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EDITORIAL

This issue of the *Nottingham Law Journal* has a major theme and a minor theme. Europe provides the major theme. This is reflected in Alan Riley's bold suggestion that the Civil False Claims Act in the United States provides the EC with a powerful model that could be developed as a means to prevent fraud against its budget and in Jonathan Steele's examination of the Freedom of Information Act in the light of wider European developments. Issues of European law and, in particular, European public law, also crop up in the case note and book review sections of the *Journal*. The minor theme is criminal law and criminal justice. This is reflected in Russell Heaton's assessment of the impact of *R v G* on *Caldwell* recklessness, in his subsequent book review and in the Nottingham Matters section, which draws attention to the important work going on in Nottingham Law School in the field of international and comparative criminal justice. It remains for me to express my deepest thanks to all our contributors and, in particular, to my excellent production team of Jane Ching, Kay Wheat, Tom Lewis and Lesley Comerie, without whom there would be no *Journal*.

ADRIAN WALTERS

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ARTICLES

THE CIVIL FALSE CLAIMS ACT: USING LINCOLN'S LAW TO PROTECT THE EUROPEAN COMMUNITY BUDGET

*ALAN RILEY**

LINCOLN'S LAW AND THE EUROPEAN COMMUNITY BUDGET

This paper argues that the US Civil False Claims Act of 1986 (hereafter "CFCA") could potentially provide the European Community with a means to effectively protect the largely decentralised revenue collection and expenditure of the Community budget. It also offers a solution to the difficulty of creating an effective means of investigation and penalisation of cross-border fraud without having to create a Community criminal law or a European Public Prosecutor.

The CFCA was originally enacted at the height of the American Civil War. The US government was faced with a series of intolerable scandals concerning defence contractors. The newspapers of the Northern states were full of stories of the Union army being provided with diseased mules, cardboard boots and exploding muskets. Abraham Lincoln memorably railed against such corrupt defence contractors:

> Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the Nation while patriotic blood is crimsoning the plains of the South and their countrymen are mouldering in the dust.[1]

To protect the US budget Lincoln asked Congress to enact a Civil False Claims Act. The original CFCA of 1863 envisaged that private plaintiffs, known as *qui tam* plaintiffs[2] or relators (hereafter "relators") would bring actions for recovery against

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[1] 89 Cong. Rec. 10,847 (1943). For a discussion of the contractor abuses of the civil war era, see Helmer, *False Claims Act: Whistleblower Litigation* (LexisNexis, 2002) 3rd Edition para 2.4.

[2] "*Qui tam*" is a contraction of *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which is translated as one, "who pursues this action on our Lord the King's behalf as well as his own". Although the Civil False Claims Act is US legislation, the idea of encouraging private parties to enforce public civil and criminal law has European origins. The origins of the CFCA can be traced back to *qui tam* actions in 14th century Europe. In an age where there was no real system of law enforcement, private citizens, often the victims or the victim's relatives, could bring actions in the name of the Crown to enforce the law. Incentives were built into the *qui tam* system, such as forfeiture of the wrongdoer's assets to the private party enforcing public or criminal law. However, a number of factors, such as the growth of urbanisation, making it more difficult for private parties to know and track down the perpetrators; the rise of seemingly victimless inchoate crimes; the Crown's interest in exercising its prosecutorial rights in order to exercise the right of forfeiture and winning public support by tackling crime and, as the centuries wore on, pressure for respect of defence rights, led to the development of a prosecution system controlled and run directly by the Crown. In colonial America, and for a number of decades after the Revolutionary War, *qui tam* legislation was popular for similar reasons to those in medieval and early modern Europe: the systems of law enforcement were weak or non-existent and private parties had to be motivated in order to draw them into law enforcement: Helmer, *ibid*, para 2.2. According to Helmer, the greatest early exponent of *qui tam* legislation was Edward III of England. See also Bucy, "Information as a Commodity in the Regulatory World" (2002) Houston LR 905, 910.

firms or individuals who had defrauded the US government. The penalties for violation of the Act were set at double damages and a civil penalty of $2,000 per violation. If a relator were successful, the relator would collect half of the monies recovered from the suit, the US authorities receiving the other half. The relator prosecuted the action alone before the US federal courts and the government had no direct right of intervention. The only way the action could be withdrawn or discontinued was by written consent of both the US District Attorney and the court.[3] The relator need not have been affected by the defendant's conduct in any way. He or she was deemed to have standing on the basis that the US government, by operation of the Act, could assign its right to sue to the private plaintiff.[4] The potential of the 1863 Act was eventually emasculated by a series of amending provisions between 1874 and 1943.[5] However, in 1986 Congress effectively resurrected the Lincoln legislation, following the contractor abuses stemming from the largest peacetime military build-up in US history.[6] Penalties are now set at triple damages for the US government, with an additional fine of between $5,500 to $11,000 per invoice; the Department of Justice has a right to prosecute the case, otherwise the right of *qui tam* relators to bring actions are retained and the relator-whistleblower can be rewarded with up to 30% of the recovery. Since 1986, the modern CFCA has resulted in recoveries of billions of dollars from firms and individuals who have defrauded the US government and deterred tens of billions of dollars of fraud that would otherwise have occurred.

A European CFCA created by Community regulation and managed by the European Commission could potentially provide the Community with a powerful means to protect the budget from fraud. Frauds would arguably be easier to detect and the existence of such a European CFCA could also act as a major deterrent to many potential fraudsters who might otherwise try to defraud the Community budget. In particular, with the accession of ten new member states, with largely weak public administrations and court systems,[7] a European CFCA may well provide significant additional protection for the Community budget in those states. In addition, it would

[3] Helmer, *op cit.*

[4] Bucy, "Private Justice and the Constitution" (2000) 939 Tenn LR, 945–946.

[5] Act of March 2, 1863, ch. 67, 12 Stat. 696–98 (1863) (first codified by Rev. Stat. 3490–94, 5438 (1874), amended by Ch. 377, 57 Stat. 608 (1943), codified at 31 USC § § 232–35 (1976), recodified at 31 USC, 3729–3731 (1982). The main damage to the Act occurred in 1943. There had been a number of parasitical *qui tam* suits brought on the back of government criminal prosecutions for contractor fraud in the defence sector. The parasitical suits enraged the then US Attorney General who, rather than amending the Act to deter such suits, insisted on the right of the US government to prosecute fraudulent contractors. Despite opposition from a number of senators who took the view that the government may not always have the will or resources to act, the *qui tam* elements of the CFCA were significantly curtailed. The 1943 amendments provided that if the government had any knowledge of the fraud when the relator's action was filed, that action must be dismissed. If the Department of Justice ("DoJ") took the case the relator became a mere observer. If the DoJ did not bring the case, the relator could proceed. However, in all cases the maximum bounty was 10%. For a discussion the events leading to the 1943 amendments and the impact of those amendments, see Helmer, *op cit*, para 2.5. Helmer points out that it was the "government knowledge" requirement that inflicted real damage on the operation of the Act. A government official somewhere could often be found to have had some knowledge of the fraud. Furthermore the Act was interpreted so that even if a relator provided information concerning a fraud to the government before filing his or her suit, such relator acquired knowledge operated as a bar to the continuance of the suit.

[6] Helmer, *op cit*, para 2.6.

[7] European Commission, *General Report on EU Enlargement II Progress by the Candidate Countries in Meeting Membership Criteria 2001* (Commission, 2002) 1; problem of corruption and low salaries in the public sector. In specific country reports there is, for example, concern regarding the independence and effectiveness of the judicial systems in Romania, *2001 Regular Report on Romania's Progress towards Accession* (Commission, 2002) 20 and delays in the Polish judicial system, with a backlog of 1·8 million cases and concerns about corruption in a small number of cases; *2001 Regular Report on Poland's Progress towards Accession*, (Commission, 2002), 20. In addition, Lithuania's report raises concerns regarding both judicial vacancies and the backlog of cases, *2001 Regular Report on Lithuania's Progress towards Accession*, (Commission, 2002) 18–19; similar concerns regarding judicial vacancies, as well as low salaries and backlogs are raised regarding Lativa, *2001 Regular Report on Lativa's Progress toward Accession* (Commission, 2002) 17–18 and concerns are also raised in Hungary regarding the overloaded Supreme Court, *2001 Regular Report on Hungary's Progress towards Accession*, (Commission, 2002). 18. See also UNICE, *Ensuring Enlargement is a Success*, UNICE Position Paper, May 2002 (UNICE, 2002).

create a Community system of investigation and administrative penalty, which would avoid the technical legal and political difficulties of creating Community criminal offences and a European Public Prosecutor.

DEALING WITH FRAUD IN THE COMMUNITY BUDGET

Although representing only 1 to 2% of the total GDP of the member states, the Community budget has a great practical importance in that it is the only source of funds that have generally Community, as opposed to national, objectives,[8] and it gives political expression to policies that underpin European integration.

The Community budget for 2002 is €98·2 billion. It is derived from what are known as "own resources". These include customs and agricultural import duties, €14·80 billion and €1·8 billion respectively; 1% of the VAT take of each of the member states, €38·30 billion; and a payment made by each of the member states based on the size of GDP, €43 billion.[9] On the expenditure side just under half goes on agricultural support at €45·2 billion, followed by €34·5 billion on the structural funds, such as the European Regional Development Fund, European Social Fund and Cohesion Fund. Relatively smaller amounts are then spent on training, youth and employment at €8·4 billion; energy and the environment, €5·2 billion and €4·1 billion on research and development.[10]

Under article 274 of the EC Treaty, the European Commission is required to implement the budget on its own responsibility and within the limits of its appropriations in accordance with the principles of sound financial management. The member states are required to co-operate with the Commission to ensure those objectives are met. Article 274 is underpinned by article 280, which directs the Community and the member states to counter fraud and other illegal activities affecting the financial interests of the Community. In reality, while the Commission has legal and political responsibility for the budget, the member states collect and pay 100% of the budget to the Community, and spend over 80%, mostly the agricultural and structural funds, on the Community's behalf. They are also responsible for supervising the effective application of the budget and applying administrative and criminal penalties should fraud affect the budget.

The Commission's role in combating budget fraud and irregularities is limited. It does have its own anti-fraud organisation, OLAF (known by its French acronym for Office Européen Lutte Anti-Fraude).[11] OLAF's principal role is to undertake internal investigations in respect of fraud and irregularity in use of Community funds within the European institutions. However, should criminal investigations become necessary, then OLAF requires the assistance of the member state in which the Community office is located where the fraud or irregularity occurred to undertake criminal investigations and, if necessary, prosecutions. In relation to external investigations, OLAF can, with the assistance of the member states, carry out checks and inspections provided by

[8] Aside from the funding obtainable from the European Investment Bank, and for the accession states, the European Bank for Reconstruction and Development.

[9] With the continual multilateral cuts in customs duties through WTO measures, customs duties are a declining source of Community revenue, the two largest sources of revenue are now VAT payments and the GDP based resource.

[10] European Anti-Fraud Office, (OLAF, 2003) p 8, http://europa.eu.int/comm/anti_fraud/publications/brochure/index_en.html

[11] OLAF may also be assisted by two nascent European organisations EUROJUST, a judicial network and EUROPOL, the European Police Co-operation unit. For a discussion of the role of both organisations see *Comprehensive EU Policy against Corruption* (European Commission, 2003) COM (2003) 317 Final 28 May 2003, 10.

Community regulations.[12] Again, whatever part OLAF plays in the investigation, criminal and administrative proceedings are in the hands of the member states. OLAF's role in the external investigation field is further limited by its staff resources. It has just 350 staff.[13] It is also restricted in the investigations it can undertake by its reliance on the member states and the general public to report cases of fraud and irregularity. This may explain why OLAF has carried out very few inspections under its own external investigation regulation.[14]

While OLAF can act as a significant intelligence and co-operation unit for the member state agencies in the fight against fraud, its role as a fraud-buster is strictly limited by its resources, the limits of its investigative powers and its lack of administrative or criminal penalties. The initial response to this question of lack of resources, investigative powers and penalties is that investigation and punishment is a matter for the member states. The states punish all other forms of fraud; there is no reason why they should not also investigate and punish fraud against the Community budget as well. Furthermore, the Community has adopted two significant measures to assist the member states in prosecuting fraud: first, a Convention on the Protection of the Community's Financial Interest,[15] and, second, a regulation providing for the Protection of the Community's Financial Interest.[16] The Convention provides for a common definition of fraud,[17] and the Council Regulation provides for a common definition of financial irregularity, [18]together with appropriate common standards for penalties, time limitations in bringing cases and provision for the member states to carry out checks and inspections.[19]

Fraud in the Community budget is not a new phenomenon. There are indications that the agriculture budget was subject to fraud as early as the 1960s.[20] A study in the 1960s suggested that one-third of Community steel subsidies were fictitious.[21] However, fraud in the foundational period of the Community running from its creation in the

[12] For a discussion of the detailed powers of OLAF in respect of its powers of investigation, see Gless and Zeitler, "Fair Trial Rights and the European Community's Fight Against Fraud" (2001) ELJ 219.

[13] For example, there are only currently 28 OLAF investigators to deal with all internal, direct expenditure, external aid and structural fund cases, *Report of the European Anti-Fraud Office, Third Activity Report for the Year Ending June 2002* (European Commission, 2003) 15.

[14] Although OLAF has powers under Regulation 2185/96 to undertake external investigations with the support of the member states, these powers have been scarcely used. See *OLAF Supervisory Committee Report*, June 2003 (European Commission, 2003) 10.

[15] Convention Drawn Up on the Basis of art K3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interest, OJ 1995 C316/49.

[16] Council Regulation 2988/95 on the Protection of the European Communities' Financial Interests, OJ 1995 L312/1.

[17] Fraud is defined, for the purposes of the Convention, as any intentional act or omission in respect of revenue or expenditure relating to the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of the European Communities; or non-disclosure of information in violation of a specific obligation, with the same effect or the misapplication of funds or misapplication of a legally obtained benefit with the same effect: art 1.

[18] Irregularity is defined as any infringement of a provision of Community law resulting from an act or omission which has or would have the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure: art 1(2).

[19] The Convention provides that penalties for fraud must be effective, proportionate and dissuasive, including, in the case of serious fraud, deprivation of liberty. The minimum amount of fine must not exceed €50,000: art 2. The Convention establishes the principle of criminal liability of heads of businesses (art 3); provides for jurisdiction (art 4); extradition and prosecution (art 5); co-operation (art 6) and rules on double jeopardy (art 7). The Regulation provides for the adoption of checking and inspection measures (arts 2 and 8); imposes a limitation period of 4 years (art 3); provides for administrative penalties (arts 4 to 8).

[20] White, *Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption* (Kluwer, 1998) 7.

[21] Checks carried out in the steel industry in the 1960s revealed that one third of the subsidised categories were fictitious: House of Lords Select Committee on the European Communities, *Fraud against the Community* (HMSO, 1989) 88.

1950s to the late 1970s and early 1980s was largely ignored by the media, the public and politicians. This benign neglect of fraud in Community budgets was first shaken in the late 1970s with the Como butter scandal and subsequent fraud scandals, together with the allegations that 10–15% of the budget was subject to fraud.[22] In the recessionary climate of the early 1980s the media, the public and politicians began to focus on the fraud issue. Political pressure led to the first significant anti-fraud measures being adopted and culminated in the establishment of OLAF's predecessor, UCLAF, in 1988. From then on a series of legislative measures such as International Conventions, Community regulations, action plans and co-operative measures have been launched to tackle budget fraud. The political priority of "budget fraud" was heightened by the fall of the Santer Commission in March 1999 and led directly to the replacement of UCLAF by OLAF, with increased powers of investigation within the Community institutions.[23]

Currently reported fraud amounts to less than 1% of the total Community budget.[24] However, the true "dark number" of unreported cases is likely to be much larger.[25] There are several reasons for significant under-reporting. In the first place, the member states do not want to report too much fraud and irregularity to the Commission. Large fraud figures make a state's enforcement and supervisory agencies look weak and can cause political problems at home.[26] In addition, reporting of fraud and irregularity is likely to result in the freezing of allocations to the programmes in question, and potentially the cutting of a state's overall funding allocations.[27] A further difficulty is that most of the fraud against the Community budget has a cross-border dimension. Evidence tendered before the House of Lords' Select Committee on the European Union indicated that 80% of the value of fraud relating to the Community budget was cross-border.[28] Consequently it can be very difficult, if not impossible, for member state agencies to know if a fraud or irregularity has been committed. For example, it is difficult to identify whether VAT was in fact paid in another member state or whether goods ostensibly despatched to a destination outside the Community and granted export subsidy, actually were exported or diverted back into free circulation within the Community. Thirdly, there is often a lack of incentive to protect Community resources. The least incentive is likely to exist in particular in respect of the collection of customs duties, where the tax is 100% a Community resource but 100% dependent on collection by the member states, and compounded by the significant potential for cross-border fraud, which requires co-operation between the member states to tackle, and given that the fraud does not concern a member state tax resource and, therefore, involves the net

[22] For a discussion of the origins of the fight against Community fraud, see the European Parliament's website on the subject: http://www.europarl.eu.int/comparl/libe/elsj/zoom_in/38_en.htm#1.

[23] Prior to the fall of the Santer Commission and the creation of OLAF, its predecessor UCLAF was only able to undertake investigations into the operations of the Commission and not into the other European institutions. OLAF was given powers in Regulations 1073/1999 and 1074/1999 to be able to undertake investigations into other European institutions. Recent case law has made it clear that this power of internal investigation extends to a wide range of European agencies. See Case C-11/00 *Commission v ECB* and C-15/00 *Commission v EIB* both of 10 July 2003, not yet reported.

[24] In the last three years, the total annual figures in euros for the value of reported fraud cases were as follows: for 2002, €324 million; 2001, €238 million and 2000, €517 million. See *Protection of the Financial Interests of the Communities and Fight Against Fraud, Annual Report 2003*, COM (2003) 0445 Final 23 July 2003 (European Commission, 2003) 67.

[25] A term coined in an article in 1994. See Ruimschotel, "The EC Budget: Ten Per Cent Fraud? A Policy Analysis Approach" (1994) JCMS 317.

[26] Ruimschotel, *ibid*, 321, 325.

[27] Ruimschotel, *op cit*, 330.

[28] *Prosecuting Fraud on the Communities' Finances-The Corpus Juris*, Ninth Report, (HMSO, 1999) para 2.

expenditure of state resources, such co-operation is not necessarily forthcoming.[29] Fourthly, there are the particular problems of the Accession States of Central and Eastern Europe who may not, even less than some of the western member states, have the administrative resources and procedures effectively to protect the Community's financial interests.[30]

A fundamental question in respect of the protection of the Community's financial interests is whether the member states, largely on their own, can be relied on effectively to protect those finances. The lack of willingness to report fraud cases and late[31] or poor[32] reporting; an unwillingness to recover unwarranted payments;[33] the lack of incentive to protect Community resources such as customs duties; the evident lack of commitment to prioritising the issue, either in terms of resources[34] or legislation,[35] suggest that it would be unwise to rely on the member states to put in place the resources, legislation and co-operative measures necessary to protect the Community's financial interest. Furthermore, there are strong grounds for arguing that the member states are unable effectively to respond to much of the cross-border fraud and irregularity. The difficulty is that while the Community constitutes a single commercial territory with open borders, there are 17 legal borders. A criminal jurisdiction limited to national territory compounded by 17 different types of criminal procedures and rules of evidence makes it extremely difficult, if not impossible, to detect and then prosecute cross-border fraud cases. A whole series of barriers face national prosecutors seeking to try a cross-border case in a national court.[36] The principal danger however is that the national trial court will refuse to accept evidence that has been obtained in another member state, on the grounds that it was not obtained by the same sort of procedure in the national court or according to the trial court's rules of evidence.

Frustration with the problem of obtaining convictions in cross-border fraud cases in the national courts have encouraged the Commission to suggest the establishment of

[29] White, *op cit*, 65. White also points out the low morale of customs officials whose numbers have been cut as a result of the removal of internal borders; the burden work of running the transit system and their own lack of resources. The Commission has more recently expressed concern regarding the funding of customs operations in Western Europe and amongst the Central and Eastern European states, post-accession. It is particularly concerned that those states that have funded their customs operations will be undermined by the lack of investment in other member state customs agencies: see *Strategy for the Customs Union* (European Commission, 2001) Com (2001) 51 Final 12.

[30] For a discussion of the state of play of the accession states' readiness to protect the finances of the Community, see *Protection of the Financial Interests of the Community, Annual Report 2002, op cit*, 7–13.

[31] Even where the member states report cases, they can take so long before they report that the reporting is valueless. See *Protection of the Financial Interests of the Community, Annual Report 2002, op cit*, 47, which suggests that reporting to the Commission post-detection can take considerable lengths of time. As the supervisory committee in its most recent report points out, late reporting makes it very difficult to identify the responsible individual. See *Supervisory Committee Report, op cit*, 13.

[32] The largest number of reported irregularities (1548 cases in 2002) had the code 99, which stands for unknown. This means that the member states were not able to identify the products concerned in the irregularities. As the Commission says "this information has no added value": see *Protection of the Financial Interests of the Community, Annual Report 2002, op cit*, 55–56.

[33] *Protection of the Financial Interests of the Community, Annual Report 2002, op cit*, 16.

[34] The Commission circumspectly puts it: "The very limited share of manpower assigned at national levels to such anti-fraud controls (investigation services of the ministries, police and judicial authorities) may indicate that insufficient account has been taken of the criminal law dimension of serious acts prejudicial to Community public finance". See *Protection of the Financial Interests of the Community, Annual Report 2002, op cit*, 15.

[35] The member states took from 1995 to October 2002 to ratify the first Convention on the Protection of the Financial Interests of the Community. An additional 1997 protocol on money laundering has yet to be ratified. By contrast, the member states managed to agree and ratify the politically controversial Treaties of Amsterdam and Nice in that same time frame!

[36] A list provided by the Select Committee of the House of Lords includes the inability to obtain foreign communication intercepts; lack of provisions to compel foreign-based witnesses to give evidence; gaps in member states' ability to assist one another in tracing, seizing and confiscating criminal assets; as well as the ubiquitous problem of ensuring the recognition of foreign-obtained evidence in the courts, especially written evidence. See House of Lords Select Committee on the European Union, *Prosecuting Fraud on the Communities Finances-The Corpus Jurist*, Ninth Report, (HMSO, 1999) para 35.

a European Public Prosecutor's ("EPP") office.[37] The EPP would investigate cases of fraud against the Community budget, and allocate cases to national Deputy EPPs. Evidence obtained by the EPP's office would be required to be recognised by the national trial court. Power to create an EPP is included in the draft EU Constitution.[38] This proposal would certainly make it easier to undertake criminal prosecutions in the national court and gain convictions, although it is likely to face significant political hostility among the member states. Many states refuse to accept that the Community should have any criminal jurisdiction.[39] Furthermore, as the House of Lords' Select Committee on the European Union pointed out, there are questions as to the feasibility of such a proposal.[40] Another option suggested by the House of Lords Committee, however, in the form of greater co-operation, is open to question,[41] for as explained above, the member states appear very reluctant really to engage with the issue and assist the Community in effectively protecting its financial interests.

THE CIVIL FALSE CLAIMS ACT 1986

The CFCA 1986

The Act creates civil liability for any person who knowingly[42] presents or causes to be presented a false or fraudulent claim for payment or approval.[43] The scope of a false claim is very broad. It includes conspiracy to defraud the government by getting a false or fraudulent claim to be allowed or paid;[44] a reverse false claim where a person uses or causes to be used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the government[45] or where a person making or delivering a document certifying receipt of property used or to be used by the government and, intending to defraud the government makes or delivers the receipt without completely knowing that the information on the receipt is true.[46] The burden of proof in CFCA cases is the civil preponderance of evidence standard.[47]

The CFCA contains two major penalties. The first penalty is of at least $5,500 and not more than $11,000 for each violation.[48] The second penalty is three times the

[37] See the details of the EPP proposal in the *Green Paper on Criminal Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor*, (European Commission, 2001) COM (2001) 715 Final, 11 December 2001.

[38] Art III 175 of the draft Constitutional Treaty establishing the European Union.

[39] As a consequence on a number of occasions the member states have refused to accept proposals creating any form of criminal law legislation within the first pillar. "EU legislation" has only been adopted on an inter-governmental basis through the third pillar.

[40] The Select Committee pointed out the practical difficulties of prosecuting fraud under two legal regimes side by side. *Prosecuting Fraud on the Communities' Finances, op cit,* para 119.

[41] *Prosecuting Fraud on the Communities' Finances, op cit,* para 131.

[42] Knowingly and knowing are defined under the statute as meaning that a person with respect to information, has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information and no proof of specific intent to defraud is required: 3729 (b) (1)-(3).

[43] 3729 (a) (1).

[44] 3729 (a) (3).

[45] 3729 (a) (7).

[46] 3729 (a) (5).

[47] 3731(c).

[48] The 1986 amendments originally provided for fine levels of $5,000 and $10,000. However, under the Federal Monetary Penalties Inflation Adjustment Act of 1990, the levels have been increased to respectively $5,500 and $11,000 in respect of violations of the CFCA occurring on or after 29 September 1999.

damage sustained by the government as a result of the defendant's conduct.[49] These penalties are applied cumulatively.[50] Hence in a case which inflicted only relatively minimal damage on the US government, but involved numerous violations, for example, over-priced ball-bearings provided by a defence contractor, each invoice would attract at least the minimum $5,500 fine, even if the application of the triple damages rule in the Act itself resulted in a relatively small penalty. Equally, one major order, which was significantly over-priced, would result in only one fixed penalty, where the maximum fine could only be $11,000; however, the triple damages rule could impose a very significant penalty on the defendant.[51]

Relators, are entitled under the Act to a share of the monies recovered. If the Department of Justice ("DoJ") initiates a prosecution before the federal courts, based on the evidence of the relator, the relator receives between 15 and 25% of the monies recovered, plus reasonable attorneys' fees, costs and expenses. If the DoJ leaves the relator to prosecute the case alone before a federal judge, then the percentage going to the relator is likely to be greater. The amount a relator can recover in such circumstances is 25 to 30%.[52]

There are a number of grounds under which the recovery by a relator can be reduced. The courts may limit the recovery to 10% or less if the litigation process reveals that the evidence rests mainly on already available public information.[53] The amount a relator recovers is also reduced if the relator participated in the fraud. In particular, the relator gets nothing if the relator is convicted of criminal conduct that also violates the Act. Even where there is no criminal conviction, the court may reduce the percentage of the recovery going to the relator who planned and initiated CFCA violations.[54]

Proceedings are initiated by a relator serving the DoJ with a copy of the complaint, and substantially all the material relating to the case in the relator's possession. The complaint is placed under seal with a US Federal District Court for an initial 60 days, during which period the DoJ assesses the complaint. The complaint is not served on the defendant until the 60-day period has expired. The DoJ may seek extensions to the initial 60-day period. The DoJ has a number of options. It can prosecute the action itself, settle the action, and let the relator proceed independently, or seek to have the action dismissed.[55] If the relator is permitted to proceed independently the DoJ can intervene in the case, and later intervene specifically to seek dismissal, to support or to take over the case.[56] In most cases the DoJ will arrive at a settlement with the defendants, and the relator's percentage will be subsequently decided in a hearing

[49] The Court however may assess less than treble damages if it determines that the violator of the Act furnished responsible government officials with all information known to the violator within 30 days of learning of it and fully cooperated with the government investigation. In addition, there must have been no ongoing civil or criminal investigation of which the violator was aware: 3729 (a).

[50] Damage does not have to be actual damage for the civil penalties to apply. It is sufficient that there is proof that a violation has occurred for the Act to apply and civil penalties to be levied. Causation however has to be demonstrated for compensatory damages to be obtained. For a discussion of the issues involved in assessing damage, see Helmer, *op cit*, para 3.14.

[51] 3729 (a).

[52] 3730 (d)(1).

[53] *Ibid.*

[54] 3730 (h). It should also be noted that restrictions are placed on a number of classes of private suits, brought by members of the armed forces, against members of the Federal Institutions, if a proceeding has already been initiated or the evidence is based on publicly disclosed information, 3730 (e).

[55] 3730 (b).

[56] If the defendant wins and the court finds that the action was clearly frivolous vexatious or brought primarily for the purposes of harassment, the relator plaintiff may be required to pay all reasonable attorneys fees and expenses, 3730 (d).

before a Federal district judge. In parallel, the DoJ may have instituted criminal proceedings against individual employees or executives of the defendant's firm.

The Impact of the CFCA

Since its resurrection in 1986, the CFCA has proved to be a uniquely powerful system for recovering losses from fraudsters. Between 1986 and September 2002, the US government recovered $6·39 billion. Relators have recovered over $988 million as their percentage of the recoveries. From a handful of cases prior to 1986, 3,954 cases have been filed in the 16 years between 1986 and September 2002.[57]

The CFCA has had an even more powerful effect on potential fraudsters. Research commissioned by the not-for-profit organisation Taxpayers against Fraud, suggests that the Medicare error rate, which measures improper payments, fraud and waste, fell from 14% in 1996 to 7% in 2000. Complaints under the CFCA were a critical element in reducing the error rate.[58] If that research is correct the CFCA has resulted in savings of literally tens of billions of dollars to the US Treasury in the health sector alone.

There are a number of features of the CFCA that go some way to explaining its success. In particular, relators are potentially able to obtain very high financial payments as a result of blowing the whistle. There are very strong grounds for paying high financial rewards. The Act recognises the reality that inside information in relation to fraud against the US government is extremely valuable.[59] The complexity of most instances of fraud, and its covert and opaque nature make it difficult for "outsider" regulatory agencies effectively to police payments to government contractors.[60] It is also clear that the damage that fraud can do to the interests of the US government and taxpayer can be very significant.

A second reason for providing such major financial incentives is that relators at the very least are likely to face the devastation of the careers in which they have often invested their lives.[61] They are likely to find that they are unable to work in their own industry ever again. There is also the likelihood, if not certainty of extremely stressful and damaging retaliation, often social and economic and sometimes physical.[62] In fact the Act goes so far as to provide a special cause of action to protect relators.[63]

The third reason to pay relators a significant percentage of the monies recovered is that they can then enter contingency fee arrangements with major law firms who can prepare their case. The contingency fee arrangement is necessary, as the work is complex, time-consuming and usually requires very high-quality legal advice to present

[57] The statistics from the US Department of Justice are collated on the Taxpayers against Fraud website (see http://www.taf.org).

[58] Meyer and Anthony, *Reducing Health Care Fraud, An Assessment of the Impact of the False Claims Act*, (Taxpayers Against Fraud, 2001) 12–13.

[59] One striking example is the Yield Burn Case, in which a former Managing Partner of investment firm Smith Barney revealed to the US Treasury that most of the major Wall Street banks were illegally overpricing US Treasury securities. The Treasury was not aware of this practice or its extent. As a result of the CFCA whistleblower complaint, a multi-agency investigation was launched, hundreds of millions of dollars were recovered and the practice of yield burn terminated in the sector. Meyer and Anthony, *op cit*, 104–109.

[60] Bucy, "Private Justice", (2002) S. Calif. LR 1, 8.

[61] See Helmer, *op cit*, para 1.2 for a graphic account of the tribulations of whistleblowers.

[62] See Bucy, Houston LR, *op cit*, 950–951, for a further graphic account of the travails of whistleblowers.

[63] 3730 (d)2. This includes restoring seniority, twice back pay, interest on back pay, special damages, litigation costs and reasonable attorneys fees.

a complaint[64] or if the DoJ does not bring the case, to institute one's own *qui tam* proceedings.[65] There is a threefold advantage from the perspective of the state to contingency fee arrangements in this context. Firstly, the lawyers do all the hard work of putting the case together, saving the state the cost of the detailed investigative effort otherwise necessary. Secondly, the lawyers act as a filter system for the state, weeding out weak, speculative or suspect complaints. Thirdly, by inducing lawyers to get involved via payment of contingency fees, the state significantly increases the enforcement resources devoted to the prosecution of fraud at no cost to itself.

There are also a number of potential downsides to the CFCA. There is a danger that the CFCA procedures could be "gamed" by a relator who let the fraud continue in order to increase the damage and thereby his or her potential percentage of the recovery.[66] This can be countered by emphasising that there is a premium for the first relator to provide evidence to the DoJ. The courts could also stand guard over such behaviour, evidence of such behaviour being a basis for a reduction in the percentage the relator would receive. It is also important to restrict relators from bringing actions based on anything other than first hand or original source information rather than public information. The issue of what counts as original source information is one of the most litigated issues surrounding the CFCA.[67]

Perhaps the most powerful challenge to the CFCA is the argument that the Act can become a prosecutorial engine against business. In the first place, there is the danger that the DoJ will take the view that a relator may win and recover for the government; therefore it will use its power to seek dismissal of a relator case sparingly. Hence, undertakings are left with the expense and trouble of defending cases that often turn out to be fundamentally unmeritorious.[68] Secondly, particularly, in the health care sector, the frauds alleged by relators and then prosecuted by the DoJ sometimes appear to be more technical than real.[69]

Clearly any European CFCA legislation would have effectively to tackle these concerns. In particular, steps would have to be taken to ensure that any whistleblowers could not use information already in the public domain, and that undertakings are protected against false allegations.

[64] From the perspective of the relators, it is usually preferable to put together a very good complaint which induces the DoJ to initiate proceedings. This approach reduces the financial exposure of the relator and his or her attorneys, and means that the full investigative powers of the state can be deployed in the case. The relator may then be able to ride the DoJ case to the settlement where the court should award the relator his or her cut of the recovery.

[65] From the raw DoJ figures it appears that the qui tam plaintiffs have very little chance of success on their own account. To date of the $6·39 billion recovered, $6·11 billion were recovered in DoJ proceedings and only $276 million in qui tam proceedings. However, Helmer, *op cit*, para 18.2(d) argues that the DoJ includes in the amounts it recovers cases in which it intended to intervene, but actually did not actually intervene. The DoJ also intervenes in a case just prior to settlement and then counts such recoveries in its list of recoveries. Helmer argues that this practice significantly underestimates recoveries by *qui tam* plaintiffs.

[66] Kovacic, "Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels", (2001) GWLR 766, 795.

[67] The Act prohibits private suits that are based on public disclosure of allegations in a criminal, civil or administrative hearing or accounting office report; a hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information: 3730 (e)(4)(A).

[68] Although the DoJ has exercised its power to seek dismissal sparingly in the past, it has recently taken a more active stance. Bucy, S. Calif. LR, *op cit*, 71.

[69] Bucy, S. Calif. LR, *op. cit.*, 64. Bucy quotes the CFCA expert John T. Boese, who described the situation faced by health care providers because of the FCA: "[H]ealth care providers today are expected to operate in an almost Kafkaesque environment, where conventional conduct is made illegal and where the government is permitted broad prosecutorial discretion, the exercise of which is unpredictable and subject to being overruled by both private citizens and other branches of government". For further criticism of the health care cases, see Trunk, "Sounding the Death Toll for Health Care Providers: How the Civil False Claims Act has a Punitive Effect and why the Act Warrants Reform of its Damages and Penalties Provision" (2003) GWLR 159. However, the DoJ has now taken some steps to overhaul prosecution by issuing guidelines for prosecutors in dealing with health care cases, see Helmer, *op cit*, para 18.2(f).

A EUROPEAN CFCA TO PROTECT THE COMMUNITY BUDGET?

A European CFCA could significantly increase the level of protection provided to the Communities' financial interests.[70] A Community regulation closely based on the CFCA 1986 would be likely to result in an increase in detection of fraud against the revenue and expenditure sides of the Community budget. Of even greater importance is the likely deterrent effect. Potential fraudsters may well be deterred from even attempting to defraud the Community when faced with the prospect that a member of staff of the fraudulent enterprise, contractor or other supplier who comes to have knowledge of the fraud can whistleblow profitably to the Commission. That deterrent factor is increased by the fear of the size of the fines that could be imposed on the enterprise. Given that a very high proportion of the value of fraud against the Community budget is cross-border fraud, and therefore difficult to detect, a European regulation that puts a financial premium on inside information and encourages whistleblowers to come forward is likely to prove a powerful new weapon in the fight against fraud.

A European CFCA does not only have significant advantages in terms of detection and deterrence. It also offers a solution to many of the legal and political difficulties encountered in proposals for Community criminal law directives and the proposed European Public Prosecutor (EPP). Most member states have opposed the creation of Community criminal law legislation and the office of EPP on the grounds that the Community has no criminal law jurisdiction, and in any event, such a step amounts to too great an interference in the legal systems of the member states. The European CFCA could provide a Community civil definition of fraud,[71] a Community-wide investigation system and Community administrative prosecution before a Community civil court,[72] which therefore does not face the same objections as criminal law legislation or an EPP.

It is also the case that the EC Treaty provides a clear legal base for a Community regulation establishing a European CFCA. The legal base would be article 280(4). It permits the adoption of necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community, with a view to

[70] One solution, at least on the revenue side to the problem of protecting the Communities' financial interests, would be to abandon VAT and customs receipts as sources of Community revenue and instead provide more resources out of GDP per capita allocation. This would certainly fraud proof almost all the revenue provided to the Community. GDP per capita allocations are entirely fraud proof. See *Protecting the Communities' Financial Interests – The Corpus Juris, op cit*, para 105. However, taking such a step would not solve the actual problem of customs and VAT receipts being susceptible to fraud, and particularly cross-border fraud. All the Community would be doing would be transferring the problem to the member states. Although in the case of customs duties, by returning that source of finance to the member states, such a step may give some states more incentive to tackle fraud in that sector. Furthermore, returning revenue sources to the member states will not deal with fraud on the expenditure side, particularly in respect of the large agricultural and structural fund budgets.

[71] There are a number of difficulties with the current definition of fraud and irregularities. In the first place it is often difficult to distinguish between a fraud and irregularity. In the second place the two definitions have different legal bases. Fraud is defined under an international convention, where it easier for member states and their courts to impose their own concept of the proper scope of the definition. Irregularity is governed by Community law and subject to the general principles of Community law, and subject to common interpretation as part of the *acquis* and is more easily the subject of a reference to the European Court of Justice. A major advantage of a European CFCA would be that a common approach could be taken to fraud and irregularity. It is submitted that the concept of "false claim" under the CFCA may provide a better starting point for the development of a common definition than the current Community concepts of fraud and irregularity. In particular, because under the CFCA the definition includes not just intentional acts, but also where a fraudster acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information.

[72] It would also be possible to apply a lower civil standard of evidence in proceedings, thereby making it easier to impose fines and recover losses to the Community budget.

affording effective and equivalent protection in the member states. Insofar as the Community desired to enact a civil anti-fraud whistleblowing statute to protect the Community budget, article 280(4) would provide an ideal legal base[73].

There is also a precedent within the Community *acquis* for cross-border civil investigative and contentious procedures and penalties run by the Commission in respect of the EC competition rules. That investigative and enforcement system, currently enshrined in regulation 17/1962 could be adapted for the European CFCA. Hence, following a complaint by a whistleblower,[74] the Commission would be able to issue decisions for the surrender of documents or undertake unannounced inspections to copy documents and ask questions. The Community competition system also involves the payment of very heavy fines. In recent cases fines have been as high as €462 million.[75]

However, certain features of the European CFCA regulation would be likely to differ from regulation 17. One feature in particular is the contentious procedure whereby the Commission not only investigates and prosecutes the case, but effectively acts as judge, albeit subject to review by the Court of First Instance. There are grounds for arguing that the decision as to whether or not a whistleblower should receive a share of the recovered proceeds should be made by an independent judicial authority, rather than the Commission. This argument is significantly reinforced where the whistleblower as relator is forced to bring the case him- or herself because the Commission has refused to proceed. Few potential relators would be willing to bring a case themselves if the proceedings were instituted before a Commission administrative body, with the Commission drafting the final decision, when the Commission had already refused to bring the case itself. [76] It is also the case that national criminal prosecutors would be likely to find it much more difficult to bring a prosecution with evidence tendered in a CFCA case, where the CFCA decision had occurred before a tribunal where the investigation, prosecution and judge had been undertaken by one institution, the Commission.

As with the US CFCA the European CFCA that I propose would impose a high penalty of three times the loss to the Community budget and in addition would impose a high minimum false claim fine of several thousand euro and a maximum fine double that amount, for each false claim. The European CFCA would also contain a provision providing for a significant maximum percentage of the fine to be paid to the whistleblower, the actual percentage to be decided by a court or other independent judicial authority, and not the Commission. The regulation would create statutory protections for the whistleblower to protect him or her from retaliation as well as criteria for assessing the percentage that a whistleblower should receive. Increases would be justified for instance by the speed with which the relator came to the

[73] However, if it were decided to use the European CFCA to protect national revenue and funds also defrauded in the same act, for instance in relation to VAT fraud, then another legal base would probably be required, possibly art 308 of the EC Treaty. The issue of mixed claims is discussed further below.

[74] In fact the current Community competition system relies heavily on corporate whistleblowing in order to prosecute the most egregious anti-competitive activities, such as price-fixing cartels. See Van Barlingen, *The European Commission's 2002 Leniency Notice after One Year of Operations* (2003),'European Commission Newsletter, Summer 2003, 16–22. Please note that regulation 17/1962 will be replaced by regulation 1/2003 on 1 May 2004. The cross-border investigative and contentious procedures of the Commission remain substantially unchanged.

[75] *Vitamins Cartel*, November 2001 (European Commission, 2001).

[76] Clearly the US concern that *qui tam* cases are being run on the basis of minor technical breaches of the law would be reinforced if the prosecutor were also effectively the judge at first instance. On the other hand, it is also the case that one of the other major concerns, the lack of DoJ control over relators, would be unlikely to be so apparent in the EC, particularly if the current DG Competition-controlled contentious procedure is maintained. Unlike the DoJ, the effect of permitting a relator to proceed would have the effect of committing Commission resources to run the contentious procedure and draft a decision. Hence the Commission would be likely to take a tougher line than the DoJ as to which relators can and cannot bring such an action.

Commission or the continued and complete assistance given to the Commission. Decreases would be justified, for example, by dilatoriness, complicity in the fraud or the availability to the Commission of alternative sources of information.

One difficult question is whether the *qui tam* procedure in which the whistleblower can step into the shoes of the authority and sue in its name if the public authority does not take the case can be utilised in the Community context. The principle difficulty with the *qui tam* procedure in a Community context is that relators can rely on the powerful US Federal Rules of Civil Discovery before the US Federal Courts to obtain additional documents to further prove their case, including wide-ranging discovery and interrogatory procedures.[77] Such extensive pre-trial discovery rules do not exist at European level or in the member states. Clearly, this is not so much a problem for the Commission under the European CFCA as it would have the evidence from the whistleblower, and it would be able to use its powers to obtain documents and carry out unannounced inspections to obtain further evidence. The position is different for relators, however. They are not the Commission and do not automatically have access to its powers of investigation. Even though relators would bring their proceedings before Community courts, it is difficult to see the member states agreeing to create a wide-ranging civil discovery procedure to protect the Community budget. An alternative approach would be to apply the logic that the relator sues on behalf of the public authority and allow the relator to deploy the Commission's power to obtain documents and power to make unannounced inspections of the defendant's premises, subject to a court order. Again there may well be political difficulties with this solution as well.

An alternative approach, and one that may prove attractive to the member states, would be to apply the *qui tam* procedure solely to cases where the alleged fraud related to funds managed directly by a Union institution or agency or concerned an official of a Union institution or agency. There are good policy grounds for taking this approach. It is not unreasonable to suppose that the Commission would be willing to be vigorous in the protection of its own revenue and expenditure, and revenue and expenditure of other Union institutions or agencies in the hands of the member states. By contrast, it is not unreasonable to suppose that the Commission may not be so vigorous in taking action against alleged fraud affecting its operations or officials or those of other Union institutions or agencies.

Even if a *qui tam* procedure that exclusively applied to fraud occurring in Union institutions or agencies or amongst their officials were approved by the member states, there is still the question of how the relator would obtain evidence. Given the narrow scope of application of the *qui tam* procedure, the member states may be willing to introduce broad US-style pre-trial discovery rules against Union institutions and agencies.

If a *qui tam* procedure were to be introduced, it would be necessary to provide safeguard powers of intervention for the Commission. Hence the Commission would have to be able to intervene in the action; seek amendment of the statement of objections; obtain or frustrate applications for interim measures; and seek dismissal of or take over the action.

