular sentencing ideology, and the presence or absence of defence counsel. It is not improbable that an offender convicted of a minor offence may simply not be deterred by a small fine as opposed to a large fine. It is also possible that the courts may have felt the offence was so picyune it didn't warrant any other penalty than a small fine.

Second, as regards Professor Walker's statement, it is useful to bear in mind that information regarding the means or occupation of an offender (particularly a first offender) is often not available to the sentencing judge. More importantly, it doesn't follow that heavy fines are imposed only in those cases where it appears that the offender can pay them. Unfortunately, the Hammond study does not answer this question by providing us with information of default among offenders, if any, according to the size of the fine imposed.

Finally, the data in Martin Davies' study shows the disadvantages involved in combining a fine with a probation order. It does not however provide us with any cogent evidence to conclude that fines are also ineffective when applied separately on offenders.¹⁷

On the obverse side of the coin, there are few disadvantages with fining offenders aside from default. One problem which might arise is that the deterrent effect of a fine might be considerably reduced or eliminated if someone pays the fine on the offender's behalf.¹⁸ Another difficulty is that fines can be imposed immediately by the court. As a result, it is possible that the presiding judge faced with an overburdening court docket may impose a fine not because it is the most appropriate sanction, but merely for the sake of expediency. Such a practice would reinforce what Herbert Packer has called 'The assembly-line of justice in the courts' and this could prove to be detrimental to the fine's effectiveness.¹⁹

16. F H Perry, 'Information for the Court', (Institute of Criminology, University of Cambridge, Cropwood publication 1973).

17. Darryl T Davies, op cit, at 71-2.

18. D A Thomas, "Principles of Sentencing" (Heinemann 1970) 222.

19. Darryl T Davies, op cit, p 34-5.

The Fine Defaulter

With the high rates of inflation and unemployment throughout the world it may seem paradoxical that the justice systems of most industrialized nations have continued to rely on fines to enforce compliance with the law. Although there has been little research in contrasting the default rates of criminal sanction, it would seem that in relation to the large numbers of fines imposed, that fines have the lowest default rate. Nonetheless, there seems to be an increasing number of fine defaulters serving prison terms and it is this fact rather than the percentage of defaulters as such, which has been attracting a great deal of attention and concern.

In an illuminating article titled '*Dismantling the System*', Keith Jobson points out that in British Columbia in 1975, over one-quarter of admissions to prisons were in default of fines. Out of 1,392 admissions only 300 cases involved imprisonment in excess of three months.²⁰ The situation is the same in the province of Saskatchewan where in the fiscal year 1970-71 in Saskatchewan correctional centres, 48.2% of admissions were for non-payment of fines.²¹

Recognizing the seriousness of the problem the Law Reform Commission of Canada investigated the enforcement and administration of fines. They adopted two major recommendations contained in The New Zealand Fine Enforcement Committee's report that (1) imprisonment should only be used as a last resort, unless all other methods have been attempted and proven unsuccessful, unavailable or inappropriate and (2) the defendant has the means or ability to pay a fine but deliberately refuses to do so. As the Commission argued:

When a judge imposes a fine as the appropriate sanction, he has presumably determined that imprisonment is an inappropriate penalty or unnecessary for the protection of society.²²

In a systematic survey of fine enforcement procedure in England Paul Softley examined the default rates of various offenders according to the following criteria: size of the fine, terms of payment, sex of the offender, principal offence and the number of previous convictions. He found that default rates were

20. Keith B Jobson, '*Dismantling the System*' article in the Canadian Journal of Criminology and Corrections, July 1977, October 1974 at 32.

21. '*Fines*', (Law Reform Commission of Canada working paper) October 1974 at 32.

22. Ibid.

higher among those fined large amounts than those offenders fined a small amount, that default was more characteristic of men than women, that default was higher among offenders who were ordered to pay instalment fines, and more frequent with offenders convicted of drunkenness, indictable property offences or non-indictable revenue and property offences.²³

Softley also discovered that offenders with a large number of previous convictions had a higher default rate than offenders with only a few convictions. This finding was confirmed by Richard Sparks' data that an offender's previous record was fairly reliable in forecasting default rates among a sample of fined offenders.²⁴

Enforcing the Fine

Before the court imposes a large fine it should take several factors into account such as (1) the offender's age, (b) his capacity to pay, (c) the nature of his offence. Failure to do so, will merely increase the offender's likelihood of default. In most jurisdictions the procedure for dealing with fine default has been imprisonment.

Imprisonment however, has proven to be an unsatisfactory response to fine default for a number of reasons. First, it means that the affluent offender can always avoid the threat of imprisonment while the impecunious offender unable to pay the fine cannot. This has been the situation in a number of countries and represents a discriminatory use of monetary sanctions. Secondly, the expense of incarcerating offenders on a short-term basis can be enormously high.

Finally, the social harm which may result to society from imprisoning a fine defaulter may outweigh the costs involved even if the offender doesn't pay his fine and escapes with impunity. The adverse effects of imprisonment on both the offender and society have already been well documented in this regard.

