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# THE ROLE OF THE LAW OFFICERS

**by Sir Nicholas Leyell, QC, MP, Solicitor General**

**This is the text of the Annual Trent Law Journal Lecture delivered on 16th March 1988**

[Madam Chaiman, thank you for your kind introduction. It is an honour to be invited to give this the 1988 Annual Lecture of the Trent Law Journal on the Role of the Law Officers. Not only am I proud to follow the distinguished lecturers of earlier years but I am much impressed by the catholic spread and the academic and practical relevance of the courses offered here at the Department of Legal Studies and by the many lectures given and the learned articles published by the professorial and other members of the teaching staff.]

The subject of my lecture could hardly be more topical, and yet the Role of the Law Officers is not widely understood. This is perhaps because the Law Officers have such a diverse variety of functions.

They are Ministers of the Crown and members of the Government with executive functions. The Attorney General is usually regarded as of Cabinet rank though he is not normally a member of the Cabinet. The Solicitor General is the equivalent of a Minister of State. They are almost invariably elected Members of Parliament and members of the governing Party. They are also lawyers, traditionally Queen's Counsel, and are the Government's principal legal advisers. I should make it clear that at this lecture I am referring to the role of the Law Officers for England and Wales, and for Northern Ireland. The Law Officers for Scotland have similar but not identical functions. The Lord Advocate, the senior Scottish Law Officer, is a member of the House of Lords, and the Solicitor General for Scotland, though normally a member of the House of Commons is not invariably so. The current Solicitor General for Scotland, Mr Peter Fraser QC, was for 8 years Member of Parliament for Angus but having lost his seat at the General Election of 1987 nevertheless remained in post. He operates largely from Scotland where he currently carries out many heavy prosecuting duties leading for the Crown in major cases.

The Law Officers also have a quasi-judicial role. They are the ultimate prosecuting authority. They are the protectors of the purity of the fount of justice. They act as guardians of the public interest, and they act in right of the Crown as protector of charity.

So how and why do they come to hold, and why do they need to hold, such diverse and, some have suggested, paradoxical powers?

The answer I believe derives from the fact that the Law Officers stand at a constitutional cross-roads. They stand at the point where the executive and the judicial, or at least the quasi-judicial, functions of our constitution intersect. They are both of the executive and yet must be capable of standing independent from the executive. Their office is extremely ancient and was in being long before our Government could be described with any accuracy as democratic. But many of our liberties long pre-date even that immensely important development.

As loyal subjects of the Crown we are governed according to law. One of Lord Denning's favourite quotations (Gouriet - v - UPW [1977] 1QB 729 at 761 H quoting Thomas Fuller's words over 300 years ago) is "Be ye never so high the law is above you". This injunction applies not only to trades unions but to Government itself. Indeed it was actually addressed by Lord Denning to the then senior Law Officer of the Crown. The point is that all are to be equal before the law. It is one of the most important duties of any Government in a free society to preserve this essential liberty; and I am unrepentant in claiming that we are not only the oldest but also one of the freest liberal democracies in the world. No one is above the law and we are to be governed and only to be governed according to law, administered and adjudicated not at the whim of the executive but independently and impartially, to quote the judicial oath, "without fear or favour, affection or ill-will"

The realities of such liberties do not happen of their own accord. It is one of the first duties of Government to provide them - to make available a judiciary of skill and integrity and to preserve its independence; to place or keep in being a scrupulous and independent criminal process; and in a democracy to be answerable in doing so to the people through their elected representatives in Parliament. Thus it is that both the Lord Chancellor as head of the judiciary responsible for the provision and purity of the judicial function at every level - and the Law Officers who answer for the Lord Chancellor in the House of Commons and for themselves as ultimate prosecuting authority, are all members of Parliament, the Lord Chancellor in the House of Lords and the Law Officers as elected MPs in the House of Commons.

It may be convenient at this point to clarify the respective positions of the Attorney General and the Solicitor General. It may be most succinctly done by saying that the Attorney General is the principal Law Officer of the Crown and the Solicitor Goneral is his deputy. Reference to a decription of Ministerial duties will see this set out in stark terms. All the functions which I have already described are ascribed to the Attorney General. To the Solicitor General are ascribed such functions as the Attorney General may delegate to him. Yet, subject to such delegation, the statutory powers of the Solicitor General both in relation to England and Wales and in relation to Northern Ireland are identical to those of the Attorney himself. The Solicitor General also acts for the Attorney General when he is unavailable or ill as most notably happened when Sir Patrick Mayhew QC MP the then Solicitor General stood in for Sir Michael Havers QC MP the then Attorney General during the Autumn and Winter of 1985/1986.

The Lord Chancellor is of course, taken literally, the only person who is a member of the executive, legislature and the judiciary; in that he sits severally as a member of the Cabinet, in the legislature on the Woolsack, and presides over the judicial committee of the House of Lords, the highest appellate court in the land. He preserves jealously that particular role! I for example am a Recorder, but for so long as I am a Minister of the Crown I do not actually sit in court thougn I am kindly permitted to retain the appointment. Nevertheless a major part of the work of both the Attorney General and myself is quasi-judicial in nature. Decisions taken in this capacity are not collective decisions of Government - but independent decisions of the Attorney Goneral or myself as Law Officers of the Crown.

This sometimes lonely independence is not widely understood. Even such notable "journals or records" as the Economist and the Independent, for example recently described the decision of the Director of Public Prosecutions Northern Ireland after consultation with the Law Officers not to prosecute further following the Stalker/ Sampson report as a "Government decision". The truth is that not only did Sir Barry Shaw CB QC, the DPP for Northern Ireland, a wholly independent public servant, take the

decision, but in exercising all their quasi-judicial functions the Law Officers remove entirely their Party political hats and don their quasi-judicial wigs to decide such questions according to the tenets of law and their own independent assessment of what is right in the public interest.

It may be helpful at this point to say a word about the right and practice of the Law Officers to consult whomsoever they choose in making that assessment. Their decision whether or not to do so will depend upon the subject matter. Consultation takes place in confidence. In practice it may include senior Ministers, Senior Public Servants, and others by whom the Law Officers can be entrusted with sometimes the most sensitive material. It is conducted privately but with a good deal of formality. They will listen and explore. But the estimation of weight and relevance is a matter for their own independent assessment and, in cases where it is his decision, for the assessment, based on their information, of the Director of Public Prosecutions or the Director of Public Prosecutions Northern Ireland.

The assertion of their complete independence in this role has been a dominant feature of the past 64 years, ever since the circumstances surrounding the Campbell case called it directly into question. I will not here describe the well-known Campbell case in detail but it will be remembered that John Ross Campbell, the acting editor of Workers' Weekly the official organ of the Communist Party had published an article inciting the Armed Forces to mutiny which the then Attorney General Sir Patrick Hastings had consented, at the instance of the Director of Public Prosecutions Sir Archibald Bodkin to prosecute under the Incitement to Mutiny Act 1797. The decision was subsequently overturned at the insistance of the Cabinet and Prime Minister provoking a constitutional crisis in the course of which the first Labour Government was not merely defeated but caused to fall. The high point of the executive's attempt to control the quasi-judicial function of the Law Officers had been the Cabinet's instruction of 6 August 1924 . . . "No prosecution of a political character should be undertaken without the prior sanction of the Cabinet being obtained". This edict was expressly repudiated by the in-coming Prime Minister Stanley Baldwin and the following year Sir John Simon, then Attorney General, reiterated the duty of the Attorney absolutely to decline to receive orders as to whom he should or should not prosecute. Today the classic statement of the constitutional position, and it draws heavily on previous statements both by Sir John Simon and Sir Douglas Hogg later the first Lord Hailsham, is that of Sir Hartley Shawcross to the House of Commons in January 1951 after the conclusion of the Gas Strikers case. "I think the true doctrine is" Sir Hartley Shawcross declared, "that it is the duty of an Attorney General, in deciding whether or not to authorise the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense I have indicated affect Government in the abstract arise it is the Attorney General, applying his judicial mind, who has to be the sole judge of those considerations" This independence was again affirmed by Mr Harold MacMillian, when Prime Minister in 1957 in relation to a decision of the Lord Advocate not to prosecute certain Scottish Police Officers.

Having thus outlined the overall functions of the Law Officers and their position in its constitutional framework it may be of interest now to examine in some detail the way they exercise the several functions.

**The Government's Principai Legal Advisers**

One of the most important and rightly one of the most time-consuming functions for the Law Officers is their role as the Government's principal legal advisers. Government itself must obey the law and it must understand the legal ramifications of its multifarious activities. It must have on hand immediate and expert legal advice in relation to all its activities some of which are inevitably and properly highly confidential; not just because of their subject matter, but becasue the advice is needed during the stages of policy formulation. It should be said that all Law Officers advice is confidential and that by convention the privilege to waive that confidentiality is vested in the Law Officers and not in the individual departmental ministers who they advise. There is thus great advantage in having advisers who are also ministers and can be privy to every detail and sensitive to both Cabinet and departmental affairs.

To provide this advice the Law Officers are assisted by the members of the Attorney General's Chambers, ten hand-picked members of the Government Legal Service on secondment from their own departments whose expertise covers the whole range of its principal activities. Headed by the Legal Secretary - the current incumbent is an expert in a number of disciplines - we have two experts on European and international affairs, one of whom comes understandably from MAFF; experts on trade and industry, Northern Ireland, criminal matters and the Crown Prosecution Service, the DHSS, Home affairs in all its wide aspects; and of course a close liaison with the Lord Chancellor's Department. We also have the benefit of the formidable body of specialist expertise to be found amongst the 1300 lawyers in the Government legal service as a whole. We are in almost continous contact with Junior Counsel to the Treasury Mr John Laws and with Treasury Counsel in Chancery. We call regularly upon the Attorney's panel of nominated Counsel across the whole spectrum of civil and chancery work. In isolated instances we also go outside to the wider Bar.

From time to time both the Attorney General and I appear in court for the Government. Almost my first task on appointment was to lead for the Crown in the House of Lords in the Heysel Stadium Football case. In January of this year I led for the Government who were intervening in an important series of competition cases before the European Court of Justice at Luxembourg, cases which were of particular importance to the Government because they raised issues of extraterritorial jurisdiction. Only last week we received judgment in the most recent case in which the Attorney General himself had appeared before the European Court on the subject of the Directive relating to the injection of hormones into battery hens - a victory over officials of the Council of Ministers on narrow but nevertheless important technical grounds. In May of this year I shall appear in a group of cases before the European Court of Human Rights in Strasbourg which raise the issue of how long the Convention will permit an individual arrested upon suspicion of terrorist offences to be detained prior to charge. But the sheer pace and weight of other work means that these days the Court appearances must be confined to cases of particular significance. The role of the Law Officers has greatly changed in this respect over the last hundred years. In 1888 my predecessor, Sir Edward Clarke, not only conducted a whole series of cases in court for the Government, large and small, and it was not uncommon for both Law Officers to appear together. He was also able to take private work and was remunerated entirely by fees. I learned from his autobiography that

his earnings in 1888, and one must remember that a pound then was worth £42 today, amounted to £17,500!

**Ulitmate prosecuting authority**

The Attorney General's second major function is as ultimate prosecuting authority. He "superintends", in the words of the statute, the Prosecution of Offences Act 1985, the Director of Public Prosecutions; and through the Director he is responsible for the Crown Prosecution Service. Indeed the present Attorney, when Solicitor General, was personally largely responsible for the establishment of the entire Service founded, as you will recall, on Parliament's insistence during the course of the Police and Criminal evidence Bill upon the prompt implementation of the recommendations of the Royal Commission on Criminal Proceedure for separation of the investigative and charging functions of the Police from the prosecution function. Its initial year was not without difficulty for its gestation period was extremely rapid but currently the Attorney and I are carrying out a nationwide series of inspection visits - I have already visited some ten different areas myself - and I am glad to be able to report that whilst some areas, particularly London and the Home Counties, are still under great pressure owing to a shortage of professional staff, the Service in very many areas is developing extremely well. This new executive responsibility for a Service of what will be some 1,800 qualified lawyers and some 4,000 staff in all is a new departure for the Law Officers whose executive functions hitherto could have been described as minimal.

In performing the function of ultimate prosecuting authority I have already referred to the independence of the decisions of the Attorney General and myself acting in that capacity. When the Attorney acts as the nominal plaintiff on behalf of the Government as he does in many civil actions he does so on behalf of the Government as his client and the decision to litigate is a collective decision of Government. But in any decision to prosecute by exercising his fiat or by the granting of consent to prosecution or in relation to his function as guardian of the purity of the fount of justice the decision of the Attorney, or the Solicitor if delegated to him, is an independent one exercised quasi-judicially as a minister of justice. Exercise of this dual role has been open to study on a number of occasions as the litigation surrounding the publication or threatened publication of Spycatcher has run its course. At each stage it has been necessary to distinguish and give careful consideration to the proper principles applicable. Similar quasi-judicial considerations arose in the initial seeking of injunctions against Channel Four Television Company to restrain the dramatic representation of the trial of the appeal of the Birmingham bombers on television during the course of that trial and the subsequent decision not to seek to extend further that injunction once the appeal itself was over. Such matters fell to be decided in the context of the Contempt of Court Act 1981 on whose Standing Committee I had sat when it was carried through the House of Commons by the former Attorney, Sir Michael Havers, in the summer of that year.

In the exercise of these prosecution functions the Law Officers work closely not only together but with the Director of Public Prosecutions with whom in any event they hold regular meetings.

**Director of Public Prosecutions for Northern Ireland**

The Attorney General has also, since the institution of direct rule in 1972, been Attorney General for Northern Ireland. Although there is no post of Solicitor General for Northern

Ireland the statute likewise provides for the Solicitor General to act as deputy in similar circumstances to those applicable in England and Wales. As on the mainland so in the Province there is a very close working relationship between the Law Officers and the Director of Public Prosecutions, Sir Barry Shaw, and Treasury Counsel, Anthony Campbell QC. Both Law Officers also take a close personal interest together with the Lord Chancellor in the working of the courts and the requirements of the judiciary. They are responsible through the Crown Solicitor for the whole process of extradition from the Republic including the longstanding system of backing of warrants with all its technicalities and the development of the new procedures consequent upon the ratification by the Republic of Ireland of the European Convention on the Suppression of Terrorism and the amendments to the Republic's domestic Extradition Act 1965.

**Legislative and Parliamentary duties**

It is appropriate at this point to return to the legislative and Parliamentary duties of the Law Officers. The most frequent of those duties - and the one with the highest profile - is the answering on every third Monday of oral Parliamentary Questions. The Law Officers are accountable to Parliament for the proper exercise of every aspect of their responsibilities and in addition by convention they answer at the despatch box, usually by the Solicitor General, for the responsibilities of the Lord Chancellor. They also have a duty to advise the House of Commons if so requested upon its constitution and procedure, upon the conduct and discipline of members, and upon the effect of proposed legislation. The Attorney General is a member of the Committee of Privileges.

Our responsibilities for actual legislation likewise encompass both legislation such as the Prosecution of Offences Act 1985 which established the Crown Prosecution Service for which the Law Officers' Department has overall policy responsibility; and the piloting through the House of Commons of the Lord Chancellor's legislation, such as the current Legal Aid Bill. This has just completed its passage through the House of Lords and last week had is First Reading in the Commons, I expect to take it through its Second Reading, Committee, and Report Stages on to Third Reading after the Easter Recess.

In consequence there is currently a very close working relationship between the two Departments on all matters of mutual interest; and the Lord Chancellor and Law Officers currently meet every week for informal discussions in addition to more formal meetings on specific topics where necessary.

The work of both Departments also overlaps substantially with that of the Home Office which has policy responsibilities for the substance as opposed to the administration of the criminal law. For this purpose tripartite meetings are held from time to time with not only the Lord Chancellor but the Home Secretary and a Minister of State at the Home Office and senior officials. The Lord Chancellor's policy responsibilities, for example in the field of family law, and the current exploration of policy development in the whole area of child care and family law embodied in the port-manteau concept of a "Family Court", overlap with a number of other Departments, particularly the Department of Health and Social Security.

I should conclude with a reference to two other functions of the Attorney General. First his function as Guardian of the Public Interest and second his traditional role as the Leader of the Bar of England and Wales.

**The Guardian of the Public Interest**

I have already discussed how the ancient and still developing duties of the Law Officers date as far back as the Thirteenth Century. For hundreds of years the Attorney General represented the Sovereign in the Royal Courts not only in protecting the interests of the Crown itself but guarding its interest as parens patriae and protector of charity. It is in this function that the Attorney General lends his name in what are known as relator actions, brought at the "relation" of a private individual and at that - individual's expense, to seek to restrain breaches of the law in matters of public concern and interest. In recent years there has been a development in that local authorities have played a growing part in this area. Nevertheless it remains a significant function of the Attorney General. More specifically under his aegis is his function of seeking injunctions on behalf of the Crown to restrain repeated breaches of the criminal law where the statutory penalty has proved to be an ineffective deterrent.

The Attorney General also from time to time represents the public interest before tribunals of inquiry under the Tribunal of Inquiry (Evidence) Act 1921 and its successors. The Law Officers will provide the courts with an amicus curiae in an appropriate case or where specifically requested. They supervise the Queen's Proctor in maintaining probity over matrimonial and family law cases. At their behest action is taken to restrain the abuse of the legal process by vexatious litigants.

**The Protector of Charity**

In relation to charities the Attorney General has the continual function, following consideration by the Charity Commissioners, of directing to appropriate charities monies left by testators whose Wills indicate a charitable destination for a bequest or bequests but fail clearly to direct such monies to an existing charity. The classic examples are bequests to "cancer research" which is not the name of any actual charity and which are thus re-directed on a fair basis to one or other of the several charities in the field.

Sometimes it is necessary actually to bring before the courts issues as to the true charitable status of a particular registered charity. A recent example has been the action brought against the Unification Church - usually known as the Moonies - by Sir Michael Havers in 1985 raising issues such as the allegedly damaging effect of the work and teachings of the Church and its members upon family life. But in all these matters the Attorney General will act with scrupulous detachment and regard for the law so that when, as in that case, and notwithstanding the dislike of many people of such cults, the evidence of anti-charitable conduct and teachings was shown to be less than at first appeared and in some respects unreliable the case was properly discontinued.

