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The *Nottingham Law Journal* is a refereed journal, normally published in Spring and Autumn each year. Contributions of articles, casenotes and book reviews to the *Journal* are welcomed. Intending contributors are invited to contact the Editor for a copy of the stylesheet, which gives details of the format which submissions must follow. Submissions and enquiries should be addressed to:

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The citation for this issue is (2006) 15(1) Nott. L.J.

ISSN No. 0965-0660

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EDITORIAL

In many respects legal education is at a crossroads. The most obvious reason for this is the introduction of top-up fees across HEI. It is difficult to predict the consequences of this move towards increased, although partially deferred, debt on the study of law, but certainly the undergraduate, conversion and vocational stages will all feel those effects.

What may be (a little) more predictable is the impact of major reviews being undertaken by both the Law Society of England and Wales and the Bar Council. Whilst these only appear directly to affect the Legal Practice Course (LPC) and Bar Vocational Course (BVC), there are also lurking implications for the LLB.

Looking first at the most direct effects: the Law Society's Training Framework Review (TFR) has just fizzled out after four years of controversy and dissention, without any clear indications of how things will move forward. The heart of the debate has been to try to achieve an appropriate balance between improving access and flexibility, yet without compromising standards of entry. Unfortunately, a great deal of heat has been generated on whether these objectives can ever be reconciled: proponents of open access have argued that this can only be achieved by changing radically the way in which people qualify as solicitors. Opponents have counter-argued that a totally flexible approach to qualification would inevitably drive down standards, and that the Law Society must continue to regulate the process of qualification. Regrettably, this impasse has resulted in deadlock. The most likely outcome, although by no means certain, is that the LPC and training contract will ultimately become more flexible, but beyond that there will be no major structural changes to the current qualification régime.

In the meantime the Bar Council published a consultation paper in December 2006 as part of its own review of the BVC. Its initial conclusions are that, pending a more extensive review in 2008, there should be no change to the length or content of the BVC, but that it should become a more flexible course.

There are several ironies in the positions taken by the respective professional bodies. The Law Society started from the premise that its qualification régime is well-regarded, before moving on to propose that it should be dismantled. Conversely, the Bar Council acknowledged "the high levels of criticism of the BVC" before going on to propose that it should be retained in largely its current form. Yet from all of this, the outcomes are likely to be the same: retain the current structure, and make delivery more flexible.

Whatever happens in the short and longer terms, the acid test for any proposal on professional legal education should be whether it maintains and enhances the standards of those entering and progressing through the profession. Although flexibility and access are important objectives, they should not be at the expense of consistently rigorous entry requirements. High standards that protect the public interest and enhance the reputation of the profession, should remain the primary aim of the vocational courses.

What of the undergraduate stage of legal education? Indeed, is it primarily a "stage" towards qualification as a lawyer, or an end in itself? For many years, the professions and the academic bodies have fenced with each other over this contentious issue, with no clear outcome. Each side has its own arsenal of statistics. Less than half of law

graduates go on to the vocational courses; yet 92% of LLB entrants were considering doing so. So is the LLB an effective liberal education, or does it merely manage to put many of its graduates off law for life? A rhetorical question for now, I'm afraid, but amidst the controversies of the TFR the law degree managed to escape any major changes.

However, this may not last for long; indeed the two professional bodies might eventually find common cause in taking on the academic stage. If they do so, there are plenty of other professions that can provide precedents for greater interference. For example, both the architectural and engineering bodies are far more prescriptive about the content of their respective degrees than the lawyers. My prediction is that, like the eye of Sauron, attention will eventually focus on the law degree; that would be a battle worth waiting for.

PHIL KNOTT

Phil Knott is Professor of Professional Legal Education at Nottingham Law School and was a member of the Training Framework Review Group for two years (although it felt like longer).