What is the solution then for dealing with the fine defaulter? Firstly, it is necessary to examine the reasons which offenders may give for non-payment of a fine. In the report '*Provincial Offences: Tentative Recommendations for Reform*' some of several reasons given for default were outlined.²⁵

23. Paul Softley, 'A Survey of Fine Enforcements' (Home Office Research Unit Report 1973) 24.

24. Richard Sparks, 'The Enforcement of The Fine' (1973), vol 13, British Journal of Criminology 92-107.

25. Darryl T Davies, op cit, p 39.

They do not have the financial means to pay the fine, regardless of how much time the court allows.

They are unable to pay the fine within the time specified by the courts.

They have committed an offence for which a mandatory penalty of a fine and imprisonment is imposed or the court has at its discretion imposed both a fine and imprisonment;

They have been negligent or have deliberately avoided paying the fine.

They have received a concurrent sentence for two separate offences and have been fined for one offence and imprisoned for the other.

They have the financial means to pay the fine but are unable to organize their incomes in such a way that they are able to make payment when required by the court.

Some writers have argued that imprisonment should be used only as a last resort for the offender who is negligent or simply refuses to pay the fine.²⁶ Although this approach seems reasonable, it would depend on the definition of the word 'negligent'. For example would an offender who extravagantly spends his money on certain luxuries after he has been fined fall into the category of the negligent offender if he subsequently defaults in paying the fine? More importantly, who would make this distinction and upon what legal criteria would it be based?

The establishment of a Fine Enforcement Board has been recommended by the Law Reform Commission of Canada as one approach to the problem of fine default.²⁷ The board would be responsible for collecting fines from defaulters by adjusting the size of the fine imposed by the court with an offender's means. As the Commission argued:

By centralising all aspects of enforcement of fines in one administration agency with adequate manpower and facilities to execute

26. 'Report of the Canadian Committee on Corrections' (Information Canada 1969) 198-199.

27. 'Fines (Law Reform Commission of Canada working paper) October 1974 at 37.

these functions, and to keep accurate, accessible and up-to-date records. possibly through computerization, much of the inefficiency and resultant inequities of the present system could be removed.²⁸

The setting up of a Fine Enforcement Board would only be a partial solution to the problem of fine default. For although the board would be useful in adjusting the fine to the offender's income it would not necessarily solve the problem of actually collecting the fine. On occasions apprehending an offender might be difficult and where small fines are involved, it would hardly justify the time and expense involved in finding the offender and transporting him to the board for a formal hearing.

Attempts to deal with fine default through legislation by giving judges the power to vary the nature of the fine imposed according to the character (age of the offender and his previous record) and circumstances of the offender (whether he is unemployed or supporting a large family on a low income) has been reasonably successful. For example, the conventional lump sum fine could be replaced by at least four alternative fines including (1) *The Postponed Fine* The courts could postpone imposing a fine in those cases where an offender is unemployed or in the process of finding work. In exceptional circumstances where it appears the offender is unable to raise the money the court could remit all or part of the fine. (2) *The Suspended Fine* This fine might be an effective sanction for first offenders of a minor offence. (3) *The Instalment Fine* Although instalment fines might be useful, it should be borne in mind that in Paul Softley's study of Fine Enforcement that offenders who were required to pay by instalment had the highest incidence of default.²⁹

Another fine, known as *the Day Fine* has been operating in Finland, Sweden and Denmark.³⁰ In the report of the Advisory Council on the penal system dealing with *Non-Custodial and Semi-Custodial penalties* the day fine was described as follows:

The fine is calculated by multiplying together a number (from 1 to 120 or from 1 to 180 in the case of multiple offences) reflecting the gravity of the offence, and

28. Ibid, at 37.

29. Paul Softly, op cit, at 24.

30. The Day fine was introduced in Finland (1921), Sweden (1931) and Denmark (1939). See Hans Thornstodt, 'The Day Fine System in Sweden', *Criminal Law Review*, 1975 at 307.

unknown. Thus we do not know what impact the size of the fine has on deterrence.

Research into the nature of fine default is still in its rudimentary stage. The result is that we are not much closer to reducing fine default although some progress has been made. The effectiveness of the various procedures that have been used for enforcing the fine have not been adequately researched as of yet to draw any firm conclusions about their strengths and weaknesses. Furthermore, the rates of recidivism between offenders who pay their fines and those who default and are subsequently imprisoned has not been determined.

Although the evidence to date suggests the fine is a fairly effective sanction any statement which purports to show that the fine is more effective than some other penalty must be prefaced with a word of caution. Without concrete empirical data, answers to these questions will border on speculation rather than fact. It is true that the fine is the most pragmatic penalty in our criminal justice system. However until such time as there is strong empirical support for the hypothesis that the fine is the most effective sanction, there is always the possibility that a sentencing policy which continues to rely on this supposition may in fact be failing to deal with criminal behaviour through the most effective and efficient means possible.