**The Head of the Bar**

Finally I turn to the Attorney General's traditional role as Head of the Bar of England and Wales. His high place had been recognised for centuries and his pre-eminence was finally established at the beginning of the nineteenth century. In this capacity the Attorney General is invariably invited to preside over all general meetings of the Bar. He and the Solicitor General are accorded precedence by the Bar in courts. But it would be wrong to see it as a mere titular role. Both Law Officers attend all the meetings of the Bar Council that they can. There have been recent meetings of great importance concerning the

Bar's relationship with the Crown Prosecution Service. They maintain close contact with the Chairman and Officers of the Bar Council and with circuit leaders and in their overall role the Law Officers also seek to maintain an effective informal liaison with the President and Officers of the Law Society, with the institute of Legal Executives, and with the Justices' Clerks. It may fairly be said that the right and opportunity to representation by effective and independent specialist advocates before any tribunal affecting the liberty and interests of the subject is a most important part of our fundamental liberties. In that Government is charged with the protection of our liberties it is profoundly in the public interest that the right and opportunity for such representation be preserved. But the role is not an uncontroversial one and it must never be forgotten that the only justification for any privileges accorded to a profession, and thus accorded to the Bar and in other respects accorded to solicitors, must be that they are indeed in the public interest. This is not the occasion for a discussion of the many issues, rights of audience, the question of fusion, issues of 'direct access', which are likely to arise in the coming months with the publication among other things of the MARRE Report. But the test to be applied, to the proponents of whichever viewpoint, is the test of the public interest. It is a test which the Law Officers ought to be well equipped to apply, and to assist others to understand.

# TRESPASS TO THE PERSON AND ASSAULTS ON THE POLICE

**by Gilbert Kodilinye, MA (Oxon), LLM (Lond), Barrister, Lecturer in Law, University of Birmingham.**

Section 51(1) of the Police Act 1964 provides that:

> "Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of the offence . . . . ."

Prosecutions under this section are extremely common and a considerable body of case law has accumulated around it. The purpose of this article is to examine the scope of the section and its implications in the law governing the rights of individuals to freedom from harassment and bodily injury.

### The Assault

At common law an assault is defined as a threat to apply unlawful physical force to a person, the effect of which is to put that person in fear of imminent bodily contact. 'Assault' in section 51(1), however, is "sufficiently appropriate to include a battery[**1**]", i.e. the actual application of physical force to a person. As James J. put it in **Fagan** v **Metropolitan Police Commissioner**[**2**]:

> "An assault is any act which intentionally - or possibly recklessly - causes another person to apprehend immediate and unlawful personal violence. Although 'assault' is an independent crime and is to be treated as such, for practical purposes today 'assault' is generally synonymous with the term 'battery' and is a term used to mean the actual intended use of unlawful force to another person without his consent".

Charges under section 51(1) are most often brought, not in respect of violent, unprovoked attacks on police officers, but in respect of merely 'technical' batteries committed in the course of resisting an arrest or search. That this was the type of offence contemplated by the legislature is plain from the wording of section 38 of the Offences Against the Person Act (1861) (the forerunner of section 51(1)) which made it an offence to "assault, resist, or wilfully obstruct" a peace officer, or to "assault any person with in tent to resist or prevent the lawful apprehension . . . . of himself or of any other person . . . ." Questions as to the legality or otherwise of an assault, search or detention are thus frequently the most important issues in section 51(1) prosecutions, and the principles of law governing arrest and search are to be found to a large extent in judgments in section 51(1) cases.

### The Execution of the Constable's Duty

In a charge under section 51(1) it is for the prosecution to prove that the constable was assaulted whilst in the execution of his duty.[**3**] If at the time of the assault the constable was not in the execution of his duty, a prosecution under section 51(1) would fail, though the accused might be convicted of a common assault or of an offence under sections 18

or 20 of the Offences Against the Person Act 1861. The question therefore arises as to what test may be applied in determining whether or not the constable was in the execution of his duty at the material time. Clearly if he was doing something unlawful, such as carrying out a wrongful arrest or detention[**4**], or trespassing on the accused's property[**5**], he would not have been in the execution of his duty. On the other hand there are many situations where it could not be established positively that the constable was doing anything unlawful when assaulted, and yet the accused might argue that the constable was not executing his duty because he was doing something outside the normal scope of his police duties, for example interfering in a domestic quarrel. In some of the older cases it was suggested that a constable was not in the execution of his duty unless he was doing something he was obliged to do[**6**], but the modern authorities reject this narrow approach. The leading modern case is **R** v **Waterfield**, where the Court of Criminal Appeal said[**7**]:

> "It would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty"

Another commonly cited dictum is that of Lord Parker CJ in **Rice** v **Connolly**[**8**]:

> "It is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice"

Lord Parker's statement of principle seems too one-sided in that it suggests that police officers have untrammelled powers to take whatever steps they should consider necessary to preserve the peace and to prevent crime, and it ignores the counter-balancing need to prevent abuses of citizens' rights. It should therefore be read subject to the statement of Ashworth J in **Waterfield** to the effect that "while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed, to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited.[**9**]"

A case which shows that the concept of the execution of a police officer's duty is not confined to situations where there was an obligation to act is **Coffin** v **Smith**[**10**], where the Divisional Court cited with approval both the **Waterfield** and the **Rice** v **Connolly** tests. Here two uniformed constables were called to a youth club by the youth leader in order to assist in the removal of the defendants from the premises. At the time the police were called no criminal offence had been committed inside or outside the club nor had any been contemplated. When told to "move on" by the constables, the defendants became abusive and struck the constables. The defendants were found guilty under section 51(1). Donaldson LJ considered that on the facts, the constables were acting in the

execution of their duty because it was a police officer's duty to keep the peace, which was precisely what the constables were doing when they went to the club to assist in the removal of the defendants. His Lordship took the view that earlier cases, which had suggested that a constable is not in the execution of his duty if he is doing something he is not compelled or obliged to do, were no longer good law. In the present case the officers "were on duty, they were in uniform, and they were not doing anything which was prima facie any unlawful interference with a person's liberty or property[**11**]".

In deciding, therefore, whether or not a constable was acting in the execution of his duty, the most important consideration is whether he was unlawfully interfering with the defendant's person or property at the material time. If there was such unlawful interference, the constable would not have been acting in the execution of his duty. On the other hand , provided there was no wrongful act on his part, the duties of a police officer to keep the peace and to prevent crime are regarded by the courts as so paramount that he would be justified in intervening on the least hint of 'trouble', and any assault on him in such circumstances would constitute an offence under section 51(1). Thus, for example, in **Weight** v **Long**[**12**], where a police officer had seen a girl running away from L after an argument, it was held that the officer was acting in the execution of his duty in approaching L and speaking to him in order "to check him out in case he was following the girl", for the officer's action was taken in pursuit of the preservation of the peace. L was therefore guilty of the offence under section 51(1) when he assaulted the officer.

**Resisting a constable's unlawful act**

It was emphasised in **Pedro** v **Diss**[**13**] that a person who is unlawfully assaulted or detained by a police officer is entitled to resist such unlawful act, and, provided the force he uses is reasonable in the circumstances, the justification of self-defence is open to him on a charge under section 51(1).[**14**] Another way of stating the position is to the effect that a person cannot be guilty of the offence under section 51(1) where the police offcer was not acting in the execution of his duty, or, as it is sometimes expressed, where he was "exceeding the limits of his authority"[**15**] when he was assaulted. The justification of self-defence arises most often in cases of unlawful detention and unlawful arrest.

**(1) Unlawful detention**

It is a cardinal principle of the common law that, in the absence of statutory authority, a police officer has no power to detain a person for questioning unless he first arrests such person.[**16**] A typical scenario would be this:- a constable approaches D, who appears to be acting suspiciously, or whom the constable suspects might be implicated in criminal activities. The constable puts certain questions to D which the latter declines to answer. D then walks away. The constable takes hold of D by the arm or shoulder to restrain him. D retaliates by striking the constable. If the act of taking hold of D amounts to a battery, albeit a technical one, or to a false imprisonment, D cannot be guilty under section 51(1) as the constable would have been "exceeding the limits of his authority" at the time of the assault; furthermore D would have been acting in self-defence.

These were essentially the circumstances in **Kenlin** v **Gardner**[**17**], **Pedro** v **Diss**[**18**] and certain other cases.[**19**] The leading authority in this area is **Ludlow** v **Burgess**[**20**]. There an off-duty policeman in plain clothes was kicked on the shin by F as he was boarding a

bus. The constable had reason to believe the kick was deliberate, but F claimed it was an accident and swore at the constable. The latter, who did not have his warrant card with him, told F to stop using foul language and informed him that he was a police officer. As F started to walk away, the constable put his hand on F's shoulder, not with the intention of arresting him, but to detain him for further conversation and inquiries, whereupon F struggled and kicked the constable. The Divisional Court held that F was not guilty of the offence under section 51(1) since there had been "a detention of a man against his will without arrest", which was "unlawful and a serious interference with the citizen's liberty, and in those circumstances it cannot be an act performed in the execution of a police officer's duty."[**21**]

Although the principle which emerges from the above cases is clear, it has been emphasised that each case must be decided on its own facts and circumstances, and that "it is not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duties."[**22**] Thus in **Donnelly** v **Jackman**[**23**] it was held that a constable who touched the defendant on the shoulder several times, not for the purpose of making any formal arrest or charge, but "solely for the purpose of speaking to him", was not acting outside the course of his duties. The Court of Appeal distinguished **Kenlin** v **Gardner**[**24**] on the ground that in that case the officers "had taken hold of one of the boys and had in fact detained him", whereas in the instant case the touching on the shoulder was a "minimal matter"

**Donnelly** v **Jackman** has been criticized on the ground that the constable's conduct amounted to a battery unless there was some lawful justification ("a very gentle touch can be a battery"[**25**]) and there was no such justification there. It appears that the only case in which the principle in **Donnelly** has been directly applied is **Pounder** v **Police**[**26**], a decision of the Supreme Court of New Zealand, where a constable had committed a "technical trespass" to the defendant's car which had lasted only a few seconds. Richmond J had no doubt that **Donnelly** was authority for the proposition that a trivial trespass to the person did not take a police officer outside the course of his duty, and that a trespass to property was to be treated in the same way.

In **Collins** v **Wilcock**[**27**], on the other hand, the Divisional Court preferred to justify **Donnelly** on the basis that a tap on the shoulder to attract attention was a physical contact which was "acceptable in the ordinary conduct of daily life" and therefore was not a battery, though Goff LJ considered **Donnelly** to be an extreme case. The circumstances of **Collins** were that W, a woman police constable, suspected that C was soliciting for prostitution and wished to question her. C refused to speak to W and walked away. W took hold of C's arm to restrain her, and C then assaulted W. The Divisional Court put more emphasis on the fact of the battery committed by W than on the fact of the restraint. Goff LJ said[**28**]:-

> "We are here concerned primarily with battery. The fundamental principle . . . . . is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery . . . . Everybody is protected not only against physical injury but against any form of physical molestation"

His Lordship then went on to say, however, that there are several specific defences to battery, such as consent, self-defence and lawful arrest, and also what he called a "broader exception", viz that no battery is committed where the physical contact is "generally acceptable in the ordinary conduct of daily life". If, in the course of carrying out his duty to prevent and to investigate crime, a police officer taps a man on the arm or

shoulder to engage his attention, the officer's conduct may fall within the "broader exception" (as in **Donnelly** v **Jackman**) and he will not have committed a battery, but "if a police officer restrains a man, for example by gripping his arm or shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest".[**29**] The result was that in the present case W's action constituted a battery on C, and C could not be guilty under section 51(1).

It is submitted with respect that it is preferable to explain **Donnelly** v **Jackman** on the basis of the "broad exception" outlined by Goff LJ in **Collins** v **Wilcock** rather than on the basis that the constable's action was merely a "trivial interference" with the defendant's person. Significantly, the **Collins** approach has subsequently been confirmed by the Court of Appeal in **Wilson** v **Pringle**.[**30**]

The emphasis in **Collins** was on the battery committed by the police officer. In another recent case, **McManus** v **Whittington**,[**31**] it was held that there could be an unlawful restraint without any physical contact at all. Thus a constable who stopped W in the street and insisted that W answer certain questions but did not physically touch W was held to have been acting outside his duties, since his "demeanour and manner" were designed to convey to W that he was obliged to answer the constable's questions and that he would not be free to go until he gave the required information. Mann J said that "the court does not inhibit a police officer's entitlement to ask questions. What is inhibited is unlawful assault, unlawful battery or the threat of false imprisonment or actual false imprisonment. Watkins LJ agreed, but added that "where the facts reveal that there has been by the so-called detaining officer, no use of physical force, the conclusion that there has been a detention merely from words used and demeanour exhibited must not be lightly reached. If they are so to find, courts must be sure in such circumstances that conduct by spoken word and demeanour must be so impressive as to lead inevitably to the conclusion that there was a detention by those means. Otherwise the work of the police on our streets will become quite impossible".[**32**]

Finally, a comparison may be made with a number of road traffic cases. It is significant that in the great majority of the cases featuring on-street detentions the constables who were assaulted were held to have been acting outside the scope of their duties. In most of the road traffic cases, however, constables who detained motorists were held to have been acting in the execution of their duties. The impression which is created is that the rights of citizens in general to be free from physical harassment are assiduously defended by the courts, but that where motorists are involved, those rights are subordinated to the powers of the police to control traffic and, it seems, to their duty to prevent not only driving offences but other crimes as well. This policy can be discerned in a dictum of Griffiths LJ in **Steel** v **Goacher**[**33**]:-

> For a multitude of reasons the police will, from time to time, wish to question motorists in the course of their duty to detect and prevent crime. I find nothing oppressive in police officers wishing to satisfy themselves, by inquiry, that a strange car being driven by two men after midnight through a good class residential area was there for an innocent purpose. If the public wish the police to contain and detect the ever increasing amount of crime and, in particular, the burglary of dwellinghouses, they must be prepared, from time to time, to put up with the occasional inconvenience of being stopped and questioned. They do not have to answer the questions but they must stop, as section 159 of the Road Traffic Act 1972 requires a motorist to stop if required to do so by a constable in uniform. I would add that one hopes that the public

will co-operate with the police in answering their questions, albeit they are under no legal duty to do so.

Another decision which points to a wider concept of the execution of a constable's duty in road traffic cases is **Squires** v **Botwright**[**34**]. There B, a constable in plain clothes, saw S commit a traffic offence and he followed her into the driveway of her house. B asked S to stay in her car until a uniformed officer arrived to give her a breathalyser test, but S refused, got out of the car and tried to push her way past B. B impeded S by deliberately standing in her way and asked for her name and address which she refused to provide. She then assaulted B. It was held by the Divisional Court that B was acting in the execution of his duty at the time when he was assaulted. B's action in impeding S without arresting her did not amount to an excess of authority by him since it was part of B's duty under section 228 of the Road Traffic Act 1960[**34a**] to ascertain the name and address of the driver or, alternatively, to require production of a driving licence. Lord Widgery CJ suggested that it would be "dangerous to answer problems of this kind too much by rule of thumb and too little by reference to the prevailing circumstances". In the particular circumstances of this case "it would be a very strange situation in law if . the prosecutor was said to have gone beyond the scope of his duty merely because, for what may have been seconds only, he sought to prevent the defendant from moving in a particular direction in order to give him time to ask a second time, as required under section 228(2)"[**35**].

The reasoning in **Squires** approximates to the "trivial interference" argument accepted in **Donnelly** v **Jackman**[**36**] and **Pounder** v **Police**[**37**], and indeed **Donnelly** was expressly cited by Lord Widgery. However, the decision is perhaps better justified on the ground that the interference with the defendant's freedom of movement was necessary in order to comply with the provisions of section 228 of the Road Traffic Act.

### (2) Wrongful arrest

Section 24 of the Police and Criminal Evidence Act 1984, re-enacting section 2 of the Criminal Law Act 1967, gives power to police officers to arrest without warrant any person reasonably suspected of having committed an arrestable offence. Section 25 of the same Act gives power to arrest without warrant for any offence which is not arrestable provided that one of the "general arrest conditions" is satisfied and the service of a summons would be impracticable or inappropriate. An arrest under either section will be wrongful, however, if section 28 is not complied with. This section provides that "no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest" The section reproduces in statutory form the long-established rule in **Christie** v **Leachinsky**[**38**], where Viscount Simon said[**39**]:-

> "If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of the arrest..... A citizen is entitled to know on what charge or on suspicion of what crime he is seized..... In this country, a person is, prima facie, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed".

Where a police officer carries out what would otherwise be a lawful arrest, but fails to

inform the arrestee of the reason for the detention, he acts in excess of his duties and an assault on him by the arrestee or, it seems, by a third party[**40**], would not be an offence under section 51(1). In **R** v **Lowe**[**41**] for instance, L had been involved in a disturbance and was arrested by police constables with the words, "That's enough, you're locked up". L then assaulted the constables. It was held that L was not guilty under section 51 because at the time of the assault the constables were not acting in the execution of their duty in so far as they had failed to inform L of the reason for his arrest.

The principle in **Christie** v **Leachinsky**[**42**] has also been applied in a case where constables conducted a body search on a prisoner who had been properly arrested and brought to a police station for further questioning. In **Brazil** v **Chief Constable of Surrey**[**43**], the appellant, B, had been arrested for acting in a manner likely to cause a breach of the peace. She was told by a woman police constable that everyone brought into the police station had to be searched for their own safety. B refused to co-operate in the search and twice assaulted the constable. The Divisional Court held that B could not be convicted under section 51(1) for two reasons. First, because a body search constitutes an affront to the dignity of a human being and could not lawfully be carried out unless the constable had considered whether a search was really necessary in the circumstances[**44**], and the constable had not considered the matter in this case. Secondly, following the principle in **Christie** v **Leachinsky**[**45**], because a constable was not normally entitled to carry out a body search without first informing the prisoner of the reason for the search, which the constable had failed to do in this case.

It may be added that the body search in **Brazil** was carried out under the powers of the police at common law to search prisoners. Section 32 of the Police and Criminal Evidence Act 1984 now gives a statutory power to police officers to conduct body searches subject to certain formal requirements. Whether the statutory power of search is subject to the **Christie** v **Leachinsky**[**46**] principle is not clear. Section 28 of the 1984 Act refers to arrest, but not to body search. Academic opinion seems to assume that the **Christie** principle does apply to statutory search[**47**], but the question must await clarification by the courts.