ARTICLES

READINGS OF BEGGING: THE LEGAL RESPONSE TO BEGGING CONSIDERED IN ITS MODERN AND HISTORICAL CONTEXT

LORIE CHARLESWORTH*

In the rear view mirror,
Broad smile; I park when
He walks by. He backtracks

One I'm out: *Do you car
need washed? Lawn: Been
workin' all day, jus \$6 more*

*for rent. I got 2 kids
they ma left me with
Anyone ask I tell them all
'bout Curtis Mayhew
I won't lie
I been inside for*

*armed robber I was very
nervous I'm fine
now doin' right*

*jus' the landlord
won't wait kids don't
eat but I put a roof*

*over they heads one
room I'm not wild I'm
tryin' hard for the kids*

There's a moment our eyes meet
before I stop believing
the bone-thin man before me

who has no children, no room –
who will come back each week
now that I go inside

* Dr Lorie Charlesworth is Senior Lecturer in Common Law at the School of Law, Liverpool John Moores University. The writer would like to thank Ben Taylor of Glaisyers in Manchester for generously talking to me about his client Lenny Hockey; the staff at Nottingham Law School for their useful comments on a version of this paper presented at the Law School's Research Seminar Series, March 2005. Except where indicated, the views expressed in this article are the writer's own.

for the six dollars to hand him
off the porch, like a penance
for living on White Street.¹

INTRODUCTION

The expectation that law evolves in a linear, purposive way, from an imperfect to an improved state through a rational process of law reform is a deeply entrenched assumption. It is one that is often found in the introduction of standard law text books used to initiate first year law students into a certain understanding of the progressive nature of law and legal process, including legal developments and the reform of law.² Empirical support for this assumption is generally lacking and this article treats such a position as one to be questioned rather than as a self-evident starting point. To that end, it will examine the legal response to the act of begging in England and Wales, from both a modern and historical perspective, in order to address the nature of that response and to consider if a linear “improved” model of the development of the law can be sustained by an examination of historical evidence. The article will begin with the case study of a modern beggar and then discuss the history of begging in its various aspects.

Historically, there have been many connections between the relief of poverty in England and Wales and the treatment of vagrants, particularly those who “begged and wandered about”.³ However, in its origins, operation and legal character, all the law relating to the relief of the poor was common law based, eliding, after 1834, into administrative law, as the new poor law.⁴ The law of vagrancy was criminal law and thus the two could be clearly differentiated in their legal rights, duties and obligations. However, the two legal systems were administered by the same individuals, creating an association between poor relief and the criminal conviction of vagrancy, which continues to resonate in modern legal measures. As we shall see, aspects of this history continue in the modern institutional concentration upon homelessness as a major and remediable cause of begging. This has, paradoxically, been accompanied by the increased criminalising of the act of begging itself.

LENNY HOCKEY, A MODERN CASE STUDY

On 21 August 2003, a number of news media reported that Manchester County Court had imposed an injunction, an equitable remedy, against Leonard Hockey banning him from begging anywhere in Manchester city centre for two years.⁵ In his judgment, HHJ Holman was reported as stating that begging is: “. . . not seen as socially respectable and imposing an injunction was seen as the only way of preventing Leonard Hockey from begging.”⁶ This judge refused the city council’s request for an Anti-Social Behaviour Order (ASBO) as Hockey’s conduct was judged not to be violent or

¹ “CURTIS” taken from Cynthia Hogue, *The Never Wife* (Mammoth Books, 1999), at p 30.

² M Doupe and M Salter, “The Cheshire World View”, (2000) 11(1) *King’s College Law Journal* 49–77.

³ Lorie Charlesworth, “Why is it a Crime to be Poor?” (1999) 2/3 *The Liverpool Law Review*, 149–167.

⁴ The Poor Law Amendment Act, 4 & 5 Will 4 (1834).

⁵ Source <http://www.homeless.org.uk/db/20030822143036> (accessed 21 April 2006). The injunction was granted under s 222 of Local Government Act 1972.

⁶ *Ibid*.

intimidating, then required as a condition for issuing such an order. Hockey could have been charged under the Vagrancy Act 1824, sections 3 and 4, which are still in force, but the police did not do so on this occasion.⁷

The Independent, reporting on 22 August 2003, gave more detail of the Manchester case. Hockey was 56 years old and had been arrested for begging 97 times in the previous 12 months to fund his addiction to heroin and crack cocaine.⁸ The offence of begging under the 1824 Vagrancy Act has been amended by the Criminal Justice Act 1982 (“CJA 1982”), section 70 to the extent that idle and disorderly persons who are wandering abroad, or placing themselves in any public place, street *etc* to beg shall be fined under the Magistrates Court Act 1980, section 34 (3)(b) Schedule 4 para 1, by an amount not exceeding level 3 on the standard scale (£400).⁹ Under the terms of the CJA 1982, section 70, offences committed under the Vagrancy Act, sections 3 and 4, were no longer to be punished by imprisonment.¹⁰ Thus, sanctions under the criminal law were available to the prosecution. Hockey, so newspapers reported, intended to appeal. It appeared that other city councils, namely Bristol and Nottingham, had also attempted and failed to secure such injunctions. Newspaper reports indicated that Oxford and Westminster councils intended to try to obtain similar injunctions in the future. According to Hockey’s solicitor, Ben Taylor, the judge had granted permission to appeal and a hearing had been set at the Court of Appeal for 28 February 2004.