A COMPARATIVE ASSESSMENT OF THE RULE AGAINST PERPETUITIES

Jenny Corrin*

Prior to 1964 the rule against perpetuities was in need of reform, but despite its faults the structure of the common law was sound. The English Law Reform Committee¹, and the draftsmen of the revising legislation in England, Western Australia, and New Zealand all accepted the basis of the rule and thought it necessary to remedy the defects which time had exposed in its application.

What follows is an attempt to assess the efficacy of the Perpetuities and Accumulations Act, 1964 in carrying out these reforms. This is done by comparing the Act with the Law Reform (Property, Perpetuities and Succession) Act, 1962 of Western Australia, and the Perpetuities Act, 1964 of New Zealand. Owing to lack of space only the radical differences in these statutes are discussed. Some reference is also made to the Report of the Law Reform Committee² on which the English Act was based.

The Perpetuities and Accumulations Act 1964 and the Law Reform (Property, Perpetuity and Succession) Act, 1962

It took almost 8 years for the proposals of the Law Reform Committee relating to perpetuities to be enacted. Ironically they were implemented two years earlier in Western Australia, where the draftsman stuck closer to the Committee's report.

Both the English³ and the Western Australian Act⁴ maintain lives in being plus 21 years as the perpetuity period. As the Law Reform Committee pointed out⁵ it was still convenient being a period during which parents might have a family and the children attain full age. Both Acts allow an alternative period of 80 years. However, this will only apply if the period is specifically invoked by the disposition creating the limitation. This is to prevent a judge "waiting and seeing" for 80 years just because no lives in being were mentioned. The 1962 Act has the advantage of simplicity but lacks the finesse of the English Act which provides that the alternative period cannot be used in relation to options to purchase land.⁶ The

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1. The Rule Against Perpetuities, 4th Report, cmd 18, hereinafter referred to as "4th Report".

2. *ibid.*

3. S1(1).

4. S5

5. 4th Report, para 5.

6. S9(2).

1964 statute also provides that the period cannot be specified when exercising a special power,⁷ which is in keeping with the policy regarding powers.

Section 2(1) of the English Act deals with the notorious presumption of fertility.⁸ It provides a rebuttable presumption that a woman may only bear a child between the ages of 12 and 55, and that a male may only procreate a child when he is over 14. This section follows the Australian Act^{8a} which reduced the Law Reform Committee's⁹ age limit for a female from 14 to 12, believing this to show complacency regarding the potentialities of the young.¹⁰

The Australian statute extends the presumption to the rule in *Saunders v Vautier*¹¹ and to "any purpose relating to the disposition, transmission or devolution of property". The Law Reform Committee thought it should be extended to these situations but made no formal recommendation.¹² It is submitted that it is a worthwhile extension.¹³ Section 2(2) of the English Act provides that the High Court may try to place any child, subsequently born to parents to whom the presumption has been applied, in the position they would have been in had the question not been so decided. The Australian Act leaves the beneficiary to the common law remedy of tracing, but the English draftsman obviously considered it too harsh to treat it as being overpaid by mistake, hence S2(2). Nevertheless the section will "inevitably give rise to uncertainty,"¹⁴ and the Australian solution seems preferable.

The English legislation has the advantage of allowing any evidence to show capacity or incapacity, in order to rebut the presumption, whereas the Australian Act is limited to medical evidence establishing incapacity.¹⁶ The 1964 Act has the added polish of S2(4) which states that presumptions as to parenthood will apply to any subsequent proceedings on the rule against perpetuities.

7. S1(2).

8. See *Jee v Audley* (1787) 1 Cox Eq 324.

8a. S6

9. 4th Report, para 13.

10. 6 U of WAL Rev 27 at p 49.

11. (1841) 4 Beav 115.

12. 4th Report, para 14.

13. See 6, U of WAL Rev 27 at p 51 for the application to the rule.

14. 108 S.J., p 628

15. S2(1)(b).

16. S76(3)

Both Acts mitigated the harshness of the common law¹⁷ by providing a "wait and see" rule whereby a limitation which was capable of vesting either within or beyond the perpetuity period would be assumed to be valid until events resolved the doubt. Section 3(1) of the English Act has the additional provision that invalidity after "waiting and seeing" shall not affect anything previously done, "by way of advancement, application of intermediate income or otherwise." This is basically a welcome addition but what is meant by "otherwise" would seem to be uncertain.

The most controversial enactment of the 1964 statute is S3(4) which provides that, where it is necessary to "wait and see", the perpetuity period is to be measured according to a special list of lives. The 1962 Act, on the other hand leaves the common law period to apply.¹⁸ The divergence of approach stems from controversy over what exactly constitutes a life in being at common law. Some critics, including Maudsley,¹⁹ Allen,²⁰ Simes,²¹ Ryder²² and the draftsman of the 1964 Act believe that it is impossible to say with certainty whether anyone is a measuring life at common law unless his life, alone, or with others, validates the gift. This means that common law lives will not do for "wait and see" as they will only be ascertainable where the gift is initially valid. Wade; Morris,²³ and Leach²⁴, and it would seem the Law Reform Committee, believe however, that common law lives are those which restrict the period; they may or may not restrict it sufficiently to save the gift. If this is true there is no need for a specialist of lives as provided by the 1964 Act.