The European CFCA should also include a provision permitting contingency fee payments for lawyers. This is a vital part of the success of the CFCA. It ensures that lawyers are induced to take cases: the lawyers filter out the weak or suspect cases and undertake the investigative effort, reducing the investigative burden on the

[77] Helmer, *op cit*, para 8.2. The DoJ does have special powers to obtain information in respect of a CFCA case prior to the actual initiation of proceedings. Under 3733(a), the US Attorney General may issue civil investigative demands after initiation of a relator action, but prior to the intervention of the government.

Commission. The Commission is then presented with a road map to successful prosecution. Essentially contingency fee payments are a way of bringing in significant additional investigative resources without the Commission or the member states having to pay for those resources. Furthermore, if a *qui tam* procedure permits either broad or narrowly focused prosecution by relators, additional resources are created to prosecute fraud, for which again Commission and member states are not required to pay.

There are also questions as to whether government employees should be permitted to benefit as whistleblower relators. The US federal courts have ruled that there are no special limitations on a government employee's right to maintain a *qui tam* action. However, some US courts have ruled that *qui tam* actions are barred against a government employee relator whose duties include the investigation and reporting of fraud.[78] Given the importance of obtaining information on fraud against the Community's financial interest, there is a strong policy argument for permitting government employees to be whistleblowers and relators. However, taking the approach of the US courts, employees such as officials of OLAF and officials of the member states' fraud investigation and prosecution agencies should be barred from bringing a claim under the European CFCA.

The collection of Community revenues and the spending of Community funds are not only decentralised to the member states, they are also often mixed up with member state revenue collection, for example in respect of value-added tax, and the expenditure of national funds, in the case of national matching funding in the utilisation of the Community structural funds. It would be difficult to apply the European CFCA purely against the element of the fraud that attached to the Community budget, but not to national budgets. One approach would be for the member states to obtain the benefit of Community law, in that the European CFCA would apply Community penalties to the whole of the revenue lost or funds fraudulently expended and then return the national part of the recoveries to the member state treasuries. Another approach, if member states were willing to adopt national CFCAs, would be for the member states and the Commission to allocate cases between them.[79] Hence in a cross-border case, the Commission would act on behalf of the Community and the member states, and in cases with solely a national dimension, the national agency would apply the CFCA on behalf of the state and the Community, with the national agencies and the Commission making proportionate financial transfers at the end of each case.

A major question remains unanswered in the discussion of a European CFCA above. That is the relationship between the evidence obtained under the CFCA and national criminal law. Even if fraudsters are heavily financially penalised under the CFCA, the public across Europe will be shocked if those who have plundered the Community's finances are not subject to a criminal process. Part of the solution is to ensure that the investigations and civil process undertaken by the Commission and any national CFCA agencies comply with criminal defence rights. This is achievable in respect of evidence

[78] Helmer, *op cit*, para 3.5(c).

[79] A European CFCA system with the Commission running cross-border cases and the national agencies running national cases would in many ways parallel the system for the enforcement of the EC competition rules envisaged in Regulation 1/2003, which is due to come into force on 1 May, 2004. It would be possible to envisage two approaches. The first would be a series of national CFCA regimes together with a European CFCA, and coordination provisions between them. An alternative approach and drawing upon Regulation 1 would be for there to be one European CFCA law whose enforcement would then be shared between the member states and the Commission. One of the major advantages of this latter approach would be that it would provide for greater uniformity in the application of the law across the Community, rather than having up to 26 differing legal regimes, with different procedures, legal terms and definitions, which are likely to be a source of confusion and potentially result in lost cases, particularly if cases have to be transferred from one jurisdiction to another.

not obtained directly from the whistleblower, such as evidence obtained on unannounced inspections.[80] However, it is likely to be much more difficult to rely in most criminal courts on direct evidence from whistleblowers, who may well be treated by the judge and the jury as paid criminal informers. On the other hand, if the European CFCA does uncover large numbers of fraud cases, then public opinion and the member states may well decide that a degree of legal harmonisation to ensure that prosecutions succeed is in fact politically acceptable.

CONCLUSION AND FUTURE PROSPECTS

The major European objection to an equivalent of the CFCA being enacted for the Community is the idea of paid informers. The concept of very high rewards to any person who came to know of the fraud, especially where the whistleblower was on the periphery of the fraud, is likely to prove difficult to accept. However, the US experience suggests that there is a very strong public policy argument in favour of high rewards for informers. US public policy recognises that the inside information that such informers or whistleblowers have is extremely valuable to the public interest in terms of detection of fraud against the public purse and deterrence. Furthermore, there is recognition that whistleblowers have to be properly compensated. By providing information to the authorities, they are effectively risking their careers; imposing considerable stress on themselves and their families and potentially putting their physical security at risk.

It is also the case that the idea of paying for information is not as foreign as it first appears. The Commission does offer some financial rewards for information in respect of fraud or irregularities against the Community budget.[81] Furthermore, in the competition field, the Commission now routinely grants immunity from fines to firms that were members of cartels, in return for information on cartel activity. In the first year of the operation of the Commission's new US-style leniency notice, introduced in February 2002, over 20 cartels have been placed under Community investigation as a result of information from whistleblowers[82].

Competition law also provides a strong precedent for creating a Community system of investigation, prosecution and civil fines in respect of the protection of the Community's financial interests. If the Community can have a cross-border system of investigation, prosecution and penalties directed against anti-competitive activities that threaten the single market, it should also be able to run a similar civil investigation, prosecution and penalty system against those who seek to distort the operation of the single market through VAT or customs fraud or undermine Community objectives by plundering the agricultural or structural funds budgets.

A European CFCA offers a potential route out of the dilemma faced by the member states of dealing with large numbers of cross-border cases (with which national agencies and systems have great difficulty in coping) but being unwilling to adopt Community criminal law or to establish a EPP Office for fear of losing criminal jurisdiction to the Community. A European CFCA as described in this article would introduce an effective civil system of detection, investigation, prosecution and penalty, but would not extend by one iota the Community's criminal jurisdiction. Such a regulatory system

[80] The solution here would be for the Commission to obtain a full warrant from a court or independent judicial authority before undertaking an unannounced inspection.

[81] White, *op cit*, 17.

[82] Van Barlingen, *op cit*.

would potentially provide an effective means of protecting the Community financial interests, given the understandable weaknesses in judicial and administrative procedures in Central and Eastern Europe, while such structures are being brought up to modern levels of effectiveness.

The adoption of a European CFCA is not a remedy for all ills. It will not solve the problem of how effectively to deal with cross-border criminal cases: member state agencies need to increase their commitment to co-operate, and many new measures are needed. However, a European CFCA potentially offers the Community an effective and immediate solution to the problem of protecting the Community finances. Many more fraudsters are likely to be detected, revenue and funds lost are likely to be recovered and many more potential fraudsters are likely to be deterred. In such circumstances, the peoples of Europe may begin to believe that all the actors on the European stage in the institutions and the member states are serious about tackling Community fraud.

FREEDOM OF INFORMATION: IS PRIVACY WINNING?

JONATHAN STEELE[*]

INTRODUCTION

Freedom of information is about the relationship between the executive and the governed. There has never been more information available: there has never been so much to know. This paper will consider the passage to the statute book of the Freedom of Information Act 2000, the likely effect of the exemptions provided for in that Act and the Community legislation on public access to documents, namely Regulation (EC) 1049/2001.

It will be argued that there are two major exceptions to the general principle of public access to documents. These are a) privacy and the integrity of the individual, enshrined in data protection legislation, and b) the "space to think", denoting the protection of the confidentiality of the decision-making process within government. It will be shown that privacy, although not recognised as a general right in English law, is making an entry through article 8 of the European Convention on Human Rights. The rights accorded under data protection legislation and in particular the body of legislation based on Directive 95/46/EC will also be considered. The question of confidentiality of decision-making in public administration, the second major exception to general transparency in public matters, will be considered in the UK context in the light of the Freedom of Information Act 2000 and in the EU context with reference to Regulation (EC) 1049/2001.

PRIVACY

According to Simon Davies of Privacy International:

> Each adult in the developed world is located, on average, in 200 computer databases ... Mass surveillance is developing from Argentina to Zambia not merely through video cameras, DNA profiling, satellite surveillance, police systems and credit-reporting agencies, but through a vast range of computer-based surveillance mechanisms.[1]

In this context, privacy can be seen as the protection of the integrity of the individual from, in particular, the intrusive forms of data collection and processing listed above. Article 8 of the European Convention on Human Rights might be expected to guard against such mischiefs.

However, invasion of privacy is often taken to refer to something rather different, namely intrusive media reporting, especially of celebrities. This kind of intrusion has a long pedigree. The law of confidentiality in the UK was developed in response to an attempt to exhibit etchings by Prince Albert and Queen Victoria, obtained without their consent.[2] The courts have held that a breach of confidence occurs where confidential information is imparted in circumstances of confidence and there has been or will be a misuse of that information.[3]

[*] Data Protection Officer, European Parliament. Any opinions expressed are strictly those of the author personally.

[1] Davies, S, (undated) "Time for a byte of privacy please", Index on Censorship, http://www.oneworld.org/index_oc/issue697/davies.html.

[2] *Prince Albert v Strange* (1848) 2 De G & Sm 652.

[3] Clayton R and Tomlinson H, *Privacy and Freedom of Expression*, (OUP, 2001) p. 15.

The law on breach of confidence provides protection for privacy and the integrity of individuals in a wide range of circumstances. However, a general right of privacy in the UK has not emerged through the courts. In *Kaye v Robertson* the claimant sought to rely on its corollary, the (putative) tort of infringement of privacy. In that case, an actor who had suffered injuries in a road traffic accident sought to restrain publication by a tabloid newspaper of an alleged interview carried out on his sickbed after surgery. Glidewell LJ spoke of "the desirability of Parliament considering whether and in what circumstances statutory provision should be made to protect the privacy of individuals".[4] The most recent occasion on which the High Court might have acted as midwife to the right to privacy was in the Hello! trial concerning the wedding celebrations of Michael Douglas and Catherine Zeta-Jones. In his judgment of 11 April 2003, Lindsay J decided the case on commercial confidence grounds rather than in terms of any privacy rights. He took the view that, in cases such as the instant case, where the law of confidence could be applied, there was no need to answer the question whether in order to give effect to article 8 of the European Convention on Human Rights, a court would be obliged to find a right to privacy, following the coming into effect of the Human Rights Act 1998:

> So broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary *inter partes* litigation.

However, the judge envisaged that if Parliament did not legislate then the courts might be obliged to fill the gap: "Further development by the courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves protection".[5]

So a reference to the right to privacy may be directed against intrusive media reporting (which by its nature involves publication) or against intrusive data collection or processing, which may well be surreptitious, and which is likely to concern a far wider class of persons.

CANDOUR AND QUALITY OF ADVICE

The second major exception to the general principle of freedom of information concerns the confidentiality of public administration and the protection of the integrity of the decision-making process. In Britain at least, public administrators have traditionally formed policy in an atmosphere protected from exposure to the public. According to this tradition, although ministers take the responsibility in public for their decisions, they reach those decisions on the basis of advice from their officials. These officials, as permanent civil servants, do not themselves have any agenda, and therefore the minister can rely on their independent advice. Their function is speaking truth to power.

If there was a time when this model operated as described here, then one has to conclude that that time is past. An illustration of the breakdown of the traditional relationship between ministers and officials was provided by the events in early 2002 surrounding the resignation of Jo Moore, adviser to the Secretary of State for Transport, in the aftermath of which it was reported that the Prime Minister's press

[4] *Kaye v Robertson* [1991] FSR 66.

[5] *Douglas and others v Hello! Ltd and others (No 6)* [2003] EWHC 786; [2003] 3 All E.R. 996, Ch D.

spokesman had "felt that his own integrity and that of the civil service had been damaged by the briefings against him and leaks by officials whose first duty is to their minister".[6] A source "close to the Prime Minister" had also reportedly said "What this last week has revealed is that there is a myth of impartiality within the civil service" and the Leader of the Opposition described the government's effect on the civil service as "corrupting its independence".[7]

If it is no longer unheard of for ministers to criticise officials, it is equally the case that leaks (not all of which need necessarily have been unauthorised) have become an increasingly prominent feature of the relations between government and the media. A report in *The Guardian* on 14 February 2000 demonstrated, using figures obtained under the open government code instituted by John Major's government, that there had been 60 leak investigations between May 1997 and the end of 1999, as compared to 70 in the last two years of the previous administration under John Major.[8]

Ironically, one of these 60 leak inquiries, instituted in the Cabinet Office, related to government proposals for a Freedom of Information Bill, leaked to the BBC in December 1997.

Having discussed the operation of public interest immunity certificates with reference to the Matrix Churchill trial in 1992, Geoffrey Robertson QC concluded that a freedom of information ("FoI") regime would have resulted in informed public debate of the issues involved in arms sales to Iraq. He stated:

> The advantage of FoI, of course, is that it would create a presumption in favour of informed debate: the prospect that advice will become public sooner rather than later will not mean that the advice will be *less* candid, it will mean that the advice will be *in favour of* candour.[9]

To my mind, the opposition of less candid advice and advice in favour of candour displays some confusion. Candour as between officials and ministers is one thing and candour as between ministers and the public is another. An official can very well give candid advice which is in favour of secrecy, or for that matter, advice in favour of openness which is given for the official's own reasons.

Be that as it may, the general question is whether officials give better or worse advice when they are aware that any member of the public may ask to see that advice as soon as it has been given. Nonetheless, some commentators have taken the view that quite apart from the utilitarian consideration of improving the quality of public administration by facilitating public scrutiny of the administrative machine, access to public documents can be considered as a human right. Addressing the question whether public access to EU documents could be considered a fundamental human right, Davis starts from a definition of human rights as those rights one enjoys simply by virtue of being human, and goes on to make a useful distinction between human rights and citizenship rights:

> in view of the self-evident fact that all EU citizens are human beings, but not all human beings resident in the EU are citizens possessing the right to vote, it could be more convincing to characterise the right to vote as a specific right of citizenship, instead of a fundamental human right . . . In order to show that . . . the right to vote is a fundamental

[6] "Spin doctors struck off as feud got out of hand", *The Times*, 16 February 2002.

[7] "Civil Service row escalates", *The Daily Telegraph*, 18 February 2002.

[8] "Straw tops inquiry list as leaks mount", *The Guardian*, 14 February 2000.

[9] Robertson, G, QC, *Freedom, the Individual and the Law*, (7th edition, Penguin Books Ltd., 1993) p. 156.

> right which is unjustifiably denied to people born subject to other, non-democratic regimes, it would first have to be shown that there is in fact a fundamental human right to live in a democratic society.[10]

Deirdre Curtin has identified two complementary lines of justification for access to information about public administration. One of these lines emphasises the role of public access in enabling the scrutiny of public administration by citizens. The other emphasises public participation in the process of will formation. Referring to the work of Dutch legal philosopher Mark Bovens, she says:

> In my view, the real significance of a substantive development of the notion of a fundamental principle of openness in EU decision-making is the fact that it enables citizens (actively) to participate in the political process. This aspect is not just part of a discourse on the standards of "good administration" ... It is also squarely part of the citizenship discourse at its most fundamental level – that of democratic citizens in a fashion truly supplementary to their (political) citizenship at the national level.[11]

However, aside from the question of access to public documents as a citizenship right, the limits of any such right will be seen in this paper to cluster around two main lines of defence: one being the "protection of candour" principle and the other being the claims of privacy, exemplified in particular by the rights conferred under data protection legislation.

Voluntary Freedom: The Code of Practice

A Code of Practice on Access to Government Information was introduced in 1994. A second edition of the code was issued in 1997.[12] The code is administered by the Parliamentary Commissioner for Administration. The explanatory leaflet issued by the government suggests that the application of the code should be broad: in response to the question "Will all information be available?" it states

> Some categories of official information must remain confidential, for instance information relating to defence, national security or law enforcement or which is personal or commercially confidential. The Code of Practice lists all these categories.[13]

The extent of official secrecy in Britain was vividly exemplified by the fact that the Parliamentary Commissioner for Administration (the Ombudsman) felt compelled to present a report to parliament in November 2001 under the Parliamentary Commissioner Act 1967 about the refusal of the Home Secretary to answer a parliamentary question about the number of declarations of interest made by ministers in the Home Office under the Ministerial Code, as well as other questions touching the Ministerial Code. The Ombudsman stated in the preface to his report: "As far as I can establish, this is the first occasion on which a government department has refused to accept the conclusions of the Ombudsman on a question of disclosure of information under the Code of Practice".[14] This incident demonstrates that faced with a choice between the embarrassment of not complying with a non-binding code of practice and the

[10] Davis, R, "Public access to Community documents: a fundamental human right? ", European Integration online Papers, Vol. 3 (1999), N° 8, http://eiop.or.at/eiop/texte/1999-008a.htm, p. 5.

[11] Curtin, D., "Citizens' fundamental right of access to EU information: an evolving digital passepartout? ", (2000) 37(1) *Common Market Law Review*, 41.

[12] Parliamentary Commissioner for Administration, (1997), *Code of Practice on Access to Government Information*, http://www.cfoi.org.uk/coptext.html.

[13] Department for Constitutional Affairs, (undated), Explanatory leaflet supplementing *Code of Practice on Access to Government Information*, http://www.lcd.gov.uk/foi/ogcode984.htm.

[14] Parliamentary Commissioner for Administration, *Access to Official Information: Declarations made under the Ministerial Code of Conduct*, 4th report, Volume 6 – Session 2001–2002, (The Stationery Office, 13 November 2001).

embarrassment that the information would (presumably) occasion if revealed, ministers will sometimes opt for the former. Only an enforceable legal duty will force a minister to reveal information that he or she wishes to keep secret.

THE FREEDOM OF INFORMATION ACT 2000

The expression "freedom of information" is generally used to identify the regulatory frameworks entitling members of the public to access to information held in the main by public bodies. The expression is something of a misnomer, in that such regimes are not intended to give public bodies the freedom to disseminate information, but rather to force them to disseminate information that they would prefer to withhold. An expression such as "public access regime" would be more accurate. However, if a misnomer has been used consistently for long enough it becomes a term of art, and so it is with this one. The point is not a mere quibble. The oldest and best-established public right to information exists in Sweden and has its roots in a fundamental law, namely the Freedom of the Press Act that sets out to guarantee the freedom of the press to disseminate information.

It seems to be natural for oppositions to see more clearly than governments the virtues of a freedom of information regime. Opposition politicians are in general supported by a party machine only, whereas politicians in government have the additional benefit of advice from officials, which, at least in the British context, may tend towards a more controlled approach to the release of information than would be the rule in a freedom of information regime. Whatever the underlying reasons and causes may have been, the legislation that was finally passed as the Freedom of Information Act 2000 had an unusually complicated passage to the statute book, and indeed at the time of writing, its implementation is not complete. This paper will examine not only the Freedom of Information Act 2000 as ultimately enacted, but will also pay particular attention to the development of that legislation during its passage, in an attempt to show the way in which the ideals of 1997 have been tempered in the years of government that followed. It will go on to examine the legislation governing public access to documents at the level of the European Union, namely Regulation (EC) 1049/2001.

The White Paper "Your Right to Know"

On 1 May 1997 the Labour party under Tony Blair won the general election in the UK, bringing to an end a period of 18 years of Conservative government. This lengthy period in opposition had given the members of the new government ample opportunity to appreciate the benefits of freedom of information. On 11 December 1997, the government published a white paper entitled "Your Right to Know". This white paper proposed a wide-ranging general right of access to information. Its foreword, by the prime minister, was sanguine about the proposals

> The traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know. This fundamental and vital change in the relationship between government and governed is at the heart of this White Paper.[15]

[15] Preface by the Prime Minister to the white paper "Your right to know: the Government's proposals for a Freedom of Information Act", Cm 3818, December 1997.

The white paper also had a foreword by the Minister charged with its implementation, the then Chancellor of the Duchy of Lancaster, David Clark, striking a slightly different note:

> This White Paper strikes a proper balance between extending people's access to official information and preserving confidentiality where disclosure would be against the public interest. It is a new balance with the scales now weighted decisively in favour of openness.

Even at this early stage, the move from a presumption in favour of openness to a balance between the competing public interests, in disclosure and withholding information, seems to have been foreshadowed.

At any event, both declarations belong to the early months of the life of the government, before the claims of confidentiality began to weigh more decisively. By the time of the publication of the draft bill in 1999, the tone had unambiguously changed.

The Bill

The draft government bill published on 24 May 1999 diverged significantly from the proposals outlined in the white paper. It was greeted with dismay by the Campaign for Freedom of Information, the director of which, Maurice Frankel, excoriated the bill in a newspaper article on the day after publication:

> But the white paper's centrepiece, the requirement that authorities wanting to withhold information must demonstrate that release would cause 'substantial harm' has been dropped. They will only have to show that disclosure would 'prejudice' various interests, allowing much more information to be concealed.[16]

Other aspects of the bill that attracted condemnation were that the prejudice test was to be applied by reference to the "reasonable opinion" of (for example) a minister, and the facility the proposals would have granted ministers to create exemptions even in respect of information that had already been requested, by means of an order in parliament. The Campaign for Freedom of Information was far from alone in its reaction, as Cornford makes clear:

> The restrictiveness of the Bill lay in the details as well as in the basic architecture of the system it proposed. Not only did it furnish public authorities with loopholes and scope for evasiveness in relation to matters important to any system of FOI [freedom of information] such as charging and time limits: it also included a plethora of novel and specially devised grounds for withholding information ... one striking example is clause 44(7). This provided that authorities would be authorised to withhold from the Commissioner any information which would expose them to proceedings for a criminal offence. The draft Bill was the subject of severe criticism, not least by a Select Committee of the House of Lords appointed to consider it (HL Paper 97) and by the Commons Select Committee on Public Administration (HC 570).[17]

The draft bill issued for consultation in May 1999 differed significantly from the bill that was finally introduced to Parliament in December 1999. The report by the House of Commons Select Committee on Public Administration contained an annex detailing significant changes from the draft bill to the bill as introduced; the list was accompanied by the caveat that it is not exclusive, even though it runs to some 60 changes.[18] Among the most significant were a reduction to 20 from 40 working days

[16] "Abysmal handiwork", *The Guardian*, 25 May 1999.

[17] Cornford, T, "The Freedom of Information Act 2000: Genuine or Sham? ", (2001) 3 *Web Journal of Current Legal Issues*, <http://webjcli.ncl.ac.uk/2001/issue3/cornford3.html>.

[18] House of Commons Select Committee on Public Administration, (1999–2000 session), First Report, Annex, "Freedom of Information Bill: Comparison of Draft Bill with Bill as introduced", http://www.publications.parliament.uk/pa/cm199900/cmselect/cmpubadm/78/7804.htm.

of the time allowed for compliance with a request for information (clause 10); provisions on discretionary disclosure (clause 14); information to be supplied on refusing a request (clause 15); the replacement of a class-based exemption with a contents-based exemption in relation to civil proceedings and statutory or other investigations (clause 25) and a limitation on the power of the Secretary of State to make new exemptions (clause 36). This last power survived in a modified form despite the opposition of the Select Committee on Public Administration; which commented, in the annex, on the power to confer additional exemptions by order:

> The Committee recommended that the Clause be removed from the Bill. The Government accepted instead the recommendation of the Lords Delegated Powers and Deregulation Committee that the power to create new exemptions should be limited to those which contain a prejudice test.[19]

In general, the select committee's report was critical of the bill on a number of points, but two in particular were identified as fundamental:

> ... the failure to strike a proper balance between disclosure and access in relation to the formulation of government policy; and the failure to give the power to the Information Commissioner to order disclosure of exempt information on public interest grounds.

The committee concluded optimistically "We hope that the House will remedy these failures during its consideration of the Bill".

The Freedom of Information Act 2000 contained a power of ministerial "override" under section 53. Moreover, notwithstanding section 35(2), which provided for the disclosure of statistical background information, there still remained a qualified exemption for information relating to the formulation or development of government policy, under section 35(1). The committee's hopes were therefore not realised with regard to its principal objections to the bill. A more detailed consideration of the scope of the Freedom of Information Act, and the extent to which its provisions might be expected to counter the prevailing predilection for secrecy, follows in the next section.

The Scope of the Act

Like all freedom of information legislation, the Freedom of Information Act 2000 provides for exemptions to the general rights it confers. The general right accorded by the Act is wide-ranging, section 1(1) providing

> Any person making a request for information to a public authority is entitled –
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.

The Freedom of Information Act 2000 therefore imposes two duties on the public authorities to which it is applicable which could, however, be satisfied by a single action. The duties are a duty to confirm or deny whether information is held, and a duty to communicate the information. In accordance with section 1(5), the communication of the information also discharges the duty to confirm its existence.

Notwithstanding the wide-ranging scope of the wording of section 1(1), the Act provides for exemptions to the general principle of disclosure, of which some are absolute exemptions and others are subject to a balance test. It is conceivable that these exemptions could operate so that whilst the existence of the substantive information was subject to confirmation, its content would be exempt from disclosure.

[19] House of Commons Select Committee on Public Administration, *First Report, The Freedom of Information Bill*, 1999, HC 831, p. xiii.

Two of the absolute exemptions are of particular relevance for the purposes of this paper, namely those provided by sections 40 and 41 of the Act. Section 40 provides for an exemption for personal data as defined by the Data Protection Act 1998.[20] Section 41 provides for an exemption for information provided in confidence.

Also of particular relevance is the qualified exemption provided for in section 35(1). This relates to the formulation of government policy and other government interests. Not only is the communication of the information in question exempted, but the duty to confirm or deny is also excluded. This is a "class-based" exemption, the justification for which seems to be based on the considerations of candour and quality of advice mentioned above. As Wadham, Griffiths and Rigby point out, even the facts on which a decision made by central government were based can be exempted from disclosure:

> The most controversial aspect ... is the extremely broad exemption offered to information concerning the "formulation or development of government policy" under s 35(1)(a). This exemption is broader than that which applied under the Code of Practice ... which covered only information relating to policy and not *factual* information underlying policy discussions.[21]

Most of the qualified exemptions under the Act are subject to a "prejudice-based" test. So, for example, under section 36(2)(a) a public authority is exempt from its duty to communicate information if, in the reasonable opinion of a qualified person (who will be a Minister of the Crown), disclosure of the information "would, or would be likely to, prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown". The list of matters covered by the "prejudice-based" test is both long and diverse: see sections 26 (defence); 27 (international relations); 28 (relations within the UK);29 (the economy); 31 (law enforcement); 33 (audit functions) and 43 (commercial interests), in addition to the provision mentioned above. The wording of the statute gives no indication of the degree of prejudice required to bring into play one of these qualified exemptions, other than the requirement of reasonableness on the part of the "qualified person".

Having discussed a series of infamous cases involving freedom of information issues such as the Spycatcher case, the Matrix Churchill prosecution and the BSE crisis, Wadham, Griffiths and Rigby conclude that even if the Freedom of Information Act 2000 had been in force at the relevant times, in many of these cases the relevant information would not have been disclosed:

> Information ... may well be found to be covered by one of the Act's numerous exemptions ... However, it should not be forgotten that many of the Act's exemptions are qualified exemptions and will therefore only be effective where the public interest in non-disclosure outweighs the public interest in disclosure.[22]

This is true enough as far as it goes. It remains to be seen, however, whether the enforcement of the compliance procedures in the Act will be effective, particularly in view of the power granted to ministers (in accordance with section 53 of the Act) to overrule decision notices or enforcement notices established by the Information Commissioner.

[20] It is not entirely correct that s 40 is an absolute exemption: in limited circumstances it provides a qualified exemption.

[21] Wadham, J, Griffiths, J and Rigby, B, *Blackstone's Guide to the Freedom of Information Act 2000*, (Blackstone Press, 2001), p. 100.

[22] Wadham, Griffiths and Rigby, *op cit*, p. 27.

This provision was one of the most controversial in a controversial bill. In response to proposals that the override power be made exercisable by the cabinet as a whole rather than by any single minister, the Home Secretary undertook to alter the ministerial code guidance rather than the legislation:

> ... it would be an extremely unwise Cabinet Minister who chose to issue an exemption certificate amounting to a veto of a decision made by the commissioner to order disclosure without consulting his or her Cabinet colleagues ... I propose ... guidance on how decisions relating to Executive exemption certificates should be made ...[23]

The Disconnected Lamp

It is common for primary legislation to provide that some or all sections of an act will come into effect in accordance with a commencement order made by the Secretary of State, *i e* by the relevant minister. The implementation of the Freedom of Information Act 2000 represents an extreme example of this technique. The Act was passed on 30 November 2000. On 13 November 2001 the Lord Chancellor announced in the House of Lords that the individual right of access to information provided for in the Act would come into effect in January 2005, more than four years after the passage of the Act:

> The Act will be fully implemented by January 2005, 11 months before the timetable set out in the Act itself. The publication scheme provisions will be implemented first, on a rolling programme, starting with central government in November 2002. I am today placing a full schedule of organisations and dates of implementation in the Libraries of both Houses. This roll-out will be completed in June 2004, and the individual right of access to information held by all public authorities, including government departments, will be implemented in January 2005.[24]

The reference to "the timetable set out in the Act itself" might be considered disingenuous. The Act does indeed provide for its provisions to come into force by January 2005, but this was regarded as a far from challenging target at the time of the passage of the Bill. Indeed, it was considered as a "safety-net" or "long-stop" provision; one which, in the light of subsequent developments, was very necessary. The wording of the commencement provision is:

> ... this Act shall come into force at the end of the period of five years beginning with the day on which this Act is passed or on such other day before the end of that period as the Secretary of State may by order appoint ...[25]

Other particular provisions impose earlier commencement dates for specific parts of the Act, and the possibility of an earlier commencement for *all* provisions is clearly adumbrated.

There are two reasons for addressing the commencement provisions of the Act: the first is for the sake of accuracy, for otherwise a reader might assume that an Act dating from 2000 was in force at the date of writing this paper; the other reason is that the delay in implementing the Act might be considered to give reasonable grounds for doubting the government's commitment to openness. However powerful a lamp may be, if disconnected from the mains of statutory authority it sheds no illumination.

[23] Hansard, House of Commons, 4 April 2000, col 922.

[24] Hansard, House of Lords, 13 November 2001, col 457.

[25] S 87(3).

The Information Commissioner: One Post, Two Roles

The Data Protection Commissioner gained not only a new title but also a new role, with responsibility for freedom of information matters, as a consequence of the Freedom of Information Act. The Commissioner at the time, Ms Elizabeth France, was sanguine about the conflicts likely to arise from her dual role, maintaining, "Data protection law is not about preventing the processing of personal data. It provides a framework to ensure that such processing is done fairly and lawfully". She did however concede:

> There will be an area where privacy and the right to know will be in tension: where a request is made to see information about someone else . . . The tension would exist whether there were two regulators or just me.[26]

Ms France also made the point that subject access is nothing new and has existed since the first Data Protection Act. While there is merit in this point, it is submitted that the potential for conflict is wider than she implies, given that the class of people about whom one can make subject access queries comprises one person, and the class of other people comprises some six billion persons.

It is the Data Protection Act 1998 rather than the Freedom of Information Act 2000 that governs subject access requests. Subject access requests fall under the Data Protection Act 1998, section 7. They are, however, identified in the Freedom of Information Act 2000 as an absolute exemption. The effect of this exemption is to bring into play the provisions of the Data Protection Act 1998 (and not, of course, to deny the subject's access to the data).

Third party requests, on the other hand, are subject to exemptions that do operate so as to deny access. These exemptions, provided for under the Freedom of Information Act 2000, section 40, also refer to the Data Protection Act 1998, and in particular to the eight data protection principles outlined in section 4 of that Act. Wadham, Griffiths and Rigby suggest that the second of these principles, in accordance with which personal data may not be further processed in any manner incompatible with the original purpose for which the data were obtained, will often preclude third party access, and speculate: "It is possible that public authorities could be tempted to rely too frequently upon section 40(2) as a reason for refusing disclosure of information".[27]

A False Dawn?

The contrast between this position and the Swedish position is instructive. The tradition of public access to documents in Sweden dates back to the Freedom of the Press Act, and has resulted in a degree of openness difficult to appreciate for those accustomed to a different tradition. I have cited elsewhere the example of a decision that the level of a specific official's salary should have been given out to a telephone enquirer.[28] Prior to the passage of the Personal Data Act, the Swedish government advanced the argument that, since the openness principle was enshrined in a fundamental law in Sweden, it was generally understood that one of the purposes for which information was collected by public bodies in Sweden was for further dissemination on request.[29] In contrast, it is anticipated that in the UK dissemination of personal information to third parties will be precluded on the grounds that such dissemination was not the original purpose of collection.

[26] France, E, "Identity Crisis? What Crisis?", *The Legal Executive Journal*, February 2001, p. 14.

[27] Wadham, Griffiths and Rigby, *op cit*, p. 131.

[28] Steele, J "Data Protection: An Opening Door?", (2002) 24(1/2) *Liverpool Law Review* 19–39.

[29] *Sveriges Riksdag*, "Propositioner 1997/98", 41–44, p 231, 26 November 1997.

It is possible that the Freedom of Information Act 2000 will effect that "fundamental and vital change in the relationship between government and governed" to which the prime minister looked forward in 1997. If this change does take place, public administration will become much more transparent to citizens. Their dealings with public bodies will take place on a basis of equality or near-equality of information; inefficiencies and avoidable delays will be identified and public bodies forced to respond to informed criticism.

It is also possible that nothing much will change: that public administrations will be able to find in the Act's many and varied exemptions reasons for delay or selectiveness in releasing information; that citizens will still find it difficult to obtain information which public bodies prefer not to disseminate; that policy and administrative measures will continue to be developed away from the scrutiny of the public.

However, developments in the UK should not be regarded in isolation. The conflict between the principles of freedom of information and the considerations of privacy and of administrative protection of candour or the "space to think" is also being played out at the level of the European Union.

THE EUROPEAN PERSPECTIVE

The revision of the EC Treaty accomplished by the Treaty of Amsterdam added a new article 255 to that treaty:

> 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
> 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
> 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

In accordance with this Treaty provision, Regulation (EC) 1049/2001 was enacted, and obliged the Commission, Parliament and Council to set up public registers of all relevant documents by 3 June 2002.

Regulation (EC) 1049/2001

It is generally the case that freedom of information legislation contains a general access rule expressed in broad terms, and Regulation (EC) 1049/2001 is no exception. The regulation provides in the first paragraph of article 2:

> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

The third paragraph of article 2 provides:

> This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

The compass of this legislation is, however, best assessed by reference to the exceptions contained in it. These can be considered under several heads. They include exceptions on security or national interest grounds; exceptions on the grounds of protection of internal decision-making processes; and, in particular, exceptions on privacy or data protection grounds.

The differing degree of qualification attached to the exceptions is noteworthy; the regulation provides at article 4(1):

> The institutions shall refuse access to a document where disclosure would undermine the protection of:
> (a) [public interest]
> (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

These exceptions are provided for without qualification, implying that the general right of access to documents is subordinated to the protection of privacy and the integrity of the individual. The prime sources of "Community legislation regarding the protection of personal data" are Regulation (EC) 45/2001 and its near relative, Directive 95/46/EC.

By contrast with the exceptions under article 4(1), there is a more restricted scope to the exceptions provided for at article 4(2), which include commercial interests and court proceedings, and at article 4(3), which is designed to protect the institutions' "space to think":

> Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process . . .

The exception is subject to an "overriding public interest" criterion, which implies a balancing of the public interest in disclosure against the protection of the institution's decision-making process. Even where a decision has *already* been taken, access to a document may still be refused, so that the "space to think" can be protected. This is effectively the same consideration as the "protection of candour" argument applied in the context of the UK civil service, which, as we have seen, is embodied in the Freedom of Information Act 2000, section 35(1)(a).

It is submitted that, as indicated above, the primacy of data protection considerations is implied by article 4(1)(b) and by article 11(2) of Regulation (EC) 1049/2001. What is more, the fact that Regulation (EC) 1049/2001 applies only to the European Parliament, European Commission and the Council of the European Union appears to imply that the purpose behind the regulation is primarily to shed light on the legislative functions of the European institutions, rather than on their administrative functions, for example, as employers of staff.[30]

This brings into focus the enactment that applies data protection principles to the institutions: Regulation (EC) 45/2001. The fact that access to some documents has been denied on the grounds provided for in article 4(1)(b) of Regulation (EC) 1049/2001 has attracted some criticism. Mr Roy Perry, MEP, in a hearing before the European Parliament on 25 November 2002, said in reply to a question on this point: "Data protection is sadly being abused too often. It is being used as an excuse and it was never designed for that".[31] The same point of view has been expressed by the then

[30] For further examination of this point see Steele, J, *op cit*, pp. 19–39.

[31] The verbatim report of the hearing is at http://www.europarl.ep.ec/comparl/peti/election/pr_cre.pdf

European Ombudsman, Mr Jacob Söderman. On 30 September 2002 the Ombudsman wrote to the President of the European Commission complaining of the "misuse of data protection rules".[32] It is perhaps not unfair to summarise the point of view presented by the European Ombudsman in the words "a European's home is his or her castle". The argument is that the fundamental basis for data protection legislation is Article 8 of the European Convention, which restricts the concept of "private life" so as to exclude the world of work. Having listed a number of sources of data protection law, an article published on the Ombudsman's website states:

> The most fundamental of these texts is Article 8 ECHR, which guarantees the protection of privacy and family life.
> In a judgment of 16 February 2000, the European Court of Human Rights confirmed its earlier case law that it is data relating to the *private life* of an individual that fall within the scope of Article 8. The Court pointed out that respect for private life comprises the right to establish and develop relationships with other human beings, and explicitly linked this understanding of the notion of "private life" with the objective of the data protection Convention, which is to "secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him".[33]

In my view, it is arguable that this restrictive view of article 8 is not necessarily justified from certain perspectives. The tenth recital to Directive 46/95/EC seems to discourage a restrictive interpretation of the concept of privacy as found in article 8:

> Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the general principles of Community law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community;

This text appears to be saying that there are two sources of a concept of privacy, article 8 and "the general principles of Community law", and that the directive should not reduce the scope of privacy protection afforded from either source, but rather harmonise at the highest level of protection. Even if one did accept article 8 as being the primary source for a concept of privacy, then the further point would still remain that the caselaw of the European Court of Human Rights has not interpreted article 8 restrictively. In particular, in *Rotaru v Romania*[34] the concept of private life was extended to include information about what subjects a student had read at university.

Does privacy begin at home, or end there?

The roots of the data protection legislation discussed in this paper lie in the Council of Europe Convention for the Protection of Individuals with regard to Automatic

[32] European Ombudsman, (2002), letter to President of the European Commission, www.euro-ombudsman.eu.int/letters/pdf/en/20020930-1.pdf.
One of the matters referred to concerns the external activities of Commission officials, details of which were requested by a newspaper. The Ombudsman's website does not give further details, but the reference may well be to the article "No Naming Names: 'Open' Commission Reveals Its Limits" in the *Wall Street Journal* of 27 May 2002. The *Journal* had requested details of officials' external activities: the Commission's response deleted all identifying information such as names, thereby anonymising the information.

[33] http://www.europarl.ep.ec/ombudsman/letters/en/20011114–1.htm.

[34] (2000) 8 BHRC 449, ECtHR.

Processing of Personal Data, opened for signature on 28 January 1981.[35] Certain principles enshrined in this Convention have influenced Community legislation in this field. In particular, the data quality principle that data must be accurate, adequate for their purpose and stored only for as long as necessary, have been substantially echoed in Directive 95/46/EC and in Regulation (EC) 45/2001.

"If criticism is the best known antidote to error ... and leaders naturally hate criticism ... then clearly a society is best served by ensuring that leaders cannot suppress or evade critical appraisal".[36] So maintains David Brin, a persuasive advocate of openness in many areas of society. On an empirical level, it is easy to observe that states with rampant corruption and mismanagement are rarely characterised by the freedom of their media, and much less by ready public access to government documents.

This is probably the most powerful argument against the widespread use of one of the two main lines of exception to public access regimes noted in this paper, namely, the "protection of candour" or "space to think" exception. It is less clear, however, that considerations of privacy should be widely set aside. An obvious example would be decisions connected with health or medical matters. However, in such matters, a conclusion, such as retirement on health grounds, can be reported without entering into details about the grounds. The purpose of such confidentiality is, however, in general, to protect the interests of individuals, not those of the administration as a whole.

If one obliges officials to state reasons for a decision, one is *a fortiori* obliging them to have reasons for those decisions, which will have to be sound enough to bear scrutiny. Open public accountability constitutes a defence against arbitrary and partial administration. However, it is agreed on all sides that there is an area of private life that is proof against such scrutiny. The difference of opinion lies in the extent of the concept of private life. The limits of privacy are not evident. In article 2 of Directive 95/46/EC there is a very broad definition of personal data as "any information relating to an identified or identifiable natural person" and similarly a broad definition of processing as "any operation or set of operations performed upon personal data", including collection, consultation or dissemination. It was surely not the intention of the legislator to bring into play considerations of the legitimate use of personal data on every occasion that any specific person is mentioned in any document, for example. The UK's Data Protection Act 1998 sought to defined data by reference to the concept of a "relevant filing system" such that "the set [of information] is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible".[37] Carey speculates:

> It is unlikely that an unstructured collection of papers which only incidentally contain personal data would be caught by the provisions. If manually recorded data do not form part of a relevant filing system then there is no need to comply with any of the provisions in the Act so far as that data is concerned.[38]

This may be the case as far as the UK legislation is concerned, but it is doubtful whether the scope of Regulation (EC) 45/2001 could be considered to be restricted to structured sets of data in the same way.

[35] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, European Treaty Series No. 108. This information is derived from Council of Europe website: http://www.legal.coe.int/dataprotection/Default.asp.

[36] Brin, D, *The Transparent Society: Will Technology Force Us to Choose Between Privacy and Freedom?*, (Perseus Books, 1998), p. 120.

[37] Data Protection Act 1998, s 1(1)(d).

[38] Carey, P, *Blackstone's Guide to the Data Protection Act 1998*, (Blackstone Press Limited, 1998), p. 8.

At some point the boundaries of privacy will surely be more precisely defined. Although there is little caselaw in point in the Court of Justice of the European Communities, there is a body of caselaw in the European Court of Human Rights on the meaning of private life. It is established that

> It may include activities of a professional or business nature ... there is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" ... Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor.[40]

It is worth noting that several cases on privacy have concerned the monitoring of telephone conversations, even those made on business premises with an employer's equipment. In one such case, *Halford v United Kingdom*, the fact that the person in question had assigned to her an office for her exclusive use and two telephones, one of which was described to her as being for personal calls, were factors which were held to create a reasonable expectation of privacy with respect to conversations held using that telephone.[41] Although the facts of that case were certainly unusual, it is submitted that the caselaw offers little support for the concept of privacy as a right restricted to the environment of home and personal relations, to the exclusion of work life.

In a recent case, the Court of Justice of the European Communities made explicit reference to the body of caselaw developed in this area by its Strasbourg counterpart. In its judgment of 20 May 2003 in *Rechnungshof v Österreichischer Rundfunk and others*[42] the court had to consider the applicability of Directive 95/46 in a dispute between the Austrian national audit authority and various public bodies, which were obliged under national legislation to transmit to the audit authority the names of members of staff whose remuneration exceeded a given limit. The Advocate General had taken the view that the audit activity of the Austrian Court of Auditors fell outside the scope of Community law and that therefore the directive was not applicable. The court however reasoned that since any personal data may circulate between member states, all personal data, subject to certain specific exceptions, were covered by the directive. Nonetheless, this wide-reaching applicability was tempered by the way in which the directive was applied. In making an explicit link with article 8 of the European Convention on Human Rights, the court insisted that the directive must be interpreted in the light of the fundamental rights recognised by caselaw. The court then proceeded to determine whether there was an interference with private life and, if so, whether such interference was legitimate. It would fail to be legitimate if the end in view could be accomplished by other means, such as disclosure of salary levels that did not identify specific persons.

This case, which may signal a convergence of the caselaw of the Strasbourg court, built on the concept of private life under article 8 of the ECHR, and the Community law on data protection, illustrates that what counts is the processing involved. Although one uses the term "data protection" it is not data that are protected by the law. What the law seeks to protect is human beings, and what they are protected from is an illegitimate use of data concerning them. The quality of illegitimacy attaches not to the data but to the use made of them, to the extent that that use represents an unlawful interference in private life.

[39] *P.G. and J.H. v United Kingdom*, [2002] Crim LR 308 (ECHR), *The Times*, 19 October 2001, ECtHR.

[40] *Halford v United Kingdom*, [1997] IRLR 471; (1997) 24 EHRR 523, ECtHR.

[41] *Rechnungshof v Österreichischer Rundfunk and others*, (C-465/00). [2003] ECR I-4989, ECJ.