Taylor claimed that the police targeted Hockey with this action because he held the tenancy of a council flat in Salford, and thus had an address at which the injunction could be served.¹¹ The injunction was granted under the Local Government Act 1972, section 222,¹² a section generally (if rarely) used for Sunday trading offences. His lawyers argued at the trial that using section 222 to obtain an injunction was a deliberate attempt to circumvent parliament’s intention not to imprison beggars set out in the CJA 1982, section 70. Taylor reported that, at the time of his trial, Hockey was chronically ill with hepatitis C. He had spent the money given to him by the press for

⁷ This Act designated the criminality of the state of vagrancy, and divided the offenders into categories: idle and disorderly, rogues and vagabonds and incorrigible rogues. The punishment for begging was determined by the class to which the offender was assigned, the Act detailed this allocation process. The first group received one month’s imprisonment with hard labour, the second three months and the third, 12 months with whipping at the discretion of the justices in Quarter Session. The offences consisted in “That any person being able wholly or in part to maintain himself or herself, or his or her family, by work or other means, and wilfully refusing or neglecting to do so, by which refusal or neglect he or she, or any of his or her family shall have become chargeable – every person returning to or becoming chargeable in a parish whence he or she had been removed, unless producing a certificate from some other parish acknowledging settlement therein- every person wandering abroad, or placing him or herself in any public street or highway, etc to beg or gather alms, or causing or encouraging any child or children so to do – shall be deemed an *idle and disorderly person*. Every one again committing any of the above offences, after being convicted thereof- and every person found wandering abroad and lodging in any barn, outhouse or unoccupied building, or in the open air, not having any visible means of subsistence, and not giving a good account of himself or herself- every person wandering abroad and endeavouring by the exposure of wounds and deformities to obtain alms- every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions under any false or fraudulent pretence – every person running away and leaving his wife, or his or her child or children chargeable, or whereby she or they or any of them become chargeable- shall be deemed a *rogue or vagabond* . . . And every person having been so convicted, and who shall therein again offend, is to be deemed and dealt with as an *incorrigible rogue*.”

⁸ The author interviewed Ben Taylor, Lenny’s solicitor, in August 2004. Taylor stated that Lenny was a drug addict and that he also suffered from Hepatitis C.

⁹ As amended by Schedule 4 Part II para I, Criminal Justice Act 1991, which sets a maximum fine on summary conviction of £400 where the statute provides no express power to fine.

¹⁰ Section 70 of the Criminal Justice Act 1982 states that the courts shall not have the power to sentence an offender under ss 3 and 4 of the Vagrancy Act 1824 to imprisonment, but shall have the same power to fine him.

¹¹ *The Guardian*, 26 November 2003 reported that the flat was grubby and littered with discarded syringes and filthy mattresses. Ben Taylor visited Lenny at his flat and sat on his sofa. He says it was grubby, but that he saw no syringes. Ben liked Lenny, he says he was a “very nice gentle bloke, a quiet unprepossessing type of fellow, very sanguine about his drug problem”. He believed that Lenny chose the “least offensive criminal offence” to fund his addiction, and that the police were simply “cheesed off” with Lenny, who, they conceded, was not threatening or aggressive.

¹² A precursor to the Housing Act 1996. S152 of the Act is used to prosecute the offence of begging in a residential area. It was thus not applicable to Lenny’s begging in Manchester’s city centre.

interviews on drugs and failed a compulsory drug test earlier imposed by the courts under a Drug Test and Treating Order. He was sent to Strangeways prison in Manchester. It was reported that he died in prison custody in November 2003.¹³

Basil Curley, executive member for housing at Manchester City Council, expressed his commiserations to Hockey's friends and family following his death:

Our contact with him was obviously not the happiest of circumstance and his lifestyle would not have been conducive to good health. Help and support had been offered to him, but sometimes people prefer to follow their own path.¹⁴

Taylor noted that Manchester City Council, possibly because of the massive publicity surrounding this case, did not use section 222 against beggars again.¹⁵ However it is using ASBOs under powers granted under the Anti-Social Behaviour Act 2003. When Hockey was taken to court the definition of such behaviour was very specific; now the prosecution simply must demonstrate that there has been "anti-social behaviour", a much more subjective test.