It was also established in **Christie's** case that there were at least two exceptions to the rule that an arrestee must be informed of the reasons for the arrest. They are (1) where the arrestee must be presumed to know the reason, i.e. where the reason must, in the circumstances, have been obvious to him, and (2) where the arrestee made it impossible for the arrestor to give the reason, such as where he made a counter-attack or ran away. Section 28(4) of the Police and Criminal Evidence Act 1984 abolishes the first of these exceptions where an arrest is carried out by a police officer. In the recent case of **Nicholas** v **Parsonage**[**49**] the main issue was whether the defendant had been informed of the ground for his arrest "at the time of, or as soon as practicable after, the arrest". Here N had been observed by police officers, who were in a patrol car, riding his bicycle along the road with his hands off the handlebars. The car drew alongside and N was told to put his hands on the handlebars which he did. As the car drove off, N was seen to make an abusive gesture, whereupon the officers stopped the car, got out and asked N for his name, saying that it was needed as he had been riding the bicycle in a dangerous manner. When N refused to give his name, one of the constables warned him that he had power to arrest N under the 1984 Act, and he was again asked for his name and address. N again refused and the constable told him he was being arrested for failure to give his name and address. N then assaulted the constable. N was prosecuted under section 51(1) of the Police Act 1964. Whether the constable had been acting in the execution of his duty when he arrested N depended upon whether the constable had complied with section 28 of the 1984 Act. It was argued by N that the reason given for the arrest, viz the

failure to give his name and address, did not satisfy section 28 since in order to comply with that section it was necessary to explain to N why the information was required. The prosecutor, on the other hand, contended that N knew why his name and address had been required because the constable had told N that he had been riding his bicyle in a dangerous manner and had also informed him about the powers of arrest under the Act of 1984, so N could have been in no doubt as to why his name and address had been sought. The Divisional Court accepted the argument of the prosecutor. According to Glidewell LJ, it would not have been sufficient if the constable had said 'I am arresting you because you have not given your name and address', without more. But in this case the constable had, not more than a minute earlier, informed N that he had been riding his bicycle in a dangerous manner, and this was sufficient to indicate to N "the nature of the offence in respect of which the name and address were required". N was therefore guilty under section 51(1) of the 1964 Act.

**Conclusion**

In the great majority of reported cases featuring prosecution under section 51(1) of the Police Act 1964 the principal question is whether the constable was acting in the execution of his duty at the time of the alleged assault upon him. It is generally easy to establish that the constable was acting in the execution of his duty, since a police officer's duty to preserve the peace and to prevent crime will justify conduct by a constable which would otherwise amount to a trespass to the person or to property. A constable acts in excess of his duty, however, if he carries out an unlawful detention, arrest or body search, and the victim is entitled to exercise his right of self-defence, provided the force he uses is reasonable in the circumstances. Where a constable is assaulted, and the defendant pleads self-defence, a prosecution under section 51(1) becomes, in effect, an inquiry as to whether the constable committed a battery or a false imprisonment against the defendant.

Where an on-street detention, without arrest, is carried out by a police officer, an assault on him by the detainee may be justified on the ground of self-defence and any prosecution of the detainee under section 51(1) will fail as the officer will have acted in excess of his duty. It appears, however, that in road traffic cases the courts are more reluctant to find that a constable acted in excess of his duty, and this policy is achieved by a liberal interpretation of the statutory powers given to police officers by the Road Traffic Act 1972 and the Police and Criminal Evidence Act 1984.

## Notes

(1) **R** v **Reynhoudt** (1962) 107 CLR 381, at p 394, per Taylor J

(2) [1969] 1 QB 439, at p 444.

(3) It is not necessary for the prosecution to prove that the accused *knew* that the person he assaulted a) was a police officer or b) was acting in the execution of his duty, nor is it a defence that the accused lacked any such knowledge. **R** v **Forbes and Webb** (1885) 10 Cox 362, **R** v **Maxwell and Clanchy** (1902) 2 Cr App R 26; **McBride** v **Turnock** [1964] Crim LR 456; **R** v **Reynhoudt** (1962) 107 CLR 381. However, a genuine mistake based on reasonable grounds that the constable was a thug and not a police officer would be material in judging the reasonableness of the resistance in relation to the defence of self-defence; **Kenlin** v **Gardiner** [1967] 2 QB 510; **R** v **Mark** [1961] Crim R 173. See, generally, (1963) 79 LQR 247 (C Howard); (1972) 88 LQR 246 (A Zuckerman). In Canada where provisions similar to section 51(1) are in force, the prosecution must prove that the accused knew the victim to be a police officer: **R** v **McLeod** (1954) 111 CCC 106; **R** v **Smith** [1987] 1 YR 117.

(4) See **infra.**

(5) See eg **Davies** v **Lisle** [1936] 2 KB 434; **Robson** v **Hallett** [1967] 2 QB 939; **Bailey** v **Wilson** [1968] Crim LR 617; **R** v **Landry** (1981) 128 DLR (3d) 726; **McLorie** v **Oxford** [1982] QB129.

(6) **R** v **Prebble** (1858) 1 F & F 325; **R** v **Roxburgh** (1871) 12 Cox CC 8.

(7) [1964] 1 QB 164, at P 170, per Ashworth J.

(8) [[1966] 2 QB 414, at p 419.

(9) Supra 7

(10) (1980) 71 Cr App R 221.

(11) At P 226.

(12) [1986]Crim LR 746.

(13) [1987] 2 All ER 59, at p 64, per Lord Lane CJ.

(14) **Kenlin** v **Gardiner** [1967] 2 QB 510; **Daniel** v **Morrison** (1979) 70 Cr App R 142. Similarly in **R** v **Jones** [1978] 3 All ER 1098, it was held that an accused was lawfully entitled to use reasonable force to resist forcible and wrongful attempts to take her fingerprints.

(15) **Bently** v **Brudzinski** (1982) 75 Cr App R 217, at p 226.

(16) **R** v **Lemsatef** [1973] 1WLR 812, at p 816, **Collins** v **Wilcok** [1984] 3 All ER 374.

(17) [1967] 2QB 510.

(18) [1981] 2 All ER 59.

(19) Eg. **Daniel** v **Morrison** (1979) 70 Cr App R 142; **King** v **Gardner** (1980) 71 Cr App R 13; **Bentley** v **Brudzinski** (1982) 75 Cr App R 217; **Collins** v **Wilcock** [1984] 3 All ER 374.

(20) (1971) 75 Cr App R 227.

(21) At p 228.

(22) **Donnelly** v **Jackman** [1970] 1 All ER 987, at p 989, per Talbot J

(23) **Ibid.**

(24) [1967]2 QB 510

(25) [1974] Crim LR at P 289 (D Lanham).

(26) [1971]NZLR 1080. This was a charge of wilful obstruction of a constable in the execution of his duty contrary to section 77 of the Police Offences Act 1927.

(27) [1984] 3 All ER 374.

(28) At p 378

(29) **Ibid. at P 379.**

(30) [1986]3 WLR 1.

(31) CO/986/85, 29 April 1986 (Lexis).

(32) **Ibid.**

(33) [1981] RTR 98, at p 103.

(34) [1972] RTR 462.

(34a) Now Road Traffic Act 1972, s 145.

(35) At p 468

(36) [1970] 1 All ER 987

(37) [1971] NZLR 1080.

(38) [1947] AC 575

(39) At pp 587, 588.

(40) **R** v **Fennell** [1971] 1 QB 428, at p 431.

(41) [1986]Crim LR 49.

(42) **Supra.**

(43) [1983] 3 All ER 537.

(44) Following **Lindley** v **Rutter** [1981] QB 128.

(45) [1947]AC 573.

(46) **Ibid.**

(47) See Clayton and Tomlinson, **Civil Actions Against the Police**, p 138.

(48) [1947] AC 573, at p 587.

(49) [1987] RTR 199. See also D.P.P.W. Hawkins. [1988] 3 All ER 673

# THE THIRD PARTY OFFENCE. ENIGMA OR AXIOM?

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**Introduction**

The object of this article is to investigate what in academic circles is the much neglected phenomenon of the third party offence.[1] A typical example of such an offence is found in s.23 of the Trade Descriptions Act 1968 which states that

> "Where the commission by any person of an offence under this Act is due to the act or default of some other persons that other person shall be guilty of the offence . . ."

The thrust of the present inquiry is to discover what sort of act or default the courts have regarded as sufficient to attract criminal liability and whether any consistent principles can be discerned from the decided cases. Finally it will be asked whether such principles as are discovered are a desirable basis on which to impose criminal liability and whether recent changes found in the Consumer Protection Act 1987 have improved this area of law.

For clarity and economy of exposition a number of terms which recur in this article are used in a slightly unorthodox way. Firstly the expression third party offender which does not occur in consumer protection criminal statutes is simply used as shorthand for the words that appear in s.23 of the Trade Descriptions Act 1968 and in similar provisions in other statutes "some other person" whose act or default caused the offence to be committed. It is easier to explain the other expressions by use of an example directly from a decided case **Holme** v **Princes Food.**[2] The facts of the case were in the words of Bingham J. that

> "a lady purchased a jar of chicken spread from a retail store in Bradford. When she opened the jar she found it contained an elastic finger dressing approximately 7 centimetres by 2 centimetres in size embedded in the chicken spread.
>
> The jar of chicken spread had been supplied to the retail store by the Respondents, Princes Foods Ltd. The prosecutor, applying his mind to the situation, rightly recognised this as a classic case of a retailer merely selling goods in the condition in which he received them from his supplier with no prospect of his examining them in any way or opening the container.
>
> Accordingly, instead of proceeding against the retailer, the prosecutor issued an information . . . . . directly against the manufacturers of the spread, Princes Food Ltd."

It can be seen that it was at least in theory open to the prosecution to charge the retailer directly with the offence of selling to the lady food which was not of the nature demanded (which was an offence contrary to what was then s.2(1) of the Food and Drugs Act 1955).

It is such an offence which will be referred to as the principal offence or the substantive offence and such a person as the retailer as the principal offender. For reasons that will quickly become apparent the retailer almost certainly would have been acquitted if he had been charged with the principal offence. Nevertheless persons in similar situations to the retailer will still be referred to as principal offenders and not alleged principal offenders. Similarly even in a situation where a principal offender would certainly have been able to satisfy a statutory defence or, in cases where the offence required mens rea and he would have been able to show that he lacked that mens rea situation will still be referred to as a principal offence having been committed. In other words the expression principal offender and principal offence will be used just so long as the actus reus of the principal offence is present.

It perhaps goes without saying that in the case used as an example the wholesaler Princes Food Ltd. was the third party offender.

It is perhaps useful initially to look briefly at the evolution of statutory defences involving third parties in order to see how a third party offence came to exist more or less independently of the defence. Initially in order for the principal offender to be acquitted he was required to successfully bring proceedings against the third party and also to show that he had exercised due diligence to avoid committing the offence.[3] The second stage of the evolution was that the principal offender still had to show that the offence was caused by the act or default of a third party but did not need to secure a conviction against him. Again he was required to show that he had exercised due diligence to avoid committing the offence.[4] The last stage which has now been described as "the modern practice"[5] is for the principal offender merely to have to show that he took all reasonable precautions and exercised all due diligence to prevent the offence occurring.[6] In both these last two situations it was open to the prosecution to bring proceedings against the third party whether or not the also brought proceedings against the principal offender. It is this third party offence with which this article is concerned.

It is submitted that in dealing with third party offences the courts have adopted a different approach when the third party is an employee of the principal offender to all other cases and these two different situations will thus be treated separately.

**Employee of Principal Offender as the Third Party**

Although the leading case of **Tesco** v **Nattrass**[7] concerned a third party defence, the case is instructive in respect of certain observations made in respect of the possible applicability of an offence brought under s.23 of the Trade Descriptions Act 1968. At the time that the case was heard the second stage of the evolution of the third party defence had been reached and thus in order to secure an acquittal the defendant company had to show that the offence was due to the act or default of a third party and also that they had exercised all due diligence but they were not required to proceed to conviction against the third party.

The case involved a prosecution under the mispricing section of the Trade Descriptions Act 1968[8] and the undisputed facts were that, although there was a large poster claiming that packets of washing powder were on sale for 2/11, the only packets that were available were priced at 3/11. The defendants claimed that the reason why this had occurred was the failure of their employees to carry out instructions. The shelf filler's instructions were that when any articles sold at a reduced price were sold out she should

inform the store manager before filling the shelves with the same products at a higher price. The store manager's instructions included a requirement that he check all the flash offer promotions before each morning's trading and it was his failure to do that that the defendant company claimed was the act or default that had caused them to commit the offence.

The Divisional Court[**9**] ruled that Tesco had failed to satisfy the third party defence because they felt themselves bound by previous authority[**10**] which had held that a defendant could not be said to have exercised all due diligence when the person to whom they delegated to take those precautions was the very person whose act or default had caused the offence. In the House of Lords Lord Reid criticised the interpretation of the statutory defence that was under consideration in the cases that were thought to create such a precedent. He said that he found no warrant in the terms of s.12(5) of the Sale of Food (Weights and Measures) Act 1926[**11**] for the proposition that "an employer has a defence if the only fault was in the actual offender but not if there was fault in any of his servants superior to the actual offender" and his Lordship was thus able to say that there was no such rule and that Tesco had thus satisfied the third party defence.

In fact such a proposition was clear from the wording because the subsection only allowed an acquittal of a principal offender if he brought before the court and obtained a conviction of the "actual offender" Lord Reid's own words "superior to the actual offender" bear eloquent testimony to the difficulty in describing an employee whose breach of a supervisory duty was instrumental in an offence occurring as an "actual offender". It is submitted however that there were two very strong reasons, quite apart from the linguistic difficulty, which made the courts reluctant to give a wide meaning to the words actual offender. Firstly, whereas in **Tesco** v **Nattrass** the issue was solely one of whether or not the principal offender was going to be acquitted, in both **Hammet** v **Crabb** and **Hammet** v **L.C.C** the supervising employee would have to have been convicted for the statutory defence to have been satisfied. Secondly the courts did not at that time and still do not have any guidance as to how grave or how trivial the lack of supervision needed to be or, looking at the example of the manager in the **Tesco** v **Nattrass** case, whether it mattered that it was one of many of the supervisory duties he had been instructed to carry out.

Presumably the linguistic problem has been solved by the apparently wider words used in modern statutes of "act or default of another person" but the problem of defining precisely what conduct should be classified as criminal remains as intractable as ever. In this respect there was an advantage with the expression actual offender in that it focused attention on the necessity of proving that an employee satisfied every element of the offence in question. What is interesting is that there are indications in some of the speeches in **Tesco** v **Nattrass**[**12**] that the law in respect of what elements of the substantive offence that need to be present to convict a third party employee may not have changed. Viscount Dilhorne, for example, said that "The language of the first part of s.23 might be understood to mean that on the facts of this case if (the shelf filler) or (the store manager) had been prosecuted, they would have been convicted though neither of them had done the acts which constituted the offence" and then his Lordship threw doubt on that proposition by saying that they did not have to decide that question.

It is submited that neither the shop assistant nor the supermarket manager should have been liable to be convicted on the facts of **Tesco** v **Nattrass** Indeed in respect of the manager it was the view of the prosecution "that it was unreasonable of (Tesco) to expect him to have time himself to comply with all the instructions issued to him, and check all the shelves of goods and flash offers each morning"

The notion that the shop assistant should have been liable for prosecution is perhaps even less defensible and certainly runs counter to the view that citizens should know in advance what conduct is proscribed by the criminal law. It is one thing to give an employee a list of instructions and quite another to detail which breaches of them or which combination of breaches would lead to an offence being committed. Even if it were possible to do this it would clearly be a fiction to regard it as being easily comprehendible to persons holding similar positions to the shelf filler in **Tesco** v **Nattrass**.

Of course the implication from the words of Viscount Dilhorne is that it might in fact be the law that to be convicted, an employee has got to do "all the acts that constitute the offence" The issue has however never been directly raised on appeal although it did form part of a submission which was not pursued on appeal in **Fine Fare and Tate** v **Tilsey** when it was said on behalf of a supermarket manager that he could not be convicted under s.23 of the Trade Descriptions Act unless he had "acted himself in wrongly labelling the containers and not for failing to exercise proper supervision. Non-feasance was insufficient; there must be evidence of misfeasance and there was none".[**13**] On the occasions when there has been an employer/employee situation before an appellate court[**14**] the judges have drawn no distinction between acts that could exculpate a principal offender from those which could inculpate a third party regarding it as self evident that if a defendant employer satisfied a third party defence by blaming an employee then that employee if prosecuted would be convicted. It is true that in **York City Council** v **Poller**[**15**] a case that did not involve an employee as the third party offender the court rejected the notion that a third party offender had to commit all the elements of the principal offence. One moments thought is enough to show that such a decision was inevitable because usually the only person capable of committing all the elements of the principal offence would be an employee. To hold that there was such a requirement in all cases would effectively lead to the startling proposition that only employees could be liable as third party offenders! It is submitted therefore that the case is not authority for the specific situation where an employee is said to be the third party offender and that it is still an open question as to whether such an offender needs to commit all the acts that constitute the principal offence.

The real question however is whether or not this would be a desirable direction for the law to have taken. Clearly the great advantage to the defendant third party is that he would know precisely what the forbidden conduct is and therefore be able to avoid it. On the other hand from the prosecution's point of view a possible problem might be thought to be the difficulty in proving a case where the offence in question is couched in terms that have contractual connotations. For example it is axiomatic in civil law that only the seller can sell notwithstanding the fact that he sells through the hand of his employee. Fortunately however this area of law has managed to escape relatively unscathed from the sort of substantive formalism that was seen in **Fisher** v **Bell**[**16**] when the court required a strict contractual meaning to be given to the words "offer to sell" when used in a criminal statute. Employee coalman have thus been said to be correctly convicted of offences involving "selling coal to which a false trade description had been applied",[**17**] an employee butcher who had incorrectly weighed meat and put it on display in the window of the shop has been held to possess short weight meat[**18**] and an employee milkman was held to have been correctly convicted of selling short measure milk[**19**].

It can be seen therefore that if a third party offence does require proof of all the elements of the substantive offence this will not pose an insuperable burden on the prosecution.

The quite separate point that this raises is that if an employee has committed all the elements of the substantive offence then it is unnecessary for him to be charged under an

act or default provision at all for it would be simpler to charge him directly as the principal offender of the substantive offence. In passing it may be pointed out that if the decision of the Divisional Court in **Coupe** v **Guyett**[20] does represent the law then there is no choice but to charge the substantive offence whenever that offence contains any requirement of mens rea. The apparently logical reasoning of the court was that as the principal offender in their case had not committed an offence because she lacked mens rea then it followed that nobody's act or default could cause an offence because no offence had been committed in the first place. It is an open question as to whether this decision can stand in the light of the Court of Appeal cases of **R** v **Bourne**[21] and **R** v **Cogan and Leak**[22] in which convictions were affirmed against defendants who merely aided and abetted the actus reus of an offence.