We have seen that the claims of privacy and the principle of the protection of candour are occasionally in competition with the principle of freedom of information. In the current state of the law at Community level as well as at the domestic level in the UK, the claims of privacy appear to be in a stronger position than the claims of the protection of the decision-making process, when such competition arises.

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CASE NOTES

The address for the submission of case notes is given at the beginning of this issue

REGULATION No. 2560/2001 AND ITS DOUBTFUL MERITS

Once upon a time, an EU Regulation came into force. It was meant to improve the situation of European citizens by reducing the costs of cross-border payments. Politicians of all parties heralded it as a major step towards the attainment of a Single Payment Area.

Recently, I learned that Regulation No. 2560/2001[1] does not quite live up to the expectations. A friend told me what happened when she asked a major Scottish bank to change the money in her account into euros and transfer the funds to Germany. She hoped to benefit from new EU legislation, because according to Regulation No 2560/2001, the charges levied by an institution in respect of cross-border payments in euro must not be higher than charges for transactions within the member state (art 3 para 1). Just to be on the safe side, my friend pointed out that the regulation had come into force and even included a copy in her letter to the bank.

She did this, however, to no avail. A few weeks later, the transaction was executed, but the bank in question deducted a commission of £14. Considering that her total savings amounted to only £37, my friend found this outcome rather annoying. After repeated inquiries, the customer relations manager finally informed her that:

> On 1st July 2003 new EU regulations did come into force. They did not, however, state that all international payments in Euro should be free of charge. They stated that UK providers could no longer apply a higher charge for cross-border payments in Euro, than for domestic payments in Euro.... As a result, we re-priced our international payments in June of this year, and those up to 12,500 Euro now attract a charge of £17 per payment.

Now, what is to be thought about such an approach? Obviously, it's not very consumer-friendly. However, from a legal point of view, one could congratulate the bank. It has found a loophole in Regulation No 2560/2001, which only provides for a comparison between cross-border and domestic payments in euros. To put it in another way, the regulation does not stipulate that the charges levied in respect of transfers within the EU must be equal, no matter what the national currency. Therefore, technically speaking, the bank is not in breach of EU law.

However, on second thoughts, one starts to wonder about the wider implications. The solution provided may comply with the wording of the regulation, but it does not fit in with its aims. According to the preamble, Regulation No 2560/2001 was proposed because the Commission took the view that there was urgent need for improvement. Two studies published in 1993 and 2001, (see paragraph 1 of the preamble) respectively, had shown that consumers were given insufficient information about the costs for cross-border transactions. In addition, compared with internal payments, the

[1] [2001] OJ L344/13.

charges levied in respect of cross-border transfers were disproportionally high. The Commission identified this anomaly as a major obstacle for the completion of the internal market. First, it is detrimental to consumers' confidence in the euro. Secondly, high costs for cross-border payments obviously hamper inter-European trade. The regulation is meant to alleviate this problem and thereby facilitate the proper functioning of the internal market. However, this aim cannot be attained if domestic banks are allowed to retain high charges for inter-European transfers by using a loophole.

At first sight it may well appear as though this problem only affected a limited number of people. This is because the majority of payments in Britain are presumably in pounds sterling. Consequently, the increased charges will go unnoticed. Or will they? British traders and consumers do incur high expenses, when they request cross-border payments within the EU. This is detrimental to the functioning of the internal market. To put it succinctly, there is no point, for example, in shopping on the internet if your bank demands a fee of £17 for each payment.

On 2 December 2003 the Commission published a consultation document entitled "New Legal Framework for Payments in the Internal Market".[2] In this document, the Commission asks for comments about existing EU law and its deficiencies, and it sets out plans for future legislation. Regulation No 2560/2001 is presented as an important step towards the achievement of a single payment area, which – despite the introduction of the euro – still does not exist. According to the Commission, the regulation has brought benefits for EU citizens and the economy in general by reducing the costs for cross-border payments considerably (COM (2003) 718 final, pp 2, 4 and 5). As can be seen from the above, this statement is not entirely true. Banks from member states that have yet to join the euro, are able to avoid the "adverse effects" of EU law. Unless the loophole in Regulation No. 2560/2001 is dealt with, it will be solely the banks – not their customers – who will live happily ever after.

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[2] COM (2003) 718 (OI).

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RECKLESS ABANDON

R v G and another [2003] UKHL 50

(Lord Bingham of Cornhill, Lord Browne-Wilkinson, Lord Steyn, Lord Hutton, Lord Rodger of Earlsferry)

The wind of judicial subjectivism[1] in the criminal law continues to gather force and sweep all before it. The rock of *Caldwell* recklessness has crumbled to dust in the face of the onslaught. How those most persistent and telling critics of *Caldwell*[2] and most persuasive advocates of subjectivism, Glanville Williams and Sir John Smith, would have rejoiced if they had been here to see it. As Sir John poignantly remarked, an advocate of judicial law reform requires limitless patience and longevity.[3]

In *G and another*[4] the 11 and 12 year old defendants were messing around in the early hours with some bundles of old newspapers which they had found in the back yard of the Co-op store in Newport Pagnell. They lit some of the newspapers and threw them on the concrete floor underneath a large plastic wheelie bin. Adjacent was another similar bin, which was next to the wall of the shop. The accused left the yard with the papers still burning. The fire spread to the first bin, then to the second and then to the guttering and fascia board on the overhanging eave. It penetrated the roof space and set alight to the roof and adjoining buildings causing about £1 m worth of damage. The defendants were charged with damaging by fire "*commercial premises . . .* being reckless as to whether *such property* would be damaged".[5] The issue therefore turned on whether they were reckless as to damaging the *buildings*. At the trial, it was accepted that the boys thought the fire would extinguish itself on the concrete floor and that neither appreciated that it might spread to the buildings. Nonetheless the boys were convicted and the Court of Appeal, basing itself on *Caldwell*, affirmed the conviction because the boys gave no thought to a risk of damaging the buildings that would have been obvious to any reasonable adult.

THE DECISION IN THE HOUSE OF LORDS

In quashing their convictions, the House of Lords unanimously[6] held that its previous decision in *Caldwell*[7] should no longer be followed in respect of its interpretation of the meaning of "reckless" in the Criminal Damage Act 1971. Henceforth "reckless" in that statute must be understood to mean simply subjective recklessness. No longer will it suffice to show that D gave no thought to an obvious and serious risk of damage to property. D must have actually seen the risk of such damage and deliberately chosen to run it. The House adopted the following definition contained in clause 18(c) of the

[1] Most recently shown in *B v DPP* [2000] 2 AC 428 HL and *K* [2002] 1 AC 462 HL.

[2] See *eg* Sir John Smith's commentary at [1981] Crim LR 392 and Glanville Williams's article "*Recklessness Redefined*" at (1981) 40 CLJ 252.

[3] Commentary on *Doring* [2002] Crim LR 817, 819.

[4] [2003] UKHL 50, [2003] 3 WLR 1060, [2003] 4 All ER 765. The appeal was from the Court of Appeal's decision reported *sub nom Gemmell and Richards* [2003] 1 Cr App R 23 which was the subject of a note in this journal by Professor Mary Seneviratne: (2003) 12(1) Nott LJ 36 arguing for reconsideration of *Caldwell*. The House itself granted leave to appeal after the Court of Appeal had refused it.

[5] My italics.

[6] Lord Bingham gave the leading judgment and all judges expressly agreed with him.

[7] [1982] AC 341.

Criminal Code Bill annexed by the Law Commission to its Report "A Criminal Code for England and Wales Volume 1: Report and Draft Criminal Code Bill" (Law Com No 177, April 1989):

> A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to –
> (i) a circumstance when he is aware of a risk that it exists or will exist;
> (ii) a result when he is aware of a risk that it will occur;
> and it is, in the circumstances known to him, unreasonable to take the risk.

Four reasons were advanced for this volte-face[8]

(1) As a matter of principle, conviction for a serious crime should require proof of a "culpable" state of mind in the form of actual perception of the risk of the harmful consequence. Mere "stupidity or lack of imagination" leading to failure to appreciate the risk should not expose someone "to conviction of serious crime or the risk of punishment".[9]

(2) The *Caldwell* "direction is capable of leading to obvious unfairness . . . It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension." This reason elides with the first but its poorly articulated basis probably resides in the failure of *Caldwell* (or more accurately subsequent authorities[10]) to give any concession where D's *capacity* to appreciate the risk (in this case, through the youth and inexperience of D) is impaired through no fault of his or her own.[11]

(3) "Leading scholars of the day" had subjected *Caldwell* to "reasoned and outspoken criticism" and judges and practitioners had expressed widespread reservations about it.[12]

(4) The framers of the Criminal Damage Act clearly intended "reckless" to be limited to subjective recklessness and therefore *Caldwell* misinterpreted the statute. Because "this misinterpretation is offensive to principle [ground 1 above] and is apt to cause injustice [ground 2 above]. . .the need to correct the misinterpretation is compelling".[13]

Taking those reasons in reverse order, the fourth is incontrovertible and clearly demonstrated in Lord Bingham's historical review of the legislation.[14] The third is also true but equally the zealous subjectivism espoused by Professors Smith and Williams has attracted considerable criticism from the current crop of academic commentators.[15] Many of them would argue for *Caldwell* recklessness albeit in a modified form to cater for fault-free incapacity. Some judges, especially at Court of Appeal level, have certainly been hostile to unadulterated *Caldwell* recklessness[16] although it is not clear that their hostility would extend to a suitably modified form.

This leads to the second reason: *Caldwell* recklessness "is capable of leading to obvious unfairness". The particular concern underlying this was probably the reduced

[8] Paras 31–35.

[9] Para 32.

[10] *Eg, Lawrence* [1982] AC 510 HL and *Miller* [1983] 2 AC 161 HL. *Caldwell* was to an extent ambiguous on this point.

[11] Para 33.

[12] Para 34.

[13] Para 35.

[14] Paras 12 and 13. See also Lord Steyn, paras 46–51, especially para 50.

[15] See *eg* Duff: *Recklessness* [1980] Crim LR 282; Wells: *Swatting the Subjectivist Bug* [1982] Crim LR 209; S. Gardner: *Reckless and Inconsiderate Rape* [1991] Crim LR 172; Horder: *Two Histories and Four Hidden Principles of Mens Rea* (1997) 113 LQR 95.

[16] Notably Robert Goff LJ in *Elliott v C* (1983) 77 Cr App R 103 DC, Ackner LJ in *Stephen Malcolm R* (1984) 79 Cr App R 334 CA and the Court of Appeal in the instant case [2003] 1 Cr App R 23.

ability of the defendant children to foresee the risk of the fire spreading owing to their age-based immaturity and inexperience. Obviously, they could not help their immaturity and inexperience and therefore their failure to foresee the obvious was not culpable. However, in the terms in which it is put, the reason is the broader one that "it is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension". This hard-core subjectivism surely goes too far and ignores the vast range of offences, including manslaughter, where inadvertence can found liability. Contrary to Lord Bingham's first reason that serious crime should as a matter of principle require proof of conscious risk-taking, there is nothing necessarily unjust or immoral about basing culpability on inadvertence. That will depend on the particular offence involved. The Sexual Offences Act 2003 utilises inadvertence-based culpability in a number of the revised sexual offences.[17] This is neither unjust nor immoral[18] but a perfectly tenable and rational response, made after due consideration,[19] to resolve identified problems. Whilst one can accept that serious crimes ought to require serious culpability, which would normally be a minimum of subjective recklessness, this should only be a starting point and not be elevated to the status of unswerving principle.

The House firmly rejected the idea of retaining the *Caldwell* principle in a modified form designed to take into account any blame-free reduced capacity of perception on the part of the accused.[20] The major reasons seemed to be that, although this might eliminate the worst of the injustices generated by *Caldwell*, it would perpetuate the misinterpretation of the Criminal Damage Act and would still offend Lord Bingham's point of principle that full *mens rea* should be required for serious offences. Perhaps more telling still, in practice, it would be difficult to devise such a modification and it would be bound to lead to "difficult and contentious argument concerning the qualities and characteristics to be taken into account."[21] The House would be well aware of the convolutions and confusions reaped in *Smith (Morgan)*[22] in regard to similar problems in the law of provocation.

There is an element of overplay in all the hand-wringing about unfairness to unperceptive youngsters. In both *G* and *Elliott* v *C*,[23] there can be little doubt that the defendants intended to damage *some* property belonging to another. In *G* it was the newspapers and probably also the first bin. In *Elliott* v *C*, it was the white spirit and shed carpet.[24] The complaint upheld in *G* therefore was not that the accused were found guilty of criminal damage but that they were found guilty of criminal damage to the wrong (unforeseenly damaged) property.

Even after *G*, it is open to argument that, by reframing the charges, it would still be possible to convict defendants in situations like *G* of damaging the unforeseenly damaged property. The fact that damage to the property belonging to another that was actually damaged – the buildings – was not foreseen by D, might not preclude the

[17] For example, age-based offences are committed unless D *reasonably* believes the child to be 16 or over, see, *eg* ss 9 to 13. This will obviously catch someone who has unreasonably given no thought to the victim's age. It adopts the formulation in *B v DPP* stiffened by the requirement for the belief to be reasonable. Offences against the under 13s require no fault element whatsoever in respect of the age factor (assuming the courts will find that that is a necessary implication of the configuration of the offences in the Act): there is a return to strict liability. See ss 5 to 8.

[18] See *eg* T Pickard: *Culpable Mistakes and Rape; Relating Mens Rea to the Crime* (1980) 30 *University of Toronto LJ* 75. See also Lord Rodger's comments in *G* at para 69.

[19] See *eg* the Government's White Paper *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (Cmd 5668, 2002), which led to the Sexual Offences Act 2003.

[20] Lord Bingham at para 37, Lord Steyn at para 54 and Lord Rodger at para 63.

[21] Lord Bingham at para 37 and Lord Rodger at para 63.

[22] [2001] 1 AC 146 HL.

[23] (1983) 77 Cr App R 103 DC.

[24] How else could she get warm unless something burned?

offence. The charge in *G* could have been framed to allege that the defendants destroyed or damaged property belonging to another, namely, commercial premises, intending or being reckless as to damaging property belonging to another, namely, a bundle of newspapers and a wheelie bin. The statutory definition of criminal damage seems to allow the kind of mixing and matching required. When the statute says, "destroys or damages any property belonging to another intending to destroy or damage any *such*[25] property", it can be argued that the "such" refers to any property belonging to another not specifically the property alleged in the charge to have been actually destroyed or damaged. There is no definitive authority on this point in relation to criminal damage, although the House's attitude to murder in *Attorney-General's Reference (No 3 of 1994)*[26] is at odds with such an interpretation. Lord Mustill unaccountably appeared to reject the idea that the *mens rea* for murder was satisfied by an intention to kill or cause grievous bodily harm to a person. It had to be the actual victim, in the absence of transferred malice. However, no such restriction applied to the offence of unlawful act manslaughter in judging whether D's act was dangerous. There was no need to prove there was an obvious risk of harm to the deceased victim as long as there was such a risk to someone. Admittedly this was an objective fault requirement as opposed to the subjective fault in issue in murder and, since *G*, in criminal damage. Although the issue was never discussed in *G*, it may be supposed that the House might well have opposed such an interpretation for criminal damage.

Even so, might not the same result be achieved by invoking the doctrine of transferred malice? It would seem so. If D intends to damage the wheelie bin, the newspapers or both and damages other property belonging to another (the buildings), then the doctrine of transferred malice would enable the two to be married to complete the offence. Although the doctrine usually applies where the damage to the different property occurs *instead of* damage to the intended property (rather than additionally to the intended damage as occurred in *G*), the latter situation is unlikely to be excluded from the doctrine. Let us suppose that D, intending to cause grievous bodily harm to X, shoots X so that the bullet passes through X's body and then kills Y who, unnoticed by D, is standing a little way behind. If X surprisingly survives the shooting, suffering only grievous bodily harm, can it be doubted that the courts would convict D of the murder of Y? Equally, if X dies too, D would be liable for both murders. Similarly if D, intending to break V's window, throws a stone through it and inadvertently breaks V's priceless Ming vase inside the house, it is thought that D could be convicted of criminal damage to the vase whether or not he foresaw the risk of damage to any property inside the house. In other words, successful achievement of D's aim should not preclude the operation of the doctrine. Nonetheless, it is necessary to observe that Lord Mustill's explanation of transferred malice in *Attorney-General's Reference (No 3 of 1994)* appears at odds with this view.[27] However, he was not considering the sort of situations exemplified above and it is not thought that his statements represent an insuperable obstacle for future courts.

[25] My emphasis.

[26] [1998] AC 245.

[27] [1997] 3 All ER 936, 949e: "The effect of transferred malice, as I understand it, is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (*but did not happen*) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually consummated crime." (My emphasis).

HUMAN RIGHTS

The Court of Appeal had given short shrift to a defence argument that the *Caldwell* principle breached Article 6(1) of the European Convention on Human Rights in that the unfairness of the substantive law infringed the defendants' right to a fair trial.[28] Article 6 is concerned with procedural fairness and any idea that a substantive rule of law could be challenged purely because it could work unfairly would open the floodgates. It is not surprising that such challenges have been consistently rejected by the Court of Appeal.[29] Unfortunately, if understandably, the House of Lords forbore to comment on the issue since it became irrelevant once the *Caldwell* principle was overturned.

SELF-INDUCED INTOXICATION

Caldwell was complicated by the fact that the accused's perception was probably impaired by self-induced intoxication. The House in *G* did not discuss intoxication in any detail because it was not raised by the appeal but nothing was said to cast any doubt on that aspect of *Caldwell*.[30] Thus its uncertain effect on the intoxication principles laid down in *DPP v Majewski*[31] remains unresolved and it is to be hoped that an early opportunity arises for the clarification that could have been provided in *Kingston*.[32] In the context of criminal damage, does the availability of intoxication as a defence depend on whether the charge alleges recklessness or merely intention as *Caldwell* can be interpreted as asserting? Has the central distinction in *Majewski* between specific intent crimes and basic intent crimes been entirely supplanted by the crimes of intention/crimes of recklessness distinction? Or is there a hybrid test: if, according to the charge, proof of recklessness suffices for conviction, intoxication can never be a defence (even if the offence is one of specific intent[33]); whereas if, according to the charge, intention must be proved, intoxication *may* be a defence but only if the crime charged is classified by the law as a crime of specific intent?[34] No hint of an answer falls from their Lordships' lips.

THE FUTURE

It is tempting to conclude that objective recklessness has now become obsolete, a mere historical footnote in the criminal law. That at the very least would be premature. Lord Bingham, speaking for all, emphasised that he was not addressing the meaning of "reckless" "in any other statutory or common law context" than the Criminal Damage Act. Even so, it seems inconceivable that its definition will not be influential wherever the concept of recklessness appears in the criminal law. It was understandable that the House should wish to cast no doubt on the applicability of *Caldwell* recklessness to the

[28] See Seneviratne n 4 above at 39.

[29] *Concannon* [2002] Crim LR 213 CA.

[30] See paras 18, 19, 36 and 60.

[31] [1977] AC 443 HL.

[32] [1995] 2 AC 455 HL.

[33] *Eg* s 1(2) of the Criminal Damage Act 1971 *cf Orpin* [1980] 2 All ER 321 CA.

[34] So that if a s 1(1) offence were charged alleging intention to damage only, intoxication could be no defence because s 1(1) is a crime of basic intent.

now abolished crime of reckless driving.[35] To have done so might have encouraged stale appeals via the Criminal Cases Review Commission. However, it would be unfortunate if the clarity given to the concept of recklessness were undermined by allowing inadvertent fault to fall under its umbrella in other spheres of the criminal law. It would breed unnecessary uncertainty.

That said, it is too early for out and out subjectivists to claim total victory. Firstly, there are many regulatory offences that utilise recklessness and it is by no means certain that they will be interpreted as confined to subjective recklessness. Certainly the few cases which have already applied *Caldwell* recklessness to particular offences are technically unaffected by *G*.[36] However it might well provoke a reconsideration in time although it should be noted that the House's ringing endorsement of *mens rea* in *B v DPP*[37] and *K*[38] has not prevented a continuing espousal of strict liability in regulatory offences.[39]

Secondly, the narrowness of fault based entirely on cognition - D's awareness of risk – has already forced the courts to enlarge their notion of *subjective* recklessness even where they have accepted that that is the minimum required to satisfy the *mens rea* of the offence before them. One case is where the accused acts in a fit of anger without thinking. In *Parker*,[40] D broke a public telephone when he crashed it down in frustration after failing to make a call. D claimed to have acted without considering the risk of damaging the phone. The court held that if he did not know of the risk, then he "deliberately closed his mind to the obvious – the obvious being that damage in these circumstances was inevitable." That sufficed for the subjective recklessness assumed, before *Caldwell*, to be necessary. Lord Bingham in *G* interprets closing the mind to risk as predicating actual realisation of risk[41] but, if that is so, D must "know" of the risk and there is no point in complicating things by adding a redundant alternative. The truth is that, if the alternative has any point, it does cover cases where, in reality, D was not aware of the risk at the time he acted because of his rage and frustration. However it may be limited to cases where the risk is plainly inherent in and inextricably bound up with D's actions so that he can be assumed to be aware of the risk in the back of his mind even if he was not thinking about it at the time.[42] It is a stretch but it can be regarded as a case where D must, however fleetingly, have been aware of the risk but his rage and frustration had despatched it to the inner recesses of his mind.[43]

A second case that has exercised the courts, especially in the offence of rape, is where D "could not care less" or is "indifferent" about the risk. Of course, like closing the mind, that might be said to require actual awareness of the risk. How can D not care

[35] See *Lawrence* [1982] AC 510 HL.

[36] *Warburton-Pitt* (1991) 92 Cr App R 136 (reckless acts likely to endanger aircraft contrary to Art 45 of the Air Navigation Order 1980 – not a strong authority in that the Court of Appeal did not expressly comment on whether the trial judge was correct to direct in accordance with *Caldwell* but, since no criticism was made of that aspect of his direction, there is implicit approval); *Data Protection Registrarv Amnesty International* [1995] Crim LR 633 (s 5 of the Data Protection Act 1984); *MFI Warehouses Ltd v Nattrass* [1973] 1 All ER 762 (recklessly making a false statement as to services contrary to s 14(1)(b) of the Trade Descriptions Act 1968).

[37] [2000] 2 AC 428 HL.

[38] [2002] 1 AC 462 HL.

[39] *Muhamad* [2003] 2 WLR 1050 CA.

[40] [1977] 2 All ER 37 CA.

[41] Para 14.

[42] See the alternative rationalisations given by Ashworth: *Principles of Criminal Law* 4th ed, (Oxford, Clarendon Press, 2003), at 182 and Simester and Sullivan: *Criminal Law: Theory and Doctrine* 2nd ed, (Oxford, Hart, 2003), at 141.

[43] As Geoffrey Lane LJ put it in *Stephenson* [1979] 2 All ER 1198 CA, "We wish to make it clear that the test remains subjective, that the knowledge or appreciation of risk of some damage must have entered the defendant's mind even though he may have suppressed it or driven it out . . ."

about something unless he has adverted to it? The answer is that he could have failed to think about the risk precisely because it is irrelevant to the pursuit of his own interests. He gives no consideration to the risks to others because it is a matter of indifference as to how they might be affected. This did seem to be the test for *mens rea* in rape in relation to the victim's lack of consent[44] prior to its reform by the Sexual Offences Act 2003, section 1. It is qualitatively different from standard subjective recklessness because it is based on an assessment of D's attitude to the risk rather than his cognition of it. Where D's conduct discloses an attitude of mindless or callous indifference to the risk, it does not matter that he gave no thought to it. This is a complication the law could do without and it remains to be seen whether it will survive in other spheres now that the law of rape has been recast by the Sexual Offences Act 2003.

An alternative suggestion in *Satnam Singh*[45] seems likely to prove more resilient especially as the concept has been utilised by the House of Lords in respect of other sexual offences in *B v DPP* and *K*. This suggests that D will be reckless if he does not positively believe that the victim is consenting, whether this is because he realises she may not be consenting (subjective recklessness) or because he has simply not considered it (objective recklessness). Similarly, in relation to offences based on the age of the victim, *B v DPP* and *K* both hold that, although a *mens rea* requirement in relation to the victim's age must be implied, it is not in the form of straightforward subjective recklessness. To escape liability, D must positively believe that the victim is over the relevant age threshold. In most cases the absence of such a belief will be because D has realised the victim might be under age. However, it could be because he has not even considered the age. It follows that *Caldwell* recklessness as to circumstances might well survive *G* at least where an unexpressed mens rea is implied by the courts under the *B v DPP* principle. Of course, the offences in *B v DPP* and *K* have been redefined by the Sexual Offences Act 2003[46] but the principle remains.

CONCLUSION

As noted above, the House advanced several arguments in support of its ruling but, in fact, missed the most telling argument in favour of its stance, namely, the necessity for a clear and certain terminology to illuminate the basic building blocks used in constructing the fault elements in offence definitions. It made no sense at all to have recklessness straddling two very different concepts with the consequent uncertainty of which applied when. The House's decision is therefore a welcome and necessary step to imposing some order and certainty in fault terminology.

Nonetheless, it is likely that some of the ideas behind *Caldwell* recklessness will survive in one form or another. The stretches identified in the concept of subjective recklessness may well remain but it would be preferable for the legislature to prescribe such fault elements in a clear and principled way that avoids conceptual confusion. The Sexual Offences Act 2003 illustrates how this might be done without doing violence to existing concepts.[47] Further, the objective strand of *Caldwell* could easily be subsumed within the category of gross negligence and it would be open to the legislature to

[44] *Satnam and Kewal Singh* (1984) 78 Cr App R 149 CA; *Breckenridge* (1984) 79 Cr App R 244 CA; *Taylor* (1985) 80 Cr App R 327 CA.

[45] *Ibid.*

[46] By adopting a similar but less forgiving line in that D must *reasonably* believe the victim was above the relevant age: see n 17 above.

[47] See, for example, ss 1–3 and 9–11.

prescribe this as a sufficient fault element in the future, beyond the current category of manslaughter, if it was thought that policy required it. A hard-line Home Secretary might well favour legislation to reverse any over-enthusiastic subjectivism of the current House.

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BOOK REVIEWS

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

JOINING EUROPE'S PUBLIC LAW DOTS

European Public Law by PATRICK BIRKINSHAW, London, Butterworths, 2003, liv + 637 pp, Paperback, £29·95, ISBN 0-406-94288-9

Professor Birkinshaw's *European Public Law* is a welcome addition to the field in this area which to date, sadly, is all too thin; although the work there is tends to be of a very high quality. This book is a significant manifestation of the excellent work that has been ongoing for the last decade within the Institute of European Public Law at the University of Hull. In this book the Institute and its Director have a very useful companion to their taught postgraduate programmes and good quality journal also entitled *European Public Law*.

Traditionally oriented public law modules have a tendency, rightly so, to focus on the impact of "European law" from very much a "bottom up" perspective. The general approach is to consider the changes that have become manifest in domestic law as a result of membership of the European Union and the more recent enacting of the Human Rights Act 1998 and increased absorption of principle from the European Convention on Human Rights. Similarly, European Union law and European human rights law modules delivered at undergraduate and postgraduate level focus primarily on the institutional arrangements and substantive law of those particular organisations, often paying scant heed to the roots of those arrangements and attendant law. Given the terror that appears to grip the vast majority of undergraduate law students when faced with the "E-word", this should not perhaps be regarded as too surprising. However, it often strikes this reviewer as being slightly odd that such modules do not underpin teaching and learning in this area with a clear understanding of the roots from which these systems have grown.

European Public Law might best be viewed as an attempt to remedy these deficiencies; to understand the linkages, flows of exchange and mutual interpenetration that exist as between various domestic legal systems and their supranational brethren. The book conceives not just of a flow of influence from "top to bottom", from intergovernmental giant to domestic legal minnow, but also appreciates the "two-way" nature of the relationship between entities of this type. That this book is firmly sited in the United Kingdom ought not to be too startling; the adoption of this viewpoint is appropriate both from the author's own geographical location and from the position that, although we may live in the age of globalisation, everything has to happen somewhere. This perspective does much to assist a domestic audience in coming to terms with a new understanding of the forces at work in the shaping of our legal systems. For this reason alone, the text should make valuable reading for all those striving to understand the machinations of our own constitution and those intrinsically linked with it, whatever their level.

After setting out his own parameters and introducing the reader to the chief concepts and themes at play in *European Public Law*, the author begins by setting out the constitutional backgrounds of the four systems that form the primary subject matter of the text: the European Union, France, Germany and the United Kingdom. Here the nature of these different and disparate systems are highlighted in turn and in each case the unique problems and issues encountered as the systems are increasingly influenced by outside forces are outlined and analysed. This is key, in order that the reader can adequately grasp what is to follow, and is achieved in a concise and succinct fashion.

The book then commences its most interesting phase, from this reviewer's point of view at least, discussing the impact of French, German and English law and legal culture on the development of European public law. This part of the text is also its most vexatious in that the author provides an excellent overview of the aspects of each system that he contends have had an impact on the development of European public law, only to engage in relatively brief analyses of these impacts with a promise of more to come in subsequent chapters. Nevertheless the descriptions of each are both engaging and enlightening and convey to the reader a real feeling for the landscape of each structure.

Reverting to its roots, the book then looks to the impact of EU law upon the United Kingdom. This reviewer must confess to a certain degree of ambivalence in this regard; whilst this section is, as ever, clearly and persuasively drafted, one wonders whether this particular element is actually necessary or at least whether it really merits the substantial coverage afforded. This is not to suggest that this particular aspect of European public law should not be of interest, but the story the chapter tells is a familiar one to those involved in the study of law: the impact of membership of the European Communities, and now the European Union, upon the constitutional and administrative law of the United Kingdom and the difficulties, solutions and tensions begotten as a result of that membership. This is not to say that the author does not have anything to add here; the recognition of the "deepening" of flows between "top" and "bottom" brought about by devolution in the United Kingdom is a welcome addition to the standard discussion pertaining to EU membership.

From this more general outset, the second part of the text moves on to discuss more specific aspects of European public law. Somewhat surprisingly, this section begins with an examination of open government and access to information. This appears to sit a little uncomfortably with what goes before and, to a certain extent, what follows. This topic appears to be placed somewhat incongruously in the midst of discussion of more central public law topics; perhaps it might have been rather better sited later in this part of the book as befits an important, but relatively peripheral, issue in the broader context of this work. Nevertheless, the author's pre-eminence in this field means that this is a useful contribution in its own, albeit relatively narrow, terms and anyone interested in the development of this area would certainly find this chapter enlightening. Following this brief excursion to relatively peripheral issues, *European Public Law* then reverts to something akin to what goes before, with a discussion of the role of national parliaments in the EU polity; the influence of European doctrine on the principles of judicial review employed by the English courts; the impact of human rights law on judicial review; the liability of public authorities; and the EU Ombudsman. The final chapter of part two considers the role of competition law as a means of regulating markets and the close correlation between United Kingdom and European Community competition law. The chapter also highlights more ancient Anglo-continental discrepancies in the regulation of monopoly in essential services. This does much to highlight the importance of market governance as a key regulatory instrument.

The final segment of the book draws these sometimes disparate threads together, questioning the whole concept of "European public law" and outlining the opportunities for further developments in areas such as European Monetary Union and the new "Constitution for Europe".

Overall *European Public Law* is an extremely welcome addition to the work in this field and begins to draw together a picture of the often less than explicit linkages between domestic systems and Europe's supranational legal systems. That it does not go further down this line is the most frustrating aspect of this text. It is interesting to note that the author refers, somewhat ruefully, to the "demands of publishers" placing necessary limitations upon the text. One cannot help but wonder whether the author feels that the enthralling picture of the interrelationships between domestic and supranational systems sketched out here might have been enhanced in terms of light and texture had more time been afforded. However, extremely solid foundations are clearly now in place for both the author and others working in this field to develop an ever-stronger understanding of these complex relationships.

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CONSTITUTIONAL LAW

Constitutional Law of the European Union by SIONAIDH DOUGLAS-SCOTT, Harlow, Pearson, 2002, xlix + 553 pp, Paperback, £30·99, ISBN 0582 317177

This book, part of the Law in Focus series, describes itself as an introduction to the constitutional law of the EU. While it does indeed confine itself to this subject area, to describe it as an introduction is rather misleading. On the one hand, it does the book something of a disservice, since it deals with the constitutional issues in some detail. On the other hand, it might raise an expectation that the law will be clearly and simply stated by way of introduction for a reader new to the subject, whereas this book concentrates on criticism and discussion, particularly of other commentary on the law. It is therefore much more suitable for someone already possessed of a grasp of the basic law than for a beginner.

For a work on the constitutional law of the EU, this book is largely standard in the topics included, although many of them, such as democracy, are covered in more detail than is usual. The book has a four-part format. The first part, "Structures", deals with the history of the EU, the EU institutions, legislative procedures, competence, subsidiarity, proportionality and enhanced co-operation. An understanding of this history is essential to any considered evaluation of the resulting law, yet this is an area often given cursory treatment in legal textbooks. Here, however, an admirable attempt is made to bring the history of the EU to life. The chapter on the institutional structure provides the basic information on the key institutions, together with an interesting explanation of their development and inter-relationship. It is unfortunate, though, that the chapter is prefaced by a lengthy introduction discussing the institutional balance which, preceding as it does the basic information, is rather confusing. The chapter on lawmaking is informative, but might better have been integrated with the chapter on institutional structure, since it largely concentrates on the effect of the different procedures on the institutional balance. Finally in this part, the chapter on the division of powers between the Community and the member states is comprehensive, especially the section on subsidiarity, although the conditions for enhanced co-operation could have been set out with greater clarity.

The second part, "The European Courts, the National Courts and the Constitution", includes the Community Courts, sovereignty, direct and indirect effect, remedies and preliminary references. The chapter on the Community Courts is thorough but its structure is rather difficult to follow, in particular the insertion of a section on legal reasoning between two sections on judicial activism. The chapter on direct and indirect effect also suffers from a rather peculiar structure, in which the direct effect of international agreements is discussed before that of directives, and other secondary legislation is covered under the heading of directives. The discussion of the policy behind direct effect is, however, extremely useful. The chapter on preliminary references is excellent, as is that on supremacy, especially the discussion of the judicial response to the supremacy of Community law in a number of particular member states.

The third part, "Direct Actions: A Lack of Individual Justice?" covers judicial review, actions for damages, and Commission and member state enforcement actions. The chapter on judicial review attempts to provide a full discussion of a complex and controversial area, but in respect of this topic the timing of publication was unfortunate. The law is stated as at April 2002 which was, of course, prior to the landmark judgments in C-50/00 P *Unión de Pequeños Agricultores v Council,*

Commission intervening[1] and T-177/01 *Jégo-Quéré et Cie SA v Commission.*[2] In the chapter on damages, the excellent discussion of wrongful acts and damage are accompanied by a surprisingly cursory coverage of causation. It is also surprising in such a critical and evaluative work that the section comparing member state and Community liability is brief, and it is unclear why the title (although not the text) of this section refers only to *Francovich.*[3] The chapter on enforcement actions against member states, however, provides a detailed and thought-provoking analysis of articles 226–8 EC.

The final part of the book, "The Developing Constitution", moves away from the traditional coverage to include human rights, citizenship and the debate on an EU constitution, topics less likely to be found in a standard textbook. The chapter on human rights is comprehensive, although it is curious that the attempts of the Court to provide protection for human rights are subjected to much greater criticism than the attempts (or lack thereof) of the legislative institutions and the member states, when in fact that former has achieved much more than any of the latter. The chapter on citizenship is perhaps ahead of its time, treating a concept that is still largely illusory for most of its alleged beneficiaries with a degree of creativity. The chapter on the EU constitution starts well, with a useful summary of some of the key issues, but it subsequently becomes over-theoretical, with insufficient attempts to relate the issues introduced to those discussed in the rest of the book.

The written style is relatively informal, which generally makes for easy reading, although on occasion it is a little too informal ("So the ECJ's attitude to the national courts seemed to be a very friendly one"). The footnotes also reflect this style, although again this can sometimes be unfortunate, for example where it involves a lack of referencing.

A comprehensive array of sources is quoted, although this sometimes produces a rather incoherent argument, and it is not always clear what the author's own argument is. Whether this is due to the publisher's constraints on manuscript length, or the author not having reached a conclusion on the issues in her own mind, is not apparent. As a result, the text is interesting but sometimes rather confusing.

What is refreshing about this book is its critical approach to its subject matter. My first instinct was that this, together with its informal style of writing, would commend it as a challenging undergraduate textbook, since it can be depressingly difficult to engender a critical approach to core subjects in the many students wanting the "right" answer for the examination. Admittedly, the book is unsuitable as a stand-alone textbook for undergraduate EU law courses, since a separate text would be required on the substantive law. In addition, the rapid pace of change in this area of law means it is already out of date, particularly in the area of the EU constitution. However, it is this same critical approach that, while apparently a commendable feature, makes the book unsuitable as a main text for undergraduate students. The sheer volume of criticism, together with assertions that the law is confused or unclear, is overwhelming when compared to the discussion of settled issues of law. It is true that there are many uncertainties in this area of the law, but this book approaches the subject as if there were no certainties at all. For those students and other readers with a firm grasp of their subject, reading this book would be thought-provoking. For those approaching the subject for the first time, it could produce an unnecessary degree of confusion and doubt.

[1] [2002] 3 CMLR 1.

[2] [2002] 2 CMLR 44.

[3] *Francovich and others v Italian Republic* [1991] ECR I-5357, ECJ.

In conclusion, this book provides a useful discussion of many of the arguments surrounding the key constitutional issues facing the EU, but readers should have a reasonable knowledge of the underlying law first and are likely, having read this book, to wish to progress to a more detailed analysis of the arguments.

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CRIMINAL LAW

Criminal Law: Text and Materials by C.M.V. CLARKSON and H.M. KEATING, London, Sweet & Maxwell, Fifth Edition, 2003, li + 886 pp, Paperback, £30·00, ISBN 04-217- 8420–2

Criminal Law: Theory and Doctrine by A.P. SIMISTER and G.R. SULLIVAN, Oxford, Hart Publishing, Second Edition, 2003, lxiv + 697 pp, Hardback, £50·00, Paperback, £25·00, 1–84113- 364–7

Principles of Criminal Law by A. ASHWORTH, Oxford, Oxford University Press, Forth Edition, 2003, xxi 512 pp, Paperback, £24·99, 0–19–295980–1

Until the mid-eighties, the serious student of criminal law encountered a veritable desert in the way of suitable textbooks. The choice was limited to one book: Smith & Hogan, although for a brief period Glanville Williams' marvellously idiosyncratic *Textbook of Criminal Law* provided an entertaining but flawed alternative. Good though it was, Smith & Hogan became a victim of its own success in judicial and practitioner circles, reducing its appeal as a student text. It is, of course, still very much in the market today though, sadly, the tenth edition issued in 2002 proved to be the last prepared by Sir John Smith. Thanks to rigorous and expert pruning, his final two editions marked a welcome return to form as a student text. However, in the intervening years the desert has flowered into verdant luxuriance, and the student is now spoiled for choice. New 2003 editions of the works being reviewed offer excellent and contrasting choices.

Ashworth provides an elegant and authoritative account of the underlying principles, policies and doctrines of the criminal law informed by the author's wider interests in the criminal justice system generally. The book is well produced and offers excellent value at £24.99. Its drawback from the point of view of the student purchaser is that, probably for most courses, it would lack sufficient detail on the substantive case law to function as a sole purchased text. Of course, that drawback can be seen as a virtue in clearing away detailed clutter to enable far greater understanding and insight into the rationale of the law and its defects. In terms of promoting an overall appreciation of the policies, functions and context of our criminal law, there is no better book. It would work as an introduction for students but it would work even better for students who have made some study of the detailed rules of criminal law. This book would surely help their knowledge to coalesce into a coherent framework to facilitate the deep understanding that eludes many students.

Simester & Sullivan first appeared in 2000 to widespread acclamation that is proudly trumpeted on the back cover of the second edition. Unlike many extracts from reviews, these are not at all misleading and are thoroughly justified. There are no great changes in the second edition apart, of course, from those required by updating. This work is of a consistently high intellectual standard and, within an acceptable length, manages to encompass detailed case law analysis (more than enough detail for any undergraduate course) with a thorough explanation and (often devastating) critique of the law and its doctrines and their policy implications. The exposition can be demanding but generally speaking it should be safely within the compass of good undergraduates. The intellectual rigour certainly does not lead to obfuscation and impenetrable complexity. All in all, this is probably the number one conventional text recommendation for the better student who is prepared to put in the considerable time and effort required to get the best out of it. In their preface, the authors muse aloud on whether they should

extend the list of specific offences covered in the event of a third edition (a certainty!). It is certainly true that traditional criminal law courses omit many important areas from consideration and might be said to give a distorted view for that reason. The gathering internationalisation in terms of fraud, drugs, money laundering, terrorism and human rights will surely prompt a general re-appraisal before too long. An expansion covering these areas could be a welcome kick-start to such re-thinking. The inevitable difficulty is: how much would it increase the length of the book (already 697 pages) and, more importantly, the cost (currently a reasonable £25 for the paperback edition)! There may be a danger of drowning the baby by overfilling the bath!

Clarkson & Keating is a well-established hybrid text and materials book, which, at £30 represents good value since it is two books in one. As the authors state in their preface,

> . . . we have tried to combine the best features of both such styles [*ie* text and case books] – a book with the flow and coherence of a textbook thus providing the reader with guidance and direction, but one that also enables a substantial amount of original material from a diversity of sources to be absorbed.

The authors have succeeded admirably. Their book is quite a fat tome, 200 pages longer than Simester & Sullivan, and approaching *War and Peace* proportions! The Text is quite extensive, far greater than a typical casebook, but, of course, the case extracts are not as extensive. Nonetheless, the case extracts given will be enough for many students. One of the most attractive features of the book is the eclectic mix of extracts from academic writings, which include many important contributions from the United States. The textual analysis is generally good and, indeed, sometimes more comprehensive than more conventional texts. It is better than Simester & Sullivan on the context and background of the legal issues but, although good, probably falls short of their very high standard on critique and analysis of the law (though by no means always). Students would find that the text is sufficiently detailed and comprehensive and should have no concerns that they might need to purchase a supplementary text. The authors have managed to incorporate good analyses of the very latest authorities and must have gone right down to the wire to do so. Unfortunately it appears that last minute changes have thrown out the pagination to a minor degree so that the cases table is inaccurate in respect of quite a few cases. That is a minor irritation in a thoroughly recommendable book that has the virtue of encouraging recourse to original sources. Like the other two books, it provides a comprehensive bibliography of periodical articles and other materials for the curious.

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NOTTINGHAM MATTERS

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

THE INTERNATIONAL AND COMPARATIVE CRIMINAL TRIAL PROJECT - FOUR YEARS ON

The ICTP Team

The law of nations is not known for its rapid development and yet one of its branches – International Criminal Law – has grown at breathtaking speed. The last four years have seen the arrest and trial of Slobodan Milosevic; the imprisonment of the former Rwandan Prime Minister Kambanda in Mali; an international arrest warrant against the former Liberian leader Charles Taylor; the establishment of the International Panel for Serious Crimes in East Timor and of the Special Court for Sierra Leone; the beginning of UN backed war crimes trials in Kosovo and the creation of a special Iraqi tribunal which is expected to try Saddam Hussein and members of his government.

Nottingham Law School, together with the University of Sydney, has followed these events through one of its biggest research initiatives: the International and Comparative Criminal Trial Project (ICTP).[1] The project was set up by Ralph Henham (Professor of Criminal Justice at the Nottingham Law School) and Mark Findlay (Professor of International and Comparative Criminal Law at the Nottingham Law School and Professor of Criminal Justice at the University of Sydney) in July 2000, at a time when growing national and international concerns about the delivery of criminal justice stressed the importance of the trial and its particular significance from a comparative and international perspective. Law reform initiatives such as the *Woolf Reports* highlighted the challenges and weaknesses of national legal systems (in terms of accessibility, delay, expense and other issues) and encouraged a comparative review in an attempt to tackle them.

At the same time, comparative criminal law had become the parent of international criminal law. The international criminal tribunals for the Former Yugoslavia and for Rwanda together with the Permanent International Criminal Court (then in preparation) were hybrids, based on different legal traditions and requiring a comparative understanding of their individual features. They provoked the question of synthesis:

[1] "ICTP" was originally an acronym for the "International Criminal Trial Project". As comparative criminal law had been an essential element from the very beginning of the project, it was decided in 2003 to extend the title to "International and Comparative Criminal Trial Project".

while combining features of common and civil law traditions, did they overcome their inherent limitations? Was the emerging model an efficient and appropriate tool for the resolution of these difficulties?