A "MODERN" APPROACH TO BEGGING

One legal aspect of Hockey's case was the use of an injunction to allow a possible prison term for re-offending, a sanction specifically excluded by the criminal law for begging (see above). Breach of an injunction allows the court a much broader range of sentencing options for contempt of court than those allowed under the criminal law. These include a conditional discharge or a fine, a suspended prison sentence or up to two years' imprisonment. Such sanctions resemble the punishments of the past rather than the modern "improved" approach that can, for example, be found in local authority responses to what is generally accepted to be an increasing social problem.

The control of begging remains the responsibility (and was also historically so) of both local authorities and the government. Liverpool City Council, as part of its City Safe project, has supported an anti-begging campaign with posters and leaflets advising the public not to give money to beggars. The campaign publicly links begging with homelessness: "FACT", one leaflet says, "By giving money to beggars YOU don't help them but may be trapping them on the streets . . ." It continues, "To help them make the change, keep your change." In order to support the argument, the pamphlet classifies a series of statements as "myth" and "fact". "Myth: People who beg are homeless. Fact: Not true. Most beggars do have accommodation." The leaflet does not explain how giving to beggars traps these non-homeless people on the streets, but it does attempt to engage the citizens in confronting the problem of beggars.

Liverpool City Council has, in working with the police, Probation Service, housing associations and many other groups, attempted to make the city a safer, pleasanter place. The posters adopt both a moral and a social welfare position; that is, that giving money to people who beg is wrong and, moreover, that it is not in the beggars' own interests. The campaign argues that beggars are deluded individuals who could be

¹³ This information is taken from *The Guardian*, 26 November 2003. As Lenny was arrested on 11 September it seems unlikely that the story reported in 13 September's *Guardian* that he was begging in London was correct. Ben Taylor explained that, once in Strangeways, Lenny suffered severe drug withdrawal symptoms and that as no medical support was given to him, he went "cold turkey". He starved himself, and already not robust, was taken to North Manchester General Hospital where he died of malnutrition.

¹⁴ *The Guardian*, 26 November 2003.

¹⁵ Taylor provided a postscript to Lenny's story. Lenny had not seen his daughter for 20 years. Because of the publicity surrounding the case she contacted Taylor and thus she met her father two or three days before he died. Taylor said: "I enjoyed him and his case. I went to his funeral. There were just two of us, his daughter and I".

saved if they are not given money. Denying them money would, it is argued, force beggars to behave responsibly. Specifically, they would have to seek appropriate help and conform to social norms.¹⁶ Thus, the posters state quite clearly that giving money keeps beggars on the streets and that is why they beg. This link between homelessness and begging remains a theme within institutional responses to begging and echoes a much earlier link between begging and wandering about (see below).

The government has many initiatives concerned with poverty. Its Social Exclusion Unit's ("SEU") interests include rough sleeping. The SEU reported in 1998, finding that 1,850 people slept rough every night and that 10,000 slept rough over the course of a year. It set a target and created a Rough Sleeping Unit aiming to reduce the number by two-thirds by 2002. In March 2002, a Homelessness Directorate was created as part of the Office of the Deputy Prime Minister.¹⁷

The SEU's report indicates that most rough sleepers are male, most are in London, and the single most common reason given for the first episode of rough sleeping is relationship breakdown. A disproportionate number of rough sleepers have experience of some kind of institutional life; around half of rough sleepers have been in prison or remand at some time; some 30–50 *per cent* suffer from mental health problems.¹⁸ The report did not indicate how these events occurred or evaluate the personal responsibility of those surveyed for their own situation.

In March 2003, the then Home Secretary, David Blunkett, outlined his proposals for tackling anti-social behaviour in a White Paper, *Respect and Responsibility – Taking a Stand Against Anti-Social Behaviour*, intended to form the basis of future legislation. The White Paper proposals to tackle begging include making the current offence recordable under the National Police Records (Recordable Offences) Regulations 2000. These came into force on 1 December 2003, ensuring that begging convictions are now recorded, once again, as a criminal record.¹⁹ Consequently, under an amendment to the Criminal Justice Act 2003, since 5 April 2004, police officers are authorised to take fingerprints and DNA samples from those arrested for begging, on the basis of its being a recordable offence.²⁰ New powers currently proposed for inclusion in a future Criminal Justice Bill will enable the courts to impose a community sentence, including drug treatment, for persistent beggars who have three or more convictions.