The real but unarticulated reason for the decision may have been a perceived injustice to the alleged third party offender. If charged directly with the substantive offence the prosecution would have had to prove that the defendant possessed the appropriate mens rea whereas the court may have thought that the prosecution would have had to prove no mens rea element if they had allowed the third party offence to proceed. It will be seen from the cases in the following section that when the courts have discerned a mens rea element in the particular act or default under consideration then they have showed no qualms in convicting the third party offender.

**Other Third Party Offender**

In a number of cases in which a third party offender has been acquitted the courts have articulated their decision purely on the ground of a complete absence of causation. One would have thought that the occasions where a local authority has embarked on a prosecution against a defendant who had no link to the principal offence must be rare indeed but the Divisional Court viewed **Sedgewick** v **Ostler**[23] as just such a case. The facts of the case were that the principal offence was that by a retailer who sold to a test purchaser food falsely described as marzipan and it was alleged that this offence had been due tc the act or default of the supplier who had described the food as marzipan in his invoice to the retailer. On a generous interpretation of the facts the magistrates found that there was reasonable doubt as to whether the retailer described the food as marzipan out of his own volition or because it had been so described in the defendant's invoice. The Divisional Court accepted that unless it could be proved that it was the latter the defendant was entitled to an acquittal because if the retailer had described the food as marzipan out of his own volition then there was no causal link to the wholesaler's invoice. One could quibble with the justices finding of fact but not with the logical deductions based on those findings.

The same however cannot be said of cases like **Tarleton Engineering** v **Nattrass** where Wien J. also spoke in similar terms when he said that "the commission of the offence by [the principal offender] was quite independent of and unrelated to anything done or omitted by the defendant".[24] The facts of that case were that the defendants had actually sold the principal offender a car with a false odometer reading and it was that precise reading which was the subject matter of the principal offence. If there had not been a false mileage reading when the principal offender bought the car he would not have offered it for sale with the same false reading, and so saying it was unrelated is unhelpful because it does not tell us why the principal offender was apparently not allowed to rely on the accuracy of the odometer reading. His Lordship specifically left open the issue of whether the defendant may have implicitly disclaimed the accuracy of the reading and one is left to wonder, given that it clearly was a cause of the principal

offence occurring, why it was not considered sufficient to make the supplier liable for the third party offence?

It may have been that odometer readings were thought to be so inherently unreliable that the principal offender was personnally obliged to check its accuracy and hence the failure to do so meant that it was his fault that the principal offence was committed.

An alternative view propounded by Harvey and Parry is that "there was no causal connection between the events, the two sales being separated by a period of about three weeks, and even if the 'other person', i.e. the previous owner, had been separately charged under section 1, the 'other person' might have had a defence (e.g. disclaimer, or act of a further third party under section 24)."[**25**] It will be remembered that in the slightly different context of the principal offence requiring mens rea[**26**] that this rationale has already been tentatively identified. For the time being however the validity of this rationale will be examined only in the situation that pertained in **Tarleton Engineering** namely that the principal offence was a strict liability offence albeit mitigated by statutory defences. Expressed in a slightly different way the suggested rationale in the court's words would be "We will not countenance a situation where a defendant has been deprived of a possible defence simply by the device of charging him as a third party offender instead of a principal offender". It follows that it is not the fact that a third party actually could satisfy a defence but merely that there was a possibility that he could that is crucial.

The basis of this suggested rationale of **Tarleton Engineering** v **Nattrass** seems to be predicated on two possible premises. The first is that a defendant is not thought to be able to avail himself of statutory defences in respect of a third party offence whereas he could have availed himself of such defences if he had been charged directly with the principal offence. It is submitted however that this premise is incorrect, firstly because although the defences are drafted in terms that appear more appropriate for principal offenders there is no specific words in the Trade Descriptions Act that so restrict them and secondly because there have been cases where third party offenders have successfully availed themselves of statutory defences.[**27**]

The second possible premise is not that the third party offender cannot avail himself of a statutory defence but that such statutory defences that are available can often be inappropriate and also uncertain in their scope. For example it would be quite worthless to a defendant to be told that he will be acquitted if he proves to the court that he had exercised due diligence to avoid committing the third party offence when he was quite unaware that there was any possibility of the principal offence being committed. In fact there is a possibility that principles for dealing with this very real problem do emerge from some of the cases that will be considered in the rest of this article.

In the meantime, before leaving the consideration of **Tarleton Engineering v Nattrass** it is worth pointing out that on the facts of that case the act or default alleged namely the failure to check the accuracy of the odometer reading was exactly what the principal offender had also omitted to do. Perhaps the least controversial rationale of the decision if we want to express it in terms of causation could therefore be said to be that the courts will never say that a third party's default has caused a principal offence when the principal offender has made precisely the same omision as the third party offender. It follows therefore that it is mistaken to regard the case and the next case that will be considered as authority for any such general proposition as that suggested by the then editors of O'Keefe's Law Relating to Trade Descriptions namely that "a seller cannot (under the Trade Descriptions Act) place the blame on his supplier, for false odometer readings under the principle 'act or default of another person'"[**28**]

During the time immediately after the **Tarleton Engineering** case odometers readings became even more unreliable as a result of traders, unable or unwilling to certify their accuracy,[**29**] turning back the reading to zero. In legal terms the object of this was to avoid applying any trade description at all because it would be obvious to a potential buyer that a second-hand vehicle could not have travelled no miles at all. Hence as the reading was not indicative of the number of miles travelled then it was not a trade description at all. The Court of Appeal have recently rejected that line of reasoning in **R** v **Southwood**[**30**] but it was the underlying acceptance and approval of the practice of zeroising odometers that led to the much criticised decision in **Lill (Holdings)** v **White.**[**31**] There is however a great deal to be gained from an examination of this case in discerning the underlying principles that led the Divisional Court to hold that there was no third party offence.

The practice of zeroising had the inevitable result of meaning that when the vehicle had been driven by subsequent owners the mileage reading would be much lower than that corresponding to the actual number of miles that had been travelled by the vehicle since it was new. It followed from this that when a subsequent owner came to sell such a vehicle he would, in the absence of an effective disclaimer, commit an offence against the Trade Descriptions Act.[**32**] In order to discourage the practice of zeroising odometers a prosecution was launched in just such a case alleging that the offence committed by the subsequent owner was due to the act or default of the trader who initially turned the reading back to zero.

In many ways **Lill (Holdings)** v **White** was a much stronger case than **Tarleton Engineering** v **Nattrass** because, quite apart from it not being the same act or default as that of the principle offender, the court were being asked to attribute blame for an act and not an omission. Further as was pointed out by the prosecution it was an act that made it necessary for some further act on the part of the owner of the car to prevent an offence occurring when he came to sell it.[**33**] The courts had often in the past given great weight to an act of one party that forced another to take steps to avoid the commission of an offence. For example the notion that a wholesale baker who sold under weight bread to a retailer should therefore impose on him an obligation, to check weigh all the loaves before putting them on sale was, albeit in the context of exculpating the retailer, emphatically rejected by the Scottish High Court of Justiciary in **McIntyre** v **Laird**. Lord Wark saying that he saw "no reason why [there should be] a greater burden on the retailer, who is in possession of goods for sale, than upon the person who sells these goods to him".[**34**]

Lord Widgery C.J. rejected these arguments mainly it would appear because he saw "a good deal of merit"[**35**] in winding back odometers to zero and this was presumably the reason why he described the transaction that followed it as being "one entirely without fault". From this he concluded that the defendants should not be blamed for anything that happened afterwards because "they would not be in a position to control or regulate any subsequent sale".[**36**] Wien J. seems at first sight to have gone a little further when he said "If someone acts perfectly lawfully in January 1975 I cannot see how they can be guilty of an offence later in 1975 . . . ." which implies that the complained of act had to be unlawful as distinct from being one without fault. One can well understand from this comment and from what was said in the **Tarleton Engineering** case why Professor Glanville Williams should have said that "Perhaps a fair interpretation of the actual decisions would be to say that the act or default must itself be a breach of the Trade Descriptions Act . . . ."[**37**]

Such a view has been shown to have been mistaken by the recent case of **Olgeirsson** v

**Kitching**[38] in which the Divisional Court held that a private person who could not be convicted directly of an offence[**38A**] had been properly convicted of a third party offence because he had sold his car knowing full well that the odometer was incorrect. It is submitted however that even at the time when it was made, Professor Williams' view was mistaken because Wien J. clearly thought that the requirement of unlawfulness at the time of the act or default was only necessary when it had not been shown that the third party "ought to have foreseen that [something] of the kind was likely to happen".[**39**] This seems to be equivalent to a test of whether a person exercising reasonable care would have foreseen that his act or omission would be likely to lead to a subsequent offence. Leaving aside the fact that the application of that principle would seem to lead to an opposite conclusion to that reached in the **Lill (Holdings)** case it is submitted that the principle itself has a great deal of merit. In most crimes the defendant knows or could perfectly easily discover the elements that go to make up a particular offence and it may be that the principle suggested by the late Wien J. goes a long way in remedying the disadvantage to a third party offender of not knowing the precise conduct that will cause him to commit an offence.

It is extraordinary that the next case that will be considered **Cadbury** v **Holliday**[**40**] also reveals a perfectly respectable principle which seems to have been misapplied. The facts of the case were that the defendant chocolate manufacturer supplied a retailer with 8 1/4 oz. chocolate bars carrying the legend "extra value" to be sold at 10p. and then later supplied 8 3/8 oz. bars in plain wrappers to be sold at 9p. The second bars of chocolate were therefore better value than the bars marked "extra value" because they were both cheaper in price and weighed more. It was alleged that the words "extra value" amounted to a false trade description which had been applied by the retailer and that this was due to the act or default of Cadbury who were accordingly charged with a third party offence. The case was in fact decided on the short ground that the word value was incapable of constituting a trade description but the late Lord Widgery C.J. also considered the matter on the basis that the word extra value did amount to a false trade description and nevertheless emphatically rejected the prosecution's argument that the act or default in question was the failure "to issue warnings against displaying bars marked 'extra value' alongside bars of later manufacture which were still better value but had no such markings"[**41**] as having "no substance at all"[**42**] His Lordship thought that checking the comparative value of the bars of chocolate was something that was "well within the retailer's power" which he could "perfectly well do"[**43**] and thus there were no duty on the defendant manufacturers at all.

It is not easy to know precisely what these expressions mean. They seem to suggest that if a retailer's exercise of due diligence would have prevented the principal offence occurring then that automatically ruled out the possibility of a third party offence. The problem with this is that it is inconsistent with those cases where convictions have been said to be rightly returned against both the principal offender and the third party offender such as the next case that will be dealt with **Meah** v **Roberts.**[**44**]

It is possible that the words "perfectly well do" imply not a high standard of care but more self evident precautions that a manufacturer would reasonably expect a retailer to take. This would of course be perfectly consistent with the previously identified rationale of the reasonable foreseeability of a subsequent offence in as much as a manufacturer would not be expected to foresee a failure of a retailer to take a self evident precaution. As has been suggested, the court may be thought to have misapplied such a principle if one takes the view that what was suggested the retailer should have done was hardly self evident but it does not alter the fact that the principle itself seems perfectly sound.

In the cases that have so far been examined the courts have managed to acquit the alleged third party offender and it is perhaps instructive now to look at some cases where the appellate courts have either allowed the conviction against the third party to stand or remitted the case back to the magistrates with a direction to convict.

**York City Council** v **Poller**[45] was a case in which a local authority was convicted as a third party being a person whose act or default caused a trader to deposit a skip without notifying the Highway Authority.[46] The defendant local authority had in fact hired the skip to the principal offender and told him that he need not obtain permission to deposit it on the highway. In such a case the Divisional Court held that it was perfectly reasonable to rely on that guidance and that being the case it was the local authority's act or default that had caused the offence to be committed. It may be observed that this seems to be getting very close to the sort of circumstances in which the courts in civil actions have imposed liability for negligent misstatement. It is easy to think of other factual situations that would fall within the principle. For example, although in **Callow** v **Tillstone**[47] a veterinary surgeon who passed meat as sound when in fact it was unfit was held not to have aided and abetted the subsequent sale by the butcher of unfit meat there seems to be little doubt that the offence by the butcher would be held to be due to the act or default of the veterinary surgeon.

Another principle that emerges is that the courts are less likely to acquit a third party on the basis that the principal offender should have himself prevented the offence occurring when the act or default in question is seen to amount to gross negligence. This is exemplified in the case already mentioned **Meah** v **Roberts** in which a fitter from a brewery, who in order to clean the lager dispensing equipment at an Indian restaurant, used caustic soda and when he had finished put some of it in an empty bottle of lemonade and left it at the restaurant. The court had no difficulty in rejecting the fitter's appeal against his conviction of the offence of being the person whose act or default caused the restauranteur to sell the caustic soda as lemonade.[48]

It is instructive that the foreseeability of offences occurring did not directly concern the court who concentrated much more on the fitter's negligence in causing a physical injury to a customer's child who drank the caustic soda which had been poured into the lemonade bottle.

The worry that a person might be convicted of a third party offence "for an act or default whether or not reckless or careless" surfaced once again in a case that has previously been looked at in a different context **Olgeirsson** v **Kitching**. McNeill J. said of the argument that it "might have merits in other cases"[49] but he was careful however to demonstrate that if there were such a principle that only deliberate, reckless or careless third party offenders were liable to be convicted that in the case under consideration the defendant had squarely fallen within that principle. His Lordship pointed out that the magistrates had found as a fact that the third party offender had known that the odometer of his car had been turned back so that when he sold it without telling the purchaser of this fact he was acting falsely. Presumably the slightly old fashioned word falsely is another way of saying that the act or default involved dishonesty. Oddly enough it can be seen that this is another situation where a court has not required there to be foreseeability of a subsequent offence but has been satisfied that a third party offence had been made out just so long as the act or default was wrongful in some way and there was a causal link to the subsequent offence.

**Conclusions**

Arguably the main point that has troubled the courts is that of convicting a third party offender who could not have foreseen that his act or default would have caused a subsequent offence to occur. The solution to this problem is to include an element in all third party offences requiring that the offender could reasonably have foreseen that the subsequent offence would be likely to occur. It may well be, if regard is had to the view of Wien J. in **Tarleton Engineering** v **Nattrass** that such a step has already been taken in as much as the reasonably foreseeable element is already a requirement of causation. If this is the case then no remedial legislation would be necessary.

It will be realised that what this leaves us with is a double test of negligence and that to be liable the third party offender would have to fall foul of both tests. If he fails to appreciate that an offence was likely to occur as a result of his act or default when a reasonable man would have so appreciated then he is negligent in respect of that element. However he also has available to him in modern consumer protection criminal statutes the no-negligence defence of showing that he exercised all due diligence and took all reasonable precautions to prevent the offence occurring.[**50**] The defence is expressed as a positive obligation[**51**] and presumably it is for this reason that the courts refer to the majority of offences that have been considered in this article as strict liability offences whereas it would be must less misleading to say that they are offences the blameworthy element[**52**] of which is negligence.[**53**] So it is only if a person is negligent in failing to perceive an offence and negligent in failing to take adequate steps to prevent it that he will be liable as a third party offender.[**54**] If one agrees that it is perfectly proper to impose criminal liability on persons engaged in trade or business for failing to exercise a reasonable standard of care to prevent offences occurring then the only objection is that under the provisions that have so far been examined in this article it is quite possible for a private citizen to be convicted as a third party offender This objection is met at least in so far as the new offences contained in the Consumer Protection Act 1987 are concerned because the third party offence provision in s.30 only catches a "person in the course of any business of his"

It will be remembered that in the first part of this article it was tentatively submitted that where an employee was charged as a third party offender the prosecution might have to show that he had committed all the elements of the offence. Approval was given of this possible direction of the law but it was pointed out that, as employees in such a situation could be charged as principal offenders, it would be the equivalent of abolishing third party offences committed by employees. The question that is raised is whether we should punish employees at all. If one accepts the view of Lord Scarman in **Wings** v **Ellis**[**55**] that the rationale of prosecutions under consumer protection legislation is to improve trading standards then we must ask whether punishing employees achieves this aim. In the sort of case like **Tesco** v **Nattrass** where the employees in question were "locked into a system where they had to carry out a company's marketing scheme"[**56**] it may be that they were just unable to cope with the duties imposed on them.[**57**] In such circumstances the mistakes made could be said to be inevitable and punishing employees for making mistakes will not make them any less likely to recur. As Ross Cranston has lucidly argued,[**58**] what we should be doing is forcing companies to emulate the trading practices of other companies of comparable size in which similar mistakes do not occur. It is submitted therefore that employees should not be liable to be convicted of any offence not merely third party offences under consumer protection criminal statutes.

In fact it seems that this is precisely what has happened in respect of the mispricing

offences contained in the Consumer Protection Act 1987 because the scope of the offences are restricted by the words "in the course of any business of his".[**59**] It is just about possible that "an employee (e.g. a manager who is paid principally by commission) can have sufficient interest in the running of the business for it to be a business of his".[**60**] It seems much more likely however that no employee will be liable and it is submitted that this is a reasonable view for Parliament to have taken, bearing in mind that there will often be no significant difference between an employee that has satisfied all the elements of an offence and one that has not.

In conclusion therefore, although it must be admitted that the principles that have emerged from the cases have been difficult to discover, it can be seen that for the most part they have a logical consistency and that they, together with recent legislative changes represent a desirable direction for the law to have taken.

## Notes

(1) Found in numerous criminal consumer protection statutes e.g. s 34(2) Weights and Measures Act 1984, s 100 Food Act 1980, s.40 Consumer Protection Act 1987 but note its absence from the Consumer Credit Act 1974.

(2) (1981) 89 Institute of Trading Standards Adminstration's Monthly Review 238 (hereinafter referred to as M R.)

(3) First appeared in s.12(5) Sale of Food (Weights and Measures) Act 1926. See footnote 11 for text

(4) First appeared as part of the defences found in s.24 of the Trade Descriptions Act 1968

(5) See clause 23 of the recommendations made in the 1984 Report of the Inter-Departmental Working Party of the Department of Trade and Industry into Legislation Concerning False and Misleading Prices.

(6) See s 34(1) Weights and Measures Act 1984 and s 39 of the Consumer Protection Act 1987

(7) [1971] 2 All E R 127

(8) "Offering to supply goods . . at a price less than they were in fact offered" Contrary to s.11(2) Trade Descriptions Act 1968.

(9) [1971] 1 QB 133.

(10) **Hammet** v **Crabb** [1931]'All E R 70; **Hammet** v **L.C.C.** (1933) 97 J.P 105.