Wade and Morris state that the theoretical difference of opinion would hardly matter if the new lives were satisfactory, but they do not consider this to be the case.²⁵ However Maudsley

17. But it was possible to devise one's own "wait and see" at common law.

18. S7(3)

19. 86 LQR 357, at pp 360-363.

20. 6 U of WAL Rev 27, at pp 43-46.

21. 6 U of WAL Rev 21, at pp 23-24.

22. 18 Current Legal Problem 39, at pp 52-53.

23. 80 LQR 486, at pp 495-501.

24. 6 U of WAL Rev 12, at p 17.

25. 80 LQR 486, at pp 501-508.

considers the list perfectly satisfactory.²⁶ Although the weight of opinion is on the side of Maudsley and those who agree with him, it is submitted that the opposing view is preferable. The statutory list is of "formidable complexity"²⁷ and common law lives, as interpreted by Wade and Morris would make the matter much simpler.

Section 9(1) of the 1962 Act reduces invalid age contingencies to 21, thus replacing S5 of the Law Reform (Miscellaneous Provisions) Act, 1941, which is repealed by S9(4). Its provisions are similar to S163 of the Law of Property Act, 1925 which is replaced in the English Act²⁸ by age reduction on a sliding scale. The 1964 solution is preferable, as although S9(1) will validate the gift in a similar fashion, it will not keep as close to the settlor's wishes.

Section 11 of the Australian Act concerns the order of applying rules. It states that "wait and see" is to operate first, then, if necessary the age reduction provisions are to be applied before any class splitting occurs. The same approach is taken by the 1964 Act but it has no specific section explaining the matter, and the order has to be grasped from the wording of the provisions concerned.²⁹ In fact one is left with the impression that the draftsman is doing his best to keep the matter a secret.

Section 5 of the 1964 Act and S12 of the Australian Act deal with the unborn widow trap.³⁰ Under the 1964 statute a gift which would be invalid solely on this account will be altered to make it vest at the end of the perpetuity period. Section 12 of the 1962 Act differs here, purporting to follow the Report of the Law Reform Committee. However, there is a subtle difference. The committee recommended that a limitation invalid solely by the reason of the unborn widow trap should take effect as if reference to the spouse was confined to any spouse born before the limitation and so a life in being. The Australian Act, however, deems the widow a life in being even if she was not one in fact. In fact the Australian provision does no great harm as the situation is unlikely to arise.

Section 12(a) deems the widow or widower a life in being for the purpose of a limitation in favour of her or himself as well. This is intended to validate a discretionary trust exercisable

26. 86 LQR 357, at pp 375-378.

27. 80 LQR 486, at p 501.

28. S4(1) & 6.

29. Ss 3 & 4.

30. See Morris & Leach, *The Rule Against Perpetuities*, 2nd ed, pp 72-73.

during the life of the widow or widower and of which he or she is one of the objects. This might be invalid at common law as she or he might not be a life in being and might outlive the other spouse for 21 years. This is an improvement on the English Act which has no equivalent provision.

In General the Australian Act is much easier to understand than its English counterpart. However, although rather technical at times the 1964 Act has improved on the earlier statute by including some necessary details.

The Perpetuities and Accumulations Act 1964 and the Perpetuities Act 1964

The New Zealand Act follows the same basic patterns as its predecessors, but there are many important differences.

Section 6 of the Perpetuities Act relates to the power to specify a period not exceeding 80 years. Under S1(2) of the English Act a donor of a special power can specify such a period but the donee cannot. In New Zealand it was considered important where a special power is granted, to preserve full flexibility of trusts by giving the donee power to specify in the instrument of appointment.³¹ However the period is still to be calculated from the date of creation of the power and not its exercise.³² This is obviously an improvement. It allows flexibility whilst sticking to the policy that under a special power the perpetuity period should commence when the power is created.

In addition S6(4) does not appear in the English Act. It provides that if a deed or will specifies a specific date for interests to vest that is, for the purposes of the section, to be deemed "a specification of a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date." For example, a gift in the will of a testator dying in 1976 to the children of A alive in the year 2000 is to be deemed a specification of 24 years. Thus, if any such period is less than 80 years it will not be necessary to have a life in being. This seems a sensible improvement on the English and Australian Acts, and makes full use of the alternative period of years.

31. S6(2).

32. S6(3). Section 2 defines powers of appointment to include discretionary trusts. Thus it will be possible, where these are special powers, to use a fixed period.

Section 7 of the Act deals with presumptions and evidence as to future parenthood. Unlike the English Act³³ but in accordance with Australian law³⁴ the presumption is applied to the rule in *Saunders v Vautier*³⁵ and for all purposes relating to the disposition, transmission or devolution of property.³⁶ The arguments in favour of the presumption apply equally in these areas of law but the provisions seem rather out of place in this statute.