These concerns influenced the creation of the project, whose two wings (comparative and international criminal justice) were considered complementary components. The general aim was to come to a better understanding of aspects of the criminal trial (including decision-making) in civil and common law traditions, through selection, analysis and evaluation of specific features apparent in both jurisdictions. As far as the international tribunals were concerned, the project team set out to examine the institutions and the role of the key players; to analyse the influence of national jurisdictions on the shaping of international criminal justice and to evaluate options for reform. Equally important, however, was the creation of a network of scholars in this important field and the establishment of an information clearing-house on international and comparative criminal justice[2].

Instrumental for the conduct of research in these fields was the unique methodology of Comparative Contextual Analysis, which was developed for the purposes of the ICTP.[3] Comparative Contextual Analysis considers the criminal trial not as an abstract phenomenon, but tries to understand the social, political and historical factors that influence its rationale and its significance for trial participants. In the light of this, the trial is seen as a process of decision-making in which the relationships between key players are subject to contextual conditions that shape the development of criminal justice.

This perspective permitted the ICTP researchers to consider crucial areas that would otherwise have been neglected. In the context of national jurisdictions, Comparative Contextual Analysis highlighted the position of the trial within society, which has substantial impact on its symbolic meaning. In the context of international criminal justice, consideration of the trial development against its contextual conditions allowed an examination of alternatives to trial justice. Trials themselves do not exist in a social vacuum: the International Military Tribunal at Nuremberg cannot be divorced from the Second World War, nor the International Tribunal for Rwanda from the cry for justice that preceded it. Both influences were historical rather than legal, but both left their individual traces on the trials that followed.

In the few years of its existence, the ICTP has seen considerable progress. More than thirty articles, book chapters, conference papers and working papers have been produced by the team, covering topics as diverse as the internationalisation of sentencing; synthesis in trial procedures and internationalised criminal trial and access to justice.[4] In 2004, the project founders, Ralph Henham and Mark Findlay, expect to publish a book entitled *Pathways to International Criminal Justice: Comparing Criminal Trials* (Willan Publishing, forthcoming). This work will explore the transformation of international criminal trials: it will deal in particular with topics such as the enhancement of rights and access; restorative and retributive justice; and the importance of judicial discretion and accountability for a more integrated sentencing

[2] A discussion of the aims of the International (and Comparative) Criminal Trial Project is provided in Findlay, "The International Criminal Trial Project", (1999) 8(2) *Nottingham Law Journal* 121–124.

[3] Comparative Contextual Analysis is discussed in more detail in Findlayand Henham, "Methodology and the Comparative Contextual Analysis of Trial Process: A Preliminary Analysis" and in Findlay and Henham, "Developing Theory for the Comparative Contextual Analysis of Trial Process", both available onhttp://www.nls.ntu.ac.uk/CLR/ICTP/Publications/workingpapers/workingpaperspage.htm.

[4] A full list is available on: http://www.nls.ntu.ac.uk/CLR/ICTP/Publications/Publications.htm. Some items on the list are accessible online.

practice. This gave rise to a research interest, pursued at the Sydney site of the project, in the influence of restorative justice in the development of international criminal law and criminal justice processes and outcomes.

The ICTP has greatly benefited from the contributions of Grazia Mannozzi, Professor of Criminal Law at the University of Insubria, Como (Italy), who worked with Henham on issues of victim participation and sentencing and of Michael Bohlander, judge at the *Landgericht* (District Court) in South Thuringia (Germany) who worked with Findlay on the use of domestic sources as a basis for international criminal law principles. Beyond that, the ICTP enjoys the support of scholars from many parts of the world: at a first expert meeting, it welcomed participants from the United Kingdom, the United States, Australia, France, Germany, Italy and Spain. In addition to the pre-existing institutional link with the University of Sydney, the ICTP has recently started a working relationship with the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. Several research assistants have worked for the project, from both its Nottingham and its Sydney sites. Helen Wu currently fills the latter position; Paul Kim is her counterpart in Nottingham.

The continuing efforts of the existing members of the ICTP and the growing support from interested individuals and institutions have made it possible to expand the work and to tackle new challenges. At the time of writing, several sub-projects are being pursued within the general framework. Ralph Henham has started an initiative whose objective is an examination of concerns and issues of sentencing in the new International Criminal Court. Together with Grazia Mannozzi, he has also created the "Victim Participation Project": a project which, based again on the methodology of Comparative Contextual Analysis, examines victim participation in England and Italy. A working paper ("Victim Participation and Sentencing in England and Italy: The Legal and Policy Context") was produced by the two authors in 2002 and an article followed in 2003, entitled "Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis".[5] The Victim Participation Project is now in its second phase, which puts particular focus on access to justice for victims in the criminal trial processes of Italy and England.

A third project has permitted the ICTP to develop from its roots in procedural criminal law. "The Criminal Law of Genocide: international, comparative and contextual aspects" is a research initiative which has recently received funding by the British Academy in recognition of its potential to bring together scholars from different jurisdictions and to offer research opportunities to young academics. The life span of this project is intended to be three years. Its objectives are ambitious: not only will it examine the phenomenon of genocide in its historical, political and social context; but it will analyse and compare the sanctions that national and international law-makers have imposed in respect of the crime. An international conference on the topic is envisaged, which will promote debate on the substantive law, but willl also review different approaches towards the social resolution of the phenomenon: be it by trial or through the processes of truth and reconciliation.

Finally, Ralph Henham and Professor Mark Drumbl of Washington and Lee University, Lexington (USA) will shortly begin further collaborative work on the nature and significance of plea-bargaining in international criminal trials.

The work of the ICTP is supported by a website, which has recently witnessed major changes to reflect the growing progress of the project. The site can be accessed at: http://www.nls.ntu.ac.uk/CLR/ICTP/. It profiles members of the project team, but also

[5] Henham and Mannozzi, "Victim Participation and Sentencing in England and Italy", (2003) 11(3) *European Journal of Crime, Criminal Law and Criminal Justice* 278–317.

provides extensive information about the team's publications and online versions of some of the papers that have been produced since its creation. The website also features one of the biggest bibliographies on international and comparative criminal law: more than 1,000 books, articles and papers are listed, some of them with links to reviews or online versions.

There are also links to the existing international criminal tribunals, non-governmental organizations and academic institutions specialising in this field. The project team also intends to establish a message board, which would act as a forum for academic debate on issues of international and comparative criminal law, but would also give participants the opportunity to suggest new topics for discussion.

From its very beginnings, the practical relevance of the project has been of great importance to its founders. By providing extensive information, thorough analysis and critical evaluation of criminal trial processes, it is expected that the results of this work will be of great value to anybody interested in law reform in this field. The ICTP's value for academic debate is reflected in the great number of co-authors and expert commentators who have given their support to the project in the past. The work is, however, also intended to benefit practitioners in the field, not only in their application and interpretation of criminal law, but also in their training.

In this regard, the project team has gone a step further. At the time of writing, a programme for a masters degree (LLM in International Criminal Justice) is being developed, which will be delivered by the Nottingham Law School with the participation of members of the ICTP. The work and the expertise gained in the lifetime of the project will therefore be instrumental for the training provided in this course. The course will also benefit from the network of scholars set up by the ICTP; whether through expert commentators who may wish to contribute to the teaching, or through more informal support in this area.

The programme, which is currently in its validation phase, is aimed at graduate students who wish to become experts in the theory and practice of international criminal law and justice, its development and its institutions. It is, therefore, expected that it will benefit those who intend to work for the International Criminal Court and other judicial bodies in the field; for non-governmental organisations; newspapers or in the academic world. In its current form, students would take two foundation modules in the first and two optional modules in the second term. The choice includes, *inter alia*, the Law of Terrorism; International Criminal Procedure; Crimes against Humanity and Genocide; War crimes and the Crime of Aggression; and the Development of the International Legal Order. It also includes more broadly based sociological, philosophical and comparative perspectives, such as the module on Comparative Sentencing and Penology. Completion of the LLM thesis will occupy the remainder of the course.

In the four years of its life, the ICTP has witnessed developments and expansion in decisive areas in its academic potential, in its technological support and in its capacity for higher education. In each of these fields, it owes much to the support and critical feedback from its many friends inside and outside Nottingham. Comments and suggestions are always welcome and will continue to form a crucial part of the development of our work and policy.

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EDITORIAL

In this issue of the journal we have strived, once again, to provide coverage of a wide range of topical issues. Beth Chadwick retells the tragic tale of Sergeant Grischa in order to explore the application of international law during World War I. Erika Kirk provides a fascinating account of the modern framework for the regulation of the clergy, which should appeal not only to legal historians, but to anyone having a general interest in professional regulation. Gary Scanlan considers the way in which the law of copyright could be adapted to accommodate different types of database in the light of recent developments at the European level. The two casenotes discuss certain aspects of the law of obligations: one is concerned with whether companies should be able to "deal as consumer" for the purposes of the Unfair Contract Terms Act; the other examines the balancing of competing rights and interests in the common law of nuisance. The book review will be of interest to all of us who are concerned with legal education, particularly at the academic stage.

As always, I am extremely grateful to those who have contributed to this issue. It is particularly pleasing for us to be able to carry a contribution from a distinguished local practitioner. I hope that David Potts has started a trend! Particular thanks go to the production team of Jane Ching, Lesley Comerie, Kay Wheat and Tom Lewis for all their assistance in bringing this issue to fruition.

ADRIAN WALTERS, EDITOR.

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ARTICLES

THE SECOND DEATH OF ILYA PAVLOVITCH BJUSCHEFF: THE LEGAL POSITION OF PRISONERS, SPIES AND DESERTERS DURING WORLD WAR 1

*ELIZABETH CHADWICK**

INTRODUCTION

As 1917 began, Europe was at war. By March, Tsar Nicholas II of Russia had abdicated his throne in favour of his son, and firing had slowed between the German and Russian trenches.[1] At about this time, Grischa Iljitch Paprotkin,[2] or German Prisoner No 173, No 2 Company, decides to escape.[3] With 16 months of captivity behind him, this former Russian Sergeant of the 118th Regiment of Infantry, Knight of the Cross of St. George,[4] begins his journey from a saw mill village prison camp in Navarischkij, to Vologda, in the Northeast steppes of Russia, to be reunited with his wife Marfa Ivanovna and child Jelisavetja.[5]

Grischa never reaches Vologda. In the course of his brief escape attempt, he meets Babka,[6] who secures for him a disguise which consists of a coat, trousers, and identification tag, formerly the possessions of one Ilya Pavlovitch Bjuscheff, No 5 Company, 67th Rifles, from Vilna – now deceased.[7] Babka urges Grischa to claim to be one of the, by now, many Russian deserters, if re-captured.

The Case of Sergeant Grischa, first published by Arnold Zweig in 1927, is a fictional account of one man's doomed struggle to escape from the machinery of war.[8] Grischa

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[1] The Revolution of March 1917 is also known as the February Revolution. M Gilbert, *First World War* (Harper Collins, 1995), p. 315. See *infra* n 33, and accompanying text.

[2] The fictional scenario which follows is taken from A Zweig, *The Case of Sergeant Grischa* (hereinafter "*Grischa*") (Eric Sutton, trans) (Hutchinson, 1947).

[3] *Ibid*, p 18. Grischa's status is in fact that of a prisoner-of-war (hereinafter "POW").

[4] *Ibid*, p 171.

[5] It is noted at this point in the war that the Eastern Front bulged from the Baltic coast to Upper Silesia, stretching towards the Duna and the Dnieper. To the south, Germany administered the area from Warsaw to Austrian territory. To the north, the Russians still held Riga and the land beyond the river. *Ibid*, p 50.

[6] Babka, whose real name is "Anna Kyrillovna", tells him "we're Russians although we're Lithuanians". *Ibid*, pp 34, and 39, respectively.

[7] *Ibid*, p 44.

[8] *Grischa* is based on an incident in 1917, and recounted to Zweig by a German Unteroffizier serving in Russia. K Petersen, *Literatur und Justiz in der Weimarer Republik* (1988), p 197. The novel was a bestseller both nationally and internationally. Zweig also wrote a play on the subject. See G Wenzel (ed), *Arnold Zweig 1887–1968: Werk und Leben in Dokumenten und Bildern* (Aufbau-Verlag, 1978), p 160. I wish to thank Prof S R Giles for translating the relevant German materials.

manages to reach the German garrison at Mervinsk, where, by Order of February 1917 from Major-General Schieffenzahn, Commander-in-Chief of the Army on the Eastern Front (called Ob-Ost for short),

> [E]very Russian deserter who failed to report within 3 days of crossing the lines into the territory occupied by the German Armies to the nearest town-major, or the commander of the nearest military or police unit, was to be forthwith charged before a court martial, and within 24 hours of his sentence to be shot as a spy.[9]

This Order is posted in seven languages, but Grischa cannot read. On capture, and as instructed by Babka, he confesses to be Bjuscheff, a Russian deserter, rather than Grischa, an escaped prisoner-of-war (hereinafter "POW"). Grischa's, or Bjuscheff's, clothes and identification tag are taken for use by German spies, and he is given German ones: the jacket of Gunner Lewin (killed) and the trousers of a lorry driver who had received nine shrapnel bullets with his thigh and knee.[10] In the prisoners' barracks where Grischa is now fed, warm and dry, "he is as neat, cheerful, and light-hearted as a fish heading for a weir".[11] He is duly convicted by court martial as the "spy" Bjuscheff.

On realising his fate, Grischa reveals his true identity, and in a short time his former camp guards from Navarischkij A Camp are summoned to Mervinsk, where they identify him.[12] Grischa is now known to be an escaped POW rather than a spy/deserter liable to the death sentence in accordance with Orders. In Bialystok, where the Judicial Section of Ob-Ost Headquarters is located, the Grischa dossier is found to be in good order. The task now is to identify the proper court to deal with him for his escape attempt. However, Major-General Schieffenzahn, who considers Grischa's case to be "a political matter", intercedes in the legal process and orders the original sentence of the Divisional Court Martial to be upheld in the following terms:

> [H]igher considerations make it undesirable that such identity should be successfully established, inasmuch as the Commander-in-Chief [Schieffenzahn] . . . is convinced that the legal aspect of the case is of very slight importance compared with the military and political interests involved. In order to maintain the prestige of our courts and in the interests of military discipline, it is necessary that the proposal to revise the condemned prisoner's sentence should be rejected as unwarranted, and further, as prejudicial to the interests of the State.[13]

Four months later (by now, the end of November 1917), Grischa is executed pursuant to the above grounds.

Grischa raises many issues, dealing in particular with the political and military policies which impacted on his treatment during this part of 1917. Nevertheless, the many legal rules which existed at the time to guide military behaviour are not dealt with by Zweig in his account of Grischa's trial by court martial and subsequent execution. It is thus the purpose of this article to explore both the history and theory of the laws of war as they pertained to POWs, spies and deserters prior to and during World War 1, and by means of this alternative perspective, to illuminate the background and events described in *Grischa*.

The structure of this article is as follows. First, the Hague Conventions and Regulations of 1899 and 1907 will be discussed with particular reference to the position

[9] *Grischa, op cit, supra* n 2, p 78. See *infra* n 84.
[10] *Ibid*, p 84.
[11] *Ibid*, p 82.
[12] *Ibid*, p 116.
[13] *Ibid*, p 163.

of POWs, spies, and deserters under the Hague Regulations on Land Warfare of 1907. Secondly, the influence of the Geneva Conventions, and the role of the International Committee of the Red Cross (hereinafter "ICRC") during World War I with regard to POW camps will be examined. Thirdly, military practice at the time will be explored. Fourthly, the division of authority in enemy-occupied territory will be addressed in order to shed some light on the final outcome. It is concluded that while "Grischa had a case" in legal and humanitarian terms,[14] the perspectives of wartime "necessity" reflected in Bjuscheff's second death were symptomatic of a deeper jurisprudential struggle – that between the state as creator, or as creature, of law.[15]

THE HAGUE CONVENTIONS AND REGULATIONS

Background

To begin in highly general terms, modern European wars were fought for a "just cause" until the 16th century, and the types of harm that a "just" (or Christian) belligerent could employ knew few restrictions.[16] By the 18th and 19th centuries, conflicting views as to the limits of "justness" resulted in the causes of war being separated ultimately from the laws of war. This disassociation led in turn to the development of laws of war.[17]

As may be seen in the fragments of an essay on international law by Jeremy Bentham bearing the date 1786–1789,[18] the mid-18th century experienced a new reliance on reason. Reason required, Bentham felt, that for any given nation, the general utility of doing good rather than harm to other nations should be the object of international law, "having the regard which is proper to its own well-being". From this, Bentham extrapolated international rights and duties, the breach of which must result in war. Though war was viewed at the time as a means of self-help and thus an arm of the law, Bentham's fifth object in his international code "could be, to make such arrangements, that the least possible evil may be produced by war, consistently with the attainment of the good which is sought for".[19]

The community of nations which arrived at many of the basic principles of the modern laws of armed conflict consisted of 19th century "civilised", capitalist European states.[20] As 19th century capitalism evolved into imperialism, the

[14] In particular, the verdict was based on a fiction, *ie*, that Grischa *de facto* was Bjuscheff *de jure*.

[15] See, *eg*, *Grischa*, *op cit supra* n 2, pp 78–80, 102, 129–132, 222–228, 301–305. See also *infra* text entitled "The Division of Authority in Enemy-Occupied Territory".

[16] See, *eg*, S Moratiel V, "The Spanish School of the new law of nations" (September–October 1992) IRRC 416; P Haggenmacher, "Just War and Regular War in Sixteenth Century Spanish Doctrine", *ibid*, p 434; T E Holland, *Lectures on International Law* (T A Walker and W L Walker, eds) (Sweet & Maxwell, 1933), pp 244 ff.

[17] P Haggenmacher, *loc cit supra* n 16, p 440. See also K Ogren, "Humanitarian law in the 'Articles of War' decreed in 1621 by King Gustavus II Adolphus of Sweden" (July–August 1996) IRRC 438.

[18] "Project of Perpetual Peace", in J Bowring (ed), *The Works of Jeremy Bentham* (1838–1843), 11 Vols, Pt 8, pp 537–554, *excerpted in* H Wheaton, *History of the Law of Nations in Europe and America* (Gould, Banks and Co, 1845 (reprinted 1973)), pp 328–344. The "line of common utility" is emphasised.

[19] Quoted in H Wheaton, *op cit supra* n 18, p 331. Traditionally, a state could release itself from all international law obligations except those relating to war's conduct by a declaration of war. *Oppenheim's International Law Vol. II*, 7th ed, by H Lauterpacht (ed), (Longmans, 1952), p 179. Bentham's focus therefore would appear to be the common utility of mitigating the effects of war. Concurrent with the development of the principles of war law, the 19th century law of neutrality arose. See, *eg*, W Wheaton, *op cit supra* n 18, pp 290 ff; H Lauterpacht (ed), *op cit supra* this note, pp 624 ff; FE Smith, *International Law* (Dent (The Temple Primers), 1900), pp 131 ff; T E Holland, *op cit supra* n 16, pp 395 ff; W E Hall, *A Treatise on International Law*, 8th ed, by A P Higgins (ed) (OUP, 1924), pp 691 ff.

[20] Rosas notes that "the increasing inter-dependence between these states, and the escalation of warfare, created an objective need for written rules common to the whole community", as determined in the last resort by the development of productive forces. A Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* (Suomaleinen tiedeakatemia, 1976), pp 2, and 82, respectively. The laws of war were thus not considered applicable to, *inter alia*, the colonial wars of conquest. See, *eg*, Capt E Colby, "How to Fight Savage Tribes"

corresponding monopolisation of production and capital resulted in part in more sophisticated developments in arms technology.[21] An early attempt to control this new technology of warfare was made when Tsar Alexander II invited states to attend an International Military Commission in St. Petersburg,[22] and the St Petersburg Declaration of 1868 was adopted.[23] The Declaration states in pertinent part that the participating states had

> [B]y common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, ... [and] consider[ed] that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war.

It is further stated in the Declaration that

> The only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy;
> That for this purpose it is sufficient to disable the greatest possible number of men;
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; ....

As for more general attempts to codify the laws of war, the first may be said to have been the Lieber Code of 1863.[24] Issued by the United States War Department as US Army General Order No 100 to regulate the behaviour of the Northern Forces during the American Civil War (1861–1865),[25] Article 15 provides in particular that "men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God".[26]

The Lieber Code in turn provided a format for subsequent projects to codify the laws of war, most notably, the Brussels Conference of 1874,[27] the Oxford *Manual* of 1880,[28] and the Hague Conventions and Annexed Regulations of 1899 and 1907.[29] In particular, both Hague Conferences expressed concern regarding evolving

(1927) 21 AJIL 279; J E Edmonds and L Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty's Army* (hereinafter "*Land Warfare*") (HMSO, 1912), Paragraph 38. *Cf* J Stone, *Legal Controls of International Conflict* (Stevens, 1954), p 549 n 11.

[21] A Rosas, *op cit supra* n 20, p 28.

[22] Seventeen states, including Russia, Prussia and the North German Federation, signed the St Petersburg Declaration in 1869. See D Schindler and J Toman (eds), *The Laws of Armed Conflict* (hereinafter "*Schindler/Toman*") (Sijthoff, 1973), pp 96–97.

[23] Reprinted in A Roberts and R Guelff (eds), *Documents on the Laws of War* (hereinafter "*Roberts/Guelff*") (Clarendon Press, 1989), at p 30. The St Petersburg Declaration prohibited the use of explosive projectiles under 400 grammes weight.

[24] Reprinted in *Schindler/Toman*, with commentary, *op cit supra* n 22, at p 3. The *Instructions for the Government of Armies of the United States in the Field*, or the *Lieber Code*, was issued by General Order dated 24 April 1863, and promulgated at the request of President Lincoln. Prepared by Francis Lieber, a German by birth, the *Code* corresponded "to a great extent to the laws and customs of war existing at the time". *Ibid.* See, *eg*, E Nys, "Francis Lieber – His Life and His Work" (Pt 2, 1911) 5 AJIL 355; J Miles, "Francis Lieber and the Law of War" (1990) XXIX – 1–2 *Revue de Droit Militaire et de Droit de la Guerre* 253.

[25] See, *eg*, Q Wright, "The American Civil War, 1861–1865", in R Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971), pp 30, 54 n 37, 46 n 12; JG Randall and D Donald, *The Civil War and Reconstruction* (D C Heath, 2d ed 1961), pp 325–339; E Chadwick, "'Rights' and International Humanitarian Law", in C Gearty and A Tomkins (eds), *Understanding Human Rights* (Mansell, 1995), pp 573, 575.

[26] The following subjects, *inter alia*, are treated: rights of the captor in occupied countries, public and private property, protection of persons, deserters, prisoners of war, booty on the battlefield, partisans, spies, flags of truce, the exchange of prisoners, parole, armistice, capitulation, and insurrection.

[27] The participating states which formulated the *Project of an International Declaration concerning the Laws and Customs of War*, reprinted in *Schindler/Toman*, *op cit supra* n 22, at p 25, were European. See, *eg*, G Werner, "Les prisonniers de guerre" (1928) 21 *Recueil des Cours* 5, 18. The *Project* provided the basis for the Oxford *Manual*, and is not to be confused with the "Declaration of the Institute of International Law", in 1875, regarding the *Project*. G Werner, *ibid*, pp 19–20. Articles 23–34 are devoted to POWs, and articles 19–22, to spies.

[28] *The Laws of War on Land. Manual Published by the Institute of International Law*, provisions for POWs are provided primarily in articles 61–78, and regarding spies, in articles 23–26. Reprinted in *Schindler/Toman*, *op cit supra* n 22, at p 35. Neither the Brussels *Project* nor the Oxford *Manual* had any legal force.

[29] The 1899 Peace Conference used the Brussels *Project* as the foundation for its work. The 1907 Hague Peace Conference "continued and completed" the work of the 1899 Conference. G. Werner, *loc cit supra* n 27, p 22. There were, however,

war technology, and the preamble of Hague Convention II of 1899 and of Hague Convention IV of 1907 each expressed "the desire to serve, even in this extreme case [of war], the interests of humanity and the ever progressive needs of civilisation". Perhaps more importantly, the preamble reflected these many concerns by inclusion of the "de Martens Clause", the 1907 version of which reads as follows:

> Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.[30]

As a final point by way of general background, the participation clause for the signatories to Hague Convention IV, found in article 2, provides as follows:

> The provisions contained in the Regulations [annexed thereto] as well as in the present Convention, do not apply except between contracting Powers, *and then only if all the belligerents are parties to the Convention.*[31]

POWs

As 1917 began, Grischa was working as a POW at Navarischkij Camp, cutting wood in a saw mill village. Zweig does not give details of his original capture, only of his rank – that of Regimental Infantry Sergeant.[32] Russian troops, despite an increase in the numbers of deserters from the Eastern Front, continued to engage in battle until Lenin's Decree of Peace of 8 November.[33] As such, and pursuant to articles 4–20 of the 1907 Hague Regulations, Grischa, as a POW, would be held in protective custody,

fewer participants in 1907. Various forms of POW internment were contemplated in Hague Conventions II and III of 1899, and Hague Conventions IV, V, X, XI, and XIII of 1907. For purposes of brevity, the following instruments are referred to: 1899: Convention II regarding the laws and customs of war on land, and annexed Regulations; 1907: Convention IV respecting the laws and customs of war on land, and annexed Regulations. Chapter 2 of the Hague Regulations (articles 4–20) provides for the treatment and repatriation of POWs. These provisions borrow heavily from the Brussels Declaration of 1874. Hague Regulations articles 29–31 deal with spies. These conventions were not regarded as a complete code of the applicable law, leaving additional special arrangements to the belligerents. A Rosas, *op cit supra* n 20, p 76. For example, the Anglo-German accord of 2 July 1917, the French-German accords of December 1917 (also dated 15 March 1918) and April 1918, the Anglo-Ottoman accord of December 1917, the French-Ottoman accord of March 1918, all dealt with reprisals against POWs. See G Werner, *loc cit supra* n 27, p 101 n 2. See also the Final Act of the International Peace Conference, signed at The Hague, 28 July 1899, and the Final Act of the Second International Peace Conference, signed at The Hague, 18 October 1907, reprinted in *Schindler/Toman, op cit supra* n 22, at pp 49, and 53, respectively; F E Smith, *op cit supra* n 19, Appendix A n M.

[30] Reprinted in *Roberts/Guelff, op cit supra* n 23, p 45. Forty-one states signed Hague Convention IV on 18 October 1907.

[31] Emphasis added. Hague Convention IV article 2, reprinted *ibid*, p 46. The text of the annexed Regulations is reprinted *ibid*, pp 48–57, the provisions of which are nearly identical with the 1899 Regulations. Hague Convention IV of 1907 was technically without binding force during World War 1 because signatories Serbia and Montenegro had not ratified it. All the belligerents were bound to Hague Convention II of 1899 until 8 August 1917. See G Werner, *loc cit supra* n 27, p 96 n 3, *citing* the *Bulletin International des Societes de la Croix-Rouge* (1918), pp 25–26. Nevertheless, the majority of the belligerents had issued military manuals which largely reflected the standards in the Hague Regulations as well as the unwritten rules of acceptable military usage. See T E Holland, *op cit supra* n 16, pp 290–293; *infra* nn 65–82, and accompanying text.

[32] *Grischa, op cit supra* n 2, p 171. The Hague Regulations provide for the qualification of belligerent combatants in articles 1–3; POW status flows from these requirements. Traditionally, a decision to grant POW status was evidence that (1) the war was international, and (2) the individual belonged to a category of persons entitled to commit hostilities. See A Rosas, *op cit supra* n 20, p 222 n 7; G Werner, *loc cit supra* n 27, pp 25, 39. The precise scope of protective legal guarantees for unprivileged combatants were, and remain, somewhat unclear. The requirement of express authorisation from a sovereign was apparently already abandoned by the time of the Brussels *Project* of 1874. See A Rosas, *op cit supra* n 20, pp 419, and 258, respectively.

[33] Armistice negotiations were finally concluded on 15 December, and fighting ceased on the Eastern Front. The war resumed on 18 February 1918 when German troops crossed the ceasefire line. The Russo-German peace treaty was finally signed on 3 March. See M Gilbert, *op cit supra* n 1, pp 343–401. At this point, Grischa, had he been alive, would have been entitled to repatriation. See *infra* text accompanying n 42.

as "[p]risoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them".[34] He could, in paraphrase, anticipate the following treatment:[35]

> *Article 4*: Humane treatment, and the retention of ownership of non-military personal belongings.[36]
> *Article 5*: Internment in a town, fortress, camp, or other place.
> *Article 6*: The use of his labour (officers excepted) in work having no connection with the operations of war. His wages would go towards improving the conditions of his internment.[37]
> *Article 7*: The same basic board, lodging, and clothing as provided to the German troops.

Article 8 merits quoting in full:

> Prisoners-of-war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.
> *Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.*
> Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.[38]

Article 9 obliged Grischa to inform his captors of his name and rank.[39] Article 18[40] afforded him a complete liberty in the exercise of religion.[41] Article 19 provided that wills and death certificates would be received or drawn up, and burials conducted, in the same way as the capturing army. Article 20 provided that, after the conclusion of peace, repatriation would be carried out as soon as possible.[42]

Spies

Grischa, as Bjuscheff the deserter[43] and presumed spy, could expect treatment guided by the 1907 Hague Regulations articles 29–31. Article 29 defines the word "spy",[44] one key to which is disguise. Hence, this rule implies that a soldier, not in disguise, who penetrates the hostile army's zone of operations, would not normally be

[34] Hague Regulations, article 4(1).

[35] Additional guidance regarding the treatment of POWs is contained in the 1907 Hague Regulations article 23, entitled "Means of Injuring the Enemy, Sieges, and Bombardments".

[36] Although Grischa carried little with him in his escape from the saw mill camp, his personal possessions were safeguarded by his subsequent captors, and returned to him prior to his execution.

[37] On release, the balance for work was to be paid over, after deducting the cost of the prisoner's maintenance.

[38] [Emphasis added.] Grischa's escape was not successful: he neither rejoined his own army, nor did he cross from the lines of German-occupied territory. *Grischa, op cit supra* n 2, pp 50–78. He should thus have been subject only to disciplinary punishment. Werner notes that the absence of a more severe penalty for unsuccessful escapees was in order to prevent assimilation with deserters ("pour éviter notamment qu'elle [la tentative d'évasion] soit assimilée à la desertion devant l'ennemi"). G Werner, *loc cit supra* n 27, p 59.

[39] Grischa initially passed himself off as Bjuscheff the deserter. However, his unsuccessful escape attempt meant that his status as a POW was a continuing one. Holland notes that the failure to disclose one's true name and rank is likely to result only in a curtailment of advantages granted to prisoners of one's class. T E Holland, *op cit supra* n 16, p 841.

[40] Articles 10–12 deal with the subject of parole, and article 13, with camp followers. Articles 14–16 concern prisoner inquiry offices, and relief societies. See *infra* nn 53–62, and accompanying text. Article 17 deals with officer rates of pay.

[41] This was presumably facilitated by the Judeo-Christian heritage common to many of the relevant signatories to the Conventions.

[42] See *supra* n 33.

[43] See *supra* n 7.

[44] "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party". Article 29(1).

considered a spy.[45] And, in a manner similar to article 8(3) quoted above, is article 31:

> A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner-of-war, and incurs no responsibility for his previous acts of espionage.

This immunity from prosecution by capturing enemy forces after the completion of a successful espionage operation indicates the lawfulness of employing spies and secret agents. On the other hand, "custom admits their punishment by death, although a more lenient penalty may be inflicted".[46]

THE GENEVA CONVENTIONS, AND ICRC ACTIVITES

Background

The development of humanitarian, or Geneva, law somewhat paralleled that of the law of The Hague, but the two treaty bodies evolved in juridically distinct forms. Put simply, Hague law operates essentially to restrain the belligerents in the conduct of war operations, while Geneva law applies to safeguard protected persons not taking part in the hostilities.[47] During World War 1, the 1864 Geneva Convention was in force between ratifying or adhering states.[48] The new Hague system, on the other hand, applied only if all the belligerents were parties.[49] The 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field adopted the Hague formula in article 24. States which were party to the 1864 Geneva Convention, but not that of 1906, applied the 1864 Convention.

The first Geneva Conference was convened in 1863. This gave impetus to subsequent Geneva Conferences in 1864 and 1906.[50] What is particularly apparent however is the absence of any express protection for POWs under Geneva law at this time.[51] Henry

[45] Article 29(2) states as follows: "[t]hus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies". While it could be argued that Grischa was indeed disguised in the clothes of Bjuscheff, it was in order to further his escape as a POW. On the other hand, Bjuschoff the deserter/spy would not have been in disguise, but instead, in his own uniform. He would however have been acting clandestinely by not reporting his presence within the requisite three days. The crux of the matter was to prove Bjuscheff had intended to obtain enemy military information. The mental element of intent required by article 29(1) was not made part of Schieffenzahn's Order. *Cf infra* n 85.

[46] *Land Warfare*, *op cit supra* n 20, paragraph 158. *Land Warfare* was prepared by its authors for the General Staff by order of His Majesty's Secretary of State for War. It was embodied from 1914 onwards in the official *Manual of Military Law* (8th ed 1951). J Stone, *op cit supra* n 20, p 547 n 1. See *infra* nn 74–82, and accompanying text. The death penalty is in fact what Schieffenzahn ordered in February 1917 for deserters who failed to declare their presence in Ob-Ost within three days, presumably on the basis that this implied spying. *Supra* n 9. This type of absolute prohibition takes into account neither the Hague requirement of a mental element, nor aspects of the surrounding circumstances, *eg*, the fact that Grischa could not read the posted warnings.

[47] See, *eg*, EP Syquia, "Dr Jean Pictet and International Humanitarian Law", in *Studies and Essays in Honour of Jean Pictet* (Nijhoff, 1984), pp 551, 555. The organisation established itself as an "International Committee for Relief to Wounded Military Personnel" in 1863. See G Willemin and R Heacock, *The International Committee of the Red Cross* (Nijhoff, 1984), p 19.

[48] See Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864, articles 8 and 9.

[49] 1899: Hague Convention II article 2, Convention III article 11. 1907: Hague Convention IV article 2, Convention V article 20, Convention X article 18, Convention XI article 9, Convention XIII article 28. One reason for this was to ensure reciprocity and equality of arms. See *supra* n 31.

[50] The results of which were the 1864 and 1906 Conventions, reprinted in *Schindler/Toman* with commentary, *op cit supra* n 22, pp 203, and 223, respectively. Military criticism of the 1864 Convention, by Bismarck for example, led to a Conference of Societies in Paris in 1867. Ratification of the Additional Articles was refused because some related to naval warfare. T E Holland, *op cit supra* n 16, pp.332–333. A proposal in 1868 to render infractions of the Convention penal under national Articles of War was also rejected by the European governments. W E Hall, *op cit supra* n 19, pp 482–483.

[51] Instead, reference was made to the Hague Regulations which were considered to be incomplete, as well as to custom and acceptable military usage. See *supra* text accompanying n 30.

Dunant, the founder of the Red Cross movement, tried to place provisions specifically regarding POWs on the 1864 agenda, but failed.[52] In 1869, the Second International Conference of the Red Cross, held in Berlin, adopted a resolution regarding the establishment of a correspondence and information bureau.[53] Dunant worked for POW protection in Paris, during the Franco-German War (1870–1871), after which he multiplied his efforts in Paris and London for a convention.[54] In spring 1874, a draft convention on the treatment of POWs was submitted to governments for their consideration by the International Society for the Amelioration of the Condition of Prisoners of War, formed in 1872 and unrelated to the Red Cross. A preparatory conference was cancelled however when the Brussels Conference was called by the Russian government.[55]

Reference was made to the 1899 Hague Regulations when the Red Cross met in St. Petersburg, for its Seventh International Conference, and the issue was raised again at the Eighth International Conference in London, in 1907.[56] The issue was effectively settled at the Ninth International Conference in Washington, in 1912. The Red Cross decided to take over the informational tasks authorised by article 14 of the Hague Regulations, as well as to entrust ICRC delegates with providing relief to POWs, as authorised in article 15.[57] The 1906 Convention, however, brought voluntary assistance under the control of the belligerent employing it.[58] The relevant bodies had already acted unofficially in this capacity during the German-Danish War of 1864, the Franco-German War of 1870–1871, and the Russo-Japanese conflict of 1904–1905, as well as during other conflicts of a more limited nature.[59] A specific convention aimed at the protection and care of POWs was not to occur until 1929.[60]

[52] A Rosas *op cit supra* n 20, p 69. Dunant subsequently delivered a report on the subject to the 1867 International Conference of the ICRC in Paris, in an effort to insert an additional article in the 1864 Convention to recognise the right of the ICRC to deal with POWs. Dunant's report was accepted by the Conference. G Werner, *loc cit supra* n 27, pp 13–14.

[53] This would lead to the establishment of the ICRC's Prisoners of War Agency in 1914, which was charged with collecting and transmitting information, and visiting internment camps. See P Abplanalp, "The International Conference of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement" (September–October 1995) 308 IRRC 520, 526–527. An associated innovation during World War I was the introduction of "l'avis de capture" – a simple card on which the POW wrote his prisoner status, address, and state of health for forwarding to his family via the free system of post provided for in article 16 of the 1907 Hague Regulations. See G Werner, *loc cit supra* n 27, p 56. ICRC activities were partly founded on the conditional authorisation given in articles 14 and 15 of the Hague Regulations. A Rosas, *op cit supra* n 20, p 463. See also *supra* n 40.

[54] G Werner, *loc cit supra* n 27, p 16. Dunant's efforts to involve the ICRC as an actor in conflicts were not supported by the Committee at this time, primarily because of its stance of political neutrality. Instead, the Committee felt that any presence in the field should be limited to the National Societies of the belligerents. G Willemin and R Heacock, *op cit supra* n 47, pp 23–24.

[55] *Supra* n 27. The Brussels *Project* provisions on POWs were influenced by the International Society's draft. A Rosas, *op cit supra* n 20, p 69. However, many participants in the International Society were not invited to Brussels. G Werner, *loc cit supra* n 27, p 17.

[56] See P Abplanalp, *loc cit supra* n 53, pp 527–528.

[57] *Ibid*, p 528. For an overview of the distinction between the respective roles of the national societies and the ICRC, see G Willemin and R Heacock, *op cit supra* n 47.

[58] Articles 10–13. See W E Hall, *op cit supra* n 19, p 482 n 3.

[59] See P Abplanalp, *loc cit supra* n 53, p 528; A Rosas, *op cit supra* n 20, p 463. The Committee developed its first operational activities in 1870–1871 by creating in Basle an agency for information and relief to the sick and wounded in the French and Russian armies. This agency was designed to facilitate the exchange of information among National Societies and to be a centre for relief transmission. G Willemin and R Heacock, *op cit supra* n 47, p 24.

[60] The 1929 Geneva Convention relative to the Treatment of Prisoners of War supplemented rather than replaced the provisions on POWs contained in the Hague Regulations. *Roberts/Guelff, op cit supra* n 23, p 215. ICRC activity for the development of the Hague Regulations occurred after the war. The International Law Association also adopted a Code for the Treatment of POWs. See *ILA Report of the 30th Conference* (1921), pp 236–246.

Grischa

The role assumed by the national Red Cross societies and the ICRC during World War 1 regarding the specific issue of the humanitarian treatment of POWs became, among other things, a means of observing the application by the belligerents of the Hague Regulations. Holland notes that the very magnitude of caring for POWs during such a protracted war as World War 1 meant that the burdens on Germany in this regard – particularly during the early years – were exceedingly heavy. Reports made available by neutral representatives indicate that "in a number of the German camps conditions were extremely bad, and that almost everywhere in Germany prisoners suffered very great privations through shortage of food and clothing".[61]

In Grischa's case, Zweig makes no mention of any particular hardship endured by the POW while in his second detention, other than personal psychological anguish caused by his fate. As for the informational functions of the Red Cross, there is no mention of any communication made to Grischa's wife of his imprisonment in Navarischkij saw mill camp or in Mervinsk, or of any correspondence passing between them. On the other hand, this could merely have been due partly to the deteriorating situation inside revolutionary Russia. There is however some mention of Red Cross delegates charged with camp inspections. In particular, delegates witness the handover of Grischa's possessions prior to his execution, and he is assured that "his wife will receive the pension of a sergeant who has fallen in action".[62]

USAGE AND CUSTOM

Background

As previously mentioned,[63] none of the Hague Conventions dealt comprehensively with their subject matter, and as noted by the authors of the British *Manual of Land Warfare*, "the delicate questions of hostages and reprisals are not mentioned at all".[64] Thus, in the discussion to follow, the impact of usage on the customary and written rules or laws of war, as outlined primarily in the *Manual of Land Warfare* (hereinafter "*Land Warfare*"), will be highlighted.[65] The British manual also makes frequent reference to the French and German manuals concerning land warfare.[66]

[61] T E Holland, *op cit supra* n 16, p 342. See also Hall, who notes that there was evidence during World War 1 of the Red Cross emblem being misused by the Germans for offensive purposes, seemingly under orders on many occasions. Allegations that the wounded were killed, and the Red Cross emblem abused, were also made. W E Hall, *op cit supra* n 19, p 484, citing the Report of the Committee on alleged German outrages, appointed by HBM's government, pp 59, 61.

[62] *Grischa*, *op cit supra* n 2, pp 321–323. See also *ibid*, p 215. The ICRC initiated such visits to POWs through the distribution of relief, extending them ultimately to other categories of detainees.

[63] *Supra* n 30. See also *Land Warfare*, *op cit supra* n 20, paragraph 5 n (c).

[64] Preface, *Land Warfare*, *ibid*, p iii. The authors of *Land Warfare* make frequent reference to Professor Oppenheim's *International Law Vol 2* (international law during wartime) (1905 and 1906), in which "he conceived of international law as the empirically identifiable product of the political will of states rather than as a natural feature of life". Book Review, Reisman, "Lassa Oppenheim's Nine Lives" (1994) *Yale JIL* 255, 264.

[65] See also *supra*, nn 23–31, and accompanying text. Holland notes that usage grew out of "sentiments of humanity, as also of personal honour, reinforced by considerations of general convenience". Preserved for the most part by military tradition, acceptable usage was indicated in these authoritative manuals. T E Holland, *op cit supra* n 16, pp 290–294.

[66] However, the authors admit that these manuals were published some time before the Geneva Conference of 1906 and the Hague Conference of 1907, reducing their value somewhat as guides for these purposes. Preface, *Land Warfare*, *op cit supra* n 20, p iii. TE Holland wrote the British manual of 1904. Holland notes mildly that the German manual "did not follow the Regulations quite closely". T E Holland, *op cit supra* n 16, pp 292–293.

POWs

The fact that the treatment of POWs had undergone great changes by the time of writing is forcefully made in *Land Warfare*.[67] In particular, it is noted, captured soldiers were not deemed to be prisoners of the state until the 17th century. This had obvious implications for their treatment, which had progressed from killing and enslavement, to imprisonment and demands for ransom.[68] Otherwise, *Land Warfare* generally parallels the Hague Regulations, *eg*, with regard to humane treatment, the rules of interrogation, and conditions for the safeguarding of personal belongings.[69]

Preliminarily, it is noted that "[i]t is forbidden to kill or wound an enemy who having laid down his arms, or having no longer means of defence, has surrendered at discretion".[70] POWs who attempt to escape, however, may be fired upon.[71] In parallel with Hague Regulation article 8, unsuccessful escapees are liable only to disciplinary punishment, which is defined negatively in Paragraph 76 of the British manual as *excluding* a death sentence. Instead,

> Punishment for attempted escape usually consists in curtailment of the measure of liberty usually allowed to prisoners, or even of detention. If escapes are of frequent occurrence it is permitted to anticipate further attempts by increasing the measures of security.[72]

In addition to being fired upon during an escape attempt or for resisting guard, POWs could be sentenced to death if convicted by a "proper court ... of an offence punishable by death under the civil or military law of the captor".[73] This implies that convicted spies may also be POWs. While the authors note that

> *Paragraph 361*: It is of little consequence whether the government imposed by the invader is called military or civil government, for in either case it is a government imposed by the necessity of war ... ,

they make the ensuing distinction:

[67] The relevant British instructions were contained in "General rules for prisoners of war interned in the United Kingdom". *Land Warfare*, *op cit supra* n 20, paragraph 54 n (d).