(11) "Where an employer or principal is charged with an offence he shall be entitled to have any other person whom he charges as the actual offender brought before the court . and if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from penalty

(12) E.g Lord Morris at 139f, Lord Pearson at 147j, but cf Lord Reid at 135e and Lord Diplock at 153e

(13) (1971) 79 M.R 316 at 317 The magistrates finding of facts summarising the appellant's arguments number 3(c).

(14) E.g **Nattrass** v **Timpson Shoes** [1973] Crim L R 197

(15) [1976] R T R 37 A case involving an offence against s.31(5) of the Highways Act 1971

(16) [1961] 1 OB 394 Because of that case it was necessary to draft offences in the Trade Descriptions Act 1968 in terms of offering to supply and not offering to sell

(17) **Preston** v **Albuery** [1964] 2 QB 796 A case concerning an offence against s 2(2) of the Merchandise Marks Act 1887.

(18) **Melias** v **Preston** [1964] 2 QB 449. A case concerning an offence against s.4(2) of the Sale of Food (Weights and Measures) Act 1926.

(19) **Hotchin** v **Hindmarsh** [1891]2 QB 181

(20) [1973] 2 All E R 1058 A case where the principal offence was alleged to be the reckless making a false statement contrary to s.14(1) (b) of the Trade Descriptions Act 1968.

(21) (1952) 36 Cr App R 1251

(22) [1976]QB 217.

(23) [1963] Crim L R 109 A case concerning the sale of food not of the nature demanded contrary to s.2(1) of the Food and Drugs Act 1955

(24) [1973] 1 W L R 1261 at 1269H - 1270A A case concerning an offer to supply a car with a false odometer reading contrary to s 1(1) (b) of the Trade Descriptions Act 1968

(25) The Law of Consumer Protection and Fair Trading 3rd Edition p 353.

(26) In **Coupe** v **Guyett** See footnote 20.

(27) E.g. **Hicks** v **S.D. Sullam** (1983) 91 M.R. 122

(28) At 3 [270] Issue 15.

(29) On seeing that the reading was high for the age of the vehicle, prefer to give no indication of the mileage rather than one that would reduce the value of the vehicle

(30) [1987] 1 W L R 1361.

(31) [1979] R T R 120.

(32) Of supplying a car to which a false trade description is applied is contrary to s.1(1) (b) of the Trade Descriptions Act 1968.

(33) [1979] R T R at 124L - 125A per Lord Widgery C.J summarising counsel's argument

(34) 1944 S L T 48 at 58

(35) [1979] R T R at 123J.

(36) [1979] R T R at 124B and 124K.

(37) Textbook of Criminal Law 2nd Edition p.985. Although Professor Williams believes that there may be an exception to this when the third party is an employee of the principal offender

(38) [1986] 1 All E R 746.

(38A) All substantive offences contained in the Trade Descriptions Act 1968 require the element of being committed "in the course of a trade or business".

(39) [1979] R T R at 124.

(40) [1975] 1 W L R 649.

(41) [1975] 1 W L R at 652D where the magistrates findings of fact are summarised

(42) [1975] 1 W L R at 656G.

(43) [1975] 1 W L R at 656H

(44) [1977] 1 W L R at 1187.

(45) [1976] R T R 37.

(46) Contrary to s 31(5) of the Highways Act 1971

(47) (1900) 83 L T 411

(48) Causing the offences of selling food which was unfit for human consumption and not of the nature demanded contrary to s.8(1) (a) and s.2(1) of the Food and Drugs Act 1955 respectively.

(49) [1986] 1 All E R at 749H.

(50) See footnote 6

(51) In the sense that the defendant has to satisfy the evidential burden of proof on the issue.

(52) It is interesting to see that in one of the new mispricing offences namely that found in s 20(2) of the Consumer Protection Act 1987 the negligence element i.e "the failure to take such steps as are reasonable" is placed squarely within the definitional element of the offence

(53) There is some dispute about whether negligence is a species of mens rea because of the difficulty of saying that it is a state of mind. See for example in **R** v **Lawrence** [1982] A C 510 at 525A where Lord Diplock describes careless driving as an absolute offence

(54) Obviously this would not apply where the principal offence requires an element of knowledge or recklessness as in s.14 of the Trade Descriptions Act 1968 In such a situation legislation would be needed to overturn the decision in **Coupe** v **Guyett** and make the mental element identical in respect of the third party's awareness of the principal offence i.e. he would have to know or be reckless as to the fact that the principal offence would occur.

The real question however is whether criminal consumer protection statutes should require as a blameworthy element anything more than negligence It is the writer's view that they should not.

(55) [1985] A C 272

(56) Ross Cranston Consumers and the Law 2nd Edition at p.286

(57) See the prosecution's view in **Tesco** v **Nattrass** 1 QB 133 at 137 "that it was unreasonable to expect [the manager] to have time himself to comply with the instructions issued to him . . ."

(58) See footnote 56.

(59) See the substantive offences in s.20(1) and s 20(2) and the third party provision in s.40.

(60) See Richard T Bragg The Consumer Protection Act (1988) 51 MLR 211 at 213.

# PROCEDURAL FAIRNESS IN UNFAIR DISMISSAL - AN APPRAISAL

by David Thomas, Lecturer in Law.

## INTRODUCTION

Providing that an employer has established a potentially fair reason for dismissal[1] it is for the Industrial Tribunal to determine under s.57(3) Employment Protection (Consolidation) Act 1978 as amended:

> "Whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case"

This determination of substantive merits involves analysis of the substance of the dismissal. For example, in a case of misconduct, the Tribunal will generally take account of the employee's previous disciplinary record, his length of service, and any other apparent mitigating factors. To be set against this are the business requirements of the employer, and in the above example the employer may make a good case for utilising the sanction of dismissal in order to deter repetition of such forms of misconduct by the remaining members of the workforce.

Procedural fairness, on the other hand, concentrates on those procedures adopted by the employer leading up to the dismissal, and it is possible that a dismissal may be held unfair due to some procedural impropriety on the employer's behalf *notwithstanding* that the employer has a good substantive reason for taking such action. So, in the above example, if the employee was dismissed for misconduct without being given a hearing the Tribunal may find that the dismissal was unfair under s.57(3) EP(C)A 1978 regardless of the fact that the misconduct was proved. The notion of procedural fairness is not expressly set down in the legislation, however its development can be traced back to the exhortive influences of the Codes of Practice that were introduced in concomitance with the statutory provisions[2]. Essentially, the Codes highlight the importance to be attached to such matters as warnings, the conducting of reasonable and proper investigations, hearings and the right to appeal against the decision to dismiss. As for the applicability and enforcement of the Codes provisions, S.6 of the Employment Act 1975 states:

> "A failure on the part of any person to observe any provision of a Code of Practice shall not of itself render him liable to any proceedings; but in any proceedings before an industrial tribunal . . . any Code of Practice issued under this section shall be admissable in evidence, and if any provision of such a Code appears to the tribunal or Committee to be relevant to any question arising in the proceedings, it shall be taken into account in determining that questions"

Although it is clear that the Codes are not law, the case law shows that procedural fairness has always had a significant, albeit fluctuating impact on the application of the legislation. Before attempting to highlight these fluctuations, it is important that the reader is aware that, as with any study on unfair dismissal the citing of numerous "important" authorities in what is primarily a statute based subject, could be criticised as creating an impressionistic, and therefore subjective view of the application of the law. To this end, tribunals have consistently been encouraged to drink at the pure waters of the statute, and to shun:

> ". . . [subjecting] the authorities to the same analysis as a court of law searching is a plethora of precedent for binding or persuasive authority"

Nevertheless it is strongly submitted that a study of the existing case law adequately highlights the major trends involved in the judiciary's approach to the application of the principles enshrined in the legislation.

**Procedural fairness - the early years**

Initially, as regards the general application of the unfair dismissal provisions the courts and tribunals cleaved closely to the idea that a failure to adopt a proper procedure was a very strong indication that the employer was acting unreasonably. An extreme illustration of this approach was seen in **Lowndes v Specialist Heavy Engineering Ltd** where Phillips J sitting in the EAT commented -

> ". . . *as a general rule* a failure to follow a fair procedure whether by warnings or by giving an opportunity to be heard before dismissal will result in the ensuing dismissal being found to be unfair" (emphasis added)

It is perhaps not surprising that the judiciary adopted such a line when confronted by the then novel (and seemingly open-ended) statutory test of reasonableness, given the existence of the Codes of Practice, and the expressed intention of the Donovan Commission[5] concerning the hoped for advances to be made in disciplinary practice and procedure upon the introduction of the unfair dismissal legislation.

So for example, in 1972, Sir Hugh Griffiths, sitting in the national Industrial Relations Court in **Vokes Ltd** v **Bear**[6] held that the dismissal of an employee for redundancy[7] was unfair given that the employee received no warning regarding his impending dismissal and that there was no consultation as to the possibility of redeployment[8]. Similarly in another case that came before the NIRC in the same year this time presided over by Sir John Donaldson, **Earl v Slater and Wheeler (Airlyne) Ltd**[9], the dismissal of an employee for alleged incompetence, who was not given an opportunity to state his case either before or at the time of his dismissal, was also found to be unfair on procedural grounds.

**Establishing guidelines of good industrial relations practice**

A further bolstering of the importance to be attached to procedural considerations in unfair dismissal during the formative years of the action was achieved given the NIRC and more latterly the EAT's willingness to construct and apply guidelines in order to

promote good industrial relations practices. These necesarily revolved around the formulation of "fair" procedures for dismissal, failure by Tribunals to take account of the guidelines made this decisions more vunerable to appeal. In his speech to the Industrial Law Society[**10**], Browne Wilkinson J (as he was then) commented:

> "If it is desirable to have established principles of good industrial relations practice, the question arises who is to lay down what those principles are. If the statutory Codes of Practice were sufficiently detailed and kept sufficiently up to date, they would provide the answer. But they are not and (if experience in getting statutory reform is any guide) it is unlikely that they ever will be. Therefore some other body has to declare what are the relevant principles and that can only be the Appeal Tribunal"

Examples of this approach (particularly when the EAT was under the presidency of Phillips J and Browne Wilkinson J) are legion. One such example is that of **British Home Stores** v **Burchell**[**11**] where the Appeal Tribunal laid down the guidelines of good industial practice that employers ought to follow if they are to act fairly in deciding whether or not to dismiss an employee for suspected dishonest misconduct[**12**]. These being that the employer must hold a genuine belief, and, in order to form that belief he must have conducted a reasonable investigation.

**The "no-diffference" rule - the down-grading of procedural fairness**

Whilst the early years of unfair dismissal were characterised by the importance attached to employers' adopting proper procedures the late 70s saw a significant drift away from such a stance. Two factors played an important role in the weakening of procedural requirements at that time. Firstly, in several key judgments, the Court of Appeal was at pains to point out that procedural impropriety was but one factor to be taken into account when attempting to determine whether or not the employer had acted reasonably in accordance with s.57(3) EP(C)A 1978[**13**]. Secondly, and perhaps more significantly, was the promotion of the "no difference" test in this context.

In **British Labour Pump Co Ltd** v **Byrne**[**14**] the EAT (Slynn J presiding) laid down the following test for determining the significance of procedural irregularities in a claim for unfair dismissal -

> "It seems to us that the right approach is to ask two questions. In the first place, has the employer shown on balance of probabilities, that they would have taken the same course had they held an inquiry, and had they received the information which that inquiry would have produced?
>
> Secondly, the employer must show ... that in the light of the information which they would have had, had they gone through the proper procedure, then would they have been behaving reasonably in still deciding to dismiss"

Essentially this test allowed the employer to disregard the "procedural niceties" contained in the Codes of Practice if it could be hypothetically established that, had he adopted such procedures, he would still have taken the decision to dismiss, and that decision was reasonable. In effect, the substance of the dismissal could no longer be challenged on the grounds of procedural failure alone[**15**].

This dubious hypothetical image building, necessary for the formulation of the "no difference" test, was firmly endorsed by the Court of Appeal in **W J Wass Ltd** v **Binns[16]**. It is apparent from the case law that the promotion of the "no difference" test (although not without its critics[17]) had a significantly corrosive impact upon the importance previously attached to procedural fairness. Accordingly, courts and tribunals were able to approach cases concerning procedural failure guided by the principles set out in the British Labour Pump case. Indeed, in **Siggs & Chapman (Contractors) Ltd** v **Knight[18]**, the EAT (Waite J presiding) went as far as to concede that the no difference test was "beyond challenge"

**The demise of the "no difference" test**

In what has been described[19] as one of the most important unfair dismissal decision in the 1980s **Polkey** v **A E Dayton Services[20]**, the House of Lords, led by the Lord Chancellor. Lord MacKay of Clashfern, declared from upon high that the British Labour Pump Principle:

> " . and all decisions supporting it are inconsistent with the relevant statutory provision and should be overruled, and in particular, the decision of the Court of Appeal in W & J Wass Ltd v Binns . . should be overruled"

Lord Mackay explained that the test was inconsistent with s.57(3) EP(C)A 1978 in that it placed an impermissable reliance upon matters unknown to the employer at the time of dismissal and because it confused unreasonable conduct on behalf of the employer in reaching the decision to dismiss, a necessary component of an unfair dismissal[21]. Setting out the new test in the circumstances the Lord Chancellor stated[22]

> "Where there is no issue raised by ss.58 to 62 [of the EP(C)A 1978] the subject matter for the Tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the Tribunal is required to characterise as reasonable or unreasonable. That leaves no scope for the Tribunal considering whether, if the employer had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as a consequence of not consulting or warning"

Lord Mackay continued:

> "If the employer could reasonably have concluded in the *light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless* he might well act reasonably even if he did not observe the provisions of the code". (emphasis supplied)

Clearly, there is a considerel practical difference between asking whether the employer had reasonable grounds for believing, at the time he took the decision to dismiss that the following of a fair procedure would have been "utterly useless" (the new test, post Polkey) and looking at the dismissal retrospectively and asking whether procedural

ommission made any difference to the outcome (the British Labour Pump test). Accordingly the relevance of procedural considerations has been re-emphasised and the earlier case law demonstrating this approach, and highlighted in the examples given at the beginning of this article will resume its previous importance. We shall now turn to look more closely at the probable practical implications of the new emphasis on procedural fairness. These can be clearly set out in the following three propositions. It should be noted that the proposition are not mutually exclusive, and indeed they highlight a number of competing considerations that will underly the new emphasis on procedural fairness.

1. **Stricter adherence to disciplinary practice and procedure will lead to fewer unfair dismissals**

   The steady erosion of procedural fairness that had commenced in earnest following the EAT's decision in British Labour Pump Ltd v Byrne, and was further compounded given the Court of Appeal's vociferous support of the "no difference" principle has clearly been halted. Consequently the refocussing of the Tribunal's attention onto procedural justice (and it is noticeable that both Lord Mackay and Lord Bridge, in a forceful concurring judgment, emphasised the importance of the Codes of Practice) is therefore likely to bring about an improvement in industrial relations[**23**] since it will serve to foster greater awareness by employers of the need for improvements in handling dismissals, and to be seen to be adopting a fair procedure. A significant improvement in disciplinary practice and procedure will therefore presumably arise. Accordingly, this will lead to fewer employees being unfairly dismissed thereby securing the aims of the legislation.

2. **Injustice to the employee to be reflected in compensation levels**

   Although many legal commentators[**24**] have welcomed the new emphasis on the importance of procedural considerations, a note of caution must be expressed about the decision in Polkey v A E Dayton Services as to the extent to which it will serve to increase the scope of employment protection rights. Although Lord MacKay refuted the notion of injustice to the employee as being a necessary ingredient in the determination of the question of fairness under s.57(3), such a factor was expressly stated as being applicable in determining the question of compensation payable to an unfairly dismissed employee[**25**]. It may therefore be possible for an employee to win his case due to some procedural omission on the part of the employer but, because the Tribunal conclude that he has not suffered any injustice, since the procedural omissions, had they been rectified, would have made no difference to the employer's decision to dismiss, his compensation will be reduced accordingly. Although the employer may well be burdened with the stigma of having a finding of unfair dismissal against him, the practical consequences of smaller compensation payments for employees, faced with probable lengthy periods of unemployment, are bleak indeed[**26**]. Given the EAT and Court of Appeal's apparent fondness for the British Labour Pump principle, there remains ample scope for the criteria of injustice to the employee, or rather the lack of it, to be reflected in compensation levels. Low, or even nil awards[**27**] of compensation may be the order of the day, and, in consequence, such a state of affairs will do little to provide the necessary incentive for certain employers to adopt fair procedures.

It will not have been lost on readers that, should such a trend emerge, it will certainly serve to undermine improvements in industrial relations practices and, in consequence, a competing consideration with the first proposition described above will arise.

3. **Outdated Codes of Practice will inhibit the development of disciplinary practice and procedure**

Although, as noted above, the judgments of Lord MacKay and Lord Bridge in Polkey stress the importance of the Codes of Practices, the fact that the codes are out of date effectively means that improvements in standards of procedural fairness may be unduly inhibited[**28**]. It is noticeable that in its introduction the 1972 Code maintained that it sought to:

> "set standards which reflect existing good industrial relations practice. It is not meant to restrict innovation and experiment or to inhibit improvements on those standards. Industrial relations can never be static. *Just as individual undertakings should review and improve their own practices, so the Code will need to be revised periodically*". (emphasis supplied)

Apart from the revision in 1977, this has simply not occurred. In an attempt to rectify this situation, ACAS produced and issued for comment in November 1985 a Draft Revised Code of Practice on Disciplinary Procedures[**29**]. The Draft Code set down procedural standards to reflect good industrial relations practice in those areas that it was felt often posed difficulties for employees and employers alike. viz misconduct, absenteeism, sub-standard work and redundancy.

It is apparent from reading the draft Code as a whole, and particularly the forthright statements made in its introduction, that ACAS was all too aware of the need for a fair and consistent application of recognised rules and procedures. ACAS clearly perceived the achievement of such a goal as necessary for securing proper employement protection, which in turn would lead to a promotion of good industrial relations practices, thereby benefiting the business enterprise

Despite such sentiments, in January 1987 the Conservative Government saw fit to reject the Draft Code[**30**]. Such a move is to be regretted in that it can only serve to unduly restrict the development of good industrial relations practices that reflect current standards. Again, a competing consideration with the first proposition described above will arise.

Some consolation may be drawn from the fact that much of the rejected Draft Code has been put into the 1988 ACAS Advisory Handbook 'Discipline at work' which is meant to complement the 1977 Code. However, it must be stressed that the Handbook is advisory only, and does not have the status of a code. In effect this means that it is not covered by s.6 Employment Act 1975, so that the Tribunal has a discretion on whether or not the provisions of the handbook are taken into account when determining reasonableness under s.57(3) EP(C)A 1978. It remains to be seen how Tribunals will exercise this discretion.