Section 8 which lays down a similar rule of "wait and see" to the English statute is worth noting. The New Zealand Act³⁷ specifies afresh the identifying lives in almost identical provisions to the English Act. However the selection of lives for wait and see is far less important in this statute because of the cy-pres power of modification of defective dispositions which it confers.³⁸

Section 10 is the most revolutionary and interesting part of the New Zealand Act. It confers a general power to reform a disposition that would otherwise fail in order to make it comply with the rule against perpetuities.³⁹ The sole grounds for invalidity must be infringement of the rule and the general intentions originally applying to the disposition must be ascertainable. A disposition made before the Act may be reformed if certain conditions are fulfilled.⁴⁰ The Act provided a transitional period up until 1967. During this time the donor could reform the disposition himself, unless he died or went insane in which case the task was performed by the Supreme Court. After this period any necessary revision of pre-1964 dispositions is done by the court. Dispositions made after the Act are also modified by the Supreme Court.

Section 10 can obviously be used where "wait and see" has failed to save the gift. More surprisingly it can also be used where a disposition is only possibly invalid.⁴¹ However, where it is necessary to "wait and see" there is a chance

33. S2

34. S6

35. Op cit.

36. S7(1)(b).

37. S8(4) & (5).

38. See post.

39. The Law Reform Committee thought such a solution vague, uncertain and inherently complex. 4th Report, para 30.

40. S10(2)(a)-(d).

41. S10(3).

that it may eventually fail. For the reformation to be made before invalidity is certain:-

- a) The reformation must not prejudice any person who could possibly take under the disposition if it were modified and it subsequently turned out that it would have been valid without such modification;

or

- b) every person who could possibly be prejudiced by the reformation must consent.

Thus were there is an uncertain disposition "wait and see" is allowed to operate before the ages are reduced and classes split. S10 may be used at any stage providing the relevant conditions are fulfilled.

Section 15 enacts a completely new idea. It abolishes the rule of remorseless construction. This rule embodies the classical English approach and was expressed by Parker J in *Re Hume*:⁴²

"The proper course is first to construe the gift according to the ordinary canons of construction and then to consider whether any part of it as so construed offends against the perpetuity rule. It is not permissible to construe the gift otherwise than according to its natural meaning it would offend against the rule."

The abolition of the rule is an admirable innovation, and surely it is only common sense when construing a disposition to "take into account that the maker thereof would probably have intended the construction under which the disposition would be valid."⁴³ As Morris and Leach stated:⁴⁴

"It is consistent with the rule as a precept of social policy that every possible measure should be taken, consistent with the language he has used, to bring a testator's will into compliance with the rule rather than to find a violation of the law's prohibition."

42. (1912) 1 Ch 693. See also *Pearks v Moseley* (1880) 5 App Cas 714, 719.

43. S15.

44. *The Rule Against Perpetuities*, 2nd ed, p 255.

Section 16 of the New Zealand Act concerns administrative powers of trustees. It is fully retrospective, thus the rule against perpetuities is deemed never to have applied in this area, whereas the English equivalent, S8 is only partly retrospective. Also it uses the words "valuable consideration", whereas S8 of the English statute uses "full consideration". This is very odd because the words in the English statute eliminate evasion of the rule by a sale to a beneficiary at a low price. The New Zealand Act does not achieve this purpose.

Section 17 deals with options relating to land. Section 17(3) contains an additional exception to the English Act.⁴⁵ The rule against perpetuities is not to apply if:-

- a) The option is conferred by an instrument which provides for the settlement upon trust of assets comprising or including the property; and
- b) The option is exercised at or before the expiration of one year after the first point of time when:-
 - i) in accordance with the settlement, all interests in remainder in the property that vest within the perpetuity period have vested and all prior interests in the property have terminated; and
 - ii) the persons entitled in remainder to the property have all attained the age of 21 or died sooner.

The exception arose from the practice of farmers in New Zealand to give, by will or settlement, an option to their sons to purchase land, often exercisable on the death of the widow at a price fixed by valuation according to the legacy fund available for other children.

Finally S20 concerns the rule against inalienability. It allows purpose trusts to subsist during the perpetuity period if they are not otherwise void. The Law Reform Committee mentioned these trusts⁴⁶ but they were not dealt with in the English Act. The provision is commendable in that it will hopefully discourage the complicated conveyancing devices whereby purpose trusts may be made virtually perpetual.

45. S9

46. 4th Report, para 49.

Conclusion

The drafting of legislation on perpetuities is obviously a complex task. Provisions must be as straightforward as possible yet at the same time provide the most suitable answer for every situation. If an imaginary common law country intended to base a completely new act on a combination of the best elements from the three acts discussed above, it is submitted that it would consist of the following sections:

For power to specify the English provision would be used with the New Zealand addition that the alternative period may be used by the donee of a special power, although the period is still to be calculated from the date of creation of the power.⁴⁸

The New Zealand Act seems to contain the most comprehensive section on presumptions and evidence as to future parenthood. However, perhaps the extension of the presumption to an area of law outside perpetuities should be included in a different statute, for example, the equivalent of the Law of Property Act 1925.