Earlier, in 2002, the BBC News ran a story concerning Ray Mallon, a former Cleveland police inspector, elected mayor of Middlesbrough, who pledged to rid Middlesbrough of street beggars in 12 months. He claimed to have cut the numbers from 24 to four since becoming mayor, stating that: "[o]ur beggars are not homeless, they are criminals who affect retail in the town and affect the economy by putting people off coming here".²¹ His words encapsulate the government's position on beggars: that they are criminals; that they affect commerce and only when homeless do

¹⁶ Note that one homeless unit, the ARCH project in my home town of Birkenhead, must evict resident drug users if any drug kit or gear is found in their rooms, which are searched regularly.

¹⁷ This comprised the Rough Sleepers Unit, the Bed and Breakfast Unit and a new team working with local authorities.

¹⁸ *Rough Sleeping Report by the Special Exclusion Unit*. Presented to Parliament by the Prime Minister by Command of Her Majesty July 1998. Cmnd 4008.

¹⁹ The National Police Records (Recordable Offences) (Amendment) Regulations 2003/2832 reg 2 (in force 1 December 2003) amended the schedule in the 2000 Regulations to make convictions under ss 3 and 4 of the Vagrancy Act 1824 (begging /persistent begging) recordable offences. (The enabling legislation is the Police and Criminal Evidence Act 1984, c60, Pt III s 27(4)).

²⁰ The Criminal Justice Act 2003, c 44 Pt 1 s 10 introduced a new section (2A) after s 2, to allow non-intimate samples to be taken (other circumstances being met) to those in custody for recordable offences (2B). Section 9 set out the same conditions for fingerprinting without consent. Formerly, the Criminal Justice Act 2000 allowed samples and fingerprints to be taken without consent for trigger offences and in certain specified geographical areas. The Criminal Justice and Court Services Act 2000 (Amendment Order) SI 2004/1892 inserted the provision that offences under ss 3 and 4 of the Vagrancy Act 1824 were trigger provisions for testing people in police detention. This came into force on 27 July 2004.

²¹ <http://news.bbc.co.uk/1/hi/england/tees/3077567.stm> (accessed 21 April 2006).

they require any support. As we shall see below, this is perhaps the only positive ideological shift in governmental approaches to begging since the 14th century. Homeless beggars are no longer despicable, rather they are victims to be rescued by a welfare-focused society, but all others have reverted to their earlier negative legal status.

It is not an extreme position to have negative views about beggars. Literature, a rich historical source of public opinion, contains many stories about the deceit and cunning of beggars. These range from Chaucer's cynical view of the mendicant friars (written in the 14th century),²² to Sir Arthur Conan Doyle's story about a rich beggar written in the 1890s. Sherlock Holmes revealed the true nature of the mysterious double life of Neville St Clair, who had discovered, when working undercover as a reporter for an evening paper, that he could earn much more money begging than in a respectable occupation, so eventually he had secretly made that his career.²³ This story has a real counterpart however, in the life of Hockey, whose income through begging appeared from newspaper reports to be rather higher than the national average wage.

Another source of information about the nature of beggars can be found in the reminiscences of magistrates. For example, Eric Crowther JP, writing in 1994 under the heading *Beggaring the Question*, mused upon beggars and his personal and professional experiences.²⁴ He noted the oddity of the 1982 reforms that removed custodial sentences from begging convictions but increased fines from a maximum of £5 to, he wrote, a maximum of £1,000.²⁵ His views on the background of those who beg mirrored some of those expressed in David Blunkett's White Paper produced by the Home Office:

I do agree that there are beggars and beggars and commentators should not lump them all together . . . the most pathetic are the mentally disordered who have been turned out of hospitals for care in a community which does not care. [The White Paper specifically refuted this charge]. Some elderly alcoholics appear unattractive but sometimes one can trace their downfall to a bereavement or a broken relationship in life . . . Drug addicts are a more serious problem, because they need so much "bread" to feed their death-dealing addiction. And some are just spongers, determined to "con" the more good-natured members of society.²⁶

Crowther detailed his own appearance on *Kilroy*, a television programme, where a number of beggars bragged about the good living they made. Crowther told of offenders appearing before him who refused to co-operate with the Probation Service in finding work because they could earn more begging; of the convicted beggar who could collect £1,200 from his building society to pay his accumulated fines.