The rejection of the ACAS Draft Code is all the more lamentable given the Court of Appeal's attitude to the establishing of guideline authority. As noted at the beginning

of this article, the willingness of the NIRC and the EAT, during the formative years of the action, to establish the guidelines of good industrial relations practice, served to enhance the importance of procedural fairness. However, such an approach would now seem to be no longer possible following a series of Court of Appeals decisions that have questioned the validity of guideline authority. The main criticism of guidelines is that they have served to encourage legalism[**31**] thereby unduly fettering tribunal discretion which was contrary to the intention of Parliament when it passed the unfair dismissal legislation[**32**].

In **Bailey** v **BP Oil (Kent Refinery) Ltd**[33], Lawton LJ explained the correct approach in the circumstances:

> "Each case must depend upon its own facts. In our judgment it is unwise for this court or the Employment Appeal Tribunal to set out guidelines, and wrong to make rules and establish presumptions for Industrial Tribunals to follow or to take into account when applying [s.57(3) EP(C)A 1978]"

**Conclusion**

Although the decision in Polkey v A E Dayton Services Ltd clearly re-asserts the importance of procedural fairness, the full-scale practical implications of that decision are yet to be felt. Clearly it will be of immense interest to employers and employees alike as to how tribunal's will attempt to resolve the competing considerations noted above. Their tasks would have been eased considerably if the present Government had seen fit to ensure the periodic revision of the existing Codes of Practice. However, the outright rejection of the 1985 ACAS Draft Code illustrates that the Government is dragging its feet in this area and, as a direct consequence, has unduly inhibited improvements in industrial relations practices that would surely have been welcomed by both sides of industry.

## Notes

(1) As contained in s.57 Employment Protection (Consolidation) Act 1978.

(2) These being the Industrial Relations Code of Practice 1972, paragraphs 130 - 133 of which have been superseded by the ACAS Code of Practice No 1, Disciplinary Practices and Procedures in Employment 1977

(3) Per Waite J in Anandarajah v Lord Chancellor's Department (1984) IRLR 130 at 132

(4) (1976) IRLR

(5) Royal Commission on Trades Unions and Employers' Associations (1968) Cmnd 3623

(6) (1972) IRLR 363

(7) Redundancy being a potentially fair reason for dismissal under s 24(2) (C) of the Industrial Relations Act 1971, now s 57(2) (C) EP(C)A 1978.

(8) Sir Hugh Griffiths relying here on paragraph 46 of the Industrial Relations Code of Practice 1972

(9) (1972) IRLR 115

(10) The role of the EAT in the 1980s (1982) 11 ILJ 69, at p 75

(11) (1980) ICR 303 (Note). Another excellent example is that of **Williams** v **Compair Maxam Ltd** (1982) IRLR 82.

(12) Note, the Codes of Practice offer no guidelines as regards what particular steps an employer ought to undertake in such circumstances.

(13) See in particular Lord Denning's comments in **Holster** v **National Farmers' Union** (1979) IRLR 238, at p 240

(14) (1979) IRLR 94 at p 97

(15) Readers should note that the development of the "no difference" rule was not as chronologically precise as the text implies In fact its origins are to be found in several cases prior to 1979: see eg **A J Dunning & Sons (Shopfitters) Ltd** v **Jacomb** (1973) IRLR 206, and the discussion by Patrick Elias, Fairness in Unfair Dismissal: Trends and Tensions (1981) 10 ILJ 201 at pp 214 - 215

(16) (1982) IRLR 283.

(17) See in particular the judgment of Browne Wilkinson J in **Sillifant** v **Powell Duffryn Timber** (1983) IRLR 91 who forcefully argued that the test was inconsistent with the House of Lord's decision in **W Devis and Sons Ltd** v **Atkins** (1977) ICR 662

(18) (1984) IRLR 83.

(19) Rubenstein: Highlights IRLR December 1987

(20) (1987) 3 All ER 974 at p 983.

(21) Ibid (The Lord Chancellor here adopting the analysis in **Sillifant** v **Powell Duffryn Timber** op cit, supra note 17).

(22) Ibid at pp. 976 - 977

(23) For an illuminating survey on employers' attitudes regarding the effects of the unfair dismissal legislation on disciplinary rules and procedures, see Theon Wilkinson Industrial Tribunals Survey (IPM National Commission on Employee Relations 1986).

(24) See in particular the comments by Rubinstein, op cit, supra note 19

(25) This of course is not a new development, see in particular the judgment of the EAT in British United Shoe Machinery Co Ltd v Clarke (1978) ICR 70.

(26) In 1986 - 87 the maximum possible award for unfair dismissal (not involving dismissal for trade union activities, race or sex discrimination) stood at £13,420. However the median award for compensation granted by Tribunal's for that period amount to £1,805, this being equivalent to approximately 10 weeks' wages for a manual worker in industry (Source - D E Gazettes October 1987, p 498; November 1987, table 5.4).

(27) A nil award for compensation is possible since the removal of the minimum basic award for unfairly dismissed employees of two weeks' pay, by the Employment Act 1980. Readers should note that the primary remedies for unfair dismissal, orders of reinstatement and re-engagement under s.69 EP(C)A 1978 were only granted in 1.1% of cases in 1986 - 87. On this evidence there would appear little hope of success for employees who pursued these remedies with the aim of circumventing the possibility of reduced or nil compensation awards. (Source - D E Gazette October 1987, p 498).

(28) A view held by Browne Wilkinson J (as he was then) as far back as 1980! op cit. supra note 10.

(29) Reproduced in full in Appendix 1. Modern Employment Law by Michael Whincup (Heinemann 1986).

(30) The Government's reasons for rejecting the Code were described in a letter from the then Secretary of State for Employment, Lord Young, to Sir Pat Lowry, the Chairman of ACAS. the main points of which are summarised in D E Gazette 1987, p 150

(31) For an excellent discussion on legalism in unfair dismissal claims see Smith and Wood - Industrial Law (Butterworths 1986) pp 224 - 232

(32) See in particular the comments by Waite P in Anandarajah v Lord Chancellor's Department op cit, supra note 3.

(33) (1980) IRLR 287 at p 289. See also UCATT v Brain (1981) IRLR 224 and Varndell v Kearney & Trecker Marwin Ltd (1983) IRLR 335. Perhaps predictably enough the present EAT has followed this approach

# DRAFTING THE ARTICLES OF ASSOCIATION OF A SMALL PRIVATE COMPANY LIMITED BY SHARES

## by Louise Thornton, LLB Barrister, Senior Lecturer in Law, Trent Polytechnic

### Introduction

Statutory regulations have laid down a model as a form of articles and any private company limited by shares may adopt this model form. The model is Table A and is to be found in the Companies (Tables A - F) Regulations 1985 (SI 1985 NO. 805).

If Table A is going to be adopted without any changes then of course there is no drafting to be done. The drafting need arises when trying to modify or exclude Table A. There are one hundred and eighteen articles in Table A and many of them are suitable for both a large public company and a small private company. On the other hand many are not suitable for the small private company. The circumstances surrounding each company vary however and modifications which suit one small private company may not suit another small private company. There is therefore no set list of instructions for drafting that may be given which will be acceptable in every situation. There are however standard amendments each of which may be considered for the needs of the client. The standard amendments vary in importance; thus Table A Article 18 unmodified states that if a call remains unpaid the directors may give notice requiring payment together with any interest. Article 18 may be modified so that not only calls and interest have to be paid but also any expenses incurred by the company giving the notice have to be paid. This is hardly a thing which will have an important effect on the company or shareholders, particularly as most shares in small private companies are fully paid; therefore calls will not be made. However, Article 24, the share transfer article, is of vital importance to anyone contemplating buying shares in the company because under the article, fully paid shares are freely transferable (with a few minor exceptions). The article is equally as important to the company because it may not wish the shares to be freely transferable; it may prefer that the company remains in the hands of the family of the founder members for example.

The standard amendments and exclusions of Table A will now be considered beginning with those that are generally regarded as the most important. Then extra insertions will then be considered which are also regarded as important.

### Table A Article 24

This article is meant for a public company which would need its shares to be freely transferable. The article puts a restriction only on the transfer of a partly paid share, in that the directors may refuse to register the transfer of a partly paid share to a person of whom they do not approve. The approval will usually depend on whether or not the transferee will be able to pay the amount which is owing on the share. The article also puts some restrictions on the transfer of a fully paid share. If the company is able to have a lien over a fully paid share (see modified Article 18), the directors may refuse to register the transfer of that share (if the lien is on a partly paid share the same applies). Also the directors have some control over procedure in that they may refuse to register a transfer of a fully paid share if the transfer is not lodged at the office (the registered office) or such

other place as the directors wish it to be lodged, if there is no share certificate relating to the shares and if there is no other evidence the directors can reasonably require to be produced to show the transferor had a good title to the shares. The directors may also refuse to register the transfer if more than one class of shares is involved. This is unlikely to happen with a small private company because usually only one class of share is used; this is the ordinary share. Finally if the transfer is to more than four transferees, the directors may refuse to register the transfer even if the share is fully paid.

If all the above restrictions are looked at it can be seen that in a small private company where shares are ordinary shares which are fully paid, there is unlikely to be a lien on the shares and a transfer is usually made to one transferee, all the transferor and transferee have to do is to ensure that they comply with the procedure relating to the registered office and the share certificate. There is then nothing the directors can do to prevent the transfer. Since most private companies wish to have control over who becomes a shareholder in the company, it should be clear that Article 24 should not be left as it is. There are in fact four transfer articles any one of which may be considered in place of Article 24.

**1. Standard transfer article**

This transfer article removes the words 'partly paid' from Article 24 and gives the directors absolute discretion in deciding whether or not to decline to register the transfer of any share, fully paid or partly paid. This would appear to solve the problem stated above because most shares are fully paid.

However, whenever the word 'directors' is used, in this context it means the board of directors. The board operates by making decisions according to the will of the majority. Thus if a shareholder wishes to transfer his shares, under this article the board, that is the majority, must pass a resolution 'declining to register the transfer' if the directors wish to stop the transfer. If such a resolution 'declining to register' is not passed, the transfer must take place providing the procedural requirements of registered office and share certificate are compiled with and it is of one class of share and is to not more than four transferees. The problem will really arise when there are only two shareholders who hold equal shares and who are also the only directors. If one wishes to transfer his shares to someone the other regards as unsuitable for the company, the majority to 'decline to register' the transfer will not be achieved and the shareholder who is transferring may transfer to whom he pleases.

**2. Unrestricted transfer by a shareholder to his family or other shareholders**

This type of transfer article allows any shareholder to transfer his shares to any one member of his family and the directors must register the transfer. He may also transfer to any member of the family of any shareholder. It also allows him to leave his shares by will, or allows the shares on intestacy to pass, to any member of his family. If the shareholder prefers to create a family trust, he may transfer his shares to the trustees providing that only members of his family are beneficiaries under the trust and no outsiders apart from the trustees are given voting rights. The trustees are also allowed to transfer the shares to any shareholder or to any member of a shareholder's family.

It is necessary under this article to define the limits of the family. Obviously spouse and children would be included in the definition. It is then a question of whether or not the client wants, uncles, aunts, great grandparents and so forth, under the definition.

A shareholder may also transfer his shares to any other shareholder and the directors must register the transfer. This could cause problems in that if there are three equal shareholders and one wishes to transfer his shares, he may transfer all of them to one of the two remaining shareholders thus turning the other, previously equal participant, into a minority shareholder. This arises because there are no proportional pre-emption rights. It should therefore be considered whether this right should remain in the articles.

If a shareholder does not wish to transfer his shares to the family (and this includes the situations mentioned above eg family trusts), or to any existing shareholder, then the directors have an absolute discretion to decline to register the transfer of the shares.

If the shares are partly paid or if there is a lien on them, then the directors may decline to register the transfer, as under Table A Article 24, even if the transfer is to a family member or an existing shareholder. Also the other restrictions mentioned in Table A Article 24 still apply; these are that the transfer must be lodged at the registered office together with the share certificate and it must be for one class of share (the ordinary share here) and to not more than four transferees.If these are not complied with, the directors can refuse to register any transfer whether to family, existing shareholders or to outsiders. This is because the clause allowing the transfer to families and existing shareholders is subject to Table A Article 24.

There are a few problems with this article. The problem of the two equal shareholders who are also directors arises as in the standard transfer article. The directors must pass a resolution to decline to register the transfer to an outsider and the necessary majority will not be obtained if one shareholder wishes to so transfer. Also there is no mechanism in this article for deciding on the price of a share should there be a dispute. However some may consider this an advantage since they would not wish a price imposed upon them (apart from by the court).

### 3. Proportional pre-emption rights in favour of existing shareholders

There are no family rights in this type of article and therefore if the promoters of the company wish a member of the family of existing shareholders to have a right to have shares transferred to him, this article should not be used.

The rights in this article are given to existing shareholders instead. If the person holding the shares wishes to transfer them, all existing shareholders have a right to have some of the shares offered to them. (Compare this right with the situation in the above article where all the shares could be offered to one shareholder only). The number of shares offered to each shareholder depends entirely on the number or proportion of the shares the shareholder already has. If the shareholder has 55% of the existing shares, then he has a right to be offered 55% of the shares which are for sale.

The article is mainly concerned with procedures which must be complied with when a shareholder wishes to transfer his shares and a mechanism for determining the price if there is a dispute. The procedure is that the shareholder proposing to transfer his shares, the transferor, must give notice in writing to the company saying that he wishes to transfer his shares and stating what price he wants. This notice is called the transfer notice.

Within set times, laid down in the article, the company sends the offer to all the other shareholders on a proportional basis, that is they are offered the shares in proportion to

the number of shares held by them (see above). The shareholders are also asked how many shares in excess of their rights they may be prepared to purchase. This is to deal with the situation whereby some shareholders do not wish, or cannot afford, to purchase the shares offered to them. The company needs to know if anyone else is interested in purchasing these extra shares. These extra shares are offered, to all those interested, on a proportional basis. It is in this way that majorities in companies can change. Thus if there are three shareholders in a company all with equal shares and one wishes to transfer all his shares, the shares must be offered to the remaining two in equal amounts. If one shareholder cannot afford to buy them and therefore does not accept the offer, the shares can be offered to the other shareholder. The equal shareholder then becomes a minority shareholder. It is in catering for this type of situation that a shareholders agreement becomes so important.

A shareholder wishing to purchase the shares may object to the price specificed in the transfer notice. He may ask that the auditor should give a certificate of fair value. This means that the auditor, acting as an expert, must certify in writing the sum which in his opinion represents the fair value of the shares. The price of the shares is then the lower of the price stated by the auditor to be the fair value and the price stated by the transferor in the transfer notice.

If the company receives acceptances for all the shares which are being offered for sale, it must give a 'sale notice' to the transferor stating the names of the purchasers and the transferor is then bound to transfer the shares to those shareholders.

If the company does not receive acceptances for all the shares being offered, it cannot give a sale notice and consequently the transferor does not have to transfer to existing members. The article then gives him complete freedom to transfer to whomsoever he pleases. Bearing in mind that the purpose of all these transfer articles is to prevent outsiders from becoming shareholders, a trap then arises. The trap is that if there is no sale notice the directors may in their absolute discretion refuse to register the transfer of any share. This means they may refuse to register the transfer of a fully paid share as well as a partly paid share, a share with a lien, and a transfer which does not comply with the requirements of Table A Article 24 (transfer deposited at registered office with share certificate etc.)

The final part of this article deals with death, bankruptcy and employment.

If anyone becomes entitled to a share because of the death or bankruptcy of a shareholder (this means the personal representative or the trustee), the person must give a transfer notice to the company. Then the mechanism for offering to existing shareholders on a proportional basis begins. The personal representatives or trustee have no right to be registered as shareholders unless they are existing shareholders. This may be likely in the case of a personal representative but highly unlikely in the case of a trustee in bankruptcy who has to be an Insolvency Practitioner. If the transfer notice is not given in these circumstances then it is deemed that it has been given and the price of the shares shall be the fair value certified by the auditor.

Finally, if a shareholder is also an employee then when he leaves the employment of the company he must either give a transfer notice or, if he does not, he is deemed to have given a transfer notice, the price of the shares being the fair value as above. This does not apply when he dies. This clause may be one to watch because it often includes directors in it and therefore if a person is employed as an employee/director he is also caught by it and is deemed to have given a transfer notice. It will really depend on the circumstances

whether the promoters, who may be the shareholders directors and employees, wish to lose their shares if they cease to be employees. Many promoters may in that situation wish to remain as shareholders even though they may not be employees any more.

**4. Proportional pre-emption rights in favour of existing shareholders subject to unrestricted transfer by a shareholder to his family or other shareholders**

As can be seen from the heading of this type of article, it is a combination of the two previous articles mentioned above. Thus a shareholder may transfer the shares to any member of a shareholder's family or trustees of a family trust, etc, or he may transfer all his shares to one of the existing shareholders. If he does not transfer to family or any existing shareholder then he must give a transfer notice to the company, specifying the price he requires for the shares. The company then offers the shares to existing shareholders on a proportional basis and the remainder of the article dealt with above comes into effect.

There is however one addition to this article which is not in the unrestricted transfer to shareholder's family (above) and this states that the directors may decline to register the transfer of shares held by employees to members of the family or to other shareholders. The purpose of this is to prevent employees, knowing they are going to leave the company and knowing that once they have left they will be deemed to have served a transfer notice, from transferring their shares to their families before they go.

The four possible transfer articles have now been considered and it depends upon the needs and circumstances of the client as to which one is chosen as an amendment to Table A Article 24.

**Table A Article 50**

This article gives the chairman a casting vote at a general meeting of shareholders. This means that when an ordinary resolution cannot be passed because there are equal votes for it and equal votes against it, the chairman may decide the issue by using his casting vote. The chairman may also be a shareholder himself so he is able to cast his votes as a shareholder and then use his chairman's casting vote to get what he wants. This is an article which must always be considered carefully, particularly when there are two shareholders with equal shareholdings. If one is the chairman with a casting vote, that one will achieve what he wants. In that type of situation it would be better to exclude this article from the articles of the company.

**Table A Article 88**

Again this article gives the chairman a casting vote but this time it is at a directors' meeting, a board meeting, where there is equality of votes. Again the chairman has his vote as a director and his casting vote is in addition to that. The problem above, that of equal participation, arises here and if Article 50 is to be excluded, then Article 88 ought to be modified to take out the casting vote.