Section 7 of the Western Australian Act would be used for "wait and see". However, due to the controversy over implied lives at common law a definition of these should be included. The Kentucky Perpetuities Act, 1960⁴⁹ provides that:

"the (perpetuity) period shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest."

However this could be further improved by the inclusion of express lives. Therefore the new statute would use S7 of the 1962 Act with an additional sub-section to the effect that lives in being are taken to be those expressly provided and those which as a matter of causality restrict the vesting period. It would also be advisable to emphasise that these lives are to be used for "wait and see".

47. S1.

48. S6(2) & (3).

49. Ky Rev Stat 381. 216.

For reduction of age contingencies⁵⁰ and exclusion of class members to avoid remoteness⁵¹ the Australian Act has the most in its favour. The provision as to class gifts, although substantially the same as in the English Act, has the advantage of simplicity.

Section 11 of the Australian Act would also be included to specify clearly the order in which the rules are to apply.

The unborn spouse trap would be dealt with by S12 of the 1962 Act, which is both clear and effective.

The classification of powers of appointment is dealt with similarly by all three statutes. The Western Australian Act is perhaps more concise. The English Act has a satisfactory section on administrative powers but it should be made fully retrospective.⁵²

Other details of the new legislation are dependent on knowledge of the existing law of the common law country concerned. If the rule of remorseless construction is used it should be abolished by a provision equivalent to S15 of the New Zealand Act. Also, if purpose trusts are in an uncertain position something similar to S20 of the Perpetuities Act should be adopted. This could be included in separate legislation which clears up the matter of purpose trusts altogether. The new act should not have a general cy-pres provision⁵³ like New Zealand as, it is submitted, that this is going too far to save the limitation. There is a difference between saving a disposition, wherever possible, and actually rewriting it it is submitted that that should not be the function of any court.

The Perpetuities and Accumulations Act, 1964 has greatly improved the law and is likely to stay intact for some time. However, it is far from perfect. All three statutes considered have good and bad points. It can only be hoped that at some future time the English Act will be revised to include the best elements of them all.

50. S9

51. S10. This is not discussed in the text.

52. S8.

53. S10.

CONTROLLING THE MULTINATIONALS

by A J Briscoe*

Debate on the control of multinational companies tends to revolve around two questions. Should multinational companies be controlled? Which aspects of multinational operations are in need of supervision?¹ Little consideration has been given to the related issue of *how* multinational companies can be controlled. This neglect is surprising. There seems little point in debating whether something should be controlled unless there are means available (or potential) for its control. This article attempts to assess the effectiveness of those controls that have been developed or advocated as a means of dealing with multinationals.

The Home Country

The home country is that in which the parent corporation of a multinational group is incorporated, the country where the corporate headquarters are sited. For this reason and because the largest portion of the corporation's assets found in any one country are probably located there the multinational owes primary allegiance to the home country. Consequently, the controls imposed by the home country are highly significant.

Although most multinationals are of US origin,² uncertainty surrounds the theoretical basis upon which the United States has exercised jurisdiction over affiliates of US multinationals located abroad. Under the 'control theory', for example, the United States' government has required the parent company of the group to exercise its corporate control over a subsidiary located overseas so that the subsidiary acts in accordance with US law. Alternatively the United States has assumed a direct jurisdiction over the foreign subsidiary itself perhaps by reclassifying the nationality of the subsidiary according to the nationality of the persons controlling it.³ This theoretical uncertainty is reflected and paralleled by another, more important, doubt. Does the US government - or that of any home country - have the moral or political right to regulate overseas activities of subsidiaries located abroad? Does this constitute an intrusion on the sovereignty of the host government, or is there a duty on the home government to control multinationals in the absence of any other effective agency?

The conflict between these principles has been posed most acutely in the context of foreign policy controls. Even during peacetime, inter-national disputes have resulted in trade blockades and limitations on the flow of goods and technology between conflicting countries.

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1. These questions are discussed in 'Why Should We Control Multinational Companies?' A J Briscoe, *Trent Law Journal*, vol 1.

2. *Ibid*.

3. Who are themselves US nationals, being either the parent corporation or its nominees.

However, the emergence of foreign direct investment in general and of the multinational company in particular - has enabled the home country to extend the effect of such blockades so that trade between third countries and the 'enemy' is blocked. Since the Second World War, the United States has strictly controlled transactions with communist countries by legislation with a definite extraterritorial effect, namely the Trading with the Enemy Act⁴ and the Export Control Act.⁵ The latter empowers the Treasury to prohibit the exportation from the United States and the re-exportation from any other countries - of any articles, materials or supplies to the extent necessary to further US foreign policy or the national security. The Act may be applied to any persons or firms resident abroad that are controlled by US citizens or residents (the Treasury Department has ruled that less than 50% ownership of shares in a foreign subsidiary may constitute sufficient control). In 1965, pursuant to the Act, the Treasury refused Freuhauf (a US parent corporation) permission to allow its French subsidiary to deliver trailer trucks to Berliet (a French company) which intended to couple them with truck cabs for sale overseas. By the time it was learned that the final destination of the trucks was China, the French subsidiary had already purchased all raw materials necessary for the trailers and the work was in progress. The US parent company ordered Freuhauf-France to cancel the order and in the resultant legal dispute, it was revealed that such action would probably close the company (because business relations with other French customers had been severely prejudiced) and result in the dismissal of at least six hundred workers. Consequently the decision was regarded as motivated by political factors unrelated to French foreign policy and as contrary to the commercial objectives of the company.⁶