On 1 March 2004 it was reported that Westminster City Council had, in a joint venture with the Metropolitan Police during the previous weekend, arrested 27 people for begging.²⁷ "*Operation Loose Change*", described as an audit of homelessness in the West End in London, used closed circuit cameras to identify aggressive beggars, characterised in the report as those who begged in Covent Garden, Leicester Square

²² Geoffrey Chaucer, *The Canterbury Tales*, (Penguin Popular Classics, 1996), at p 13. In the *Prologue* Chaucer portrayed a friar who uses flattery and charm to obtain alms even from the poor. "He was the beste beggere in his hoys, . . . For though a wydwe hadde noht a sho, So plesaunt was his 'In principio', Yet wolde he have a ferthyng, er he wente." (251-5).

²³ Sir Arthur Conan Doyle, "The Man with the Twisted Lip", from *The Adventures of Sherlock Holmes*. Republished in *Sherlock Holmes, Short Stories*, (Jonathon Cape, 22nd impression, 1980), at p 128.

²⁴ Eric Crowther, "Beggaring the Question", (1994) 158(29) *Justice of the Peace and Local Government Law* 455-457.

²⁵ A mis-statement of the law, see earlier.

²⁶ Crowther, *op cit*, at p 455.

²⁷ *The Independent*, 1 March 2004.

and Piccadilly Circus.²⁸ The alleged offenders were then arrested following tip-offs from council staff such as street cleaners and traffic wardens. Those arrested were fingerprinted and had DNA samples taken before being released on bail. It was reported that Crisis, the homelessness charity, stated that the council's action would only serve to criminalise people:

The vast majority of people who beg are homeless and all are vulnerable. What they desperately need is support to deal with their problems and find a route back into society . . . embarking on costly crackdowns is a waste of public money and also grossly demeaning to homeless people.²⁹

Crisis' response thus contains the modern stereotypical defence of begging, that of the homeless needy.

Kit Malthouse, deputy leader of Westminster City Council, stated that the operation would act as a general deterrent against begging, gather data on those people for whom begging was a symptom of other problems and identify those persistent beggars who do it for personal gain. He is quoted as saying that: “[t]he idea that everyone begging is down on their luck is fantasy”.³⁰ Malthouse attacked charities that run soup kitchens because: “they encouraged people to stay on the streets”. This story, expressing very differing approaches to begging, epitomises the two opposing perceptions of beggars, as homeless victims or criminal nuisances. Meanwhile, London Underground Limited (“LUL”) had introduced a scheme of licensed and police-vetted buskers: beggars with talent.³¹ After a 16-week trial LUL decided to make the scheme, comprising 318 newly licensed buskers, permanent. Apparently buskers' takings went up, violence involving buskers and staff fell from 33 incidents in eight months to three in the three months of the trial. There are, it was reported, similar schemes in New York, Paris and Tyne and Wear (the latter for seven years). It was further reported that Glasgow and Oxford were considering officially sanctioned busking sites.

A LEGAL HISTORY OF BEGGING

It is an a-historical methodology to read the present into the past, but any reading of the statutes against begging must acknowledge the loathing with which many of those who begged were perceived.³² Vagrancy was a matter for legislation from the earliest times. After the appalling devastation caused to the population by the Black Death in the mid-14th century, the localised static social structure of society underwent upheaval as survivors moved around for many reasons, including, for the poorest, a new money value upon their labour in a decimated population. For others, no doubt, the loosened bonds of society allowed licence. Palmer has considered the effects of the plague upon

²⁸ It is interesting that “aggressive” appears to have been defined by place. One wonders how successful an aggressive beggar would be. The author's personal experience has been that charm in a beggar elicits a positive response. As Langland wrote, “a man who is forced to find food and money from others, is always softly spoken and obliging in his manner”, William Langland, *Piers the Ploughman*, (Penguin Books, 1978), at p 173.

²⁹ *The Independent*, 1 March 2004.

³⁰ *Ibid.*

³¹ *The Independent*, 6 September 2003.