**Table A Article 72**

The directors may appoint a committee to deal with certain situations and if there are two or more members then the chairman has a casting vote because the committee is subject to the same regulations to which the board is subject. Therefore this must be excluded if the casting vote is excluded in Article 50 and Article 88.

**Table A Articles 73 - 77**

The retirement by rotation of directors is regarded as important for a public company but not necessarily so for a private company. This article states that at the first annual general meeting all the directors shall retire from office and then the article lays down a procedure by which directors retire in rotation at later AGM's. The article goes on to say that if the vacancy left by the retiring director is not filled, then the retiring director is deemed to be reappointed except in certain circumstances.

These provisions give the shareholders some control over directors in that if the majority of the shareholders do not approve of the particular director, that director is, in effect, sacked without any difficulty. The problem with a private company, particularly a small private company, is that if the directors retire, there is no-one to put in their place and so they will obviously be reappointed. This is rather a pointless exercise and therefore unless the majority shareholder is not a director, it would seem preferable to exclude it. The directors then continue in office without any problem. (They can of course be sacked if necessary under other provisions such as s.303.)

It is important to realise that if the retirement by rotation provisions remain as part of the articles, the managing director and any other director holding any other executive office are not affected by them and do not retire periodically (Article 84).

**Table A Articles 94 - 97**

The common law position is that provided there is a clause in the articles allowing him to do so, a director may make a contract with the company or be interested in a contract with the company. Article 94 says however that he may not vote at a board meeting on a resolution concerning a matter in which he is interested, directly or indirectly, if the matter is material and conflicts with the interest of the company.

There are some exceptions however whereby he may vote and these include for example the giving of a debenture to a director, the creation of a charge in his favour, the allotment of shares to him, and any approved retirement scheme proposals. Article 95 says that he may not count in the quorum of any meeting where a resolution on which he may not vote is to be considered. However Article 96 says that if the company in general meeting passes an ordinary resolution, the prohibition on voting (and therefore on counting in the quorum) may be removed and the director may then vote and count in the quorum even though he is interested in the contract with the company.

Finally, Article 97 says that if there is a proposal concerning the appointment of two or more directors, each director may vote on the proposal concerning another director but not on the one concerning himself.

These articles are generally rather inconvenient for a small company in which the directors may have other interests. If they are not able to vote and count in the quorum, there may be no chance of even considering certain contracts because the necessary quorum may not be obtained. Thus there are two possibilities, either the articles may be changed so that directors can vote and count in the quorum or Article 96 may be used. The problem with Article 96 is that the directors are dependent on the wish of the majority to relax the effect of Articles 94 and 95, and the shareholders may only agree to relax for each specific matter. There then may arise a dispute between the majority shareholders and a director which may not be serious enough to cause a sacking or anything as drastic as that, but could lead to the refusal to pass the required ordinary resolution. It is probably better from the director's point of view to give him a right under the articles to vote and count in the quorum. The declaration of interest in the contract to the board under Section 317 and Article 84 should be sufficient protection to the company. The board will be aware of the director's interest and will treat any passionate speech in favour of adopting the contract with the necessary caution.

**Table A Article 54**

Under this article each shareholder shall have one vote, at a general meeting, on a show of hands, and each will have one vote for every share on a poll. This is the normal situation for an ordinary share. However the spirit of the Companies Act which in 1948 felt that directors should be able to be sacked if the majority shareholder wished it, seems to have been somewhat betrayed and in 1970 a case called **Bushell v Faith** (1970 AC 1099) held that articles which gave a director/shareholder three votes per share on a resolution to dismiss him were valid. Thus it is possible to change the one share, one vote rule. In the small private company the increase in voting power is traditionally used in a similar situation to **Bushell v Faith** The articles are changed to state that a director may, on a poll, have more than one vote per share on a resolution to dismiss him. Although **Bushell v Faith** had three votes per share, the usual number nowadays is ten votes per share or the votes are linked proportionally so that as the capital increases the number of votes the director has increases. It is only the director who is to be sacked who has the extra votes. Obviously if all directors had this increase in voting power the other directors/shareholders could probably sack the minority shareholder/director as a director.

Since it is an article which gives the director this protection, it is possible to change the article to take it away, that is to change back to Table A. Therefore it is wise to entrench the article giving additional votes so that when a resolution is put to the general meeting to return to Table A Article 54, any director who wishes to vote against such a resolution is given either ten votes per share or an increased proportion of votes, depending upon which was used in the **Bushell v Faith** type clause.

**Table A Articles 64 and 89**

Article 64 says that the minimum number of directors shall be two (unless an ordinary resolution says otherwise) and Article 89 says that the quorum for a board is two (unless another number is chosen by the directors themselves). This minimum number may be changed in any direction It may go down to one if a company is to be controlled by only one person or if the directors trust each other, or it may be raised to three or more so that for example, each family interest is represented in the quorum.

**Table A Articles 65 and 66**

A director, if unable to be present at a board meeting, is able to appoint an alternate director to attend and vote in his place. The alternate may be either another director or anyone approved by the board. The suggested amendment is that a director could act as alternate for more than one director and in that case he has a vote for each director he represents (plus his own vote). A suggestion is made that the alternate should only count as one in the quorum, presumably to prevent a situation of one director acting as alternate for two others, falsifying an account of the meeting. This suggestion coincides with the ruling in the general meeting. A shareholder may appoint a proxy to vote for him but when it comes to a quorum there must be two persons present (if the quorum is two). One person cannot be present for himself and as proxy for another and count as two for the quorum.

As far as remuneration is concerned, an alternate under Table A has no right to it. This may make persons reluctant to act as alternates so the suggestion is that the alternate is entitled to the remuneration the director he represents would have had, but only if his appointer tells the company to pay him.

**Table A Articles 40 and 41**

All the articles which have been considered above relate to directors, except the transfer article and the chairman's casting vote. There seems to be few amendments of any importance relating to shareholders and their meetings. Articles 40 and 41 appear to be the only problem. Article 40 says that the quorum for a general meeting should be two persons. The article does not say when there should be a quorum. In case there is any doubt as to whether the quorum should be present throughout the proceedings, the article is amended to say that there only needs to be a quorum at the beginning of the meeting to prevent a shareholder from controlling the situation by walking out. Article 41 deals with an adjourned meeting. If a quorum is not present the meeting is adjourned to the same time and place next week. To prevent a perpetual series of adjournments, in the case where a quorum is not present the following week, the adjourned meeting is dissolved.

**Table A Articles 8, 18, 38, 81, 87 and 118**

The changes required to these articles could be regarded as possibly rather minor. However if the article is actually needed, it may not be considered to be so minor after all. So perhaps the unimportant relates to the possibility of the number of times the circumstances surrounding the articles are likely to arise. In the life of most small private companies there is little possibility.

The amendment to Article 8 extends the lien on a partly paid share to a fully paid share. Shares nowadays are usually fully paid. This point also affects Article 18 in that the article refers to calls made. Since the shares will probably be fully paid there will be no calls for payment. The extension to Article 18 is to widen the liability of the member from liability for calls and interest to expenses payable.

Article 38 states regulations for the notice required for general meetings. The notice has to state the time and place of the meeting and the general nature of the business to be transacted. The article could be amended so that it distinguishes between the kinds of

business conducted at meetings. There are two kinds of business; ordinary business and special business. Ordinary business must be specified in the articles and is usually the declaration of a dividend, the consideration of the accounts, the reports of the directors and auditors and the appointment and fixing of the remuneration of the auditors. These matters are always dealt with at the AGM and by using the words ordinary business the list (above) in the articles is meant. All other business is special business. It saves printing costs if the notice for the AGM can say the words ordinary business instead of detailing the above list. If Table A is unamended the whole list must be stated. Special business must always be stated. In a small private company with few shareholders printing costs are not as expensive as in a company with hundreds of shareholders and therefore an amendment may not be necessary.

Article 81 deals with the disqualification of directors for various reasons, one being if the director comes under the Mental Health Act. An amendment will cover any illness which prevents him from doing his job effectively.

It is only salaried directors who come within Article 87 and who may receive benefits such as pensions. This may be extended to all directors. It could be argued that this may be regarded as very important to the directors personally. The same could be said of the amendment which widens the scope of the indemnity by Article 118.

**Additional articles to be considered**

The promoters may consider the use of an associate director clause whereby employees may be appointed as associate directors. Such directors would be given very little power in that they have no rights and are not regarded as directors as far as Company Law is concerned. The promoters may also consider giving the directors express borrowing powers but since Article 70 states that the business of the company shall be managed by the directors who may exercise all the powers of the company, this would merely be a safeguard.

The most important additional article to consider is an article dealing with sections 80 and 89.

**Section 80**

If the directors wish to allot shares, under section 80 they must have authority to do so. The authority may either be given by the company in general meeting or by the articles. At the beginning of the company's life it is quite likely that other people will be taking shares or that the subscribers to the memorandum, who have one share each, will require more shares. The directors therefore must have the section 80 authority to allot the shares and it is easier to put the authority in the articles when they are being drafted than to call a company meeting to get the necessary authority. Later on in the company's life it is procedurely easier to get the authority from the general meeting. Therefore the section 80 authority must be added to the existing articles.

There are a few rules relating to the section 80 authority.

The maximum amount of shares that may be allotted must be stated in the authority. The best way to do this is to say that the directors may allot all the shares in the nominal or authorised share capital.

The authority must state the date on which it will expire and the date must not be more than five years from the date on which the authority is given. In drafting the article the date on which the authority is given is the date of the incorporation of the company and it is possible to say that the authority will expire five years from the date of incorporation.

Section 80 authority cannot be used for shares not in existence at the time the authority was given. Thus, if a company is formed with a nominal capital of £10,000, consisting of 10,000 £1 shares, the section 80 authority can only relate to those 10,000 shares. If the company later decides to increase the nominal capital to £30,000, consisting of 30,000 £1 shares, then a new section 80 authority will be required before the directors can allot the 20,000 £1 shares. This means that since in practice many companies allot all the nominal capital as soon as the company is formed, the section 80 authority in the articles is used up and next time the directors wish to allot shares, not only must they increase the nominal capital but they must get another section 80 authority.

Finally, it is not possible to exclude section 80. The directors must always obtain the necessary authority to allot the shares.

**Section 89**

Once the directors have the authority to allot the shares under section 80, the question arises to whom do they allot the shares? Section 89 deals with this problem. It states that the shares must be allotted to existing shareholders according to the proportion of shares they already hold. Thus, if a shareholder has 50% of the existing shares, he must be offered 50% of the shares being allotted.

When a company is first formed this rule may create problems. There are usually two shareholders only, the two subscribers to the memorandum. They hold one subscriber share each. It is quite a probable that other people wish to take shares in the newly formed company. However under section 89 the shares must be allotted equally to the two subscriber shareholders.

Fortunately section 89 (unlike section 80) may be excluded by a provision in the memorandum or articles. It does not have to be a definite statement saying that the section is excluded. Any statement which is inconsistent with section 89 will be sufficient to exclude the section. Thus a statement saying that the directors may offer the initial nominal or authorised capital to such persons as they think fit, is sufficient to exclude section 89 when the directors are allotting the shares in the initial share capital. The directors may then allot to all those who wish to become shareholders and not just to the two subscriber shareholders. Later on, if the company increases the share capital, then the new shares will have to be allotted according to section 89 and therefore must be allotted according to proportional pre-emption rights.

**Factors to be considered when drafting articles**

There is no set answer to the question which articles in Table A must be amended, and which additional articles must be used. The answer will always depend upon the circumstances of each company as stated previously.

Also it must be remembered that at the time the articles are being drafted, the company does not exist and the promoters are the clients who have to be advised as the best form

of articles which will suit their interests. This is why there are so many amendments to Table A affecting directors. Thus although it may not be for the benefit of the company to have a **Bushell v Faith** type clause, it is certainly for the benefit of the promoters who presumably are going to be the directors and shareholders. A long term view has to be taken of their interests and it could be that in the future other shareholders will take shares in the company and the initial majority shareholders and directors may become minority shareholders who wish to remain as directors. They must therefore be protected.

**Alteration of the Articles**

The articles, which are drafted before the company is formed, will be sent to the Registrar of Companies in Companies House, together with the other documents necessary to form a company. The company is then bound by its articles and must act in accordance with them. However a situation may arise whereby the company wishes to alter its articles. This may be done under section 9, which states a company may alter or add to its articles by special resolution. When the special resolution has been passed, a copy of it must be delivered to the Registrar within 15 days of the resolution being passed together with a printed copy of the amended articles.

It may be that a company is formed with Table A, unamended, as its articles. During the life of the company certain of the articles in Table A may prove to be very inconvenient. An example of this may be that the directors are often interested in contracts made with the company. Therefore the articles may be changed so directors can vote and count in the quorum where they are interested in contracts with the Company. Another example may be that a majority shareholder and director is going to become a minority shareholder because capital is needed by the company and he cannot afford to buy any more shares. He wishes however to remain a director and therefore before the allotment of shares to the outsider, it is agreed that the articles should be altered to bring in a **Bushell v Faith** type clause which is to be entrenched. This will protect the director from being sacked should relationships deteriorate between him and the new majority shareholder.

It is therefore important to realise that although the amendments to Table A may be undertaken before the company is formed, the amendments are equally as valid and may be used during the company's life to deal with any particular problem at that time.

# THE ROLE OF LAW IN JAPANESE SOCIETY

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### BACKGROUND[1]

Japanese Law is an unusual hybrid: onto its original customary law has been grafted law from two different families of law: the common law family and the civil law family. The reasons for this mixture are historical.

Prior to the twelfth century, Japan was ruled by Emperors but, at the end of the twelfth century, the Shogun, who led the military forces, took power and the Emperors became mere figureheads until the downfall of the Shogun in 1867. The period from the twelfth until the end of the sixteenth century was one of civil disturbance as families competed for the power of the Shogunate; peace and stability were restored by the Shogunate of the Tokugawa family which held power from 1603 until 1867 (described therefore as the "Tokugawa period").[2] The Tokugawa Shogunate, in consolidating their power, cut off Japan from the outside world. There was a complete ban on all Western literature (partially lifted in 1720)[3] and, by 1638, most foreigners had been expelled: only the Dutch and Chinese had a limited right to trade.

However, during the nineteenth century, Western interest in trade with Japan grew and, in 1853 the US government sent a fleet of warships to cruise off the Japanese coast in order to persuade the Japanese to trade. This gunboat diplomacy bore the expected fruits: the Shogun unwillingly entered a series of "unequal" treaties, first with the US and then with England, Russia and the Netherlands. The treaties were seen as "unequal" because, in particular, it was agreed that foreign consular courts rather than Japanese courts would have jurisdiction over foreigners: this was insisted upon by Western nations who considered Japanese law to be barbaric - as perhaps, in some ways, it was, with torture an institutionalised part of the judicial system.[4] Nevertheless the treaties with the Western nations were widely resented in Japan and this was one of the main causes of the Shogun's downfall in 1867.

The Shogun was replaced by the Emperor who encouraged his country to modernise and learn the technical and scientific skills possessed by the Western nations. It was accepted that the law had to be rapidly modernised so that the humiliating imposition of extraterritoriality in the treaties could be expunged and foreigners could be made subject to the jurisdiction of the Japanese courts. A criminal code and a code of criminal procedure entered into force in 1880 and were heavily influenced by French law.[5] The civil code, brought into force in 1898, was based primarily on German law, however; this was preferred to the French draft for various reasons, not least because of German's enhanced prestige as the victor in the Franco-Prussian War.[6]

After the Second World War, when Japan surrendered to the USA, Japan was occupied by US forces until 1952. The US occupation force was concerned with not merely physical but also psychological disarmament of the Japanese, so that never again would a small military élite under the Emperor take the country into war. Thus, in 1946, a Japanese constitution was introduced which was in many ways similar to the US Constitution and which guaranteed fundamental human rights. The various codes were also revised to ensure, for example, that there was equality of treatment between man and woman.

In order to bring democracy to the economy, the US occupying force was also responsible for the introduction of new company and competition law (the latter known as "antimonopoly" law) largely based on American models.

All these new laws, both civil and common law based, were imposed on the Japanese people by those in power and they were not immediately absorbed by the Japanese populace. This is hardly surprising for these laws reflected societies which were vastly different to Japanese society which was still, in essence, a feudal state at the end of the Second World War.

It is therefore interesting to examine Japanese Law because rules and concepts have been drawn from more than one legal system and adapted to Japanese society, which has undergone many social and economic changes since the end of the nineteenth century. However, it is not so much the law itself as the Japanese attitude to the law which has excited Western attention within the last fifty years. This is not as surprising as it may initially seem: for, in asking why the Japanese people resort to law less frequently than most Western nations (or Hong Kong Chinese or Taiwanese for that matter), one is drawn into more problematics areas, involving an examination of the role of the law in society and its interreaction with societal controls.

**The Use of Law in Japan**

Law appears to take a less prominent role in Japan than in Western societies. It is well known that the Japanese resort to litigation much less frequently than Western nations in settling disputes.[**7**] It has also been observed that Japanese businesses more frequently rely on oral contracts and, if contracts are in writing, they tend to be simpler and less detailed than Western models. In particular, rather than using an arbitration clause in a written contract, it is usual for the parties to provide that, in the event of a dispute, the parties must negotiate in good faith.[**8**] This type of clause should not be confused with an arbitration clause, which is so popular with Western companies. In arbitration, an arbitrator will normally apply the law alone (unless the law of contract or the arbitral rules chosen by the parties provide otherwise) to arrive at a decision in favour of one party or another: in contrast, the typical clause in a Japanese contract is asking the parties to negotiate and it is implicit that the parties will not consider the law alone, if at all, but will make mutual concessions to arrive at a solution which both are prepared to accept.[**9**]

When one turns to examine Japanese criminal law, one discovers that the law is applied in a more limited way than in Western societies. Where a relatively trivial crime has been committed, the police openly exercise a discretion in deciding whether to prosecute, taking account of whether the offender is apologetic and contrite.[**10**] More serious crimes must be referred by the police to the prosecutor. However, according to Article 248 of the Code of Criminal Procedure of 1948, the prosecutor can exercise a discretion whether to prosecute[**11**], however serious the crime. This wide discretion to allow even a murderer, for example, to escape punishment is explained by the fact that the Japanese place emphasis on correction and rehabilitation rather than punishment or retribution. If it is clear that the offender is apologetic and unlikely to re-offend because of age, social circumstances etc, then it is considered preferable that the offender should be absorbed back into the community where societal pressures (from his family, for example, or from his position in a company) should ensure that he subsequently conforms to socially acceptable conduct.

Having demonstrated that law does play a more limited role in Japanese society, one inevitably has to ask the reasons for this. In attempting an answer, a more detailed examination of why Japanese people resort to litigation less frequently is necessary.