[68] *Land Warfare*, *ibid*, paragraph 54. Improvements in the treatment of POWs have been attributed to changes in their socio-economic value as a labour reserve for the detaining power. See A Rosas, *op cit supra* n 20, pp 43–75. Much of the credit for specifying and developing the 18th century European laws and customs regarding POWs belongs to the Treaty of Amity and Commerce of 1785 between the United States and Prussia, reprinted in C Parry (ed), *The Consolidated Treaty Series, Vol 49* (Oceana Publications, 1969), and cited by A Rosas, *op cit supra* n 20, pp 349–352. See also G Werner, *loc cit supra* n 27, pp 16, 94; T E Holland, *op cit supra* n 16, pp 335 ff.

[69] *Land Warfare*, *op cit supra* n 20, paragraphs 66–68, and 69–73, respectively. See also paras 82–91 (conditions of internment), paras 92–95 (labour), paras 96–101 (parole), paras 102–109 (bureaux of information), paras 110–111 (prisoner exchange), para 112, (charitable assistance), para 113 (freedom of religion), para 114 (wills, death certificates, burials), paras 115–116 (repatriation).

[70] *Ibid*, paragraph 50, and Hague Regulations article 23(c). This prohibition, located in Chapter IV of *Land Warfare* entitled "killing and disabling of enemy combatants", is presumably the first step in the taking of prisoners within the dictates both of the laws in force, and "religion, morality, civilisation, and chivalry". *Ibid*, paragraph 39.

[71] *Ibid*, paragraph 74, citing *Proceedings of the Hague Conference of 1899*, p 144. It is further noted that "a previous summons to halt and to surrender should be given *if possible*". [Emphasis added.] See also the Brussels *Project* article 28.

[72] *Land Warfare*, *op cit supra* n 20, paragraph 77. The authors note by way of example that during the Franco-German War of 1870–1871, the Prussian government severely curtailed the movement of captured French officers because of an alleged frequency of escapes. *Ibid*, n (f).

[73] *Ibid*, paragraph 79. See also the Oxford *Manual* article 23: "[i]ndividuals captured as spies cannot demand to be treated as prisoners of war". The Hague Regulations are silent on this point. With regard to Grischa's sentence of death as a deserter and presumed spy, it is provided in *Land Warfare* paragraph 64, as follows:

> Deserters from the enemy should be treated as prisoners of war, *unless special circumstances render it desirable to liberate them.* Deserters and subjects of a belligerent captured in the ranks of the enemy have, as already pointed out [in Paragraph 36], no right to claim treatment as prisoners of war, or the benefit of the laws of war.

Emphasis added. Paragraph 36 describes deserters as "traitors to their country". As they "cannot be regarded as enemies in the military sense of the term, [they] cannot claim the privileges of the members of the armed force of the enemy".

> *Paragraph 364*: . . . the civil and penal laws of the occupied country continue as a rule to be valid, the courts which administer them are permitted to sit, and all crimes of the inhabitants not of a military nature or not affecting the safety of the army are left to their jurisdiction.
> *Paragraph 365*: The officers, men and followers of the occupying force are not answerable to the jurisdiction of these courts; they are dealt with by the military law of their army.

The relevance of this distinction will be discussed below.

Spies

The authors of *Land Warfare* deal with espionage, and acts of treason which are closely allied with espionage, in Chapter 5. They begin by noting that espionage is "formally sanctioned by the Hague Rules", and further, that "it is lawful to employ spies and secret agents".[74] Nevertheless, they emphasise that "custom admits their punishment by death".[75]

As noted above, Hague Regulations article 29 provides a restrictive, technical definition of a spy, which requires the spy to act clandestinely and under false pretences.[76] The authors of *Land Warfare* point out, however that

> [A]ny person who makes or endeavours to make unauthorised or secret communications to the enemy, or to collect information secretly for him, is ordinarily spoken of as a spy.

and that the Hague definition "does not cover all such cases".[77] They further distinguish between spies as so defined, and war treason, which latter characterisation is not mentioned in the Hague Rules, but exists in customary international law.[78]

They conclude that

> *Paragraph 164*: An officer or soldier who is discovered in the enemy's line dressed as a civilian, or wearing the enemy's uniform, may be presumed from the circumstances to be a spy, unless he is able to show that he had no intention of obtaining military information.

However, the fact that a person is in his own army's military uniform when caught is not conclusive.[79] Hence, and in accordance with the Hague Regulations concerning the subject, it would appear that the crucial requirement for conviction as a spy at a Paragraph 169 trial[80] is proof of intent to obtain enemy military information. Finally, the immunity afforded to a captured enemy spy after a successful espionage operation[81] does not extend to persons guilty of war treason, who may be arrested at any place or time.[82]

[74] *Ibid*, paragraphs 155, and 158, respectively. The authors admit that, while this latter point is controversial to many writers, "military custom has always sanctioned it". *Ibid*, paragraph 158 n (c).

[75] *Supra* n 46. The Hague Conventions are silent on this point.

[76] *Supra* n 44.

[77] *Land Warfare*, *op cit supra* n 20, paragraph 160.

[78] *Ibid*, paragraph 167. War treason, as described in paragraph 445, includes acts by private individuals or soldiers in disguise which, if done by members of the armed forces, may be perfectly legitimate, for example, damaging the means of communication, assisting the escape of enemy prisoners, fouling water supplies. Should an act not amount to espionage, belligerents may still impose very severe penalties on the basis of war treason. The German military authorities in particular interpreted the concept of war treason harshly. T E Holland, *op cit supra* n 16, pp 348–349.

[79] *Land Warfare*, *op cit supra* n 20, paragraph 165. The authors give as examples a soldier admitted behind enemy lines under Red Cross privileges or a flag of truce who then obtains military information. *Ibid*, paragraph 165 n (b).

[80] "As required by Hague Rules, 30. Still less can anyone else be punished without previous trial, which in every case is indispensable". *Ibid*, paragraph 169 n (a), citing the Hague Conference, 1899, p 146.

[81] Who must be granted POW privileges. *Ibid*, paragraph 170, and Hague Regulations article 31, text quoted *supra*.

[82] *Land Warfare*, *op cit supra* n 20, paragraph 171. The authors note, however, that Hague Regulations article 13 does not restrict the benefit of immunity from prosecution to spies who are soldiers. *Ibid*, paragraph 171 n (c).

Grischa

Under military custom and usage as reflected in British, French, and German military practice by World War I, it would appear that Grischa, the unsuccessful POW escapee, would face disciplinary punishment at most on recapture, which could in his case involve a more severe restriction on his liberty of movement. Further, while the POW is in principle subject to the laws, regulations and orders of the detaining power, he remains under the criminal jurisdiction of his own country. Thus, it is impliedly recognised, through the complete immunity granted in law from prosecution by a detaining power after a successful escape, that the POW is expected to continue to act in the interests of his country of allegiance.[83] By so doing, he has a positive duty to make the attempt, in order to rejoin his own forces.

As regards Bjuscheff the deserter, he would not be entitled to claim POW treatment, as both the status, and the equivalent treatment were lost by the act of desertion. On the other hand, Paragraph 64 of *Land Warfare* exhorts commanders to treat deserters as POWs, unless circumstances exist which are more favourable to sending them on their way.[84] Regarding espionage, usage (which of course has no legal force) also implied that proof of an intent to obtain enemy military information clandestinely was crucial in a conviction for espionage, which in turn relegates the issue of a disguise to a matter of circumstance.[85]

Viewed in this way, Schieffenzahn's Order regarding deserters and spies appears to be much harsher than either the Hague Rules, or military usage, and the refusal by Schieffenzahn to adjust Grischa's identity back from that of Bjuscheff on the bases of "military and political interests", "the prestige of our courts", "the interests of military discipline", and to prevent "prejudice to the State" fully underscores his further opinion that "the legal aspect of the case is of very slight importance".[86] In other words, an intent to spy was presumed simply by the failure of a deserter to report to the military authorities within three days. Thus, no distinction is made between an act which is absolutely prohibited, and an act which both the written and unwritten rules of the day define as resulting from specific circumstances, and which requires intent. While it is of course in the very nature of an absolute prohibition that intent may be irrelevant, the knife twists when Schieffenzahn's subsequent refusal to adjust Grischa's death sentence as a spy to that of disciplinary sanction is based on the dossier's "political nature".

There would be many presumptions favouring the POW attempting to escape: (1) there was a duty to do so; (2) if unsuccessful, disciplinary sanction alone would result; and (3) a complete immunity from prosecution for a successful escape upon subsequent recapture by the enemy would be granted. The fact that Grischa wore Bjuscheff's uniform as a disguise in which to escape would have done nothing to alter this legal scenario, particularly after his former camp guards arrived in Mervinsk to identify him.

[83] A belligerent may however attempt to exert coercive political control over its POWs, particularly when an armed conflict has ideological content. A Rosas, *op cit supra* n 20, pp 430, 434. See *infra* n 86.

[84] However, "feigned deserters are apt to be treated as spies". T E Holland, *op cit supra* n 16, p 347.

[85] Nevertheless, the necessary mental element may be presumed in the face of a risk known to the accused. Grischa wore Bjuscheff's uniform because of the risk of recapture. Thus, rationally, Grischa could have been convicted for spying in the uniform of Bjuschoff, but only on proof of an intent to obtain military information.

[86] *Supra* n 13. Rosas notes that the growing trend towards "total war" seen in World War I, in addition to the "relatively high degree of tension between the main protagonists", meant that efforts to exploit POWs politically led to "differential treatment according to national origin". A Rosas, *op cit supra* n 20, p 75. The only tension readily apparent in Zweig's account is of a more personal kind – that between Major-General Schieffenzahn (the son of an Austrian miller and persecuted by the "vons" while at military school), who wielded the civil authority, and His Excellenz Otto von Lychow, Divisional General in charge of troops in transit, Schieffenzahn's superior, and an old Prussian Junker, friend of the Emperor, and "protector of Grischa". See also K Petersen, *op cit supra* n 8, p 17.

THE DIVISION OF AUTHORITY IN ENEMY-OCCUPIED TERRITORY

The Hague Rules

Zweig locates his plot in the Ob-Ost, which by 1917 chiefly comprised the militarily-occupied lands of Courland, Lithuania, and Northern Poland. The written and unwritten laws which govern the occupation of enemy territory are thus of relevance in regard to the civil and military administration in place at the time of Grischa's re-arrest and subsequent execution.

The subject of enemy-occupied territory is dealt with in the Hague Regulations articles 42–56. Occupation of enemy territory must first be contrasted with both the act of invasion, and the fact of ownership. Invasion, while usually preceding, or coincident with occupation, may be more transitory in the event, *eg*, of a special force completing its particular task and moving on. In that event, occupation may be said to be merely temporary.[87] Similarly, ownership usually occurs through formal annexation consequent to final conquest.[88] Thus, article 42 of the Hague Regulations provides the following definition:

> Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[89]

The military occupier is charged with maintaining public order "while respecting, *unless absolutely prevented*, the laws in force in the country".[90] This means that the civil and penal laws of the occupied country generally speaking continue in force, even though the native authority can no longer act within the occupied district. The occupier may also, *inter alia*, collect taxes and other money contributions,[91] and use state-owned military property.[92]

A further reference to the potentially transitory character of belligerent occupation is apparent in the Hague Regulations article 45, which enjoins the occupier not "to compel the inhabitants of occupied territory to swear allegiance to the hostile power". This prohibition reflects the continuation of the duty of allegiance to the legitimate ruler. Allegiance however is to be contrasted with the transfer of the duty of obedience to the occupier (which the legitimate ruler is now incapable of demanding, anyway). The inhabitants of the occupied area are thus allowed to pursue their lives largely uninterrupted in exchange for submitting to the effective authority exercised by the occupier.

On the other hand, the liberty of the population may be restricted by the power of the occupier to suspend the operation of laws to the extent it considers required for the safety and the success of its operations. Thus, the occupier will frequently replace the actual civil and judicial administration by its own military jurisdiction. As a corollary to this, the occupier may declare certain acts, not forbidden by the ordinary laws of

[87] See *Land Warfare*, *op cit supra* n 20, paragraph 343. *Cf* paragraph 343 n (d) (the rules of occupied territory "should be observed as far as possible in territories through which troops are passing").

[88] See, *eg*, T E Holland, *op cit supra* n 16, p 354.

[89] Thus, occupation must not only be acquired, but maintained. *Land Warfare*, *op cit supra* n 20, paragraph 350. It is thus essentially a right of control.

[90] [Emphasis added.] Hague Regulations article 43. See also *Land Warfare*, *op cit supra* n 20, paragraph 364, quoted *supra* in text.

[91] Hague Regulations articles 48–51, but within strict guidelines. See also *Land Warfare*, *op cit supra* n 20, paragraphs 369–372.

[92] Hague Regulations article 53, once again within strict guidelines. *Cf* article 52.

the country, to be punishable.[93] While the right to do so may be viewed as a function of military necessity, and of war itself, a belligerent may also be persuaded to so act far in excess of its rights by the effectiveness of intimidation of the inhabitants.[94] There are, thus, two separate jurisdictions exercised by the occupier: that over the native population, and that over the occupying troops.

Usage

The authors of *Land Warfare* deal with the occupation of enemy territory in Chapter VIII. While discussing the Hague Regulations throughout, they make a number of additional, perhaps explanatory, remarks. First, they note that

> In the interests of the inhabitants it is most desirable, though in strict law not necessary, that the invader should take measures to make known by proclamation the fact of the establishment of occupation and the area over which it extends. He should at the same time summarise the effects which result from the new state of affairs.[95]

They caution, however that "the occupant . . . must not treat the country as part of his own territory".[96] Sovereignty does not pass to the occupant, but is merely "temporarily latent",[97] nor may the occupier alter "the existing form of government, upsetting the constitution and the domestic laws, and ignoring the rights of the inhabitants".[98] On the other hand, the occupier may suspend "political laws and constitutional privileges as a matter of course",[99] and thus may restrict and condition commercial intercourse, impose censorship, control modes of transportation, and restrict freedom of movement.[100] While religious, educational and medical establishments must be kept open, this is subject to "refraining from reference to politics", and the dictates of military necessity, generally.[101]

These many usages reflect the authors' assertion that an occupying authority is "a government imposed by the necessity of war".[102] As such, the occupier can exert a fairly free hand over any direct relations between it and the inhabitants. This fact, as reflected in the Hague Rules and usages indicated above, has obvious legal and economic consequences. On the other hand,

> In return for this considerate treatment it is the duty of the inhabitants to behave in an absolutely peaceful manner, to carry on their ordinary pursuits as far as is possible, to take

[93] See, *eg*, W E Hall, *op cit supra* n 19, pp 558–562. *Cf* Hague Regulations article 23, *supra* n 35, and, in particular, article 23(h); "Appendix: Correspondence with the Foreign Office respecting the Interpretation of article 23(h) of the Hague Regulations concerning Land Warfare", L Oppenheim, *The League of Nations and Its Problems* (Longmans, Green and Co., 1919), p 48.

[94] *Cf* W E Hall, *op cit supra* n 19, pp 570–571. He notes that "rights which are founded upon mere force reach their natural limit at the point where force ceases to be efficient", and likens abusive control mechanisms to "a system of terrorism, . . . because an occupying army does not scruple to threaten and to inflict penalties which no government can impose upon its own subjects". *Ibid*, p 575.

[95] *Land Warfare*, *op cit supra* n 20, paragraph 347. For example, "in 1870, the Germans generally, but not always, proclaimed military jurisdiction directly they took possession of a locality by reading or posting a notice . . . which gave a list of offences against the troops for which the penalty of death would be inflicted". *Ibid*, paragraph 347 n (c) (citation omitted). See also paragraph 364, quoted *supra* in text.

[96] *Ibid*, paragraph 355. *Cf* Hague Regulations article 55, which specifies that state property must be administered "in accordance with the rules of usufruct".

[97] *Land Warfare*, *op cit supra* n 20, paragraph 353.

[98] *Ibid*, paragraph 354. *Cf* W E Hall, *op cit supra* n 19, p 557 n "1" (a modern example of an assertion of substituted sovereignty occurred in Alsace in 1870); T E Holland, *op cit supra* n 16, p 361 n 29 (German practice 1914–1918). "Rights of the inhabitants" presumably includes respect for their lives. See *Land Warfare*, *op cit supra* n 20, paragraph 383, and Hague Regulations article 46.

[99] *Land Warfare*, *op cit supra* n 20, paragraph 362.

[100] *Ibid*, paragraphs 373–377.

[101] *Ibid*, paragraphs 378–380. See the 1864 Geneva Convention articles 3 and 4, and the 1906 Geneva Convention articles 12 and 15. *Cf* Hague Regulations article 56.

[102] See *Land Warfare*, *op cit supra* n 20, paragraph 361, quoted *supra* in text.

> part in no way in the hostilities, to refrain from every injury to the troops of the occupant, and from any act prejudicial to their operations, and to render obedience to the officials of the occupant . Any violation of this duty is punishable by the occupant.[103]

The authors cross-reference this provision to Paragraph 441, *et seq*, entitled "The Punishment of War Crimes". Acts relevant to the population of occupied territories include "war rebellion", "espionage and war treason", and "marauding".[104] Paragraph 450 provides that charges of war crimes can carry the death sentence, and may be dealt with under Paragraph 449 either by "military courts or by such courts as the belligerent concerned may determine"'. The authors note further that "it would not be in the interests of humanity" to grant a right to such prisoners to claim release at the end of the war, "for otherwise belligerents would be forced to carry out capital punishment in many more cases that is now usually necessary".[105]

Grischa

In the discussion which immediately precedes, attention has been paid to the rules and theory of belligerent occupation. Its purpose has been to stress that, by the outbreak of World War 1, a certain commonality in European standards and rules reflected the common interests of the major capitalist states. For example, observance of the rules of usufruct, rather than powers of outright disposal, was required regarding the use of state property. Money contributions could be levied from the occupied population, but where private property was in issue, compensation was required.[106] Where the rules were broken, or simply ignored, elements of conflict inherent to all competitive social relations are in evidence.

In *Grischa* it is noted that "it did not occur to anyone that the land would ever be evacuated". It was to be instead "a future Prussian province".[107] The distribution of authority in Ob-Ost was as follows. The office of Major-General Schieffenzahn dealt with all local constabulary matters. The Divisional General von Lychow was the final authority in all military affairs of the staffs of armies in the field quartered in the town, but in them only.[108] Although the relations between the garrison and field-army were somewhat intertwined regarding Grischa's situation, the power to decide his fate was either the Major General's, as control over non-military movements in the territory (including those of spies and deserters)[109] was considered a constabulary matter, or the Divisional Head von Lychow's, Schieffenzahn's senior, who was in charge of the court martial of the army headquarters of the area and hence, over escaped prisoners.

With particular regard to the administrative tension occasioned by Grischa's detention, noted above, it is of interest that two major subplots play throughout Zweig's account: (1) the rise of the industrial, militarised European state,[110] and (2) the conflict occasioned by the rise of the middle classes in Germany to positions of authority.[111] At this point, the statement by Clausewitz that "war is a mere

[103] *Ibid*, paragraph 384.

[104] *Ibid*, paragraphs 444–448. See also Hague Convention IV article 3, regarding the payment of compensation, and Treaty of Versailles articles 228–230, regarding the prosecution of war criminals.

[105] *Land Warfare*, *op cit supra* n 20, paragraph 451.

[106] Hague Regulations article 52.

[107] *Grischa*, *op cit supra* n 2, p 51.

[108] *Ibid*, pp 82–83.

[109] See, *eg*, *supra* n 95.

[110] See *supra* nn 20–31, and accompanying text; *Grischa*, *op cit supra* n 2, pp 141–144.

[111] See, *eg*, *supra* n 86.

continuation of (peace-time) policy by other means" becomes relevant.[112] In particular, factors such as a fluctuating class structure (occasioned at least in part by alterations to and within the societal forces of capitalist production) proved influential when the time arrived to adopt a stance of political convenience, not only towards the manner of waging a technologically-advanced war, but also, towards Grischa.

Ultimately, we learn that Grischa's case was not determined by rules concerning escaped POWs, spies, or the administration of occupied territory.[113] Instead, "the legal aspect of the case" was balanced against "the military and political interests involved", and found to be "of very slight importance".[114] The binding obligations found in the Hague Regulations were thus effectively limited by "the compatibility of the latter with the state's goals",[115] as based on legal theories current in Germany in the period before 1914. This in turn meant that "the fundamental element of the state was power and no law could interfere where clashes of power were at play among states".[116]

The opposing schools of state community as represented by the development of Hague and Geneva law, and state individuality as interpreted through notions of individual state political imperative, met in Mervinsk regarding Grischa's fate. In particular, the underlying ideological struggle between Schieffenzahn and von Lychow reflected not only an interpersonal tension, but also a tension felt throughout Europe at the time between competing schools of social, political and military thought. In turn, the more jurisprudential concerns inherent in debates over the relationship between law and the state source much of the dialogue. Should conclusions as to the strength of the rule of law in the relationship between Germany and the other belligerents (and within the occupied territory of Ob-Ost) during World War 1 be viewed in this light, it becomes clearer perhaps why Hague law and the developed norms of military usage were not persuasive in Grischa's case. In other words, while the fact of Grischa's second arrest, and trial before execution, appear to have been in conformity with the rules of "civilised" European states, the outcome rested on a known fiction. *Grischa* thus demonstrates the victory of power over the forces of law,[117] and Bjuscheff dies a second time.

CONCLUSIONS

In legal and humanitarian terms, "Grischa had a case". On the other hand, the wartime "necessity" reflected in the execution of "Bjuscheff" was symptomatic of a deeper jurisprudential struggle – that between the state as creator, or as creature, of law. It is now proposed to finalise the conclusions reached thus far.

[112] C M von Clausewitz, *On War*, by A Rapoport (ed) (Penguin, reprinted 1968), Book 1, Ch 1, paragraph 24, p 119, and discussed in A Rosas, *op cit supra* n 20, p 16.

[113] *Cf supra* n 94, and accompanying text.

[114] See *supra*, text accompanying n 13.

[115] A Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press, 1986), p 76. While the development of 19th century theories of treaty obligation is beyond the scope of this discussion, Carty notes that a Hegelian school of thought was in vogue at the time in Germany. In reliance on Romantic concepts of identity, states were viewed as existing in a state of nature. This meant that individual state contracts (*eg*, treaties) could be based neither on a higher law, nor provide the foundation for any universal law. A higher, or universal law simply did not exist. States' rights instead were actualisable only through the individual will of each. A state which could not harmonise its individual political will with that of other states must settle the matter by war. In this way, war could change the law. Thus, "the German jurist was convinced that the convergence of theory and practice was complete". *Ibid*, p. 77. *Cf supra* nn 18–20, and 64.

[116] A Carty, *op cit supra* n 115, p 77, *citing* H von Treitschke, *Politik, Band 2* (1900), pp 544–547.

[117] See K Petersen, *op cit supra* n 8, pp 16–17.

Grischa, the Escaped POW?

According to Hague Regulations, article 4, Grischa the POW is in the protective custody of the enemy state, and "not of the individuals or corps" who capture him. Article 9 states Grischa's obligation on capture (and presumably, re-capture) to give his correct name and rank. Hague Regulations article 8(1) declares that he is subject to the detaining power's laws, regulations, and orders in force, and acts of insubordination may be severely punished. However, he has a duty to escape.[118] In order not to conflate the categories of POW and deserter (who could not claim POW treatment), article 8(2) allows disciplinary punishment only for an unsuccessful escape attempt. A successful escapee is immune from punishment for the escape, according to article 8(3).

There is no express provision for the humanitarian treatment of POWs in Geneva law during World War 1, other than that given in Hague Regulations article 4: "they must be humanely treated". Nevertheless, the International Committee for the Red Cross play an active role regarding this specific issue on the conditional authority contained in Hague Regulations articles 14 and 15. Despite the fact that the 1906 Geneva Convention brought voluntary humanitarian assistance under the control of the belligerent employing it, visits to POW camps became a means by which ICRC delegates could observe the application of the Hague Regulations.[119] ICRC delegates visit Grischa in his second place of internment prior to his execution, and conclude that the prison is humanely run.

The British *Manual of Land Warfare* conforms with the Hague position on POW escape attempts, adding that "disciplinary" punishment does not include the death sentence.[120] However, POWs may be fired upon during an escape attempt, and may be sentenced to death for "an offence punishable by death under the civil or military law of the captor".[121] This implies for example that POWs may be convicted of spying.

Therefore, the maximum sentence available in law and usage for Grischa's failed escape attempt is disciplinary punishment. His failure to give his true name and rank on re-capture is likely to result only in a curtailment of advantages.

Bjuscheff, the Spy and Deserter?

Espionage is regulated by Hague law, and article 29 of the Hague Regulations strictly defines a spy as a soldier in disguise who penetrates into the zone of operations of the enemy with the intention of obtaining enemy military information for communication. Article 31 of the Regulations provides that a successful espionage operation meets with the same immunity from punishment as a successful escape attempt.

The authors of *Land Warfare* imply that the Hague definition is too restrictive, and distinguish between spies as so defined, and war treason. With regard to spying, they note that there are occasions when a military spy may be caught wearing his own uniform,[122] and focus more on the element of intent. Therefore, an alleged spy must show that he has no intention of obtaining military information for purposes of espionage. As to war treason, the Hague Regulations are silent. Nevertheless, this category exists in customary international law. Thus, when an act does not amount to espionage, belligerents may still impose very severe penalties on the basis of war treason, which offence carries no immunity from punishment.[123]

[118] *Supra* nn 67–73, and accompanying text.

[119] *Supra* nn 61–62, and accompanying text.

[120] *Supra* nn 63–66, and accompanying text.

[121] *Supra* n 73, and accompanying text.

[122] *Supra* n 79.

[123] *Supra* nn 78, and 80–82.

Deserters are dealt with as follows. Deserters, as traitors to their country, lose any right to claim either the status or treatment of POWs because they can no longer be regarded as enemies in the military sense.[124] This loss of status implies also that the ICRC has no authority to care for them, unless they fall within the categories of sick and wounded protected through the Geneva Conventions of 1864 and 1906. Nevertheless, and according to usage, deserters should be treated as POWs, though one commentator remarks that feigned deserters may be treated as spies and shot.[125]

Grischa is re-captured after his escape attempt wearing a Russian uniform, though not his own, and he gives a false name and rank. Thus, the issue of disguise is relevant. On the other hand, he quickly reveals his true identity and status, which are confirmed by his former camp guards. The problem then becomes to ascertain whether evidence exists to prove he possesses an intent to obtain enemy military information, which arguably could conflate his status as an escaping POW with that of a spy. Evidence of an intent to spy during his escape would deprive him potentially of POW treatment,[126] and opens the door to the death penalty.[127]

War Law, or War Politics?

The basic principles of the laws of armed conflict were formulated primarily during the 18th and 19th centuries among European states which shared growing levels of economic inter-dependence. The monopolisation of the twin forces of production and capital implicated concurrent developments in arms technology as well as efforts to codify humane measures of restraint in the means and methods of warfare. The written and unwritten rules which resulted applied among those "civilised" capitalist states which possessed a degree of parity in (industrialised) armaments.[128]

By implication, Bentham's project of an international code took capitalist technology into account. Bentham proposed that each state should restrain its choice of the means and methods of warfare, albeit within confines of "the regard which is proper to its own well-being".[129] The implication thus is that reciprocity in restraint is to the ultimate benefit of industrialised states. It is therefore not entirely surprising that the more long-term interests of state survival among industrialised states should be reflected in the Hague and Geneva instruments. However, by the end of the 19th century, neo-Hegelian views current in Germany undermined the consensus regarding treaty obligation. The thesis that international restrictions such as those applicable during war could not plausibly be characterised as law, in conjunction with a superficial reading of the Clausewitzian view of war as an extension of (peace-time) policy,[130] meant that any analogy between the obligations inherent in municipal law contracts and international treaties was theoretically unsupportable.[131] The resulting dialectical theory of war escalation thus rested on the view that, as the state stood above its treaties, it did "not need to seek objective standards of behaviour"[132]

[124] *Supra* n 73.

[125] *Supra* n 84.

[126] Oxford *Manual* article 23, *supra* n 73.

[127] *Supra* text accompanying n 73.

[128] *Supra* n 20, and accompanying text. Thus, the Lieber Code, applicable during the American Civil War, corresponded to the customary laws of war. *Supra* nn 24–27, and accompanying text. See also *supra* nn 31, and 48–49, and accompanying text.

[129] *Supra* nn 18–19, and accompanying text. Arguably, this view is particularly tenable when assessments of the balance in material force affect the utility of war as an arm of the law.

[130] *Supra* nn 112, and 115, and accompanying text.

[131] See A Carty, *op cit supra* n 115, p 75.

[132] *Ibid*, p 76, *citing* E Kaufmann, *Das Wesen des Volkerrechts und die Clausula rebus sic stantibus* (1911), p 204. Thus, a self-determining state, as a subject, determines its conduct from values within itself.

outside itself. The effect of this was to make the obligations contained in Hague law and military usage a matter of self-regulation, and hence, of political self-interest.[133]

Grischa? Bjuscheff?

When it is put to Schieffenzahn that "the matter had gone far beyond a mere question of jurisdiction", as an innocent man was being sent to his death, Schieffenzahn characterises Grischa/Bjuscheff as "a Russian deserter, who had so disgracefully abandoned his post in the prison camp", and adds, "if the German soldier refuses to obey orders, he is shot".[134]

According to the logic of the executioner, there is no need to treat Grischa as an enemy in the military sense, if one assumes that desertion is roughly equivalent to "abandonment". As deserters cannot claim either the status or treatment of POWs, there is no need – legal or otherwise – to consider Hague definitions of espionage.[135] Schieffenzahn thus assimilates Grischa's status as an escaped POW with that of a deserter, a point which Hague Regulation article 8 was intended to avert.[136] To conflate Grischa's status and behaviour with that of a German soldier is somewhat disingenuous, however. In common with the German soldier, Grischa the POW shares a duty of obedience to Germany, which in Grischa's case is transitory. On the other hand, Grischa owes a continuing duty of allegiance to Russia which implicates the duty to escape.[137]

Further, the Order under which Grischa/Bjuscheff is convicted and executed for espionage consists of an absolute prohibition applicable specifically to "Russian deserters".[138] As Russia was removing itself from the "common European heritage",[139] the potential spread of a spirit of revolt into the rest of Europe caused great alarm.[140] When coupled with the dictates of occupational security in Ob-Ost, there was thus perhaps even less reason of a "political" nature to adhere to Hague obligations – self-regulatory or otherwise.

As discussed earlier, the maintenance of control over occupied territory must be effective,[141] and it is not at all uncommon for the inhabitants of enemy-occupied territory to suffer various forms of intimidation, the force behind which serves also to keep the occupying army disciplined. It must thus be queried whether the "political necessity" of executing Grischa was sourced ultimately in these manifold "interests of discipline".[142] Nevertheless, it was difficult to find among those stationed in the garrison a company willing to shoot Grischa. Instead, a Bavarian machine-gun battalion, sent back from the front for delousing and re-equipping prior to transport to the Flanders fighting, agree to execute Bjuscheff in exchange for four bottles of schnapps. Its men have an average age of 20 years.[143]

[133] This view is to be contrasted with the equally contemporaneous view of international law as "the empirically identifiable product of the political will of states". Book Review, Reisman, *loc cit supra* n 64.

[134] *Grischa, op cit supra* n 2, p 222.

[135] *Supra* n 73.

[136] *Supra* n 38. Although Grischa escaped his camp in order to go home, his POW status presumably would continue until his escape attempt succeeded, at which point he would become a deserter.

[137] *Supra* nn 67–73, and accompanying text.

[138] *Supra* n 9. *Cf supra* n 86. It could be argued that foreign deserters present in Ob-Ost would be likely to be Russian.

[139] *Supra* n 33, and accompanying text.

[140] In many instances, this was due in large part to the sheer duration of the war. See, *eg, Grischa, op. cit. supra* n 2, pp 102, 129–132, and 311.

[141] *Supra* nn 89–94, and accompanying text.

[142] *Grischa, op cit supra* n 2, pp 233–235, presumably "pour encourager les autres".

[143] *Ibid*, pp 312–314.

CONTROLLING THE CLERGY OF THE CHURCH OF ENGLAND: NINETEENTH CENTURY TO THE PRESENT DAY

ERIKA KIRK[*]

INTRODUCTION

The religious ministry, together with medicine and the law, is one of the oldest professions. Like other professions, ministers of religion have particular rules that govern their behaviour. But unlike other professions, the clergy of the Church of England, formerly of the Church of Rome, have an entirely separate legal system dedicated to the regulation of their conduct, both within the working environment and outside it.

The accountability of the clergy under canon law,[1] in addition to the dictates of secular law, creates a disciplinary procedure that is without parallel in other professional spheres. For example, an infringement of the general criminal law by a clergyperson may result not only in prosecution in the secular courts, but also proceedings in the quasi-criminal jurisdiction of the ecclesiastical courts. Similarly, where proceedings in the secular courts establish the irretrievable breakdown of the marriage of a clergyperson, this may give rise to disciplinary procedures in the church courts, with legally enforceable consequences. This situation is partly the result of the historical evolution of the two legal systems, as outlined below; but it is also partly a concomitant of the particular role that is occupied by members of the clergy. Expectations of parishioners, who contribute to the costs of ministry, and expectations of members of society in general, suggest that higher standards of conduct are demanded of the clergy than of the laity, and their misdemeanours are dealt with by force of law, rather than self-regulation as in other professions.

Although it is usually matters relating to sexual or financial misconduct that attract attention, the system of clergy discipline also extends to matters such as dress, swearing, drinking, and detailed regulations concerning the liturgy and church services. Clergy are also subject to complex regulatory provisions relating to furnishings and ornamentation of churches and care of church buildings.[2]

Apologists for the disciplinary system have argued that a punitive system is necessary for the sake of the community, so that "scandal is avoided and the delinquent understands that the authorities in the church have a prior responsibility to safeguard the common good of the faithful".[3] Whether the system of regulation that has evolved is an appropriate means to achieve this end is another matter.

Public awareness of this separate system and of matters of clergy discipline tends to be limited, but occasionally attention is drawn to the difficulties associated with this area of law. For example, in the nineteenth century, the emergence of the Oxford Movement and the Tractarians engendered public interest and controversy.[4] This led to changes in legislation, the prosecution of clergy in the criminal courts in respect of

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[1] Canon law regulates not only the conduct of the clergy, but also such diverse matters as forms and ceremonies for divine service, church furnishings, and qualifications for post holders such as archdeacons.

[2] This is the faculty law of the Church of England. Clergy must seek a faculty (permission) to make alterations to the fabric or furniture of a church, and civil proceedings in the church courts can ensue.

[3] Working Party on Clergy Discipline and Ecclesiastical Courts (1996) 4 Ecc LJ 18 at 511.

[4] For an account of this period, see WJ Sparrow Simpson, *The History of the Anglo-Catholic Revival from 1845* (George Allen & Unwin Ltd, 1932).

the conduct of worship in church, and the use of the Judicial Committee of the Privy Council as a forum for debate in theological and doctrinal matters. In this century, the debate leading to the enactment of the Clergy Discipline Measure 2003 has resulted in a resurgence of interest in the topic.

This article discusses some of the issues surrounding clergy disciplinary procedures in the Church of England,[5] beginning with an examination of the most readily identifiable sources of law by which the conduct of the clergy has been regulated, these being the legislation of the Church of England, the decisions of the courts, and parliamentary legislation. Special attention is given to the nineteenth century statutes and cases as these throw into sharp focus the complex relationship between the secular and the ecclesiastical legal systems. It is then possible to consider some of the current disciplinary regulations, with an overview of the Ecclesiastical Jurisdiction Measure 1963 and the newly enacted Clergy Discipline Measure 2003. This study will give some indication of the difficulties that abound when the subtleties of professional conduct must be regulated by statute and case law.

SOURCES OF LAW: LEGISLATION OF THE CHURCH

Lord Blackburn, in the case of *Mackonochie v Lord Penzance*[6] remarked that the ecclesiastical law of England "is not a foreign law. It is part of the general law of England – of the common law in that wider sense which embraces all the ancient and approved customs of England which form law". The origins of ecclesiastical law are indeed ancient, for they can be traced back to at least four centuries before the Reformation, to the evolution of the canon law of the Western or Catholic church.[7] In the 12th century, at the time when the common law of England (*ie* common to the whole country) was emerging, the universal law of the church (with the Pope at its head) was also developing into a parallel system which was held to apply to all Christians in all places, parts of which were expressly or by custom adopted in this country. The existence of this canon law alongside the common law resulted in numerous disputes over the next 200 years, as clerics and common lawyers argued over the extent of their respective jurisdictions.

At the Reformation, this body of canon law was not abolished, although appeals to the Pope were no longer possible. Instead, these provisions received statutory recognition, and remained in force except where "repugnant, contrarient or derogatory" to common law, statute or royal prerogative.[8] As a result, this part of the ecclesiastical law was said to be as much binding law as any other legislation, for clergy, laity and those outside the Church of England alike.

Canons

Further legislation of this type followed in the form of the Canons Ecclesiastical of 1603. The Canons were the product of the ancient legislative Convocations (meetings of the clergy) of Canterbury and York, and according to Richard Hooker, were made by "instinct of the Holy Ghost".[9] The Canons reproduced some of the

[5] This article concentrates mainly on the provisions relating to priests and deacons, though similar rules govern the behaviour of bishops and archbishops, with slight differences in procedure.

[6] (1881) 6 App Cas 424 at 446, HL.

[7] For an account of the development of canon law from the early church and through the Middle Ages, see James A. Brundage, *Medieval Canon Law*, (Longman, 1995).

[8] Submission of the Clergy Act 1533.

[9] Known as the prophet of Anglicanism, Hooker's writings were highly influential in the early development of the Anglican church.

pre-Reformation canon law, and gave directions on divers matters relating to the conduct of the clergy, both on and off duty. As such, it seemed that these Canons would be rules for the clergy only, binding in spiritual matters, but the inclusion of regulations concerning marriage, the qualifications of schoolmasters, and other material that did not relate solely to the clergy led to some debate as to whether the 1603 Canons were also binding upon the laity. The debate was apparently resolved by the case of *Middleton v Crofts,*[10] which is regarded as authority for the principle that the Canons of 1603 were binding on the clergy, and on the laity in so far as declaratory of the ancient law and usage of the Church of England, but not otherwise. Lord Hardwicke CJ justified this distinction on the basis that in contrast to much of the Tudor legislation affecting the church, these provisions had never received confirmation from parliament. In addition, members of the laity were not represented in Convocation at the time of the Canons and therefore could not be bound by them.

The 1603 Canons were revised and extended in 1964 and 1969, and the power to legislate by Canon was transferred from the convocations to the principal governing body of the Church of England, the General Synod (formerly known as the National Assembly).[11] The status of these Revised Canons Ecclesiastical, as amended from time to time by Synod, was the subject of correspondence in the *Ecclesiastical Law Journal* in July 1995 and January 1996. In the 1995 edition [12] it was pointed out by Oswald Clark that as the "ordinary man in the pew" (sic) did not subscribe to the Canons, then they would appear to apply only to the clergy or to particular classes of persons addressed by the provisions. In the same edition,[13] Brian Hanson, an authoritative voice in the field of ecclesiastical law, pointed out that *Middleton v Crofts* had settled the issue with regard to the canons made by Convocation. However, Hanson then offered the opinion that as under the Synodical Government Measure 1969, power to make canons had passed to General Synod, on which body members of the laity were represented, all canons passed by the General Synod should be binding on them. Indeed Lord Hardwicke's other main reason in *Middleton v Crofts* for excluding the laity from the effect of the Canons, that is, the lack of approval of Parliament, was addressed in the Synodical Government Measure of 1969, which requires the assent and licence of the Queen before canons may be promulgated.

Whatever doubt there may be as to whether the Canons bind the laity, there is no doubt about the fact that the Revised Canons bind the clergy. In *Bland v Archdeacon of Cheltenham,*[14] Sir Cecil Havers, the Deputy Dean of the Court of Arches, commented that the 1969 Canons "have statutory authority through a Church Assembly Measure passed through Parliament". This version of the Canons imposes duties on the clergy in relation to their professional conduct, their home life, and even their dress. There are also regulations concerning forms of service and doctrine, which are given statutory force by the Church of England (Worship and Doctrine) Measure 1974, and are enforceable through the ecclesiastical courts under the Ecclesiastical Jurisdiction Measure 1963 (as amended). It is the measures of the Church of England that regulate such matters as the jurisdiction of the ecclesiastical courts, the appointment of incumbents of parishes, and the disciplinary system for the clergy. There are two key measures concerned with clergy conduct: the Ecclesiastical Jurisdiction Measure 1963 (as amended) and the Clergy Discipline Measure 2003. Both

[10] (1736) 2 Atk 650.

[11] Synodical Government Measure 1969, s 1.

[12] 4 Ecc LJ 17 at 441.

[13] *Ibid* at 442.

[14] [1972] All ER 1012 at 1018.

of these will be examined in greater detail later in the article, but it is interesting to note at this point the legal status of measures of the Church of England.

Measures

In common with canons, measures of the Church of England are the product of the legislative process of the General Synod. Their legal status is however quite different from that of the Canons, for they are the primary legislation of Synod, and have the force and effect of an Act of Parliament. They are therefore binding on all, clergy and laity, members of the Church of England and non-members alike. Once passed by Synod, measures must be submitted to the Parliamentary Ecclesiastical Committee, which consists of representatives of both Houses of Parliament, for consideration and report. The committee report and the measure must then be laid before both Houses, and be presented to the Queen for Royal Assent.

In an increasingly secular, pluralist and multi-cultural society, the fact that the rules of a religious organisation can acquire the binding force of statute law, by making use of the legislative process of the government, may seem an extraordinary anomaly. But this is, of course, one of the many curious consequences of the Reformation and the resultant Establishment of the Church of England. The fact of Establishment means that the Church of England is recognised as having a particular legal and social status, and such of its disciplinary regulations as are contained within its measures acquire legal enforceability.

The drawback to this arrangement from the perspective of the church might be the fact that in ecclesiastical matters, the supremacy of parliament is still very much a reality. As Briden and Hanson observe,[15] "in the event of unresolved conflict, it is the will of Parliament or the Crown which, for good or ill, prevails", as the Church discovered to its cost during the passage through its parliamentary stages of the Churchwardens Measure 2001.[16]

As with primary parliamentary legislation, the measures also enable the making of subordinate legislation in the form of orders and instruments.

The Book of Common Prayer[17]

The case of *Martin v Mackonochie*[18] established three categories of ecclesiastical practices: things lawful and ordered; things unlawful and prohibited; and things neither ordered nor prohibited expressly or by implication, but the doing of which must be governed by the living discretion of some person in authority.[19] The category of things lawful and ordered is governed, not only by detailed provisions of canon law, but also by the Ornaments Rubric in the Book of Common Prayer.[20] In the past, the rubrics have been held to have the full force of statutory provisions[21] gaining their authority from the Act of Uniformity 1662. Breach of these rules would therefore constitute an offence against ecclesiastical law.

[15] G Moore, *Introduction to Canon Law*, 3rd ed, by T Briden and B Hanson (Mowbray, 1992) at 7.

[16] The Parliamentary Ecclesiastical Committee expressed concern at certain of the provisions of the Measure as presented by General Synod. As a result, Synod had to delete the offending clauses before the Measure was passed by parliament.

[17] This is one of the foundation documents of the Church of England. It is annexed to the Act of Uniformity 1662, and contains authorised liturgy, articles of faith, and instructions to the clergy on matters of liturgy and doctrine.

[18] (1868) LR 2 A&E 116.

[19] *Per* Sir Robert Phillimore, *ibid* at 191.

[20] This is set out immediately before the order for Morning Prayer. Rubrics in the Book of Common Prayer are directions or instructions, and take their name from the red ink in which they were sometimes printed.

[21] See, *eg*, *Westerton v Lidell* (1858) Moore's Special Report at 187.