But it is not only in relation to foreign policy that the United States has sought to control the overseas operations of multinational corporations. In antitrust and a variety of fiscal matters also, statutes with an extraterritorial application have been introduced and enforced by the courts in the face of the objections of foreign governments. It is therefore ironic that United Kingdom regulations promoted to ensure a similar extraterritorial effect have failed to achieve their purpose because of inadequate enforcement. The Southern Rhodesian Act 1965⁷ was intended to impose a trade embargo on Southern Rhodesia and to have extraterritorial effect to achieve this purpose.⁸ Nevertheless, the primary order made under the Act the Southern Rhodesia (UN Sanctions) (No 2) Order⁹ - simply prohibits the supply of goods to and from Southern Rhodesia by companies incorporated in the United Kingdom, and British multinationals have maintained trade despite the 'embargo' through the use of subsidiary companies incorporated in South Africa.¹⁰

4. 40 Stat 415 (1917), and as amended.

5. 63 Stat 7 (1949), and as amended.

6. The affair was concluded by the intervention of a French court which resulted in the appointment of a "provisional manager" to carry out the order. J N Behrman, 'National Interests and the Multinational Enterprise', p 110-1 (1970).

7. C 76

8. Section 2(1).

9. 1968, SI no 1020.

10. See, for example, 'The Guardian', May 21, 1973.

In at least one other area British legislation concerning multinational operations has proven to be of questionable usefulness. The gathering of information about corporate activities is often an essential precursor to the initiation of court proceedings. US courts have encountered little difficulty in this respect when dealing with multinational companies, having assumed power to subpoena the US parent corporation to produce documents and witnesses from the overseas affiliate.¹¹ Whether British courts will adopt a similar approach remains to be seen. But it is clear that an investigation into the affairs of a company under the Companies Act 1948¹² has only limited scope where that company is part of a multinational enterprise. As Sir Geoffrey Howe (then Minister for Trade and Consumer Affairs) commented in reply to a question concerning the 'Lonrho affair' in the House of Commons,

The inspectors have powers under section 166 to inquire into the affairs of subsidiaries to the extent that they consider relevant and necessary for the purpose of investigation into the affairs of the holding company. If a subsidiary is based abroad inspectors can pursue inquiries into that subsidiary, but the jurisdiction that they can exercise does not extend outside the territory of this country. Thus, in so far as they make inquiries abroad, it will not be possible to compel witnesses to attend or to command the production of books and papers. They can question those directors of a subsidiary company who are directors of the London-based parent about the affairs of both companies.¹³

Furthermore, the Companies Act does not permit an investigation to be ordered into the affairs of an overseas subsidiary itself.¹⁴

The Host Country

Theoretically, the power of the host nation over subsidiaries of a multinational company that operates within its jurisdiction is absolute. The nation state has unfettered legal sovereignty in deciding whether to admit new foreign investment, whether to tolerate existing investments and whether to alter the conditions attached to the continuance of foreign business. But legal sovereignty must be distinguished from political sovereignty.

11. J H Behrman, *op cit*, at p 116-7.

12. 11 & 12 Geo 6, c 38.

13. 'Weekly Hansard', London, HMSO, vol 858, issue no 938, 18 June 1973, p 23.

14. This is because the power to investigate the affairs of a company contained in section 164 is subject to the definition of a 'company' in section 455(1), as a company formed and registered under the Act.

The political reality is that the host nation is severely limited in its ability to control the multinational company, a reality best illustrated by reference to the most extreme action which a national can adopt - nationalisation. The automatic consequence of nationalisation is that the benefits associated with foreign investment - the projection of new capital and technology into the economy, the creation of jobs, and potential contributions to balance of payments and regional development¹⁵ - are all lost. But notwithstanding these factors, where the nation is a producer of agricultural or industrial raw materials (especially oil and metals) nationalisation remains a viable proposition. If the process is a manufacturing one, however, nationalisation may prove impractical because multinational management strategy is often based upon a policy of centralisation. Renault, for example, manufactures various different vehicle components in Rumania, Spain and Argentina. These are assembled for the same car in plants around the world. Consequently if Rumania nationalised the plant that makes all the gearboxes for the Renault "Estafette" model, those gearboxes would remain in Bucharest since they are useless for any other purpose.¹⁶

A wide range of controls less severe than nationalisation have been developed by host nations to counter the power of the multinationals. They include a compulsory local shareholding (which may constitute a majority holding), the appointment of nationals to the local board of directors, the prohibition of foreign investment in certain 'key' sectors of the economy and the request that multinational companies voluntarily comply with 'guidelines of good corporate citizenship.' A detailed examination of the effectiveness of each of these measures cannot here be undertaken but what is clear is that they suffer from a common defect - inflexibility. The argument against rigid controls is presented by Professor D F Vagts when he points out that different government departments have conflicting objectives in their relationship with multinational companies. The point is illustrated with reference to one aspect of multinational operations, transfer pricing (the pricing of goods which are transferred from one affiliate of a multinational enterprise to another).