**Resort to Litigation**

Various writers, in discussing the low level of litigation in Japan, have looked to cultural factors for an explanation. Attention is drawn to the fact that conciliation was the norm throughout the Tokugawa period[**12**] and Shinto, the native religion in Japan, is based on a belief in harmony. In particular, Kawashima has argued that litigation is disliked because it recognises and admits the existence of a dispute and leads to a clear cut decision of who is right or wrong according to universalistic standards which cannot take into account the particular circumstances of the parties involved.[**13**] He has stated that, within a social group, it is expected that those lower in the social hierarchy are expected to defer to their superiors in the expectation that their superiors will make concessions, whilst those of equal status have a flexible relationship and the application of fixed universalistic standards would not suit such a relationship. Kawashima has suggested that disputes are less likely to be solved by conciliation where either there is a dispute between social groups or a disagreement occurs in the tense relations between usurer and debtor[**14**]; in other words, it is more likely that the parties will litigate where social control is weak and where no tradition of harmony exists. Kawashima concluded that there would be increasingly more resort to litigation as traditional values become less influential.

However, Kawashima's writings have been severely criticised by Haley, who argues convincingly that the idea that the Japanese are reluctant to litigate is a myth.[**15**] Haley's view is that conciliation has been desired by successive governments in Japan and this explains why laws providing for conciliation of disputes were introduced from the 1920s onwards. He also suggests that the governments have done nothing to remove the various obstacles to litigation.

Certainly, it is true that past governments, referring to the traditional Japanese respect for the spirit of "harmony" (wa), passed a series of conciliation laws from the 1920s onwards which were subsequently consolidated in the Domestic Proceedings Act 1947 and the Conciliation of Civl Affairs Act 1951. Similarly, after a number of major pollution cases were litigated in the 1960s, the government passed the Law for the Resolution of Pollution Disputes in 1970 which provided for the mediation schemes administered by the Prefectural Pollution Review Board, whose members are appointed by local government officials and who are generally law professors, professional lawyers or retired judges. It is interesting to note that the government stated that the mediation schemes were consistent with Japanese tradition; nevertheless, there is incontrovertible evidence that the 1970 law was a compromise to appease businesses which had objected to the imposition of a strict liability law with compensation determined by the courts as in any other tort dispute.[**16**]

Nevertheless, it should be emphasised that conciliation in civil cases is optional (although for contested divorces, it is a necessary first stage) and the parties are not obliged to accept a suggestion by the conciliation committee. Either party can request conciliation (Chotei) prior to trial, or the judge may refer a matter to conciliation once the proceedings have begun. The conciliation committee will consist of two lay commissioners plus the judge, although in practice the judge is usually absent until the final hearing. Parties frequently do accept the suggestions of the conciliation committee

and, if they do, the agreement by conciliation subsequently become effective like a judgment.[**17**] Conciliation is very popular in Japan, particularly in the lowest courts, the courts of Summary Jurisdiction.[**18**] However this popularity may be accounted for by the difficulties that a person who wishes to use the Japanese courts must face.

Potentially the most difficult problem, in my view, is the relatively small number of professional lawyers (bengoshi) in Japan, who are concentrated in the larger cities. As Oda points out, "There are only about 12,000 attorneys in Japan to serve a population of 110,000,000 compared with some 45,000 in the UK with a population of some 56,000,000."[**19**] The number of professional lawyers are directly controlled by the government. All practising lawyers (including judges and prosecutors) have had to complete a two year apprenticeship at the Legal Training and Research Institute after passing a national judicial examination. As the number of applicants has increased, the pass rate has dropped and has been under 2% since 1974.[**20**] The government pays a stipend for those who attend the Institute and has used budgetary constraint as a reason for not allowing more than five hundred applicants to pass each year. Haley comments that "The failure of Japan to provide more judges and lawyers has been clearly a matter of governmental policy,"[**21**] whilst Kawashima comments "The fairly small number of lawyers in Japan relative to the population and the degree of industrialisation suggests that people do not go to court so frequently as in Western countries and that the demand for lawyers' services is not so great."[**22**] In order to break away from this "chicken and egg" debate, one must comment that the public need for lawyers has not been so great as to persuade the government to allow more lawyers to qualify. Moreover, although established lawyers can pick and choose their clients, those newer to the profession, totally reliant on recommendations since advertising is not allowed, may find themselves under-employed.[**23**] It should also be pointed out that the relatively small number of lawyers has not as such led to enhanced prestige, as might perhaps have been anticipated. Nevertheless, it is apparent that if a potential litigant lives outside the big cities, the problem of access to a lawyer is a big stumbling block.

A further problem, but a less convincing one in my view, is the fact that there are delays in having the case decided. A case taken to a District Court, which hears the more serious cases at first instance rather than the Summary Court, may take approximately 13 months to be decided. This is not particularly long although, if it is appealed to the High Court and Supreme Court, the case will take on average five years to be decided, although a small proportion take much longer. The delay is caused partly by the relatively small number of judges and partly by the discontinuous trial process where the parties, rather than having their "day in court" as in this country, have their cases reviewed at approximately monthly intervals. However, as countries such as France and Germany have a discontinuous trial process with consequent delays as a result, delays in Japanese courts do not in themselves seem a strong reason in considering the relative lack of litigation in Japan.

Haley also argues that the Japanese courts have no equivalent to the common law power of contempt: although prosecutors can initiate criminal proceedings if necessary, Haley considers this a cumbersome and impractical approach.[**24**] He argues that lack of effective enforcement measures encourages the Japanese to resort to social controls instead.[**25**]

Finally, it should be noted that legal fees are high and, even if a party wins a case, the cost of legal fees cannot be recovered from the losing party. This has led Oda to conclude that, taking account of delays in the court, shortage of lawyers and legal costs, "...it is not so much an ingrained 'non-litigiousness' as a rational cost-benefit judgement which keeps the ordinary Japanese away from the courts."[**26**]

**Homogeneity of Japanese Society**

In considering the reasons for the more limited role of law in Japanese society, it is important to refer to the fact that Japan is an unusually homogenous society with certain rules of social behaviour expected of individuals. This is due to historical and geographical factors: Japan is isolated from the Asiatic continent and has not engaged in a series of wars throughout its history as Western relations have: there has also been the long period of isolation during the Tokugawa period. Also, for most of its history, approximately 85% of the Japanese people have farmed the land and the tight agricultural schedule which was necessary in growing rice gave Japanese people "a sense of the unity of all people of the nation".[27] It is evidenced by the fact that Koreans, brought to Japan in large numbers during the Second World War to replace the many Japanese workers fighting in the war, have never been absorbed into Japanese society. More surprisingly, there are a group of Japanese (called "burakumin" : "hamlet people") who have traditionally been discriminated against because their families have been employed in demeaning jobs such as butchering animals, the leather trade, etc, contrary to the Buddhist prohibitions on taking the lives of animals: this discrimination still continues and people from these communities cannot obtain jobs with big companies and there is strong societal pressure on young people to ensure that an ordinary Japanese person does not marry a burakumin.[28]

Such a strong homogeneity of thinking[29] assists in explaining why the Japanese are often described as "group conscious". When Japan was primarily an agrarian society, the group was the family unit. Nowadays, the group is typically the large company: the company usually provides housing and other benefits for its employees who feel an emotional attachment to the company.[30]

This notion of "group consciousness" may help the observer to understand why, in Japanese law, the enforcement of economic laws such as the Antimonopoly Act of 1947 depend upon criminal and administrative sanctions rather than relying upon individual suits.[31]

The close relationship between the Japanese people also helps to explain the limited role of law.[32] It is interesting to observe that police stations ("Kobans") are small and locally situated as this makes the police familiar in neighbourhoods and assists in creating close ties with the pepulace. However, there is considerable social distance between the police and the Korean community, and although some understanding exists between the police and burakumin, definite tension still exists.[33] One can see that it is easier for the police to exercise their discretion not to prosecute where there is a relatively close relationship between the pelice and the offender, the offender showing a willingness to accept social norms by admitting his guilt and apologising.

The Japanese concern to establish a good understanding with prospective business partners also helps to explain the "negotiate in good faith" clause: in any society, if companies expect to have a continuing business relationship, they are less likely to insist on their strict legal rights.[34] In Japanese society, where there is a great emphasis on having a trustworthy reputation so that personal introductions become all important, relationships between busiensses tend to be closer as a result. However, in a society where there are obstacles to litigation and sanctions are not as effective as their common law counterparts, there is every reason for a business to spend more effort in acquainting itself with a prospective business partner rather than having to run the risk of litigation subsequently.

**Limitations on the role of law**

Without law or without sufficient law, a society may resort to various forms of social control[**35**], such as ostracism, in order to control its members.

What one can see operating in Japan is a mixture of legal and social controls. There are not only social controls in the criminal sphere which influence the exercise of police and prosecutional power to prosecute, but also in the civil sphere. For example, ostracism is practised by the Japanese financial clearing house to ensure that no-one reneges on a promissory note or cheque: it has a rule that no bank can transact business of any type with any individual or firm that defaults twice on promissory notes and cheques: as businesses need a bank account to stay in business this practice ensures that promissory notes and cheques are usually honoured.[**36**]

Another form of social control, in a society where a trustworthy reputation is all important, is adverse publicity. Adverse publicity can lead to loss of 'face' and damaged reputation. Adverse publicity has been sought by the plaintiffs' lawyers in the thalidomide[**37**] and pollution[**38**] cases in the 1960s, and in more recent cases[**39**], to put pressure on the defendants, and to attempt to achieve a consensus in the community on a particular issue to put political pressure on the government.

Where limitations are placed on the role of law, both negative and beneficial effects can be produced. The negative effects can be seen in reading of the violent behaviour of the frustrated victims of pollution towards the employees of the responsible companies after the companies initially denied liability.[**40**] However, there may be beneficial effects as well, as illustrated by the work of the Japanese Civil Liberties Bureau.

The Civil Liberties Bureau was established in 1948 with the active encouragement of the US Occupation Force who hoped that it would lead people to assert their individual rights, particularly against the government. Ironically, less than 1% of the complaints received by the Bureau consist of such complaints: the vast majority of complaints relate to "social rights" involving, for example, parents' complaints about the disrespectful behaviour of their children towards them, or people complaining about unfriendly or selfish neighbours, etc. In other words, a large number of these grievances could not be taken to court if the complainants lived in a Western society and, what is more, there would be no formal body provided to offer counsel and mediation to the complainant. The main function of the Bureau is, therefore, to encourage people to conform to expected norms of behaviour and, although the Bureau has no formal enforcement powers, it is remarkably effective because the Commissioners are older, respected members of the society who rely on persuasion, publicity and conciliation in resolving most complaints.[**41**]

Alternatives to law can therefore fulfil a useful function. Mediation and conciliation is used in various informal ways in Japanese society: for example, a third party is likely to attempt to mediate when a husband and wife are considering divorce, and the police are frequently used as mediators in all types of dispute.[**42**]

The advantage of mediation and conciliation is that, because some sort of realistic compromise is likely to be agreed, they are less likely to leave one of the parties feeling bitter and resentful.[**43**] In particular, if conciliation is requested by a party in a civil case, the Conciliation of Civil Affairs Act 1951 provides that the Commissioners should determine the legal position and then apply common sense in trying to achieve a settlement. This allows a flexible, individualistic response to a dispute. Also, because the

Japanese place so much emphasis on apologises in their culture, legal resolutions of disputes in court are, in cetain cases such as the pollution cases, particularly unsatisfactory.[**44**] In the pollution cases, the victims were more concerned to receive an apology than compensation.

Mediation and conciliation play only limited roles in a number of Western societies and clearly they could be used more extensively. Fujikura has suggested that Americans resort to litigation frequently because there are few other means or devices that allow parties to discuss their problems together.[**45**]

Law is clearly a valuable tool for regulating rights and duties between people within a society and establishing norms of behaviour. Without law, not merely peaceful forms of social control such as obstracism might be used but also violent forms of social control where one individual or group imposes its will through force. A perfect system of law would ensure that a weaker party is always protected and this is dependent upon easy and affordable access to the courts with effective remedies available. If such a system of law was then supplemented by mediation and conciliation, a complainant could then choose the most appropriate form of dispute resolution and there could be no suggestion that the complainant was in effect being forced to use mediation or conciliation because of a lack of a satisfactory alternative. No society has entirely achieved such a perfect system of law: however, the problem with the limited role which law plays in Japanese society is that it is not clear that the social controls used are necessarily always the best[**46**] and it is not clear to what extent mediation can lead to an unfair settlement.

## Notes

(1) For a brief overview see K Zweigert and H Kötz, "An Introduction to Comparative Law". Vol 1, 2nd ed 366 - 372.

(2) For an explanation of the law (essentially criminal and administrative) which existed during this period, see Henderson, "The Evolution of Tokugawa Law" in Henderson and Haley, "Law and the Legal Process in Japan" (1978) 4 - 30. See further, Wren, "The Legal System of Pre-Western Japan", 20 Hastings LJ (1968) 217 - 244.

(3) Yosiyuki Noda, "Comparative Jurisprudence in Japan : Its Past and Present" in Hedeo Tanaka, "The Japanese Legal System" (1976) 194, at 197.

(4) Torture was banned in civil cases in 1872 and all institutionalised torture was banned in 1879.

(5) Boissonade, a French professor, had been responsible for drafting these codes. See Takayanagi, "A Century of Innovation: The Development of Japanese Law 1868 - 1961" in H Tanaka, "The Japanese Legal System" 163 et seq.

(6) See ibid, p.178 et seq, for a detailed explanation of the academic and parliamentary debate which led to the rejection of the French draft of the civil code in 1890.

(7) For detailed figures see, eg Hideo Tanaka, "The role of law and lawyers in Japanese Society" from H Tanaka "The Japanese Legal System", 254 at 255.

(8) Kawashima, "The Legal Consciousness of Contract in Japan" from Henderson and Haley, "Law and the Legal Process in Japan" (1978) 841 et seq.

(9) For a more general discussion of mediation and arbitration, see Peter Stein, "Legal Institutions" (1984) 5 - 7.

(10) David H Bayley, "The Individual and Authority", from Henderson and Haley, "Law and the Legal Process in Japan" (1978) 740 et seq.

(11) Technically, prosecution is "suspended": for further details see B J George, "Discretionary Authority of Public Prosecutors in Japan" Law in Japan (1984) 42 - 72. See further Dando, "System of Discretionary Prosecution in Japan", American Journal of Comparative Law (1970) 518 - 531.

(12) The Shoguns actively discouraged litigation by a variety of mechanisms: see Henderson, "The Evolution of Tokugawa Law" in Henderson and Haley, "Law and the Legal Process in Japan" (1978) 4 at 22 et seq.

(13) Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan" in Tanaka, "The Japanese Legal System" 269 at 277.

(14) ibid, at 279 et seq.

(15) John O Haley, "The Myth of the Reluctant Litigant", Journal of Japanese Studies (Summer, 1978) 306 - 322.

(16) Frank K Upham, "Law and Social Change in Postwar Japan" (1987) at 56 et seq.

(17) For details see H Tanaka, "Conciliation", in Tanaka, "The Japanese Legal System" at 492.

(18) Hiroshi Oda, "The Land of the rising lawyer"Financial Times 20 August 1987.

(19) ibid. However, in comparing figures, one should note that a number of matters dealt with by lawyers in the UK are not dealt with by lawyers in Japan: for example, divorces are registered in the Family Register and are seen as an administrative matter rather than a legal one

(20) For figures see Hakaru Abe, "Education of the Legal Profession in Japan", in Tanaka, "The Japanese Legal System" 566 at 567

(21) Haley, ibid at 310.

(22) Kawashima, ibid at 280.

(23) Oda, ibid.

(24) Haley, ibid at 320. See also John O Haley, "Legal vs Social Controls", Law in Japan (1984) 1 at 2.

(25) Haley, "Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions", Journal of Japanese Studies 8:2 (1982) 265 at 275.

(26) Oda, ibid.

(27) Isaiah Ben-Dasan, "The Japanese and the Jews", in Tanaka "The Japanese Legal System" (1976) 286 at 289.

(28) See further: E Ames, "Police and Community in Japan" (1981) 94 et seq.

(29) See further: Yosiyuki Noda, "The Characteristics of Japanese Mentality" in Tanaka "The Japanese Legal System" 295 et seq.

(30) Nakane, "Criteria of Group Formation" Japanese Society (1970) 1 - 22.

(31) See further: H Tanaka and A Takeuchi, "The Role of Private Persons in the Enforcement of Law"; Tanaka "The Japanese Legal System" 331 - 352.

(32) For a broader discussion, suggesting that law varies with relational distance, see D Black, "The Behavior of Law" (1976) 40 - 46.

(33) See Ames, ibid. For a Western comparison see D Black, "The Manners and Customs of the Police" (1980) "Dispute settlement by the Police" 109 - 192. See further Henry Lundsgaarde, "Murder in Space City: A Cultural Analysis of Houston Homicide Patterns" (1977) 56 et seq.

(34) See eg S Macaulay, "Contract Law amongst American Businessmen" in "The Social Organisation of Law" (1973) by D Black and M Mileski, 75 - 94.

(35) See Stein, ibid 7 12.

(36) Haley, "Sheathing the Sword of Justice in Japan : An Essay on Law Without Sanction", ibid at 277.

(37) See "Diary of the Plaintiff's Attorney's Team in the Thalidomide Litigation" Law in Japan Vol 8 (1975) 136.

(38) Upham, ibid, Chapter 2.

(39) Haley, "Introduction : Legal vs Social Controls" ibid 5 - 6.

(40) Upham, ibid.

(41) Joel Rosch, "Institutional Mediation: The Evolution of the Civil Liberties Bureau in Japan" Law and Society Review, Vol 21 Number 2 (1987) 243 et seq.

(42) Henderson, "Modern Japanese Analogies to Tokugawa Conciliation" in "Conciliation and Japanese Law: Tokugawa and Modern" Vol II (1965) at 191 et seq.

(43) For a discussion of mediation in African societies, see eg James L Gibbs "Two Forms of Dispute Settlement among the Kpelle of West Africa" in Black and Mileski "The Social Organization of Law" 368 et seq.

(44) Upham, ibid at 40

(45) Kōichirō Fujikura "A Comparative View of Legal Culture in Japan and the United States" Law in Japan (1983) 129 at 131.

(46) For example, the prosecutor's discretion to prosecute, which is subject to procedural safeguards and which is generally exercised impartially, is potentially unjust in taking account of the defendant's social background. See the case of **Japan** v **Fukumoto** in B J George's article, ibid, at 69.