Although the relevant provisions of the 1662 Act have been repealed,[22] the rubrics continue to determine the legality of matters ritual and ceremonial, and the 19th century cases must be read in that light. It has since become apparent, however, that strict observance of the rules relating to ritual and ceremonial in the Ornaments Rubric has not been enforced by the courts. There is thus an interesting divergence between law and practice, which was remarked upon in the *Report of the Royal Commission on Ecclesiastical Discipline 1906*.[23]

This is evident from the case of *Rector and Churchwardens of Bishopwearmouth v Adey*[24] a case concerning the legality of the practice of reservation of the Sacrament.[25] A complaint had been made that reservation of the Sacrament is forbidden by the Thirty Nine Articles of Religion contained in the Book of Common Prayer. The then Chancellor of Durham Consistory Court, E Garth Moore, took the opportunity to comment on the legal status of the Prayer Book. "The Book of Common Prayer has statutory authority. It is a schedule to the Act of Uniformity 1662. Because the Book of Common Prayer has statutory authority it does not mean that it is itself a statute." Garth Moore argued that the logical consequence is that the Prayer Book should not be interpreted in the same way as a statute. He went on to assert that the Book of Common Prayer is in the nature of a directive written by clergy for clergy, and it should therefore be interpreted liberally according to the occasion. By these means he was able to conclude that the reservation of the Sacrament was not forbidden by either the Articles or the rubrics of the Book of Common Prayer.

Quasi-legislation

According to some commentators, there is an increasing tendency for the activities of the Church of England to be controlled by what has been termed "ecclesiastical quasi –legislation". This is defined as "extra-legal regulatory instruments informally made by a wide range of church bodies",[26] and consists of, for example, circulars, directions, guidelines, and codes of practice produced by a variety of committees within the church. The exact nature and legal status of this type of regulatory material, and its binding force, is a matter of some debate. Doe argues that the purpose of such regulation is supplementary, to fill in gaps in the formal law, or to provide for flexibility in pastoral matters. But he acknowledges the possibility that such rule-making may have legal consequences.[27]

The sphere of clergy discipline provides a good example of this type of regulation in practice. In February 2000, a Joint Committee of the Lower Houses of the Convocations of Canterbury and York was set up to prepare a code of professional conduct for the clergy. (The Convocations, although no longer having power to create canons for the Church of England, continue to meet to consider other matters affecting it.) The Joint Committee prepared a draft document which was published for comment in February 2002 and debated by both Convocations, before final publication as a booklet[28] which was commended to the clergy by the Archbishops of Canterbury and York.

[22] Church of England Worship and Doctrine Measure 1974, s 6(3) and Sched 2.

[23] Cd 3040 para 3630.

[24] [1958] 3 All ER 441.

[25] This involves reserving some of the bread and wine consecrated at a Communion service for use at a subsequent service at which a priest might not be available *eg* for a sick person in their own home.

[26] N Doe, "Ecclesiastical Quasi-Legislation" in N Doe, M Hill and R Ombres (eds), *English Canon Law* (University of Wales Press, 1998) at 93.

[27] Doe, *op cit.*

[28] *Guidelines for the Professional Conduct of the Clergy* (Church House Publishing, 2003).

It is interesting to note that although the original motion of Convocation envisaged the creation of a code of practice, following legal advice, the word "guideline" was substituted for "code". Presumably this was to avoid comparison with other codes that have legal significance, such as the Highway Code and the Codes of Practice attached to the Police and Criminal Evidence Act 1984 (as amended). In the preface to the final version of the guidelines, the chairman of the working party[29] emphasises the fact that the guidelines do not form a legal code, and that they are not "commandments set in stone". This seems to indicate an awareness on the part of the Committee that there is some degree of doubt about the exact legal status of documents such as this. However, despite the chairman's disclaimer, many of the guidelines are couched in normative terms, and many use the terminology of rights and duties, and it is tempting to think that non-observance of the guidelines by a member of the clergy would be strongly indicative of behaviour that might result in disciplinary action.

Whatever doubts there may be about the effect and enforceability of rules of this nature, the Clergy Discipline Measure 2003 provides for the continued use of such quasi- legislation in the context of clergy discipline. The Measure provides for the appointment of a Clergy Discipline Commission consisting of representatives from members of General Synod, both clergy and laity, and at least two senior lawyers of judicial status. The Commission is charged with the duty to "issue codes of practice and general policy guidance to persons exercising functions in connection with clergy discipline".[30] No indication is given as to whether such codes and policies will be binding upon those to whom they are addressed, but Doe sees the proliferation of this type of informal rule-making as indicative of a radical increase in ecclesiastical regulation generally.[31]

SOURCES OF LAW: THE COURTS

The history of the church courts in this country can claim to pre-date the history of the courts of common law and equity, and the interplay between the ecclesiastical and the secular courts is complex. For centuries, the clergy of the Church of England have been subject to the jurisdiction of both the church and the secular courts. This overlap can, however, have undesirable consequences when the secular courts are called upon to consider theological matters for which judges have been neither trained nor equipped.

A clergyperson behaving badly in matters of doctrine, ritual or ceremonial may be dealt with in the particular church court designated to deal with such matters. But where conduct that constitutes a criminal offence is alleged, a member of the clergy can be held accountable under the quasi-criminal jurisdiction of the ecclesiastical courts, in addition to any prosecution in the secular courts. The operation of these specialised ecclesiastical courts has been described as a system of "gothic complexity".[32]

Historical Context

In order to understand the evolution of the modern system of disciplinary tribunals that is introduced by the Clergy Discipline Measure 2003, it is necessary to have an

[29] Hugh Wilcox, *ibid*, at ix.

[30] Clergy Discipline Measure 2003, s 3.

[31] Doe, *op cit.*

[32] Smith, Bailey & Gunn, *The Modern English Legal System*, 4th ed, by SH Bailey, JPL Ching, MJ Gunn and DC Ormerod (Sweet & Maxwell, 2002) at 44.

understanding of the history of the ecclesiastical courts. Because of its position as the established church, the courts of the Church of England occupy a unique position. As Briden and Hanson neatly observe, "the Church's courts are courts of the State and the State's courts are courts of the Church".[33]

However, Dale characterises the history of the church courts as "a story of gradual loss of jurisdiction"[34] as many of the matters that would formerly have been regarded as the concern of the church courts have been transferred to the secular courts, or abolished by statute. For centuries, a plethora of church courts existed, that could exercise jurisdiction not only over the clergy, but also over the laity, in matters ranging from divorce, probate and defamation, through bigamy and incest to brawling. The 19th century saw a gradual reduction in the powers of the church courts in respect of the laity, but the complexities of the system remained well into the 20th century.

Until its repeal by the Clergy Discipline Act 1892, the Church Discipline Act 1840 provided a procedure for the hearing of complaints against clergy. The relevant diocesan bishop would issue a commission to five persons, including the Chancellor or an Archdeacon or rural dean, to investigate the charge. If the commissioners found a *prima facie* case to be answered, the bishop could pronounce summary sentence or proceed to a full hearing in the consistory court. Here the bishop would sit with three assessors, assuming the roles of judge and jury. Alternatively the case might be referred to the Provincial Court, that is, the Chancery Court of York (for cases arising in the northern Province) or the Court of Arches (for cases arising in the Province of Canterbury). Ultimately the parties could appeal to the Judicial Committee of the Privy Council.

The 19th century provides a number of cases that are illustrative of the singular workings of the ecclesiastical courts, and the interplay with parliament and the temporal courts. The catalyst for this was the controversy engendered by the Oxford or Tractarian Movement, which began in 1833 and developed over the next fifteen to twenty years into an Anglo-Catholic revival.[35] The doctrinal questions raised by disputes between the Tractarians and the Evangelicals resulted in legal proceedings against clergy who were accused of not holding to the declared doctrine of the Church of England. Although these proceedings began in the ecclesiastical courts, the final court of appeal for doctrinal cases was the Judicial Committee of the Privy Council, and thus as Sparrow Simpson observes, in these judgments "the respective authority of the secular and the spiritual is apparent in its acutest form".[36]

The Judicial Committee of the Privy Council

One of the most celebrated cases was that of *Gorham v Bishop of Exeter*,[37] which began as proceedings in the Arches Court of Canterbury in a cause of *duplex querula*.[38] In 1847, the Lord Chancellor, Lord Cottenham, offered the living of the parish of Bramford Speke in Devon to the Revd George Cornelius Gorham. The Bishop of Exeter refused to proceed with the appointment, however, on the grounds that Gorham held views of unsound doctrine relating to the Sacrament of Baptism. It was alleged

[33] *Op cit*, at 111.

[34] W Dale, *The Law of the Parish Church*, 6th ed, (Butterworths 1989).

[35] The Tractarian Movement sought to revive the spirituality of the Anglican Church by the dissemination of Tracts, the first of which was written by John Henry Newman. Subsequently the movement became identified with the Ritual party, which sought to re-introduce Roman Catholic practices and church ornaments that had been banned since the Reformation.

[36] Sparrow Simpson, *op cit*, at 46.

[37] (1850) 14 Jur 443 PC.

[38] *Duplex querula* is an action in the nature of an appeal by a clergyman whose bishop has refused to institute to a particular parish.

that Gorham had expressed the view (contrary to the Articles of Religion of the Church of England)[39] that spiritual regeneration was not given or conferred at Baptism and that infants do not automatically become members of Christ by Baptism.[40] The Arches Court found in favour of the bishop, and Gorham appealed to the Judicial Committee of the Privy Council.

Six eminent lawyers heard the appeal, with three bishops in attendance. Lord Langdale, giving judgment, pointed out the Privy Council was not being asked to consider whether Gorham's views were theologically sound or unsound, but whether his opinions were contrary to the Articles of Religion of the Church of England.[41]

> This Court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon true and legal construction of her Articles and Formularies; and we consider that it is not the duty of any court to be minute and rigid in cases of this sort.

The decision of the Privy Council was that Gorham's beliefs were not contrary to the doctrine of the Church of England and that he should not have been refused admission to the living of Bramford Speke.

The Bishop of Exeter later condemned this as a "perversion of justice".[42] It was claimed that the Privy Council judgment would allow priests to teach that regeneration was an open question in the Church of England, and that the state was attempting an interference in spiritual matters, unprecedented in the history of the church.[43] Despite the careful disavowal by the Privy Council of any attempt to express opinion on the theological accuracy of the arguments presented, much criticism was made of the fact that judges with no theological training had decided how the Articles of Religion should be interpreted. Notwithstanding, the Privy Council continued to constitute the final court of appeal for doctrinal matters until its jurisdiction was ended by the Ecclesiastical Jurisdiction Measure 1963.

This was not, however, the end of the litigation arising out of the Anglo-Catholic Revival. The latter part of the 19th century saw the development of Ritualism in the Church of England.

Ritualist Prosecutions

Ritualism developed out of Tractarianism, and particularly from the advanced Anglo-Catholic societies that observed the "six points" of Tractarianism.[44] The *Liverpool Mercury* of 14 May 1874 claimed that Ritualism was a "religious fanaticism generally picked up at the University of Oxford". But it was at Trinity College, Cambridge, particularly under the influence of its senior tutor Revd Thomas Thorp, where much ritual innovation took place. Thorp had been one of a number of vociferous critics of the *Gorham* judgment.

Part of the reason for the Ritualist Movement lay in the perceived need for revival of a church that had become lax in its worship and discipline. But the chosen means

[39] The Thirty Nine Articles contained in the Book of Common Prayer summarise the official view of the Church of England in relation to fundamental issues of theology, doctrine and practice.

[40] Though perhaps his real crime was that he had advertised for a curate who was "free of Tractarian error", and this had apparently caused offence to the bishop.

[41] EF Moore, *The Case of The Rev GC Gorham against The Bishop of Exeter* (Stevens and Norton, 1852) at 472.

[42] Sparrow Simpson, *op cit* at 50.

[43] *Ibid* at 52.

[44] These included wearing full Eucharistic vestments, using lighted candles on the altar, and using incense during the service.

(the six points, the use of the sign of the cross and auricular confession) were widely condemned as Romish practices. Rival groups formed, represented by, for example, the English Church Union (High Church) and the Church Association (extreme Evangelicals). These two groups were soon locked in battle over ritual. The Church Association instigated prosecutions of clergy on the grounds that Ritualist ornaments and practices were inconsistent with the rubrics of the Book of Common Prayer, and the English Church Union sought to defend those who were under attack.

One of the most significant cases was that of *Martin v Mackonochie*,[45] in which the Revd Alexander Mackonochie was accused of various Ritualist practices. The case was brought under the provisions of the Church Discipline Act 1840, which enabled the bishop to try cases himself with assessors, or to send the case to the Court of the Archbishop. Mackonochie's case was duly tried before Sir Robert Phillimore, who commented that the proceedings were of a criminal character, and noted the harshness of this.

Phillimore's judgment was based on an understanding of the rubrics of the Book of Common Prayer as deriving their authority from the Act of Uniformity 1662. It was also impressively learned, involving an examination of New Testament passages in the original Greek, and discussion of passages from Bede in the original Latin. Phillimore's conclusion was the helpful threefold analysis of ecclesiastical procedures referred to earlier, and he found that at least three of the practices of which Mackonochie stood accused were actually lawful. The Church Association, dissatisfied with this conclusion, appealed to the Judicial Committee of the Privy Council, which reversed Phillimore's decision and condemned Mackonochie on all points raised against him. Mackonochie refused to comply with the judgment, and so in November 1870, the Judicial Committee of the Privy Council suspended Mackonochie for three months. This was not, however, the end of the matter. Mackonochie attempted to obtain a judicial review of the decision to suspend him from office, and he was also subjected to further prosecutions involving the Judicial Committee of the Privy Council.

These cases revealed an interesting interplay between the powers of Church and state, and the effect of legal decisions upon members of the Church of England. It was claimed by Bishop Fraser[46] that the meaning of the ambiguous rubrics in the Book of Common Prayer had now been clarified by the Judicial Committee of the Privy Council. But this supposed clarity was achieved at great expense. Mackonochie's case took four years and involved five hearings. Moreover, some of the Ritualists simply ignored what the Judicial Committee had decided. Two senior Canons of St. Paul's Cathedral, Liddon and Gregory, wrote to the Bishop of London[47] asserting that the Judicial Committee was not a synod of the Church of England, its jurisdiction had never been recognised by the church, and that as a matter of conscience, they would not comply with its decisions.

It is interesting to note that many of the Ritualist practices declared illegal by the Judicial Committee of the Privy Council are commonplace in the Church of England today. This was recognised in the *Report of the Royal Commission on Ecclesiastical Discipline* in 1906,[48] in which it was observed that when a court deals with matters of conscience and religion, its judgments will not be effective if they do not carry moral authority. Therefore if clergy refuse to recognise the right of the Judicial Committee of

[45] *Supra*, n 15.

[46] J Bentley, *Ritualism and Politics in Victorian Britain* (Oxford University Press, 1978) at 39.

[47] Sparrow Simpson, *op cit* at 137.

[48] Cd 3040, para 363.

the Privy Council to pronounce on such matters it would appear to mean that its judgments are unenforceable.

Subsequent legislation has expressly reduced the powers of the Judicial Committee of the Privy Council. The Ecclesiastical Jurisdiction Measure 1963, sections 45(3) and 48(5) provides that in matters of doctrine, ritual and ceremonial, neither the Court of Ecclesiastical Causes Reserved nor a Commission of Review is to be bound by any decision of the Privy Council.

SOURCES OF LAW: PARLIAMENTARY LEGISLATION

Clergy of the Church of England are subject to the general law of England as created by Parliament through legislation. Some exceptions exist. For example, the case of *Diocese of Southwark v Coker*[49] established that clergy do not have a contract of employment. Therefore as they are not persons who have a contract of service within the Employment Rights Act 1999, section 230 (2), they do not have the benefit of employment protection legislation. Neither is the Church of England constrained by employment discrimination legislation. As has been seen above, however, in addition to general legislation, clergy of the Church of England are subject to specific legislation in relation to their conduct.

Until 1963, in terms of secular parliamentary legislation, discipline of the clergy was regulated by the Church Discipline Act 1840, the Public Worship Regulation Act 1874, and the Clergy Discipline Act 1892, according to the nature of the offence charged. Examination of this legislation, particularly of the Public Worship Regulation Act 1874, reveals the roots of the 20th century approach to clergy discipline in terms of procedure and practice.

Church Discipline Act 1840

The Church Discipline Act 1840 could be invoked in cases of crimes and acts of immorality committed by clergy but the legislation was also used for the prosecution[50] of Ritualist priests for such matters as "excessive kneeling"[51] and the "truly horrible offence" of wearing a surplice throughout the service![52] Proceedings could take the form of a commission of enquiry consisting of the Diocesan Bishop, the Chancellor of the Diocese (who was usually a High Court judge) and senior clergy, or could be referred to the Provincial Court to be heard by the Chancellor.

Public Worship Regulation Act 1874

In a further attempt to curb the Ritualist movement, the Public Worship Regulation Act 1874 ("PWRA 1874") was enacted; more specific offences were created and the powers of the Consistory Court were put on a statutory footing. Proceedings could be commenced against clergy in this court for such matters as the introduction of illegal ornaments, for example candles and frontals, or failing to observe the services laid down in the Book of Common Prayer.

The PWRA 1874, section 8, permitted prosecutions to be instigated by an archdeacon or churchwardens, or by any three parishioners. The bishop could at this stage stay the action, hear the case himself, or refer it to a judge. Proceedings before

[49] [1998] ICR 140 CA.

[50] Notice that the language used is that of the criminal law.

[51] *Martin v Mackonochie, supra,* note 15.

[52] Prosecution of the Revd AS Prior, reported in *The Daily Telegraph*, 4 January 1870.

a judge took a strict legal form, with evidence given on oath, the judge having the powers of a court of record and the ability to enforce attendance of witnesses in the same manner as a judge of one of the superior courts of law or equity. The court's powers were thus modelled on those of the secular courts, and this fact, together with the power of the bishop to veto proceedings[53] led to problems in the operation of the legislation.

Within two weeks of the PWRA 1874 coming into force, the Church Association against Ritualist priests began a new series of prosecutions. Most of the Ritualist clergy decided that the new court set up under the Act, being secular in nature, had no jurisdiction over them, and ignored its decisions. When they refused to obey court orders (known as monitions) prohibiting them from celebrating communion, the complainants claimed that the clergy were in contempt of court, which carried the sentence of imprisonment. As a result, five priests, two in London and one each in Manchester, Liverpool and Birmingham, served prison terms. This unforeseen outcome had the opposite of the desired effect, and invoked public sympathy for the Ritualists.

Meanwhile, the power to veto cases afforded to the bishops by the PWRA 1874, section 9, rendered the Act difficult to enforce in some cases. In 1886, Edward King, Bishop of Lincoln, refused to permit the prosecution of two priests of his diocese. Consequently, the Church Association turned its attention to King himself, and laid a complaint before the Archbishop of Canterbury that King had committed Ritual offences. Archbishop Benson doubted that he had jurisdiction to act, but was overruled by the Judicial Committee of the Privy Council and accordingly King's case was heard in a specially convened hearing at Lambeth Palace.

The outcome was legally significant, not only because Benson held substantially in favour of King, but also because in so doing, he ignored the judgments of the Privy Council in previous Ritualist cases. Instead of basing his judgments on recent legal precedents, Benson relied on history, citing as authority decisions made at the Council of Hatfield in 680 AD. This approach drew attention once again to the continuing tension between secular and ecclesiastical law.

One of the main objections to the PWRA 1874 was that it was perceived as the product of Parliament only, the views of the Church Convocations having been completely ignored. The issue therefore came to be seen as one of the independence of the Church of England. Was the Church of England free to make its own decisions in matters of doctrine and worship, or could parliament, as the sovereign law-maker, control these matters? And was it appropriate that the final appellate authority in ecclesiastical causes was a non-ecclesiastical body, that is, the Judicial Committee of the Privy Council? In retrospect, it became clear that the PWRA 1874 was "the most unpopular and unworkable of modern Acts of Parliament"[54] and that in the case of conflict between ecclesiastical power and civil power, clergy would rather go to prison than submit to parliamentary sovereignty.

In the Clergy Discipline Act 1892, parliament again attempted to legislate for the behaviour of clergy, this time in the sphere of morality, rather than worship and doctrine. The Church Discipline Act 1840 was repealed, and replaced with provisions for hearing cases before the Consistory Court. Some attempt was made to define the relationship between the temporal courts and the church in relation to clergy misbehaviour. The legislation provided that if a member of the clergy was convicted of

[53] Inserted during the passage of the bill through parliament, as a result of pressure from bishops sympathetic to the Ritualists.

[54] Sparrow Simpson, *op cit*, at 151.

an offence in a secular court, and sentenced to imprisonment, or if found to have committed adultery in a matrimonial cause, or if a bastardy order was made against him, the bishop would have no discretion but to declare his living vacant and would have the option to depose him from holy orders.

The Ecclesiastical Jurisdiction Measure 1963 repealed the 19th century Parliamentary legislation, and brought matters of doctrine and discipline firmly within the ambit of church authority. However, the legacy of secular influence over church matters can still be seen in the 1963 legislation. The remainder of this article will therefore focus on the operation of the 1963 Measure, and the subsequent developments in the Clergy Discipline Measure 2003.

REFORM AND THE ECCLESIASTICAL JURISDICTION MEASURE 1963

Between 1883 and 1952, six commissions recommended reform of the ecclesiastical courts, culminating (in 1954) in the report of the Archbishop's Commission on Ecclesiastical Courts chaired by Lloyd Jacob J, entitled *The Ecclesiastical Courts: Principles of Reconstruction.* The result was the enactment of the Ecclesiastical Jurisdiction Measure 1963, ("EJM 1963") which abolished many obsolete jurisdictions, and restructured the hierarchy and functions of the church courts. For example, archdeacon's courts, which were virtually defunct, were abolished, and the original jurisdiction of the Arches Court of Canterbury and the Chancery Court of York was removed, the latter two courts retaining appellate jurisdiction only. The Measure removed the possibility of appeal to the Judicial Committee of the Privy Council in disciplinary matters, and abolished the power of the Queen in Council to hear suits of *duplex querela.*[55] To that extent, the Measure attempted to regularise the interplay between secular and ecclesiastical legal power. But what the Measure gave with one hand it then took away with the other for it provided that nothing in the Measure was to affect the prerogative powers of the Crown, nor would it affect the power of the High Court to control the proper exercise by the ecclesiastical courts of their functions.[56]

Statutory force was also given to a distinction that has been of fundamental importance in the operation of clergy discipline. Matters of doctrine, ritual and ceremonial, were to be dealt with by a different procedure and in a different forum from matters of morality, unbecoming conduct, and neglect of duty,[57] and this dichotomy persists in the new provisions of the Clergy Discipline Measure 2003. The court system outlined in the Measure also perpetuated the division of jurisdiction into civil and criminal matters. Civil cases comprised the faculty jurisdiction of the courts, and clergy discipline, the criminal jurisdiction.

Unfortunately, as commentators have remarked, the new system of courts and procedures introduced by the EJM 1963 was no less complicated than the system it replaced, and it was predicted that "it is doubtful whether, in some of its aspects, any attempt will be made to use it more than the one time necessary to convince even its authors of its unserviceability for many of the purposes for which it was designed".[58]

[55] EJM 1963, s 82(1).
[56] EJM 1963, s 83(2).
[57] EJM 1963, ss 6 and 14.
[58] G Moore, *op cit,* at 113.

The Court System under the EJM 1963: Doctrine Cases

The EJM 1963, section 14 (1)(a) provided that proceedings could be instituted against members of the clergy for any offence against the laws ecclesiastical involving matters of doctrine, ritual or ceremonial. This provision was designed to regulate liturgical activity, and is therefore the successor to the legislation that enabled the prosecution of the Ritualist priests. It would also cover credal matters, such as denying the doctrine of the Trinity or the deity of Christ.

Proceedings were to be commenced with the laying of a complaint before the Diocesan Registrar by an authorised complainant within the terms of EJM 1963, section 19, which could include six persons whose names are on the electoral roll of the parish church. The bishop had then to give the accused[59] and the complainant the opportunity for a private interview with him.[60] The bishop could at that stage decide to take no further action, but if he did proceed with the case, the next step was a Committee of Inquiry. Again, the Committee could dismiss the case at that stage, or it could refer it to the Court of Ecclesiastical Causes Reserved, a court newly created by the Measure, and consisting of three diocesan bishops, two lawyers who had held high judicial office, and a panel of theological advisers. Appeal from this body lay to a Commission of Review consisting of three Law Lords and two House of Lords bishops. In the light of the experience of the nineteenth century cases, the ecclesiastical legislators took the opportunity to declare in the EJM 1963, section 45(3) that the Court of Ecclesiastical Causes Reserved would not be bound by any decision of the Judicial Committee of the Privy Council in relation to matters of doctrine and ceremonial.

In the 40 years that this provision has been on the statute book, it has not been tested in practice. Given its unwieldy nature, it is perhaps not surprising that there has not been one case heard in this court, and anecdotal evidence suggests that bishops find other ways of dealing with clergy whose views cause concern. It is however interesting to compare the lack of litigation in respect of doctrine, with the abundance of cases concerning Faculty applications. Do modern congregations care more about church furnishings than they do about the doctrinal and liturgical correctness of their clergy?

The Court System under the EJM 1963: Conduct Cases

The EJM 1963, section 14(1)(b) provided that proceedings could be instituted under the Measure against incumbents, charging such clergy with any other offence against the laws ecclesiastical (apart from doctrine etc) including conduct unbecoming the office and work of a clerk in Holy Orders, or serious, persistent or continuous neglect of duty. The EJM 1963 did not define these offences, but did expressly exclude political opinions or activities from the scope of unbecoming conduct, and excluded political opinion from the scope of neglect of duty: apparently leaving political activity as a possible basis for a charge of neglect of duty. No definition was provided of "conduct unbecoming", but a parallel was available in the Revised Canons.[61] Conduct proscribed by the Canons could range from drunkenness[62] to writing a rude letter to a parishioner.[63]

As with doctrine cases, proceedings of this nature were commenced by complaint and were framed in the language and procedure of the secular criminal courts, a feature

[59] Again, note the language of the criminal law.

[60] EJM 1963, s 39.

[61] Canon C26, para 2.

[62] *Marriner v Bishop of Bath & Wells* (1878) 42 JP 436 PC.

[63] *Bland v Archdeacon of Cheltenham supra*, n 11.

that attracted much criticism, given that the charges laid before the Consistory Court would not normally have constituted criminal offences. The bishop of the diocese would interview the parties, after which an Examiner (a barrister or solicitor) would consider whether there was a case to answer, in a manner comparable to committal proceedings in the magistrates' court. A case could be dismissed at this stage, or referred to the Consistory Court, presided over by the Chancellor (as judge) and two clergy and two lay assessors (as jury). The procedure was modelled on that of the Crown Court when hearing criminal cases, and could result in conviction and sentence.[64] Appeal from this court lay to the Provincial Court.

Between 1963 and 2003, only three conduct cases reached the stage of trial in the Consistory Court, the most well known being the trial of the Dean of Lincoln, the Very Revd Brandon Jackson, in 1995. This case attracted much publicity and costs of the parties and the courts came to little short of £100,000. Small wonder that "there is much anecdotal evidence that bishops are unwilling to utilize the 1963 Measure because of the cost both in human and financial terms".[65]

This reluctance also led to "short cuts" that provided alternative methods of dealing with problem clergy. A diocesan bishop could exercise his "pastoral discipline" by adding the name of the cleric to the Archbishop's Caution List (sometimes referred to as the Lambeth and Bishopthorpe register). Prior to the Clergy Discipline Measure 2003, the list (the content of which was confidential to the bishops) contained names of clergy on whom official censure had been passed, and also names of those in respect of whom there was some disciplinary matter or a past history that should be known to the bishops. The latter aspect of the List caused concern, as the procedure for entering such names, and the types of misbehaviour that would justify this were unclear, and the presence of a name on the list would have serious implications for a clergyperson seeking a new appointment. The procedural uncertainty, potential inconsistency, and lack of opportunity for the erring cleric to plead his or her own case made this informal method of discipline at best unsatisfactory, at worst a breach of the rules of natural justice.

A similar lack of clarity surrounded the type of disciplinary proceedings that could be taken against clergy who were not incumbents of parishes.[66] The EJM 1963 did not allow for the fact that increasing numbers of clergy would be appointed to parishes as priest in charge on fixed term contracts, rather than as incumbents. The Measure also did not take account of the growing number of non-stipendiary clergy.[67] Clergy who were not incumbents were governed instead by the Revised Canons. Canon C12, para 5 allows a bishop to revoke a licence summarily without further process. Clergy may appeal to the appropriate archbishop, but from his decision there is no appeal, and this has serious implications for any priest in charge who may lose home and livelihood in summary fashion.

Criticisms of the System

Reference has been made on several occasions to the fact that the system of clergy discipline prior to and under the EJM 1963 was modelled on secular criminal jurisdiction. The language and procedure surrounding ecclesiastical "offences" was

[64] Sentence took the form of a censure that could range from *inter alia* deposition from Holy Orders (unfrocking) through suspension, to rebuke (a reprimand).

[65] The Report of the General Synod Working Party reviewing Clergy Discipline and the working of the Ecclesiastical Courts, *Under Authority*, (GS 1217) (Church House Publishing 1996) at 4.

[66] An incumbent of a parish possesses the living or benefice, and is designated vicar or rector.

[67] Non-stipendiary clergy are ordained and licensed by the bishop to minister in a parish, but do not receive a stipend and are not generally appointed as incumbents.

redolent of criminal law, which was inappropriate in cases in which allegations were not usually criminal in nature, and would not have given rise to a prosecution under secular law. The Ecclesiastical Law Society Working Party on Clergy Discipline and Ecclesiastical Courts reported that the proceedings and standard of proof were modelled so closely on jury trial in the Crown Court that of necessity they became adversarial and combative. The Working Party observed that this could create a polarisation of issues and have undesirable consequences for both clergy and parishioners.[68]

Further serious concerns were voiced by the General Synod report, *Under Authority.*[69] Because the procedures were complex and rarely used, neither clergy nor lawyers were well versed in the legislation, and such expertise as there was varied considerably from diocese to diocese. Despite the availability of ecclesiastical legal aid, costs were prohibitive, and the public nature of the proceedings often gave rise to a "media circus". Similarly, it was often difficult, if not impossible, to find local assessors to sit in the Consistory Court who had not already heard about the case, or who did not know the accused personally.

The advent of the Human Rights Act 1998 also had serious implications for proceedings under the 1963 Measure. Mark Hill[70] noted that the role of the bishop combined elements of investigator, prosecutor and judge, which would contravene the principles of Article 6 of the European Convention on Human Rights. The role of the bishop also gave rise to concern in that his pastoral role as "Father in God" to the clergy would be compromised by the disciplinary role imposed on him under the Measure.

In November 1992, the General Synod Standing Committee recommended that a Working Party be established to review clergy discipline and the work of the courts. The report was published in 1996[71] and recommended that the Church of England should make a radical revision of its disciplinary structures. Over the next five years, an implementation group worked on the draft measure, and it was referred to the Parliamentary Ecclesiastical Committee in 2001. The Clergy Discipline Measure 2003 eventually received the Royal Assent on 10 July 2003, and is being brought into force in stages.

CLERGY DISCIPLINE MEASURE 2003

The new Measure originally rejoiced in the title of the Ecclesiastical Jurisdiction (Discipline) Measure, but mercifully this was changed at draft stage. The Report of the General Synod Working Party[72] had recommended that matters of doctrine be dealt with by the same legislation that would deal with matters of conduct. However, a vote in General Synod resulted in doctrine cases being excluded from the ambit of the new system. At present therefore, the Court of Ecclesiastical Causes Reserved still has jurisdiction in matters of doctrine, ritual and ceremonial under the provisions of the 1963 Measure that have survived repeal by the Clergy Discipline Measure 2003, section 7 ("CDM 2003"). A Working Party set up by the House of Bishops has been considering how best to deal with such cases, and the press has excitedly but

[68] *Op cit,* at 510.
[69] *Op cit.*
[70] M Hill, "The Impact for the Church of England of the Human Rights Act 1998" 5 Ecc LJ at 431.
[71] *Op cit.*
[72] *Ibid.*

misleadingly suggested that "heresy trials" are planned. The draft Clergy Discipline (Doctrine) Measure will be debated by General Synod in July 2004, and will propose the introduction of a doctrinal disciplinary tribunal for matters not dealt with by CDM 2003.

Procedure under Clergy Discipline Measure 2003

The CDM 2003 is intended to provide a "new, modern and workable structure for clergy discipline in non-doctrinal cases".[73] The most fundamental change concerns the replacement of the Consistory Court with a "bishop's disciplinary tribunal" for each diocese.[74] Proceedings may be instituted against a priest or deacon by written complaint.[75] The new provisions make no distinction between incumbents and priests operating on a licence from the bishop. Such a complaint may be made by a two-thirds majority of the parochial church council, or by a churchwarden or any other person with a "proper interest" in making it.

Time limits are imposed within which the Diocesan Registrar makes a preliminary scrutiny of the complaint and reports to the bishop. The bishop has a range of options including dismissing the complaint, penalty by consent, or a formal investigation under the CDM 2003 section 17. A possible outcome may be a hearing before the disciplinary tribunal consisting of two members of the clergy, two laity, and a legally qualified chairman. Rights of appeal to the president of tribunals[76] are available to both sides during the preliminary stages of the process, and the respondent (no longer the accused) may appeal to the Provincial Court against any penalty imposed.[77] Decisions of the tribunal are also open to judicial review by the secular courts.

The new Measure attempts to address many of the concerns that dogged the EJM 1963. Under the previous legislation, there was no effective filter to stop proceedings at an early stage, due to the lack of clear guidance to the bishops in this area. Under the new Measure, the introductory sifting procedure has been borrowed from disciplinary proceedings in other professions, and enables the Diocesan Registrar to consider the quality of the evidence and the *locus standi* of the complainant at an early opportunity. The Parliamentary Ecclesiastical Committee, commenting on the CDM 2003, pointed out that this could add considerably to the work of the Registrar, and underscores the need for that person to be not only a qualified lawyer, but also well-versed in ecclesiastical law.[78] The advantage is, however, that this supplies the opportunity for malicious claims to be identified and dealt with speedily.

The newly proposed tribunal is modelled on secular tribunals. Decisions are by majority vote after a private hearing. Members of the tribunal will not come from the same diocese as the respondent. In contrast with proceedings under the EJM 1963, the standard of proof will be the same as that in proceedings in the High Court in the exercise of its civil jurisdiction, again following the trend set by disciplinary proceedings in other professions.

The question of the appropriate standard of proof was the subject of discussion in General Synod, in terms of attempting to balance the right of the clergy to a safe decision, with the right of congregations to be protected from errant clergy. The decision to adopt the civil law standard was in the event taken on the basis that this

[73] *Report by the Parliamentary Ecclesiastical Committee on the Clergy Discipline Measure* on 3 April 2003.

[74] CDM 2003, s 2.

[75] CDM 2003, s 10.

[76] Appointed under CDM 2003, s 4.

[77] CDM 2003, s 20.

[78] *Op cit.*

was thought to be more flexible than the criminal standard, the degree of probability varying according to the seriousness of the matter in question.[79]

Grounds for Proceedings

It is still possible to recognise the provisions of the EJM 1963 in the wording of the grounds for complaints. Thus in the CDM 2003, section 8, neglect of duty and conduct unbecoming still form the basis of the regulation of clergy conduct. The language of criminal offences has been removed, in response to previous criticism, but worryingly, the type of behaviour that may be defined as misconduct appears to have been broadened. Neglect of duty need no longer be "serious, persistent or continuous" to constitute misconduct, and "inefficiency in the performance of duties" has been introduced as a ground for proceedings. Similarly, conduct that is not necessarily unbecoming, but is "inappropriate" may bring members of the clergy within the disciplinary provisions. This represents a departure from the EJM 1963, and it will be interesting to see whether the result is an increase in complaints against clergy, as behaviour that would not previously have been grounds for complaint is brought within the ambit of the legislation.

Involvement in a divorce, or conviction of a criminal offence by a secular court continue to be matters which may give rise to disciplinary proceedings as they did under the EJM 1963.

Statutory Innovations

The CDM 2003 provides for the creation of a body new to ecclesiastical law, the Clergy Discipline Committee. The Committee will give general advice to the disciplinary tribunals, and issue codes of practice. This general oversight is designed to provide some consistency across the dioceses, and to address the difficulties that were inherent in ensuring comparability of decision-making in the Consistory Courts. The Committee will be chaired by a person with suitable legal qualifications; for example, having held high judicial office. The chairman will also be president of tribunals, and will issue practice directions and act as chairman of a disciplinary tribunal where important points of law or principle are involved.

The CDM 2003 attempts to regularise a difficult area from the previous regime, in that it places the Archbishop's Caution List on a statutory footing. A duty is imposed on the Archbishops by the CDM section 38 to compile and maintain a list of clergy who have been subject to disciplinary proceedings, or who have resigned following a written complaint. Unfortunately for the clergy, the list can continue to be used to name those who have "acted in a manner, not amounting to misconduct, which might affect their suitability for holding preferment". No guidance is given in the CDM 2003 as to how this procedure is to be interpreted and implemented. The clergyperson has the opportunity to ask the president of tribunals to review the decision to place his or her name on the list, but once listed, it appears that a name will remain in place for at least five years. Again, this will be a matter of some concern to clergy whose prospects of obtaining a post may be affected by this provision.

A further innovative feature of the CDM 2003 is that it provides for the creation of a Code of Practice. As mentioned earlier, the Code of Practice is to be formulated by the Clergy Discipline Commission to provide guidance for the purposes of the Measure. It was the view of the General Synod Working Party report,

[79] On the advice of Geoffrey Tattersall QC: Appendix F to the Report by the Revision Committee on the Draft Clergy Discipline Measure GS13474.

Under Authority,[80] that a Code of Practice would be a way of achieving flexibility of procedure in the operation of the disciplinary system. The Working Party was of the opinion that a code could give guidance, highlight best practice, and enable procedures to be modified as time passes, without the need for amending legislation. The Code will thus perhaps address some of the gaps and grey areas that are apparent in the new legislation. Whilst these are valid arguments in favour of such a Code, this does however introduce greater uncertainty into the administration of ecclesiastical law. On the other hand, it provides an opportunity for the ecclesiastical lawmakers to avoid the scrutiny of parliament, as the Code of Practice must be laid before General Synod before coming into force, but not laid before parliament.

CONCLUSIONS

It is too early to tell how much difference the new Measure will make to the conditions of service of clergy in the 21st century. In part this is because grey areas continue to exist in the rules that govern the conduct of clergy. Some of these areas may be addressed by the codes of practice, and in this respect ecclesiastical legislation follows the trend of secular parliamentary legislation, in providing for "quasi-legislation" to "fill in the gaps" more speedily and flexibly than might be the case if amending legislation were required.

The 19th century Ritualist cases provided a dramatic illustration of the consequences that arise from the interplay of secular and ecclesiastical law. Whilst the clergy continue to be subject to the two separate legal systems, the reduction of the influence of the criminal law must be seen as an improvement. What has replaced it seems to be the influence of the civil law, with the introduction of tribunals and a civil standard of proof. But the acid test of the appropriateness of the new system will be the extent to which it achieves the aim set out in the document *Under Authority*:[81] that the community of faith might expect quality and accountability from its clergy, and that "discipline should be handled firmly, fairly and sensitively and without delay".

[80] *Op cit.*
[81] *Op cit.*

THE DATABASE DIRECTIVE – ONE STEP TOO FAR?

GARY SCANLAN *

INTRODUCTION[1]

The Directive on the Legal Protection of Databases ("the Database Directive")[2] seeks to provide for the protection of databases[3] from unauthorised use by third parties.[4] It does so by regarding such works as meriting copyright protection where the work satisfies the terms of the Database Directive. Article 3(1) of the Database Directive states that:

> In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own *intellectual creation* (italics supplied) shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

It is interesting to note that the article does not state that databases qualifying as copyrightable works are to be regarded as literary works.[5] This should be contrasted with the position of software under article 1 of the Directive on the Legal Protection of Computer Programs (the "Software Directive").[6] Nevertheless both directives require that the test for originality, which prescribes the terms upon which a work shall attract copyright protection is to be satisfied by the concept of intellectual creation.

In addition the Database Directive is unique in creating what it has defined as the *sui generis* right in respect of databases, a right which is clearly independent of and unrelated to any rights derived from copyright *per se*.[7] The nature of this right has been recently examined in the case of *British Horse Racing Board Limited and others v William Hill Organisation Limited*.[8] This paper will however, only consider this right briefly, in the light of the above case,[9] and will concentrate principally on the means by which the law may begin to recognise that the present test for attracting copyright

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[1] Thanks must go to the staff at Nottingham Law School for their comments on this paper during a research seminar on 31 March 2004 and also the anonymous referees.

[2] Council Directive 96/9 EEC . This directive has already been subject to considerable academic and professional discussion. See, in particular, Derclaye, "Do Sections 3 and 3A of the CDPA Violate the Database Directive? A Closer Look at The Definition Of A Database In The UK And Its Compatibility With European Law" (2002) 24(10) EIPR 466–474 and the articles cited therein.

[3] A database is defined by the Copyright Designs and Patents Act 1988, s 3A, as a collection of independent works, data or other materials which:
(i) are arranged in a systematic or methodical way, and
(ii) are individually accessible by electronic or other means.
The Database Directive was implemented by the Copyright and Rights in Databases Regulations 1997 SI 1997/3032. The effect of the implementation is that compilations are a distinct form of literary work from that of a database. See also Regulations 6 and 12 of the Database Regulations.

[4] In so doing the Database Directive recognises the effort and expense in producing such works and the economic value inherent in their exploitation, with the consequent savings of time and resources to third parties who use such works without authorisation.

[5] This aspect of the article will be considered below particularly within the context of article 3(2) of the Directive. Although as noted above in n 3, when the Database Directive was implemented, databases were already categorised as a form of literary work under Copyright Designs and Patents Act 1988, s 3.

[6] Council Directive 91/250/ EEC. This directive was implemented by the Copyright (Computer Programs) Regulation 1992, SI 1992/3233.

[7] See Chapter III and Articles 7–11 of the Database Directive.

[8] [2001] RPC 612, [2002] ECC 24 and [2002] ECDR 4, CA.

[9] Which is subject to referral to the European Court. The issues to be addressed by that court in the case are not relevant to the issues discussed in this paper, and no further reference will be made to the question of *sui generis* rights except in the conclusion of this paper.

protection for a literary work, the skill labour and capital test, may no longer be viable, or at least constitute the only means by which copyright or intellectual property rights may be ascribed to such a category of work.

Originality, Intellectual Creativity and the Variable Concept of Creativity

A new approach to the creation of intellectual property rights in literary works may be to recognise a hierarchy of rights in these forms of work, with different incidents and duration and form of protection to be ascribed to the various forms of literary work. This system would itself depend on the application of different tests of originality to each of these classes of work, either the old skill, labour and capital test or that of intellectual creativity, thus providing a more flexible approach to this area of the law of intellectual property.

It is a central theme of this paper that the concept of intellectual creativity must be based on an innovative and imaginative use of the literary form. Only in these circumstances should the author or creator enjoy full copyright protection in a literary work, both as to its incidents and duration of protection as presently recognised by the law in respect of all literary works. Works exhibiting the quality of intellectual creativity as defined in this paper have more than an economic value, and should be protected by the law of intellectual property because of their inherent qualities.

Nevertheless, it is maintained in this paper that the present test of originality, the skill, labour and capital test, should retain a valuable function and purpose in the law of copyright. Works that lack intellectual creativity, but which have involved the author in the expending of capital and effort, should be protected by the law of copyright. The duration of protection in these cases should, however, be considerably restricted. Copyright in these circumstances should provide a means of protecting the economic investment of the author in the work and ensuring that the law will allow recovery of expenditure of capital, and ultimately reward the author's effort by recourse to the exclusive exploitation or licensing of the work. These forms of literary work are essentially economic in nature and purpose, and have a short life, losing their economic value rapidly. The law should recognise the distinction between these forms of literary work, and those, which, being works of intellectual creativity, would attract full copyright protection as presently recognised by the law. Economic exploitation is not insignificant in respect of literary forms exhibiting intellectual creativity, but the principal motive in the creation of these forms of work is to achieve a work, if not of merit (this is an amorphous concept), that is at least of more than a transitory or peripheral quality. It is therefore maintained in the conclusion of this paper that the law of copyright should recognise a flexible, or variable concept of originality, depending upon the nature and purpose of the relevant literary form.