15. A J Briscoe, *op cit*, p 2.

16. R J Barnett and R E Mueller, 'Global Reach', p 42 (1975).

"A mere listing of these objectives suggests the diversity:

- (1) Income tax authorities will seek higher prices assigned to exports and lower prices to imports;
- (2) foreign exchange authorities will push in the same directions to minimise losses to hard currency reserves;
- (3) customs and sales (or value added) tax authorities, however, will be interested in increasing the value assigned to imports;
- (4) the agency charged with preventing "dumping" will view the local price as artificially low;
- (5) the agency charged with administering the revenue from the country's natural resources will press upward on the export price which is the tax base."¹⁷

Professor Vagts therefore argues that multinational operations should be assessed in the widest possible context.

In Canada, the Gray Report has recently considered these and other factors before diagnosing the need for a co-ordinating mechanism capable of weighing the implications of multinational investments from a broad perspective.¹⁸ The Report advocated the establishment of a review body to screen all foreign investments (whether they be in the form of new capital ventures, foreign takeovers or licensing arrangements) and, where necessary, to bargain with a multinational company for terms more favourable to the host country.¹⁹ Thus, matters such as the location of better research facilities, export performances, and employment policies might be negotiated prior to a new investment and conditions imposed upon any approval given.

The logic which underlies the Gray Report's main recommendation appears admirable: counter the flexibility of multinational operations with a flexible national response. But herein also lies the weakness it is a *national* response, and any individual nation that imposes restrictions felt to be unreasonable by the companies may simply be sidestepped. The ultimate flexibility of multinational enterprise is to invest elsewhere, and this flexibility cannot be countered by unilateral national action.

17. 'The Multinational Enterprise: A New Challenge for Transnational Law', Harve L Rev, vol 83, 739 at 769.

18. 'Foreign Direct Investment in Canada', the Government of Canada', 1972, p 453-4.

19. Ibid, p 460-1.

Regional Control

The United Nations 'Group of Eminent Persons to Study the Role of Multinational Corporations' reached three important conclusions. They accepted that national states have a limited ability to control multinational companies, they acknowledged that international control by the UN is unlikely in the near future, and they recommended that the gap between national and international controls be bridged by regional economic groupings.²⁰

Regionalism is based on the presumption that a group of nations may collectively realise a more autonomous development than each could achieve individually. To multinational corporations, regional groups offer larger and more attractive markets and thereby inherit greater bargaining power. The most successful regional attempts to control multinational companies to date (excluding those of raw material producers such as the Organisation of Petroleum Exporting Countries) is that of the Andean Common Market.

Created in May 1969 by the Cartagena Agreement (signed by Bolivia, Chile, Columbia, Ecuador and Peru), the region has more recently drawn up the Andean Foreign Investment Code²¹ which is expressly concerned with the supervision of multinational companies. The Code lays down the minimum standard of control that each member state must incorporate into its national law. A variety of controls are imposed upon foreign companies (defined basically as companies that are less than 51% owned or controlled by nationals of member states) in matters such as the transference of technology, the repatriation of invested capital and the remittance of profits.

But most significant is the policy of divestment. Under this, foreign companies in all industries are required to divest themselves of a majority foreign ownership over a period of fifteen years. In banking, transportation, broadcasting and publishing, 80% of equity share capital must be owned by nationals of member states within three years. The sanction for non-compliance with divestment is that the benefits of free movement of goods and services within the common market are denied.

In comparison with the Andean Common Market, the EEC has yet to adopt particular regulations which relate to multinational companies. The approach of the European member states in general and of the United Kingdom in its domestic policy has been to deal with the various issues associated with foreign investment on an *ad hoc* basis. Thus, Michael Hodges describes how the Treasury, the Board of Trade, the Department of Economic Affairs, the Ministry of Technology and, to a lesser extent, other government departments were all concerned with various aspects of multinational operations during the 1960's. There has been no attempt to devise a long-term strategy for

20. 'The Impact of Multinational Corporations on the Development Process and on International Relations', UN, (1974).

21. Text translated in 'International Legal Materials', vol 11, p 126.

for ensuring that the economy derives maximum benefit from their activities, there are no coherent or consistent policy guidelines. Hodges poses the question of how similar such an *ad hoc* approach is to that of A A Milne's nursery character, Winnie the Pooh who said "We will build it here, just by this wood, out of the wind because this is where I first thought of it".²²

22. 'Multinational Corporations and National Government' (1974) p 122.