The Harmonisation Of Copyright Law

The problems and difficulties in arriving at a concept of what constitutes originality for the purposes of attracting copyright protection to works meriting such protection is due, in part, to the need to secure the harmonisation of intellectual property law within the European Community. This has proven particularly troublesome with regard to the case of databases and their protection.[10] These problems and difficulties arise in the

[10] In view of the fact that the various jurisdictions in the EC had, prior to the enactment of the Database Directive, different tests for affording copyright protection to such works. The pressure to ensure harmonisation of intellectual property law between the various jurisdictions within the EU is not, however, matched by the need to ensure harmonisation of the law of copyright within domestic law between the various forms of literary work which presently merit copyright protection. This matter will be addressed below within the context of the harmonisation of the law of intellectual property with respect to databases and computer programs as literary works.

case of databases because of article 3 of the Database Directive and its prescribed requirement for copyright protection for such works, namely that the work should be the author's own intellectual creation.[11] It is far from clear what constitutes a work of intellectual creation within the context of a database.[12] This paper will, in view of the above, address the following issues:

a) The concept and nature of "intellectual creation" principally within the context of databases and, for the purposes of comparison, the concept as applied to computer programs.[13]

b) Whether the adoption by domestic law of a higher test or standard for copyright protection in respect of all literary works that may be regarded as databases or akin to databases[14] as defined by the Database Directive and the Copyright Designs and Patents Act 1988, sections 3 and 3A, with the consequential rejection of the old test of originality, *ie* skill, labour and capital, is either desirable or necessary.

c) Whether the concept of "intellectual creation" can be accommodated within English copyright law as the test by which works other than databases and computer programs can attract copyright protection, in view of the fact, *inter alia*, that copyright protection may be sought in respect of a wide range of, and with regard to, many different types of work. For example, there are essential differences between a database,[15] a compilation or table and a computer program. If the concept is not interpreted or applied in a flexible way, it is,[16] it is suggested, difficult to apply the concept to both computer programs and to all forms of databases, or to any other form of literary work for the purposes of attracting copyright protection, unless intellectual creation is given a very wide meaning and ambit.[17]

d) Whether "intellectual creation" is an appropriate test for granting copyright protection to databases,[18] or whether the concept of a database depends upon, or is defined by, the nature of the medium or form of the work.

THE CONCEPT OF INTELLECTUAL CREATIVITY - DATABASES AND COMPUTER PROGRAMS COMPARED

The Nature Of Databases Covered By The Database Directive

A database that will be the subject of protection under the Database Directive is capable of being electronically stored and extracted. It will nevertheless correspond to works such as anthologies, directories or catalogues in hard copy form.[19] In so far as

[11] It should be noted that this is the same criterion for copyright protection in the case of computer programs under article 1 of the Software Directive. In enacting the directives in respect of both databases and computer programs, the legislature did not follow a consistent policy, enacting only in the case of databases the requirement that the works be afforded copyright protection solely on the ground of intellectual creativity. See the Copyright Designs and Patents Act 1988, s 3A(2).

[12] The same problem has arisen within the context of computer programs see Derclaye, "Software Copyright Protection: Can Europe Learn from American Case Law Part 1" (2000) 22(1) EIPR 7–16.

[13] This aspect of the paper builds upon matters and concepts considered in an earlier article, see McGee, Cerfontaine and Scanlan "Creativity and Form as Grounds for Copyright Protection in English Law" [2001] CLLR 173.

[14] For example with respect to compilations and tables which are classed as literary works under s 3(1)(a) of the Copyright Designs and Patents Act 1988, but are not to be regarded as constituting databases, see below.

[15] Or at least databases where there is more than a simple compilation of existing information, (see article 3(2) of the Database Directive and below).

[16] This issue will be fully addressed below.

[17] And a very low threshold for satisfaction or compliance with the concept as in the case of the skill labour and capital test for originality as presently adopted for most forms of literary work.

[18] Or at least for certain forms of database see below, see also article 3(2) of the Database Directive and below.

[19] Although certain forms of this type of work may be protected in the form of compilations and tables as literary works under Copyright Designs and Patents Act 1988, s 3(1)(a) as amended by the Copyright And Rights In Databases Regulations 1997, SI 1997/3032.

a database contains material that has been created by the authors, and constitutes original work,[20] this aspect of the work will be protected as a work of literary copyright.[21] It is the compilation of the work, the selection of the materials and the arrangement of those materials in a systematised and methodical form that might attract copyright protection for the work as a database under the Database Directive.[22] In this regard, it is irrelevant that these aspects of the work constitute no more than a mere directory of previously available information. It is clear from the terms of the Database Directive that it is otherwise inappropriate to regard the mere compilation of a database as a work involving intellectual creativity, unless there is this systematised and methodical approach to its compilation, or at least intellectual creativity as understood within the context of the production of a computer program.[23] A database that does not have this systematised and methodical organisation of its data, is, it is suggested, no more than a compilation by another name. Such database is defined in this paper as a pure database. It is suggested that the adoption of the concept of intellectual creation as a ground or requirement for copyright protection of a database was modelled, at least in part, on the requirement contained in the Software Directive, which itself in part reflects the law applied to "literary works" in civilian legal systems such as Germany and France.

The Computer Program As A Work Of Intellectual Creativity

A computer program of any complexity, unlike a pure database, requires some input on the part of the creator which involves not only considerable technical skill,[24] but, more importantly, a degree of creativity in giving form and expression[25] to the ideas for which the program was created, and which formed the foundation of the program, and is the justification for its existence.[26] There is, it is suggested, no general comparative or comparable level of creativity in selecting, arranging or compiling previously existing information as part of a database *per se*. The fact that the database is electronically stored is irrelevant as regards whether there is any creative input in producing such a work. The Database Directive, in prescribing a blanket requirement of intellectual creativity as the ground for recognising copyright in all forms of database, has confused technical and mechanical complexity with conceptual complexity.[27] It is conceptual complexity that is a vital ingredient of creativity and the manipulation of concepts within a literary form or format that constitutes a creative

[20] As understood within the context of literary works, see McGee, Cerfontaine and Scanlan "Creativity and Form as Grounds for Copyright Protection in English Law" [2001] CLLR 173 for a consideration of the concept of originality, *ie* skill, labour and capital, as a ground for affording copyright protection to a work and the suggested substitution of a test of creativity for certain forms of literary works.

[21] See article 3(2) of the Database Directive.

[22] See the Copyright Designs and Patents Act 1988, s 3A.

[23] And also within the context of a literary work as defined and considered below.

[24] Particularly in the use and manipulation of a computer language in producing the program.

[25] Through the use of computer language and symbols, in the same way as the creative use of the English language, its symbols and words might be used in writing a novel in which the most fundamental aspects of the human condition could be examined.

[26] It is accepted that the extent to which aspects of a program or software will attract copyright protection still remains unclear, but the general principle of protection for software is well established, both in Europe and the United States, see Derclaye, "Software Copyright Protection: Can Europe Learn from American Case Law" (2000) 22(1) Part1 EIPR 7–16.

[27] A prosaic example may help here. Miles Kingston in an article in the *Times* in 2001 wrote about an individual who acquired the score-book of one of the famous (or infamous) bodyline Test Matches. The owner recalls how he can now follow every single delivery of the test. This could be regarded as the equivalent of a database. A commentator notes that the score-book will not tell the reader about the participant's thoughts or feelings, or convey the atmosphere of the game, nor the collective experience of the crowd. That would require a creative act and any work exhibiting these characteristics constitutes a true literary work. This is the fundamental distinction between a work such as a pure database and a novel. And yet domestic law suggests that they are legally closely related and should therefore – although at present they do not appear to – require the same test for attracting copyright protection. It is suggested that this approach is unsound.

act. Only a database fulfilling these characteristics should attract copyright protection as a work of intellectual creation within the terms of the Database Directive. Such is defined in this paper as a complex database. To this is added the difficulty of considering the relationship between a database as defined by the Copyright Designs and Patents Act 1988, section 3A, and compilations and tables as defined by section 3(1)(a) of the 1988 Act.

If the technical aspects of writing a software program in respect of a database are ignored,[28] then the nature of a database can be examined and the problems of protection of a database in various circumstances can be considered. Finally, the database as a work meriting copyright protection can be compared with works such as compilations or tables.

The Nature Of A Database

A database might consist exclusively of previously existing information that has been compiled and indexed, such as a list of customers or potential customers of a business. This form of work may be regarded as a "pure database", although it is difficult to distinguish such a work from that of a compilation or table. If a pure database is in hard copy then it may simply attract copyright protection as a form of literary work.[29] The courts currently recognise copyright in literary works such as compilations or tables solely on the ground of originality, *ie* the skill, labour and capital test.[30] Generally, this requires the author or creator of the work to engage in an exercise that involves some degree of skill, labour and expending of capital, but there is no requirement that the author or creator should exhibit any degree of creativity or literary merit in bringing the work into existence.[31] This situation arises in part because the law [32] gives a broad definition of what constitutes a literary work, and this includes such mundane works as compilations and tables. It is also clear that a database as defined by section 3A of the 1988 Act must also constitute, if in a permanent form, a literary work, although the provision does not specifically state that this is the case.

These principles are difficult to reconcile with the concept of "intellectual creation" as the criterion for copyright protection as prescribed in both the Software and Database Directives. But just as there are certain forms of literary works, which for their vitality, if not for their legal status, must contain and exhibit aspects of creativity

[28] Since the program creating the database could be afforded copyright protection, just as the contents of a database might attract copyright protection, in both cases independently of the copyright protection afforded to the database by virtue of the systematised and methodical selection or arrangement of the material.

[29] The Copyright Designs and Patents Act 1988, ss 3 and 3A. Thus literary copyright has attached to such mundane works as a street directory, *Kelly v Morris* (1866) LR 1 Eq 697; a chemist's trade catalogue, *Collins v Cater* (1898) 78 LT 613; broadcasting programme schedules, *Independent Television Publications v Time Out* [1984] FSR 64; the form of hire purchase agreements, *Capital Finance Co v Bowmaker* [1965] RPC 463; business literature, *Van Oppen and Co Ltd v Leonard Van Oppen* (1903) 20 RPC 617; a calendar, *Matthewson v Stockdale* (1806) 12 Ves 270 and even the contents of a telegram, *Exchange Telegraph Co Ltd v Central News Ltd* [1897] 2 Ch 489. These cases are not exhaustive, but they illustrate that the concept of a literary work for the purposes of copyright protection is exceptionally wide and clearly includes pure databases such as that noted in the main body of the text.

[30] Which includes databases and computer programs. Although with the enactment of the Database Directive, and the consequential Database Regulations, originality in the case of a database or computer program requires an act of intellectual creativity on the part of the creator.

[31] Except in the case of a database or computer program, see n 30 above. In the case of *Macmillan & Co Ltd v Cooper (K&J)* (1923) 40 TLR 186, Lord Atkinson, while dealing with the issue of whether there could be copyright in a selection or abridgement of works in which there was no copyright said (at p 188):

> It will be observed that it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if we may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for the product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess and which differentiates the product from the raw material.

The consequence of this pronouncement, together with other similar judicial statements is that the criteria for a literary work to attract copyright protection, that is originality, is deprived of any creative requirement.

[32] See the Copyright Designs and Patents Act 1988, s 3(1).

and literary merit,[33] so also there is the potential for creativity in computer programs, and in certain circumstances in the creation of "complex databases".[34] The very essence of all such works is creativity: skill, labour and the expending of capital being mere tools to achieve this end.[35] This quality of creativity is shared by such diverse works as novels and computer programs. Furthermore, each of these kinds of work also exhibits individual characteristics, constituting particular incidents that would need to be present if the relevant work were to be regarded as a work of intellectual creation, thus meriting copyright protection on this ground.[36] This compares with works such as "pure databases" (as herein defined), or, more accurately, compilations or tables, which, it is maintained, have no need for creativity for their vitality and where creativity as a ground for copyright protection is inappropriate, as well as legally unjustifiable.

Consideration should now be given as to whether the adoption of the higher test of intellectual creativity as a ground for affording copyright protection in respect of pure databases[37] is either desirable or even necessary.

THE DESIRABILITY OR NECESSITY OF THE INTELLECTUAL CREATIVITY TEST

Intellectual Creation – Pure Databases

In respect of these kinds of work, a concept of originality as currently required for most literary works may well constitute an appropriate test for attracting copyright protection. The test of originality adopted in the case of databases, *ie* the concept of intellectual creation,[38] would nevertheless, it is suggested, have to recognise the essentially mechanical rather than creative nature of most, if not all, pure databases. The concept of originality, *ie* the skill, labour and capital test, as a ground for recognising copyright in a literary work has not yet been abandoned by the English courts, despite the enactment of the Software and Database Directives.[39] The current approach of the courts to the formulation of the requirements for copyright protection of a literary work would not preclude the judiciary from taking a more robust and flexible approach to the formulation of the grounds for copyright protection *per se* and, in doing so, giving effect to the fundamental distinction in nature between works such

[33] For example, a novel, short story or poem.

[34] See below for a consideration of this concept. Although it may be stated at this stage that a complex database must satisfy the criterion of Copyright Designs and Patents Act 1988, s 3A and arrange its material in a systematic and methodical manner.

[35] See Derclaye, *op cit*, where these issues are considered. Although the skill, labour and capital test of originality is a low standard, this is not too dissimilar a test which is applied to the aspects of a database that would attract protection under *sui generis* rights.

[36] Thus, for example, the novel would, in these circumstances, need to exhibit certain characteristics of form if it is to be regarded as a literary work, such as a plot and realistic characterisation (although these aspects of the classic novel may be more contentious in relation to some modern fiction). It is the creative use of these characteristics by the novelist which would constitute the work an intellectual creation of the author, and which would afford the work copyright protection if the ground for copyright protection were intellectual creativity and not mere originality, *ie* the skill, labour and capital test.

[37] Be they in electronic form or as hard copy, see the Copyright Designs & Patents Act 1988, ss 3(1) and 3A.

[38] As required by the Database Directive, and subsequently implemented.

[39] It should be recalled that in adopting the Software Directive the UK did not implement the requirement for attracting copyright protection prescribed under article 1(3), that is, that the work be the author's own intellectual creation. This has been regarded by certain Commission officials as a defective implementation, see Cornish, *Intellectual Property* (3rd ed, Sweet & Maxwell, 1996) at 444 para 13–25. Nevertheless, this omission cannot be entirely disregarded since the implementation by the UK of the Database Directive *did* implement the prescribed requirement of intellectual creativity as the ground for affording copyright protection to such a work. It should be noted here that the failure to implement a directive in full gives rise to the possibility of enforcement proceedings under article 226 of the EC Treaty.

as complex databases and computer programs and works such as pure databases, compilations and tables. The adoption of the higher standard intellectual creativity test for affording copyright protection to a database, although a statutory requirement, should only be applied to complex databases,[40] and not pure databases,[41] compilations or tables.[42] However, the principle of affording copyright protection to works based on their form and format, is, it is suggested, a practical and legitimate option for the law to take, and could both accommodate and reconcile the differences between originality, *ie* the skill, labour and capital test, and intellectual creativity as grounds for affording copyright protection to a work or works as different in nature and form as pure databases, compilations and tables, complex databases, novels and computer programs.[43]

THE ACCOMMODATION OF THE INTELLECTUAL CREATIVITY TEST IN THE DOMESTIC LAW OF COPYRIGHT

A Variable Concept For Copyright Protection – Databases And Computer Programs

It has been argued[44] that the concept of originality as a ground for affording copyright protection to a literary works is not only in need of reform, but that such ground must be a variable and flexible concept depending upon the nature and form of the work. It has been further maintained that domestic law has created many of its problems in this area of copyright law because of its insistence on a wide application of the concept of literary work to a diffuse, diverse and unrelated set of works.[45] A literary work for the purposes of the Copyright Designs and Patents Act 1988 encompasses works as varied as a classic novel and a hire purchase agreement, or a Thomson's Directory. If domestic law were to adopt the concept of intellectual creation as the sole ground for affording copyright protection,[46] it might be possible to accommodate such diverse works as pure databases, complex databases, computer programs and compilations and tables within the concept by amending the current law, such amendment being within the purview of the judiciary.[47]

Re-Defining The Literary Work

The first reformulation of the law of copyright could take place within the context of a re-definition of what constitutes a literary work. The concept of a literary work could

[40] The concept of the complex database will be considered below.

[41] Pure databases are more accurately examples of works defined in the 1988 Act as compilations and tables.

[42] Although these forms of work have frequently involved a significant investment in terms of time and effort on the part of the creators, and therefore it is suggested merit copyright protection.

[43] And which are subject to copyright protection on different although not necessarily conflicting grounds. See n 46 below.

[44] See McGee, Cerfontaine and Scanlan, *op cit.*

[45] The rigid insistence of domestic law that a work such as a street directory is fundamentally the same in nature as a major novel or scholarly text is unsound both in its philosophy and in the impact that such works have on society. The former is a product designed to generate wealth for the compiler and publisher, albeit through the provision of a useful service to the public. The major novel or work of scholarship is principally produced to expand human knowledge and experience. The author creates these works from the need to express and propound their personality, skills, learning and scholarship to the world. The more mundane and less elevated motive of academic or professional vanity should not however be ignored in these cases, although these reasons for publishing what may be regarded as true or pure literary works should not be viewed as unworthy. The differing reasons and purposes for the production or creation of these works renders, it is suggested, the present copyright regime unworkable if not damaging to literary creativity.

[46] It should be noted that the United States began over a decade ago to reformulate the test for affording copyright protection which goes beyond the common law approach of originality and which leans towards a more civilian approach, recognising the importance of the creative spark in the work, see *Feist Publications v Rural Telephone* 499 US 340 (1991), where the court held that a "White Pages" telephone book cannot be a work to which copyright attaches.

[47] Although to effect a complete reform of this area of the law would require some legislative activity, notably some reformulation of the Copyright Designs and Patents Act 1988, s 3(1).

be redefined so as to exclude from its ambit works that require for their completion only effort, skill, and the expending of capital.[48] Only literary works that come within recognised literary forms, or which *exhibit the characteristics*[49] of such works, could be regarded as literary works. These forms of work would attract copyright protection only if they satisfied the test of intellectual creativity. Consideration should now be given to the way in which the concept of intellectual creativity could in these circumstances be formulated.

Intellectual Creativity As A Ground For Affording Copyright Protection

Within this context, intellectual creativity would first require the work to follow a recognised form or format.[50] The work would have to use this form or format in a creative manner. This would not, however, require the work to exhibit any merit[51] independent of the form or format. Such a requirement of merit as a factor in affording copyright protection to a work would be both impracticable and incapable of universal application, since what constitutes merit or renders a work worthy of acclaim is not an objective criterion upon which there could ever be consistent agreement. Creativity would, it is suggested, require the author to use the form or format of the work in a manner that has not been either wholly or substantially produced by a previous author in the relevant medium.[52]

The Types Of Works Which Could Be Subject To A Test Of Intellectual Creativity

The proposed nature of the test of intellectual creativity for affording copyright protection to a literary work as redefined in this paper, would, it is suggested, cover a computer program[53] and a complex database. This test would apply, not only because of statutory enactment (at least in the case of the database and computer program), but also because these works are capable of satisfying the prescribed criteria. The writing of a program that enables a person to read or see material on a computer screen[54] potentially requires the author to use the mechanisms for producing a computer program[55] in a manner that has not been wholly or substantially produced by a previous author. The manipulation of the symbols of the selected computer program language to produce the program is not only a highly complex and skilful act, but, in so far as it produces a program that renders the storage and access to information an innovative amalgam of form and ideas, must constitute, by definition, a creative act. It is suggested, therefore, that a narrowing of the ambit of the definition of literary work, for the purposes of the Copyright Designs and Patents Act 1988, and a consequential adoption of a higher test for copyright protection based on intellectual creativity would not exclude computer programs from the ambit of a literary work as

[48] It is suggested that the concept of originality could be maintained as a ground for affording copyright protection to a work which does not constitute a literary work as redefined in this paper. See below. Furthermore, the duration of copyright protection could in these cases be reduced from the usual period of a life in being plus 70 years, as in the case of typographical arrangement of works.

[49] The nature and form of such works needs both further consideration and careful definition. This requires a separate article or paper.

[50] This is easiest to establish in works such as poems, short stories and novels. However, there is no reason why it could not be applied with equal certainty and force to works such as a computer program for reasons set out above.

[51] Literary or otherwise.

[52] This aspect of the proposed nature of the test of intellectual creativity has been adopted from the test for infringement of a literary work to which copyright attaches, which requires an infringing party to copy all or a substantial part of a prior published work to which copyright attaches without the consent of the copyright owner.

[53] As well as works such as novels, short stories and poems, and works of scholarship.

[54] As well as gain access to the information and cross-reference the same.

[55] Principally the selected computer program language, but not limited to this medium.

redefined in this paper.[56] Furthermore, domestic law could accommodate the proposed concept of intellectual creation, not only in the context of computer programs, but within the context of such important forms of work as the novel, the short story, the poem and works of scholarship,[57] including complex databases. It would, however, for reasons stated below exclude works such as pure databases, compilations and tables.

INTELLECTUAL CREATIVITY AS AN APPROPRIATE TEST FOR GRANTING COPYRIGHT PROTECTION TO DATABASES

Databases Pure And Complex

It is suggested that works such as compilations or tables are fundamentally different from complex databases,[58] computer programs or any other true literary work.[59] It is suggested, therefore, that the application of a concept of intellectual creativity as considered above is inappropriate to a work such as a pure database, compilation or table.[60] It is maintained that a suitable and practical course for the law to take would be to preserve the concept of originality, *ie* the skill, labour and capital test, as the ground for affording copyright protection to works such as pure databases, compilations and tables. Works such as compilations and tables, catalogues and directories, although currently regarded as literary works, would, it is suggested, be more suitably defined by the law as works of "compilation and reference".[61] These works could attract copyright protection on the grounds of the present common law test of originality, but for a lesser period, of, say, 25 or 15 years from the date of publication.[62] Either period, in view of the generally short-lived value of most works of compilation and reference, is more than adequate to ensure that the compiler or author of such works achieves a suitable return for his or her efforts and expending of capital.[63]

[56] Accordingly, the UK could expressly implement the intellectual creativity test for computer programs, but this would be dependent on a further statutory amendment to the present law of copyright. This would involve a redefinition of what constitutes a literary work within the terms of the Copyright Designs and Patents Act 1988, s 3, as has been suggested in the main body of the article.

[57] The latter would include works of philosophy, biography and history. Works such as Runciman's *History of the Crusades* would clearly constitute literary works, and even the novels of "popular" contemporary authors such as John Grisham.

[58] The status of databases containing materials that could form the subject matter of an independent copyright right is considered below.

[59] That is a literary work as defined in this article. See also McGee, Cerfontaine and Scanlan, *op cit.*

[60] The reasons behind this statement have been considered above. They can be summarised as follows. The database, or at least the pure database, uses information that is already in existence. The compilation of such a work is involved and skilful, and requires the expending of capital. Nevertheless, there is no creative spark; no use of the form or format in a way that has never been wholly or substantially produced before. All pure databases exploit the form or format in fundamentally the same fashion. In this regard there is no distinction between a database in the form of hard copy or a compilation or table.

[61] This classification was adopted in respect of such works in McGee, Cerfontaine and Scanlan, *op cit.*

[62] The greater period is proposed on the analogy with the period for protection of a typographical arrangement of a literary work. The Copyright and Rights in Databases Regulations 1997, SI 1997/3032, reg 17 provides for a database right that has a duration of 15 years despite prescribing that a database, in order to attract copyright protection, must constitute a work of intellectual creativity on the part of the creator. However, the reformulation of the database begins the period of protection anew.

[63] It is suggested that one of the grounds for recognising a copyright period of a life in being plus 70 years in cases of "true" literary works is to protect the reputation of the author during the life of his immediate descendants. Such an elaborate and comprehensive protection is not required in the case of works such as compilations and tables, *ie* works of compilation and reference. Nevertheless, the expending of time and resources in compiling a work of compilation and reference should be recognised and copyright protection afforded to such works, while accepting that such works lose their commercial value over a comparatively short period. In these circumstances a limited duration of protection secures the commercial investment expended, and ensures a fair return for the compilers.

Nevertheless, there is a problem in adopting these proposals with regard to a pure database, namely the express words of the Database Directive and the consequential Regulations and amendments to the Copyright Designs and Patents Act 1988. It will be recalled that the Database Directive provides that copyright protection will be afforded to such works where they are the author's own intellectual creation.[64] Consideration must now be given as to the way in which the law could possibly recognise the concept of intellectual creativity within the terms of a database,[65] *ie* a complex database, and yet preserve what, it is maintained, is a fundamental distinction between these forms of work and what has been referred to in this paper as works of compilation and reference.[66]

A Flexible Concept Of Intellectual Creativity

Domestic law has not generally adopted the requirement of intellectual creativity as prescribed in the Database Directive as the test for attracting copyright protection in respect of literary works.[67] This may not, however, be a long-term option for the UK to take.[68] Nevertheless, it is submitted, for reasons stated above, that the adoption of the concept of intellectual creativity as a ground for affording copyright protection for pure databases[69] is not without its conceptual difficulties, because, in essence, it goes a step too far in affording protection to such works, since the nature of these works, it is suggested, do not require the element of creativity. The concept of creativity could only be accommodated in these cases if it were to be regarded by the law as a flexible concept, applying differently to various type of work, and not limited to complex databases or computer programs, but applying to all forms of database and ultimately to any category of literary work as currently defined.

Accordingly the concept of intellectual creativity could be interpreted by the courts, in the manner suggested, in respect of pure databases,[70] so as to accommodate the low threshold of performance and achievement generally exhibited by such works.[71] Derclaye[72] has examined the concept of intellectual creativity within the context of the computer program. She pointed out that the Green Paper on Copyright[73] emphasised the differences between the notions of originality in each of the member states of the EU, together with the need for harmonisation. The Green Paper also sought to reconcile these differences and to formulate a common definition of "originality" that could be adopted by all member states. In so doing, the Commission did not refer to the law of copyright in the United States, or to relevant case law in that jurisdiction, but considered only the various tests for affording copyright protection to works laid down in the various member states of the European Union. The Database Directive

[64] Although it will also be recalled that the Database Directive, unlike the Software Directive, does not expressly state in article 3(1) that databases are to be regarded as literary works. This did not however, prevent the UK from implementing the Database Directive, and defining such works as literary works, while also implementing the prescribed test of intellectual creativity for affording copyright protection to such works.

[65] As opposed to works of compilation and reference, which, as literary works prescribed under the Copyright Designs and Patents Act 1988, s 3(1)(a), need only satisfy the test of originality in order to attract copyright protection.

[66] Which would include works such as pure databases, compilations and tables.

[67] As was the case with respect to the implementation of the Software Directive, see above.

[68] See Derclaye *op cit.*

[69] Or other forms of works constituting works of compilation and reference.

[70] In addition to computer programs and other literary works.

[71] As is the present general requirement of originality for copyright protection of literary works.

[72] "Software Copyright Protection : Can Europe Learn From American Case Law Part 1" (2000) 22(1) EIPR 7–16.

[73] See *Communications from the Commission, Green Paper on Copyright and the Challenge of New Technology Copyright Issues Requiring Immediate Action*, COM (88) 172.

subsequently provided that the criterion for copyright protection of such works should be a concept of originality based on the work being the "author's own intellectual creation",[74] which constitutes a new definition of originality for these forms of work. However, these developments leave open the possibility that each member state might interpret this term by recourse to its own existing law. The concept of intellectual creativity seems to be a compromise between, for example, the very high and demanding standard of originality required in legal systems such as that of Germany[75] and the low threshold of achievement for affording copyright protection in respect of, *inter alia*, literary works[76] as prescribed in the UK.

Nevertheless, the use of the word "creation" or "creativity" in the Database Directive and the current legislation must be addressed, and, if the test of intellectual creativity is subsequently applied in this jurisdiction as the sole test for attracting copyright protection to literary and other works, it must change, if not supplant, the skill, labour and capital requirement of originality that has existed for over 100 years. However, within this context, creativity can be regarded as a variable concept depending upon the nature and form of the work. The Copyright Designs and Patents Act 1988, section 3, defines literary works as "any work, other than a dramatic or musical work, which is written or spoken or sung" and includes:

i) a table or compilation (other than a database),
ii) a computer program,
iii) preparatory design material for a computer program,
iv) a database.

The drafting of section 3 does not preclude the possibility that each of the specific categories of literary work noted above could have the concept of intellectual creativity applied to them in a different and variable way, tailored to the particular and unique nature of the relevant type of work. This could still leave the literary works covered by the general definition in section 3(1)[77] to be governed by a single all-embracing concept of creativity, which might correspond with the test of creativity that could be applied to the works covered by paragraph (b) of section 3, namely computer programs.[78]

THE VARIABLE CONCEPT OF CREATIVITY

The Pure Database And Works Of Compilation And Reference Considered Compared And Contrasted With The Complex Database

The concept of creativity that could be applied to literary works such as novels and computer programs has already been considered. If the concept were accepted as a variable one, its application to works such as pure databases would depend on the recognition of the creative use of the form or format of the work. It is difficult, however, to conceive, except in rare instances, of such a medium as a pure database being brought into existence as a consequence of a creative act.

[74] Article 3(1).

[75] See Derclaye, *op cit*, on this point.

[76] Which includes works such as compilations and tables.

[77] Principally works such as novels, short stories and poems.

[78] And which has been noted above in the context of literary works such as novels.

Complex Databases

Nevertheless, if the concept is to be accommodated within the context of complex databases, it could be formulated in the following terms. The selection or arrangement of the material must not only constitute a systematised and methodical approach to the work, but also an imaginative use of the data or materials. This would mean that the work is capable of being an innovative use of the form. However, it is suggested that this would also require the work, as a consequence, to impart information or insight to the reader or user in addition to, and arising independently from, the collective form of the work.[79] To be less abstract, consideration should be given as to the way in which a complex database, such as an electronic anthology of quotations,[80] may be capable of being produced as the result of intellectual creativity. The compiler could, by the systematised and methodical selection of the material of the compilation together with the arrangement and juxtaposition of the material and quotations, give the reader an insight into social, historical or literary themes.[81] In such cases the compiler's commentary on the selected materials or quotations is independent of the compilation and would, of course, constitute work capable of intellectual creativity therefore attracting independent copyright protection.[82] Such aspects of the work would effectively merge with the compilation or database itself. Nevertheless, it is difficult to conceive of such commentaries forming an aspect of a pure or complex database *per se*.[83] Accordingly, it is maintained that the concept of intellectual creativity can only rarely, if ever, apply to the materials constituting the elements of a pure database, and can effectively only apply to databases where there is a "value added" element,[84] *ie* complex databases. In the latter case, the form of database must constitute a literary work for which intellectual creativity is the sole criterion for attracting copyright protection. The compilation or table as a literary work, by way of contrast, will, because of the nature of its constituent material, rarely involve any aspect of imagination on the part of the compiler or any innovation in the use of the form.[85] The compilation or table as a form of work, such as a street directory, by its very nature cannot constitute an imaginative use of the materials or an innovative use of the "literary form". It is for these reasons that it is suggested that any attempt to formulate a precise test of intellectual creativity in respect of pure databases that differentiates such works from those of compilation and reference is not without its difficulties and may prove impracticable. It is for this reason that

[79] In other words, the work is to some degree greater than the constituent parts of the work.

[80] In this context there is no distinction between works of this kind in either electronic form or in hard copy.

[81] For example, quotations of writers, authors or critics of a particular period could, through the selection or arrangement of the material indicate the changing mores of a society, or the evolution or demise of a literary movement. Contrast this approach to an anthology with a pure reproduction of quotations, based on alphabetical or chronological order, without any attempt to illustrate by the arrangement of the materials any themes or literary movements. This latter work would constitute a pure database or more realistically a compilation.

[82] As a literary work under the Copyright Designs and Patents Act 1988, s 3(1)(a), that is independent of the copyright protection attaching to the database, see article 3(2) of the Database Directive and commentary in the text above. At present the test of originality for these independent works within the database is of course the skill labour and capital test.

[83] Nevertheless, these aspects of a work, even if a constituent element of a pure or complex database would rightly constitute a potentially creative work and therefore be capable of attracting copyright protection as a literary work. See above and n 82 for a consideration of this issue.

[84] The nature of the complex database has been considered above. It must be emphasised that the value added element in respect of these kinds of databases can only relate to the imaginative selection, arrangement and juxtaposition of the material in the database thereby constituting an innovative use of the form. Any commentary does not *per se* constitute a part of the compilation or database and must be considered as a possible work of creativity which could attract copyright protection as a literary work in its own right, as has been referred to above.

[85] This is the same situation in the case of the pure database, which, it is suggested, is indistinguishable from compilations and tables.

seeking to apply a precise test of intellectual creativity in respect of pure databases may prove a step too far.

CONCLUSIONS

It has been argued in this paper that there is an urgent need for the law of copyright to redefine what constitutes a literary work and to determine the nature of the test to be applied to such works in order that they may attract copyright protection. It is suggested that the concept should be redefined with more precision and discrimination, and by reference to the form or format of the work. Such an approach would recognise that there are fundamental differences between the kinds of output, currently regarded as literary works,[86] and that these are so classified more as a result of historical accident than pure logic or policy.

The present wide definition of a literary work in the Copyright Designs and Patents Act 1988 has resulted in the blanket acceptance of the principle that all forms of literary work must satisfy a single, all-embracing test for attracting copyright protection. This cosy, but rather unsatisfactory position, can no longer be maintained following the implementation of the Database Directive and the requirement that databases must constitute works of intellectual creativity before they can attract copyright protection. While the current and generally accepted test in domestic law for affording copyright protection to a work, that of originality, which is based on the labour, skill and expending of capital on the part of the author is undemanding, it nevertheless presents a workable, if somewhat unsatisfactory, means of determining whether a work will attract copyright protection.

However, the seemingly imminent adoption of the test of intellectual creativity as the sole ground for copyright protection of all literary works would place an intolerable strain on the legal regime covering such works. In particular, the continued recognition of *all* forms of database, compilations and tables as literary works cannot, it is suggested, be reconciled with a single test of intellectual creativity as the ground for affording copyright protection in respect of these forms of work. Furthermore, it is submitted that any attempt to devise an all-embracing test of intellectual creativity in respect of all forms of work currently defined as literary works is both misconceived and inappropriate.

The time has come for domestic law to recognise that works, be they in electronic or hard copy form, have different economic and social functions. From this premise, it is suggested, that works which fulfil not only economic, but other functions in society, such as novels and works of scholarship should, however classified,[87] attract the present full period of copyright protection. In addition these works would need to satisfy the rigorous intellectual creativity test in order to attract copyright protection. This would include the complex database.

By way of contrast, works such as pure databases, compilations and tables are essentially products providing a service to the public, and are produced with economic gain in view. The compiler in these cases is, it is suggested, fully rewarded by the granting of a restricted period of copyright protection.[88] It is submitted that the matters noted above and the essentially non-creative aspect of works that have been defined in this paper as works of compilation and reference as collective forms of

[86] Including pure databases.

[87] Although, it is suggested, that the term "literary works" should be reserved for such works.

[88] Say for a period of between five and 15 years.

endeavour, merit the retention of the present common law test of originality for such works.[89]

[89] This paper recognises the paucity of case law on the meaning of the concept of intellectual creation, which in view of the period of time for which the concept has been applicable to databases, must be a cause for concern. A recent case concerning databases is that of *British Horse Racing Board Ltd & Others v William Hill Organisation Ltd* [2001] RPC 31, Ch D Patents Court; a decision of Laddie J, which is only of indirect help. The case concerned an action by the claimants to restrain the defendant bookmakers from using, in a new part of its business and without the claimants' licence, certain data which, according to the British Horse Racing Board Ltd, was derived indirectly from a database maintained by it. The case was heard by the Court of Appeal, [2001] RPC 612, [2002] ECC 24, [2002] ECDR 4, which then referred the case to the European Court in May 2002. Judgment is expected in the near future.

The English courts held, *inter alia*, that what the defendants were doing was taking the contents of the British Horse Racing Board's database and re-arranging those parts of the database for their own use. This was capable of amounting to an infringement of the Board's rights in the database. However, the case was principally referred to the European Court on the question of infringement of the *sui generis* right in the database. The English courts were of the opinion that the *use of the information* contained in the database by the defendants was, capable of being an infringement of the claimant's *sui generis* rights in the database. Such use was capable of amounting to an infringement of the Board's *sui generis* rights in the database, because what fell to be protected was not primarily the information *per se*, but the investment on the part of the claimant that went into obtaining, verifying and presenting that information. The *sui generis* right is applicable only to databases and essentially prevents the unauthorised use of the *information* contained in the database, thus protecting the investment of the time and effort of the compiler in verifying the accuracy of this information.

The case therefore is not directly relevant to the issue of the nature of intellectual creativity as a ground or test for affording copyright protection in respect of a database, or any literary work.

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CASE AND COMMENT

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

WHEN IS A COMPANY A CONSUMER?

Feldarol Foundry plc v Hermes Leasing (London) Ltd v Ors [2004] EWCA Civ 747

(Kennedy, Tuckey and Kay LJJ)

INTRODUCTION

The case of *R & B Customs Brokers Co Ltd v United Dominion Trust Ltd*[1] established that a company can be a consumer for the purposes of avoiding a clause in a contract purporting to exclude liability for breach of the statutory implied term relating to quality and fitness under the Sale of Goods Act 1979. The decision in *R & B* has been regarded with some scepticism, and doubt has been expressed as to its correctness.[2] However, in *Feldarol* the Court of Appeal was unwilling to challenge the view taken in *R & B*.

The facts of Feldarol

The company, trading as an aluminium foundry in Dorset, purchased, through its chairman and managing director, a second-hand Lamborghini Diablo by way of a hire-purchase agreement with the appellant finance company. The transaction was arranged through a credit broker. The car was defective and was returned to the car dealer 18 days after delivery. The respondent company's chairman and managing director arranged with the dealer that a replacement would be supplied and that the finance agreement would be rolled over to the supply of the replacement car. This arrangement was communicated to the finance company by the credit broker. The respondent company paid the first instalment due under the agreement but the replacement car never materialised. The dealer later went into liquidation. It was agreed at trial that if the car had been validly rejected, the respondent company was entitled to recover the repayment of the instalments paid under the agreement, if not, the appellant was entitled to the remainder of the sums due under the agreement.

[1] [1988] 1 WLR 321, CA.

[2] The Law Commission has suggested that the decision in *R & B* might not be correct: *Unfair Terms in Contracts*, Joint Consultation Paper, The Law Commission Consultation Paper No 166, The Scottish Law Commission Discussion Paper No 119, 3 July 2002 at para 3·85. The final report on Unfair Terms in Contracts is expected before the end of 2004.

The issues

The terms and conditions of the agreement between the parties contained a clause excluding liability for breach of the implied conditions relating to quality, description or fitness. The appellant could not rely on the exclusion clause if the respondent company was a person dealing as consumer under the Unfair Contract Terms Act 1977, section 6(2), as this provision has the effect of rendering void the purported exclusion of the term relating to quality implied by virtue of the Sale and Supply of Goods (Implied Terms) Act 1973, section 10(2). On the other hand, if the respondent company was a person dealing otherwise than as a consumer, the term excluding liability was subject to the requirement of reasonableness under the Unfair Contract Terms Act 1977, section 6(3).

The issue was, therefore, whether the respondent company was a person dealing as consumer under the Unfair Contract Terms Act 1977, section 12, which provides as follows:

> (1) A party to a contract "deals as consumer" in relation to another party if –
> (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
> (b) the other party does make the contract in the course of a business; and
> (c) in the case of a contract governed by the law of sale of goods or hire purchase, ... the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.
> But if the first party mentioned in subsection (1) is an individual paragraph (c) of that subsection must be ignored.[3]

The first instance decision

The trial judge in the Bournemouth County Court, Mr Recorder Peter Barrie, held that the respondent company had acted as a consumer in the purchase of the car under a hire-purchase agreement. The car was not of satisfactory quality and as the respondent company dealt as consumer, the appellant was unable to exclude its liability for breach of the implied term relating to quality. The judge considered that the company was purchasing the car for the managing director "as a part of the rewards of his employment", and that the terms of the agreement meant that the respondent company had held itself out as acting in the course of a business in respect of the transaction. However, since the facts of the case could not be distinguished from the decision of the Court of Appeal in *R & B Customs Brokers*, the judge was constrained to decide that the respondent company had *dealt as consumer*.

The Court of Appeal decision

Tuckey LJ reviewed the case of *R & B Customs Brokers* where a four-wheel drive vehicle had been purchased under a conditional sale agreement for the use of one of its directors. The car was defective, the company rejected it and sought to recover the amount paid under the agreement for breach of the implied term relating to fitness for purpose under the Sale of Goods Act 1979, section 14(3). The finance company sought to rely on a term in the agreement excluding liability for such a breach. It was held that R & B had dealt as consumer within the meaning of the Unfair Contract Terms Act 1977, section 12, and therefore the implied condition could not be excluded by the terms of the agreement.

[3] The last sentence of this provision was added by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045, reg 14. However since a car is a type of good ordinarily supplied for private use, paragraph (c) is clearly satisfied, despite the luxury/high performance status of the car in question.

Tuckey LJ referred to the judgment of Dillon LJ to the effect that that where a company had entered into a contract, what was important was whether the contract was made in the course of a business. However, Dillon LJ continued, the very nature of a corporate entity meant that a contract made otherwise than in the course of its business would be *ultra vires* and illegal. Further, Dillon LJ had gone on to refer to the House of Lords' decision in *Davies v Sumner*,[4] where the words "in the course of a trade or business" in the Trade Descriptions Act 1968 were interpreted. It was held in that case that an offence was not committed under the Trade Descriptions Act as the transaction had not been an integral part of the defendant's business. The words "in the course of" in the phrase "in the course of a business", and the legislative purpose of the 1977 Act, led to the conclusion that the words were not used "in the broadest sense".[5] Where a transaction is only incidental to the business, said Dillon LJ, a degree of regularity is required before it could be said to be in the course of a business: on the facts of *R & B*, there was not the required degree of regularity.

The four submissions made by the appellant in *Feldarol* were that: (i) the trial judge should have distinguished *R & B* on the facts, (ii) *R & B* was the decision of a two-man court, which conflicted with the more recent decision of the Court of Appeal in *Stevenson v Rogers*,[6] and so should not be followed, (iii) *R & B* was incorrectly decided in any event and (iv) the court should hold that a company can never deal as consumer for the purposes of the Unfair Contract Terms Act 1977.

Tuckey LJ considered that *Stevenson v Rogers* provided the answer to a number of the appellant's submissions. The case concerned the sale by a fisherman of one of his fishing boats. The plaintiffs brought an action claiming damages for breach of the implied term that the fishing boat was of merchantable quality. It was held by the Court of Appeal that the sale had been made "in the course of a business" for the purposes of the Sale of Goods Act 1979, section 14(2).

It was clear from the decision in *Stevenson*, said Tuckey LJ, that the decision of *R & B* was binding. He cited at length the judgment of Potter LJ in *Stevenson,* which explained how the decisions in *R & B* and *Stevenson* could be reconciled. An interpretation of "deals as consumer" in the 1977 Act giving consumer buyers increased protection was, he said, entirely consistent with the wide meaning given to seller "in the course of a business" in the 1979 Act, section 14(2), giving the buyer protection. If there was to be harmonisation of the various provisions in consumer protection legislation, then that was the job of parliament.[7] If the decision in *R & B* was to be challenged, then that was not the job of the Court of Appeal.

The case could not be distinguished from *R & B.* The decision in *R & B* did not relate to the size of the company, nor to whether the car had been put through the company's books. A declaration and acknowledgment in the agreement relating to the use of the goods for business purposes had no bearing on the test as to whether the transaction was an integral part of the respondent company's business, nor to the degree of regularity of such a transaction. It therefore followed that the Court of Appeal regarded itself as bound by its own previous decision in *R & B.*

The car had been properly rejected, and there had been no affirmation of the contract. The appeal was dismissed.

[4] [1984] 1 WLR 1301.

[5] The words of Lord Keith in *Davies v Sumner* cited by Dillon LJ in *R & B* at p 330.

[6] [1999] 1 All ER 613.

[7] Reference was made also to the fact that the relevant provisions of the Unfair Contract Terms Act 1977 having remained unchanged. Of course this has to be qualified by reference to the change noted in n 3.

Comment

The case deals with an issue that is in urgent need of attention. The contradiction that allows a company to be considered a consumer under some consumer protection statutes has existed for over a quarter of a century and should not be allowed to continue[8].

The test continues to be whether the transaction in question is an integral part of the company's business, or merely incidental to the carrying on of the business. If it is the latter, then what is the degree of regularity? Even where there is a declaration in the agreement that the goods will be used for the purposes of the business, and an acknowledgement by the purchaser that "the goods will be used for his own business purposes", then, according to the Court of Appeal in *Feldarol,* these statements relate merely to the *use* to which the goods are to be put.[9]

Much of the early confusion arose from the fact that the phrase "in the course of a business" was required to be interpreted *both* in the context of the implied term as to merchantable quality in the Sale of Goods Act 1893, section 14(2), *and* in the provision relating to purported exclusion of liability in a "consumer sale" in section 55 of the same Act. The definition of "consumer sale" referred to goods sold to a person "who does not buy or hold himself out as buying them in the course of a business". Section 55 of the 1893 Act was replaced by the Unfair Contract Terms Act 1977, section 12, although this provision replaced the term "consumer sale" with the phrase "deals as consumer"[10]. As Potter LJ pointed out in *Stevenson,*[11] had the court in *R & B* been interpreting the term "consumer sale" in the original provision in the Sale of Goods Act, the result might have been different.

Part of the problem, it is suggested, is that the Sale of Goods Act only came to be viewed as a consumer protection measure on becoming a consolidating Act in 1979. It may be acceptable to have different meanings of "in the course of a business" in different statutes in order to provide an overall scheme of increased protection for consumer buyers. To allow the business seller in the *Stevenson* case to argue successfully that the sale did not give rise to the implied term relating to quality under the Sale of Goods Act would have undermined protection for the buyer. In the words of Potter LJ in *Stevenson*:[12]

> To apply the reasoning in the *R & B Customs* case in the interests only of consistency, thereby undermining the wide protection for buyers which s 14(2) was intended to introduce, would in my view be an unacceptable example of the tail wagging the dog.

In addition, there exist two different definitions of consumer in the legislation relating to unfair terms. Under the Unfair Terms in Consumer Contracts Regulations 1999,[13] regulation 3(1), "'consumer' means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession".

[8] See P B Fairest, "Consumer Protection – For Whom?" [1978] NLJ, 1127: "At first blush, it seems odd that a company can ever be a consumer. . .".

[9] In an earlier case on the sale of a ship, *Rasbora Ltd v JCL Marine Ltd,* [1977] 1 Lloyd's Rep 645, Lawson J was prepared to hold (at p 651) that there was a consumer sale as the ship was purchased with the intention that it was only to be used by a Mr Atkinson, who owned all the shares in the plaintiff company. The question as to whether the company bought or held itself out as buying the ship in the course of a business was not considered (see Fairest, *ibid*).

[10] See Fairest, *op cit,* n 8.

[11] *op cit,* at p 625.

[12] *ibid,* at p 626, and cited by Tuckey LJ in *Feldarol.*

[13] SI 1999/2083.

The definition repeats the definition of "consumer" in the Unfair Terms in Consumer Contracts Directive,[14] and a number of other consumer protection directives.[15] Thus only a natural person can be a consumer under the 1999 Regulations and a person who "holds himself out as" making the contract in the course of a business is not excluded from the definition. An example of such a person put forward by the Joint Law Commission Consultation Paper may be a person asking for a trade discount for trade terms[16] although as the Law Commission has suggested,[17] if *R & B* is correct, the consumer would have to hold out that the transaction was an integral part of the business or made regularly to deprive him of his protection as a consumer.

Some member states have adopted legislation on unfair terms that extends to relationships beyond those between businesses and consumers. The French system has not expressly rejected the idea that certain types of traders can be a consumer.[18] There are also some provisions in the German Civil Code treating businesses as consumers in providing protection from unfair terms.[19] It has been acknowledged that at European level that there may be contractual imbalance and inequality outside the business to consumer relationship:[20]

> This does not mean, however, given the special nature of consumer relations, that contracts in which one of the parties is a consumer should not be treated differently, as both the type of terms considered unfair and the degree of protection may be different. A distinction may be made, for example, between absolute prohibitions and relative prohibitions or arrangements for identifying unfairness.[21]

Of course this is the approach in our domestic legislation, under the Unfair Contract Terms Act 1977.

Consideration of the definition of consumer by the Court of Justice of the European Communities indicates that the term is to be given a narrow interpretation. The case of *Cape Snc v Idealservice Srl* and *Idealservice MN RE Sas v OMAI Srl*[22] concerned a reference by the Italian court for a preliminary ruling on the following questions on interpretation of the Unfair Terms Directive:

> (1) Is it possible to regard as a consumer an undertaking which, by a contract with another undertaking using a form produced by the latter in so far as the contract falls within the scope of its normal business activity, acquires a service or merchandise for the sole benefit of its employees, which is wholly unconnected with and remote from its normal trade and business? Can it be said in such circumstances that that party acted for purposes which do not relate to the undertaking?

[14] Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, art 2(b).

[15] Earlier consumer protection directives such as the Doorstep Selling Directive do not include the word "business" in the definition, although it has been suggested that this is not significant (see Howells, G, and Wilhelmsson, T, *EC Consumer Law* (Dartmouth, 1997), at p 3, Bamforth, N, "The limits of European Union Consumer Contract Law" (1999) 24(4) ELR 410–418, and the word is included in the definition in later directives such as the Distance Selling Directive. An exception to this is Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, which defines a consumer as "any natural person who, in the contracts covered by this Directive, is acting for purposes which are *not related to* his trade business or profession" [my emphasis]. An earlier version included the word "directly" before "related".

[16] The example given by the Law Commission refers to the suggestion in Furmston, F, *Cheshire, Fifoot & Furmston's Law of Contract* (Butterworths, 2001) at p 204, that a person obtaining a trade card in order to make purchases from a wholesaler may deprive himself of his consumer status under the 1977 Act.

[17] *Unfair Terms in Contracts*, (*op cit* n 2) at para 3·88.

[18] *Ibid*, at Appendix A, para A.32.

[19] *Ibid*, at para A.33.

[20] Opinion of the Economic and Social Committee on the "Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts", OJ C 116/25, 20·04·2001, at para 3·2.

[21] *Ibid*, at para 3·5.

[22] Joined Cases C-541/99 and C-542/99, [2001] ECR I-9049.

(2) If the foregoing question is answered in the affirmative, is it possible to regard any party or entity as a consumer when it is acting for purposes not relating or conducive to its normal trade or business, or does the term consumer relate only to natural persons, to the exclusion of any other?
(3) Can a company be regarded as a consumer?

Idealservice had concluded two contracts for the supply to OMAI and Cape of automatic drink dispensers to be used solely by the staff of these two companies. It had been submitted that the directive did not exclude an interpretation conferring the status of consumer on legal persons, and that member states could, when transposing the directive, treat a company as a consumer in domestic law. This argument was rejected by the Court, which observed that as the definition of the term "seller or supplier" refers to both natural or legal persons it was clear from the wording of article 2 that a person other than a natural person could not be a consumer.[23] In view of the answer given to the second and third question, the court considered it unnecessary for them to answer the first question.

Two further cases before the ECJ have concerned the definition of "consumer". In the first, *Bayerische Hypotheken und Wechselbank AG v Edgar Dietzinger*,[24] a natural person not acting within his or her trade or profession entering into a contract of guarantee to secure a loan made to another person who for his part *was* acting within his trade profession, was held not to be a consumer within the definition in the Doorstep Selling Directive 85/577. The aim of the Directive was to protect consumers and such a guarantee would fall within the scope of the Directive only if the party whose loan was being guaranteed was a consumer.

In *Criminal Proceedings against Patrice Di Pinto*,[25] another case concerning the Doorstep Selling Directive, the ECJ considered that a trader who was canvassed with a view to placing in a periodical an advertisement concerning the sale of his business was not entitled to the protection afforded by the directive. The argument that there was the same element of surprise as compared with an ordinary consumer was rejected on the grounds that the trader would be aware of the value of his business and so was not to be regarded as a consumer protected by the directive.[26]

To return to the interpretation of "consumer" in domestic law, according to the decision in *R & B*, it would appear that neither the status nor the size of the "consumer company" is relevant. According to *Feldarol*, the decision in *R & B* did not relate to the size of the company, which may be a private or a public company. On the one hand, it could be argued that a limited company should fall outside the remit of consumer protection laws.[27] On the other hand, it has been recognised that as the personal and business affairs of persons running small businesses may be intermingled, consumer protection should be afforded to those persons in both their personal and business capacity.[28] On the facts of the decisions in the three cases on unfair terms referred to (*Rasbora*,[29] *R & B* and *Feldarol*), the "consumer" in each case was respectively a purchaser of a boat who saw the advantages of a VAT-free purchase by

[23] Art 2(c) of the directive provides "seller or supplier means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned".

[24] Case C-45/96, [1998] ECR I-1199.

[25] Case C-361/1989, [1991] ECR I-1189.

[26] Although the directive did not preclude national legislation on canvassing to protect traders acting with a view to the sale of their business.

[27] See Fairest, PB, *op cit*, n 8: "at first sight, any plaintiff with "Ltd" after his name does not look too promising a candidate for a part in the coveted role of consumer."

[28] See *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century*, Cm 6040, DTI December 2003 at para 3·66.

[29] At n 9.

a company wholly owned by him and incorporated in Jersey; the purchasers of a car by the sole directors and shareholders of a private company for their personal and business use and the purchaser who in his capacity as managing director of a public company was to be provided with the car as a reward of his employment. Yet this analysis points to the status of the buyer and the purpose of the transaction, both issues which have been rejected as a result of the decision in *R & B*. Looking beyond the size of the business and the purpose of the transaction, the Law Commission[30] was not convinced that exclusion clauses in business-to-business contracts should ever be automatically void. The consumer company, such as the one in *R & B*, may have been familiar with the form of the transaction being entered into and so might not require the protection of consumer protection laws.

However, Dillon LJ in *R & B* did leave the way open for a future case to adopt a different approach:[31]

> If the company had never been incorporated and Mr Bell had bought the car personally for personal (or domestic) and business use it would, I apprehend, have been difficult to argue that he had not been dealing as a consumer in buying the car. On facts such as those of the present case it would seem anomalous and in some measure disquieting if a different result were reached if the car was bought by a company for the personal and business use of its two directors. It occurs to me that in such circumstances it could well be appropriate to pierce the corporate veil and look at the realities of the situation . . .

The *Law Commission Joint Consultation Paper* suggests restricting the definition of consumer to natural persons and also that it is not necessary for a natural person who buys goods related to his or her business to be treated as a consumer. Furthermore, it suggests, a transaction made partly for business and partly for private purposes should be assessed according to the facts, "according to the purpose for which it was predominantly intended".[32] It is to be hoped that this is the approach adopted in the forthcoming final report of the Law Commission.

So why was it that the Court of Appeal in *R & B* chose to use a case on interpretation of a criminal statute to interpret civil law obligations? According to Neill LJ,[33] "it would be unsatisfactory . . . if, when dealing with broadly similar legislation, the courts were not to adopt a consistent construction of the same or similar phrases." However, Potter LJ acknowledged in *Stevenson,* a decision on the meaning of "in the course of a trade or business" in a criminal statute was required, in the event of ambiguity, to be construed restrictively. In addition to the impact of the use of the word "trade":

> [t]he observation of Lord Keith that such an expression, in the context of an Act having consumer protection as its primary purpose, conveys the concept of some degree of regularity is to be afforded great respect. However, I do not think that it should necessarily be regarded as of universal application.[34]

For the time being the concept of consumer under the Unfair Contract Terms Act 1977 is determined by giving the words "in the course of a business" in section 12(1)(a) a narrow interpretation, so allowing a company to claim that it is a consumer, whilst (if the reasoning in *Stevenson* is followed) the same words in section 12(1)(b) are to be given a wide interpretation in the name of consumer protection. If the same approach

[30] See *Unfair Terms in Contracts,* (*op cit,* n 2) at para 5·11.

[31] *Op cit,* at p 331.

[32] *Unfair Terms in Contracts,* (*op cit,* n 2), paras 4·153–4.155.

[33] *Op cit,* at p 336.

[34] *Op cit,* at p 624.

was to be adopted as that taken by the ECJ in their interpretation of European consumer protection legislation, then the words "he neither makes the contract in the course of a business nor holds himself out as doing so" in section 12(1)(a) should be construed so that a person cannot be a consumer whilst being a trader at the same time. This approach would avoid requiring the court to look into the purpose of the transaction or the use to which the goods are to be put, or force them to make distinctions between private and public companies. Although we have seen that there is an argument for providing protection on unfair terms based on contractual imbalance, there is every argument for providing different degrees of protection, with the consumer, in the everyday meaning of the word, receiving the highest level of protection.[35]

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[35] See art 95(3), Art 153(1) EC Treaty.

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COMMON LAW NUISANCE – WHERE RIGHTS CONFLICT

Dennis and another v Ministry of Defence

[2003] EWHC 793, [2003] Env LR 34, [2003] EGLR 121,

The Times 6 May 2003

(QBD) (Buckley J)

This case provides an interesting example of the law in development: specifically first the evolving role of public interest factors in the common law of nuisance set in the context of the interface between apparently conflicting rights, and second the significance of remedies in shaping substantive rights. It is suggested that this development of the common law is influenced especially by the direct incorporation of the substantial part of European human rights law into English law by the Human Rights Act 1998,[1] which as a result of the use, in particular, of the language of "proportionality" entails a balancing of competing interests and rights.

THE FACTS

RAF Wittering became a Harrier station in 1969. As an airfield it had been established in 1916. Of course military flying has changed almost beyond measure since the First World War. Particularly relevant to the present case is the obvious fact that modern jet aircraft create a great deal more noise than the old propeller powered aeroplanes of the past. In the case of RAF Wittering the impact of aircraft noise on the surrounding countryside had by the 1980s become a very serious problem for the continuance of flying from the airfield and yet despite this it was an airfield of overwhelming strategic importance for the training of Harrier pilots.

Approximately two miles from RAF Wittering is the Walcot Hall estate, comprising 1·387 acres together with the Hall itself. The Hall was built in 1678 and is a Grade 1 listed Building. The estate as a whole had been bought in 1963 by the father of Mr Darby William Dennis, who was brought up there and who himself became its owner in 1984. This was the same year that he and his wife moved into the Hall, which became a home for themselves and subsequently for them and their three children.

At Walcot Hall the noise from the Harriers was apparently unbearable. The noise was deafening in the extreme, as well as intrusive, shattering the estate's peaceful environment. Furthermore Mr and Mrs Dennis's farming business was struggling by the 1980s and they therefore started to think of commercially exploiting the Hall itself. Investigations were carried out to diversify into corporate entertainment. However nothing came of this, although it seems Mr and Mrs Dennis were genuine in their commercial intentions.

In 1986, Mr Dennis made his first written complaint to reach the defendant about the noise. Nothing, however, was done to resolve the problem to Mr and Mrs Dennis's

[1] See Schedule 1 of the Human Rights Act 1998.

satisfaction, and eventually in 1996 proceedings were commenced. Finally the case came on for trial in the Queen's Bench Division of the High Court before Buckley J in 2003.

THE NATURE OF THE PROCEEDINGS AND THE RELIEF SOUGHT

The claimants sought by way of relief a declaration or alternatively damages in the sum of £10,000,000. The reason for seeking a declaration, of course, was that the obvious remedy of an injunction was simply not available against the Crown. Instead the court has discretion to "make an order declaratory of the rights of the parties".[2] As a matter of "settled convention"[3] it was said in argument that the Crown would invariably "act appropriately in the face of such a declaration"[4] and in that sense a declaration was the equivalent of an injunction.

The claim to damages by Mr Dennis, the first claimant, was based on both alleged common law nuisance and also under the Human Rights Act 1998 alleging interference with his human rights. As regards the latter Mr Dennis relied on Article 8[5] and Article 1 of the First Protocol.[6]

The second claimant, Mrs Dennis, brought her claim simply under the Human Rights Act 1998, alleging interference with her human rights on the same or a similar basis to that of her husband.

THE TRIAL AND JUDGMENT

The Ministry of Defence met the allegation of common law nuisance by arguing the noise was justifiable on grounds of public interest. Public interest had never previously succeeded as a defence to an alleged nuisance, although it has been regarded as a factor in assessing the reasonableness of a defendant's use of the land.[7]

What the defendant sought to contend in resisting liability altogether was that its use of the airfield was in substance ordinary as part of the defence of the realm; it was to everyone's advantage, and the claimant had not been singled out, but simply suffered the inevitable result of the country having an operational air force.

The Ministry of Defence sought to develop its case further by seeking to diminish the alleged nuisance's impact, emphasising that it did not involve physical damage to Mr Dennis's property, but simply impaired his enjoyment of it. Additionally the

[2] Section 21 (1) (a) Crown Proceedings Act 1947.

[3] Paragraph 80. All references to paragraph numbers refer to the judgment.

[4] Paragraph 80.

[5] Article 8·1 provides:
"Everyone has the right to respect for his private and family life, his home and his correspondence".
Article 8·2 then provides:
"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country for the prevention of disorder or crime, for the protection of health, morals, or the protection of the rights and freedoms of others".

[6] Article 1 of the First Protocol provides:
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of the property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

[7] See for example *Clerk and Lindsell on Torts* (Sweet and Maxwell, 18th edition, 2000), paragraph 19·72.

defendant argued that when the defence of the realm was in issue, the public interest factor constituted a complete defence because it was much more significant than the sort of commercial and other interests which defendants in previous nuisance cases had unsuccessfully tried to argue were embraced by public interest protection. Yet further the Ministry of Defence relied on the argument that the issue of nuisance had to take account of the nature of the locality and that this was characterised by the existence of RAF Wittering itself.

The defendant did not deny that there was a problem with noise. The evidence was overwhelming in this regard and inevitably therefore Buckley J found that there was a factual noise nuisance. The central issue for the court, however, was whether or not there was a nuisance in law. Buckley J held that the answer to this question depended on "seeking to strike a fair balance"[8] between the parties. As part of this process the court had no difficulty in rejecting as self-evident the defendant's arguments that RAF Wittering was an ordinary use of land:

> The noise is extreme and if military activities are generally to be so regarded in the context of nuisance [*ie* as an ordinary use of land], then the [Defendant's] argument could logically extend to detonating, by way of testing state of the art explosives, including nuclear devices. I regard such activities, which generate extreme noise or other pollution as extraordinary uses of land, even in this day and age. They may well be justified by other considerations but not in my view as ordinary use.[9]

The court also rejected the defendant's arguments based on the locality being characterised by the presence of RAF Wittering itself, finding that despite the RAF's presence the "area remains essentially rural, with villages and individual residences".[10] The court had no sympathy with the contrary argument that amounted in substance to no more than a suggestion that a tortfeasor could simply by his or her own presence influence the legal nature of the locality concerned, although nevertheless quite clearly the old defence of Belgrave Square being different from Bermondsey still remains valid.[11]

A further, but late, defence raised by the Ministry of Defence that they had acquired an easement to create a nuisance by prescription in view of the lapse of time since they first flew Harriers was also rejected by the court. It was held that since, in order to be an easement the claimed easement had to be capable of lying in grant, and of its nature, in this case it was far too uncertain for any conveyancer to have drafted it in the form of a grant.

The outcome of the case was that Buckley J decided that there was in law an actionable nuisance, but turning to the issue of remedies the court then decided that because of the effect of the public interest factors raised by the defendant this was a case in which in its discretion the court would withhold the declaration sought. Buckley J said in support of this approach:

> The problem with putting the public interest into the scales, when deciding whether a nuisance exists, is simply that if the answer is no, not because the claimant is being oversensitive but because his private rights must be subjugated to the public interest, it might well be unjust that he should suffer the damage for the benefit of all. If it is to be held that there is no nuisance, there can be no remedy at common law. As this case illustrates the greater the public interest, the greater may be the interference. If public

[8] Paragraph 34.

[9] *Ibid.*

[10] *Ibid.*

[11] See *Sturges v Bridgman* (1879) 11 ChD 852.

> interest is considered at the remedy stage and since the court has a discretion the nuisance may continue but the public in one way or another pays for its own benefit.[12]

The remedy given by the court to the first claimant was therefore an award of damages alone. Consequently the RAF could continue to fly their Harriers but would have to pay compensation.

Further it is plain that in reaching this result Buckley J was influenced by European human rights law. In this regard he said:

> The principles or policy underlying these considerations are that public interest should be considered and that selected individuals should not bear the cost of the public benefit. I am in favour of giving effect to those principles. I believe it is necessary to do so if the common law in this area is to be consistent with the developing jurisprudence on human rights;[13]

and also,

> I am conscious that there is no authority directly in point that supports my solution. However, save where it may be considered more appropriate to leave the matter to legislation, the common law should develop in line with European decisions on human rights . . .[14]

This part of the case is novel because generally speaking in the past the courts, having found a nuisance in law to exist, have been very ready to grant injunctions restraining continuance of the nuisance. Furthermore the judgment was also on the face of things seemingly self contradicting: the court held there was a nuisance remediable in damages, but at the same time also held there was no nuisance that it was prepared even to declare judicially to be such. Accordingly one interpretation of the effect of the court's decision is that, bizarrely, it accepted that a common law nuisance both existed and did not exist at the same time. In this context, however, the court recognised that it was faced with a conflict between existing interests or rights. Hence when refusing the declaration Buckley J said, on one side among other considerations he "had in mind, in particular the nature of the public interest, the defence of the realm", but at the same time "[o]n the other side, I have considered, particularly, the property rights of Mr Dennis",[15] as well as other factors.

In essence it is suggested that the decision depended on how the court reconciled the rights conflict between on the one hand the Ministry of Defence's right to fly its aeroplanes in defence of the realm as it wished and on the other the first claimant's right not to suffer a noise nuisance. In giving expression to both sides' rights as it did, rather than preferring the one over the other, the court was seemingly reconciling the irreconcilable and doing so by "seeking to strike a fair balance" in deciding on the remedy it would grant to the first claimant.

The presentation of the case as a rights' conflict, it is argued, indicates that a jurisprudential rights' analysis should give insight into what "seeking to strike a fair balance" conceptually involves. In this connection it is suggested the typology and vocabulary of Hohfeld[16] may be useful as an analytical template. Applying Hohfeldian principles it is suggested Mr Dennis had a "claim right", but given the court's licence to the defendant to continue the nuisance the question is raised as to what was the correlative of this "claim right", that is what was the corresponding concept on the

[12] Paragraph 46.

[13] Paragraph 47.

[14] Paragraph 49.

[15] Paragraph 48.

[16] See W N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, (Yale University Press, 1923).

part of the Ministry of Defence, helping to define Mr. Dennis's right as a "claim right"? Understanding fully the first claimant's "claim right", it is suggested, requires the precise nature of the particular "claim right" to be examined. When this is done it is concluded that it was not in law a right not to suffer a factual noise nuisance, but rather it was a right to be compensated for any such nuisance that occurred. The correlative of this right was therefore the "duty" of the Ministry of Defence to pay damages to the first claimant.

But what was the effect of the right of the Ministry of Defence for the RAF to fly its Harriers in defence of the realm? There was no suggestion of Mr Dennis interfering with the exercise of this right since the court would not give him the declaration he sought, nor obviously was there any realistic possibility of him being in a position to exercise the self-help remedy of abatement. Having prosecuted protracted proceedings any such remedy was probably lost to him anyway. Further if it were argued as the correlative of the defendant's right that Mr Dennis had a duty to permit something he could not himself control, then quite simply any such argument would seem absurd.

Accordingly it is suggested that what Mr Dennis had is that most quizzical of Hohfeldian concepts, a "no right": that is he had "no right" to prevent the Harriers from flying. Whether or not they flew, in what direction they flew and how often they flew was simply a matter of the RAF's discretion. If this is the case then what the Ministry of Defence had in the typology of Hohfeld is a "privilege", that is a discretion, to fly their Harriers or not as they chose, coupled only with a duty to compensate Mr Dennis if they thereby created a factual nuisance, since a right to compensation when they occasioned a nuisance in the exercise of their "privilege" was the nature of the "claim right" he concurrently enjoyed.

In summary therefore the rights of the parties were different from one another. They were accordingly not in conflict, but figuratively speaking rights lying in parallel. Further and most importantly it is apparent that it was the availability, or not, of a relevant remedy that actually shaped the rights concerned. The first claimant had a "claim right" to be compensated for the fact of the nuisance, the correlative of which was the "duty" of the defendant to pay the compensation concerned. In addition the defendant had a quite different right, a "privilege", to fly their Harriers, exercisable in the RAF's discretion, the correlative of which was that the first claimant had "no right" to prevent the Harriers from flying.

It is suggested that there is nothing conceptually inconsistent in the development of common law nuisance in this way and indeed it is quite logical. In a different context a car owner having a driving licence and insurance has the "privilege" to use his or her car whenever he or she wishes and the rest of us, generally speaking have "no right" either that the car be driven or that it should not be driven; but should the car owner negligently run over a pedestrian the car owner has a "duty" to compensate the pedestrian for the injuries caused and the pedestrian has a "claim right" to those damages.

The apparent conflict of rights was therefore reconcilable and in law reconciled by the court, although not of course in the vocabulary of Hohfeld, but in the vocabulary of "seeking to strike a fair balance" in deciding what remedy the court would award the first claimant.

With regard to Mr and Mrs Dennis's claims under the Human Rights Act 1998, Buckley J considered that while there was interference with both claimants' rights under Article 8 and Article 1 of the First Protocol, the application of the Act was actually academic because the remedy of damages the court was prepared to give at

common law constituted in itself "just satisfaction".[17] The court stated that it would otherwise have awarded damages under the Act in respect of the claimants' rights under Article 8 and Article 1 of the First Protocol on the basis that, although

> ... the public interest is greater than the individual private interests of Mr and Mrs Dennis ... it is not proportionate to pursue or give effect to the public interest without compensation for Mr and Mrs Dennis.[18]

Buckley J added that "... common fairness demands that where the interests of a minority, let alone an individual, are seriously interfered with because of an overriding public interest, the minority should be compensated."[19]

The court then proceeded to deal with the quantum of damages for common law nuisance. Buckley J awarded £950,000, much lower than the £10,000,000 claimed. Unfortunately the precise make up of the award is not particularly clear from the judgment, although it is apparent he awarded it under three heads: (i) past and future loss of amenity, (ii) past and future loss of use and (iii) loss of capital value. While Buckley J thought it an "imprecise calculation"[20] and while he considered an award of less than £50,000 for past and future loss of amenity would not "do justice to the serious loss of amenity over a considerable number of years",[21] it is neither clear what he thought would do justice under this head, nor what the split was between past and future losses. As regards capital loss the court found that there was a five to ten *per cent* risk of the first claimant selling the Hall in the remaining period in which it also found that Harriers would be operating from RAF Wittering, a period ending in 2012. Buckley J also found that there was something like a £4,000,000 diminution in the capital value of the estate and Hall attributable to the nuisance, which he discounted to £300,000, presumably to reflect the degree of risk of it materialising as a loss. Finally on the issue of loss of use Buckley J found (on what seems from the judgment to have been neither strong nor clear evidence) that Mr and Mrs Dennis would have established a business of some sort by 1997 that would have been generating a net income of £55,000 p.a. by the date of trial.

The court gave itself the task of approaching quantum in terms of an "overview"[22]. This entailed taking account of the identified heads of loss, not simply by adding them together, but rather by applying them as a "guide"[23], as for instance there was an overlap between capital loss and loss of use. Without further analysis, however, the court simply then awarded by way of damages an overall figure of £950,000.

No award of damages was made under the Human Rights Act 1998, even though the second claimant's claim was based solely on an allegation of infringement of her human rights. What the court indicated was that while it would have given judgment for damages under the Human Rights Act 1998 if it had not done so in favour of the first claimant in nuisance, it would nonetheless have done so in the same sum that it in fact awarded to the first claimant, although presumably split between both the first and second claimants. Therefore an award under the Human Rights Act was unnecessary.

[17] See section 8 (3) Human Rights Act 1998.
[18] Paragraph 63.
[19] *Ibid.*
[20] Paragraph 89.
[21] Paragraph 69.
[22] Paragraph 88.
[23] *Ibid.*

Finally as a matter of general principle it is axiomatic that damages in tort are assessed on the basis of putting the successful claimant in the position he or she would have been in had the tort concerned never happened. Applying this principle the first claimant was clearly entitled to damages for any capital loss, any past and future loss of amenity and any past and future loss of commercial use. But should the compensation have gone further to give full effect to the general principle upon which damages in tort are awarded? If an injunction had been sought then the court could have awarded equitable damages under section 50 of the Supreme Court Act 1981. Accordingly should the first claimant have claimed and been awarded what are sometimes known as restitutionary damages[24] on the basis that the benefit conferred on the defendant by refusing the declaration far exceeded the damages otherwise awardable to the first claimant? Further given that the court accepted there was no practical possibility of relocating the Harriers and given that the impact of the noise nuisance could not be addressed by the likes of double glazing, if the court had to quantify damages on the basis of the tort never having happened then in practice this could only be on the assumption that either the defendant did not fly its Harriers or the first claimant agreed to allow them to do so. In other words it is arguable that where, in addition to the other losses he incurred and for which he received damages, by refusing the declaration the court deprived the first claimant of his bargaining position to the obvious advantage of the defendant. However it is contended that this argument is not sustainable, and that once more the answer to the problem becomes obvious when regard is had to the nature of the parties rights' position and the key role played by remedies in shaping those rights. Quite simply the first claimant had a "claim right" only to payment of compensation, which the defendant had a "duty" to pay: he had "no right" to prevent the Harriers from flying and therefore had no bargaining position to lose. There was therefore no reason for awarding restitutionary damages, as the defendant was not securing by the court's decision an advantage disproportionate to the compensatable loss incurred by the first claimant. Overall it is suggested that *Dennis and another v Ministry of Defence* represents a sound development of the common law.

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[24] See H McGregor, *McGregor on Damages*, (17th edition, Sweet and Maxwell, 2003) paragraph 12–002: "In a nutshell restitutionary damages arise where the commission of the wrong results in a benefit to the wrongdoer which exceeds . . . the loss to the person wronged . . ."

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BOOK REVIEWS

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

ASPIRATIONS FOR LAW IN THE UNIVERSITY

Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century by ANTHONY BRADNEY, Oxford, Hart, 2003, xii + 208 pp, Hardback, £22·50, ISBN 1-84113-248-9

In this short and engaging book Anthony Bradney attempts several tasks, and succeeds at more then one. The self-imposed tasks of the author are: to contribute to scholarly work concerned with higher education in general and the law school in particular; to assess the current state of the law school and legal education in the UK; to criticise certain approaches to the teaching of law in Universities; to set out a model of liberal education and the liberal law school that is both desirable and practicable in the UK. On the foundation established by performance of these tasks the ultimate aim is to form a strategy for the development of law as an academic subject. A strategy designed to protect what is valuable in the contemporary law school, and to facilitate a collective resistance by law schools to philistine and damaging criticism and distorting institutional pressures.

The book starts with an overview of the current situation and an introduction to the argument being advanced. There is an introduction to the field of scholarly writing that the book falls within, which places the book in an academic context. The book is also placed within a practical context, the contemporary state of academic law in the UK. The current situation is judged favourably, but not uncritically. The enemies of healthy development, philistine criticism and inappropriate regulatory mechanisms, are identified. The role of the "liberal" law degree, as a standard around which academics can rally, is sketched. This treatment makes for a lively start, and manages to carry the reader a long-way into the author's concerns in a serious yet entertaining manner.

In setting the scholarly context Bradney wrestles with a particular problem law as a discipline has had within universities. The discipline of law in the common law world has always been defined with reference to a social activity (law) rather then any distinct methodology for enquiry. Among legal academics significant numbers have had, and significant numbers still do have, professional rather than academic qualifications. Many students have always entered into a law degree as a route to professional qualification. The subject matter studied on a law degree programme has been partially determined by the professional bodies. Post-graduate research degree programmes have not been prominent historically in the law school. For all these reasons law is prone to being viewed by other academics as less than a true academic subject, less than a discipline, and the law school as little more than a training facility. Bradney is anxious

to meet this criticism, and certainly makes a robust case for the modern law school as a centre of truly academic activity.

Certainly I can confirm from personal experience that some non-law colleagues are inclined to sneer at the idea of law as a discipline. However, I suspect part of the resentment is fuelled by the ability of law to recruit capable students rather than the nature of the discipline *per se*. Too extreme a reaction to such criticism might smack of ingratitude to the very forces that both generate the resentment, and make the thriving state of law possible. Universities have always relied upon students who have sought to enter the "learned" professions or the state bureaucracy, whether the students have been funded privately or by the state. In this respect law is actually typical rather than exceptional as a discipline. Regardless of any such caveat Bradney's treatment of the issue is thought provoking and useful.

The positive assessment of the current state of the law school is welcome. Some of the enthusiasm seems a little hyperbolic, but the basic argument seems convincing. Law schools and legal academics are working in a very positive environment of expanded opportunities and achievements. Whilst there are contemporary problems the allegedly halcyon days of the past are rather shabby when realistically compared with the present. In many ways our discipline has never been healthier. This seems the correct approach for an attempt to influence the future aspirations of university law schools. The programme is not primarily defensive, it is from a position of considerable strength that academic lawyers can seek to define the future of their discipline.

The identification of the enemies of healthy development is perhaps less convincing. External regulators (RAE, QAA), philistine and uninformed public criticism, and the demands of the profession (sometimes as regulator, sometimes as "the market") are the major enemies identified. Internal "enemies" are less clearly identified, internal meaning here internal to the institution (the university), internal to the professional group (fellow academics), and internal to the discipline (legal academics). At this stage of the book the reader is being offered a unifying call to arms. This book is aimed at legal academics almost to the exclusion of any other audience. The focus upon external agents in identifying the enemies of the liberal law school is a sign that the need to appeal to the whole of that audience has had an effect on the architecture of the argument.

This has some consequences. The group that must be united is not lawyers, nor those involved in legal education: the group is those academics who specialise in law. The concept of the liberal law school, and in practice this must mean the liberal law degree, is intended to be defining for this group of scholars. This means a lot of weight is placed upon this central idea. It is intended to become the basis of the group's self-definition, the standard around which the group can rally, the ideal towards which the group can aspire, the key to successful strategies for repelling our enemies and building the future. It is at this crucial point, for this reviewer, that the book fails to identify any idea that can sustain the pressures placed upon it by the argument. The attempt to formulate the necessary ideal is undertaken in chapter two of the book.

The paradigm formulation put forward for the qualities indicated by the idea of a liberal university education is derived from a speech in 1852 by John Henry Newman (Cardinal Newman, as he subsequently became). To quote from two passages excerpted by Bradney:

> [the university is] an assemblage of learned men . . . [who] learn to respect, to consult, to aid each other. Thus is created a pure and clear atmosphere of thought . . . [the student]

> profits by an intellectual tradition, which is independent of particular teachers, which guides him in his choice of subjects, and duly interprets for him those which he chooses. He apprehends the great outlines of knowledge, the principles on which it rests, the scale of its parts, its lights and its shades, its great points and its little, as he otherwise cannot apprehend them. Hence it is that his education is called "Liberal". A habit of mind is formed which lasts through life, of which the attributes are, freedom, equitableness, calmness, moderation, and wisdom.

This model of a liberal education is static, complacent, hierarchical, and leaves the student strangely passive (his or her role is to apprehend, not actively analyse nor synthesize, and never to lead but always to follow). It is a monkish view of education, with emphasis not on action, perish the thought, but on acceptance and quietude. The underlying idea of knowledge is derived from classic enlightenment thought: all "truth" is reconcilable and arranged by an intelligence that has ensured that ultimate contradiction is impossible. For some lucky, if insufferable, few it may be that the contemplation of the rational order and perfect realisation of this order in the world fuels a calm and equitable intellectual activity. For me it is the irritation of the discord I perceive between ideal and reality, between purpose and design, between desire and achievement. Cardinal Newman's intellectual life was far more interesting and conflicted than his ideal of a liberal education.

The inadequacy of this vision of liberal education demands reflection. Why has Bradney made this the keystone to the structure of his argument? The answer lies in what he wishes to reject, the enemy within, the vocational law school. Newman stresses the non-practical, the eternal verities, the superiority of wise contemplation over futile activity. There seems no other convincing reason for placing Newman's conception of a liberal education centre stage unless these features are desirable. It entails having to deal with Newman's sexism, his antagonism towards research within the University, his elitism, and his irrelevance in several ways, both intellectual and practical. The reason proffered, that Newman's conception has been very influential, is hardly compelling. Smallpox has been influential, but that is not a recommendation. The argument must be not that Newman has been influential, but that his influence has been beneficial and will continue to be so. It is the substance of the approach that has been adopted, because it has attractive features for the author.

It is at this point that I must disagree with Bradney. His vision of the law school is not the only available version of liberal education, and for me it is profoundly unattractive. The use of this vision as a tool to build a sense of group identity among academic lawyers will probably serve to do little more than confirm the opposition of legal academics in two resentful camps: the impractical high-theorists versus the stolid vocational-trainers, to caricature both sides. Such a division is all the more dangerous to unity, because it risks reflecting an institutional divide between the old and the new universities. If the aim is to forge a vision that can inform the self-image of legal academics then Newman's vision is not likely to work.

The challenge is to integrate the practical and the theoretical, not to have the proponents of the two approaches arguing at cross-purposes. For this challenge, if we want a historical authority figure, we are better looking to John Dewey. Dewey was an enemy of a dichotomy between valuable education and worthless practical activity. His key insight into education was that learning is not a passive process, education is not a transmission from one mind to another of a substance called knowledge, learning is something that happens through activity. Wisdom, contrary to the implication of the ironic cliché, is not "received"; it is earned. Therefore, for Dewey the important issues

were what was done, and what was learnt from the doing. Consider this passage as a basis for a theory of liberal legal education:[1]

> Two conclusions important for education follow. (1) Experience is primarily an active-passive affair; it is not primarily cognitive. But (2) the *measure of the value* of an experience lies in the perception of relationships or continuities to which it leads. It includes cognition in the degree to which it is cumulative or amounts to something, or has meaning.

Here is an approach to education that allows an escape from the unreality of pure book learning without losing sight of the fact that the exercise is the subject matter for exploration, rather than an end in itself. This opens up a real possibility for co-operation between the "vocational" and the "theoretical", a necessary aim as each without the other must be ultimately barren. A vision more different to Newman's is difficult to imagine. The development of this integrating and active vision as an ideal is surely the better choice for law schools.

Bradney criticises a model of legal education that would make the role of the university that of a mere training agency for the profession. His criticisms are cogent and convincing, and should be read by everyone who is concerned with the future of university law schools. But rejecting this approach does not entail adopting Newman's vision. As Bradney recognises one of the attractions of a call for a "liberal" education is the lack of clarity and consensus over what a "liberal" education entails.

If we start with the discussion of the word "liberal" by Raymond Williams in *Keywords* then we can identify:[2] three qualities of the word "liberal" that form the core of its attraction for legal academics; two qualities of "liberal" that academic supporters of a liberal education would probably reject; and three qualities of "liberal" that would probably prove contentious. The hope is that an analysis of the word "liberal", as used in the expression "liberal education", may allow us to reach a level of consensus that will prove unobtainable if we proffer potentially contradictory paradigms for consideration.

Of the three core attractions of the word "liberal" the most important is probably the individualistic focus of education implied by liberal education. Liberal doctrine is concerned with the individual, and his or her relations with society. Liberal education is concerned with the development of the individual student, and his or her relations with the discipline and the world. This implies a rejection of a model of education that sees the key measure of success to be the accomplishment of some social purpose, a model that reduces the student from being the point (*raison d'être*) of the system to being a product of the system. A liberal education aims to encourage the development of the student: this ideally leads to an increase in capacity, an improvement in ability, and a broadening of horizons in the student. However, and crucially, the purpose is not to make the student more useful to others, but to make the student more.

Second, and generally attractive in theory at least, "liberal" in the phrase a "liberal education" implies an open-minded education, as opposed to a dogmatic education. The student is meant to develop his or her own understanding, and that includes the possibility that the student will ultimately reject the underlying ethical approach of the teacher. This aspect of "liberal" is often associated with the linked idea of tolerance. It is an important aspect of a liberal education that it is not a process that leads to any particular pre-determined conclusion.

[1] John Dewey, *Experience and Thinking, Democracy and Education* (Macmillan Co, 1916) reprinted in John J McDermott (ed) *The Philosophy of John Dewey*, (University of Chicago Press, 1981) at 496.

[2] Raymond Williams, *Keywords*, (Flamingo, 1983).

Third, and probably the least often articulated of the three, a liberal education implies a generous spirit towards the task of education. One meaning of "liberal" is open-handed. This is an important quality of a liberal education. The western ideal of the free exchange of ideas and free discussion is worth upholding. It is a generous attitude, and far from universal in history. Scholarship is an inherently collaborative venture and students are entering a community when they enter a university. One reason plagiarism is deplored is that it is a failure to acknowledge the help proffered to the student, who seeks to steal what was freely given.

It seems to me that it is these three qualities of "liberal": a focus on the development of the individual, an open-mind as to what conclusions will be reached, and an ideal of generosity both within and from the community: that attract legal academics to the idea of a liberal approach to education, and probably to academia itself. If there is an easy consensus to be formed it is likely to form around these qualities of liberalism as expressed in the phrase a "liberal education".

Of the two qualities of "liberal" that are likely to be rejected the first is "liberal" as the pursuits and culture of a leisured class. The purpose of such an education is little more than the assertion of social superiority through learned prejudices of taste and comportment. The second quality of "liberal" that is likely to be rejected is "liberal" as sloppy, ill-disciplined, and lacking in rigour. Sentimentality and inability to make difficult choices are qualities often associated with "liberal" when the word is used in a pejorative sense. It is unlikely that the rejection of these meanings of "liberal" will weaken the attraction of the idea of a liberal education.

Three remaining qualities of "liberal" are the ones most likely to divide legal academics, and therefore, are probably the most interesting. First, the word "liberal" is a very close cousin of "licentious", and carries a similar meaning of "unrestrained by convention". Whether experimenting with the boundaries of what is acceptable is part of a liberal education, or not, is surely moot. Second, the very core of the attraction of "liberal" is its focus on the individual. The neglect of social forces and an anti-collectivist bias has been the bane of liberal thinkers, who have been assaulted from both the left (Marx) and the right (Burke) on the issue. Within the confines of a liberal education the individualistic focus on the development of the individual student is attractive. However, whether this focus on the individual should have any broader application is a matter of deeply felt disagreement. Finally, "liberal" has connotations of "radical" or "progressive". Whether these connotations are a necessary part of a liberal education is likely to be both a matter of dispute, and a question that would demand its own analysis of the terms before it could be carried out in a useful manner.

If we can agree that the first three qualities of a liberal education identified above are core, the second two mere calumny, and that we will have to debate over the last three, then we have enough of a consensus to provide a defining collective approach to legal education.

At this point Bradney again provides an important contribution in his book. The model of a liberal education set out by Bradney is applied, *seriatim*, to the "mission" or general activity of law schools, to the curriculum of law degrees, to the research conducted in law schools, to the administrative structure of law schools and to the auditing of law schools. The critique of both current practice and alternative approaches is probably the strongest single aspect of the book.

The viability of multiple aims for law schools is doubted. The idea that universities should serve the economy in the manner determined by government is rejected as totalitarian in principle and as miserably under-resourced in practice. The idea that the

law school should become a state subsidised training agency for the profession is subjected to withering scorn. The presence of an umbilical cord between research activity and academic status is proclaimed. The ham-fisted and wasteful process of audit is condemned to the status of a social madness: ill-conceived and irrational in principle, damaging in practice. It is in the use of a model of a liberal law school as a tool for critical appraisal of practice and critical analysis of alternative models that the potential vigour of the approach used by Bradney is realised. It is in the tearing down and defacement of false idols that Bradney excels, and that job is always a useful and necessary one.

The constructive use of the model of a liberal law school is seen in an attempt to sketch out the legitimate boundaries of activity in a liberal law school. The discussion of administration is particularly useful. The comparative neglect in discussions of legal education of how things are actually done, when compared with the attention given to what things should be done, is a sign of weakness of spirit and analysis. Here the actual institutional processes for the delivery of a liberal education are considered as a vital question, rather than as an inevitable and dull necessity. Raising the profile of administration, and the organisation of decision-making, within law schools above the horizon is a necessary part of an investigation into the law school. The conclusion reached is that the actual way in which decisions are made and implemented is not a mere matter of chance, of no importance in principle. A liberal law school needs a collegiate structure if it is to be a community of scholars. If it is not a community of scholars it will not be able to support a liberal law school.

This book has a limited audience. It is directed primarily at legal academics, and secondarily at everyone who is interested in the future of legal education in UK universities. It is highly recommended to that audience. I do not agree with all the arguments put forward by Bradney. However, the treatment of the subject in a lively and entertaining manner is to be applauded. The seriousness of intention is admirable. The identification of issues of interest or concern is useful. In a short, and easily read, book it would be churlish to ask for more.

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