³² “. . . many valiant beggars so long as they may live by begging do refuse to labour”, from the Ordinance of Labourers, 1349; “. . . that whereas by reason of some Defect in the Law, poor People are not restrained from going about from one Parish to another, and do endeavour to settle themselves in those Parishes where there is the best Stock, the largest Commons or Waste to build cottages, and the most Woods for them to burn and destroy, and when they have consumed it, then to another Parish, and at last become Rogues and Vagabonds”, Preamble to the Act for the Better Relief of the Poor, 13 & 14 Car 1 c 12, 1662.

the development of domestic law in detail.³³ One such was the various attempts that were made to stabilise and control a wandering population. The Ordinance of Labourers 1349 ordered that stocks were to be built in every town for the punishment of runaway labourers; under the Statute of Labourers 1388 the poor were ordered to repair to their birthplace in order to be maintained there. A statute of 1495 directed that vagabonds and beggars were to be set in those stocks for three days and three nights with a diet of bread and water, and for six days for a second offence. Stocks and whipping places were placed in all the parishes of England where they were maintained under statutory authority until well into the 19th century.

Those who begged could be designated as vagrants in a process overseen by the justices of the peace under the authority of an act of 1361. The very poor thus were confronted by the possibility of whipping, branding, banishment or even at one point hanging for begging, and yet still they begged. Under the statutes of 1536 and 1547 vagrancy was designated a felony for repeat offences: some were hanged upon conviction; others severely whipped and sent to gaol.³⁴ These numbers were limited only by the shortage of prisons. Vagrants could be sent for compulsory labour in the bridewells,³⁵ impressed into military service or exiled under an act of 1597.³⁶ During the 16th century there were no obvious distinctions between the helplessly destitute and those who were deemed to be wilfully so, except the criminal conviction of the latter for vagrancy.³⁷ Nolan, in *A Treatise of the Laws for the Relief and Settlement of the Poor* first published in 1803, echoed that view, although he differentiated between those who begged but were able to work (vagrants), and those who begged because they were unable to maintain themselves through age or bodily infirmity.³⁸ His view of the earlier statutes was that they made:

... in other respects a wide and proper distinction between rogues and vagabonds, who have recourse to begging in the love of idleness and vice; and beggars who are compelled by decrepitude to glean the necessaries of life from the pity of their fellow creatures ...³⁹

Definitions of vagrancy were initially imprecise: the act of 1598 described vagrants as: "... all wandering persons and common labourers, being persons able bodied found loitering and refusing to work ... not having living otherwise to maintain themselves".

Contemporary justices' manuals indicated that members of the bench were expected to be able to make a judgment of such individuals through their own experience.⁴⁰ There was a presumption that those who were not part of the respectable poor, who gave no good account of themselves and who looked like vagrants, were vagrants.⁴¹

³³ Robert C Palmer, *English Law in the Age of the Black Death, 1348-1381. A Transformation of Governance and Law* (The University of North Carolina Press, 1993).

³⁴ Imprisonment was provided as a penalty under the statutes of 1383, 1388, 1576 and 1597.

³⁵ In 1553, Edward VI conveyed an old decayed palace, the Bridewell, to the City of London for the "safekeeping, punishing and setting to work of idle poor and vagabonds". Other towns followed suit, and the Act of 1576 established houses of correction in all towns: Robert Jutte, *Poverty and Deviance in Early Modern Europe* (Cambridge University Press, 1994), at pp 69-170.

³⁶ After 1608 vagrants could be exiled to Newfoundland, the East and West Indies, France, Germany, Spain and the Low Countries. Most were sent to the American Colonies where they were indentured into service.

³⁷ Ivy Pinchbeck and Margaret Hewitt, *Children in English Society, Vol I*, (Routledge and Keegan Paul, 1969), at pp 94-8.

³⁸ Michael Nolan, *A Treatise of the Laws for the Relief and Settlement of the Poor*, 2 vols, 2nd ed 1805 (Garland Publishing, reprint 1978), vol I, at p 135.

³⁹ Nolan, *op cit*, at p 137.

⁴⁰ For example, see Michael Dalton, *The Country Justice* (Henry Lintot, (1742 ed), at p 169.

⁴¹ Only a small minority of poor migrants were treated as vagrants, whipped and sent back to their place of birth or last residence with a vagrant's passport: Paul Slack, *Poverty and Policy in Tudor and Stuart England* (Longmans, 1988), at pp 91-2. Eden recognised the difficulty. He stated that the vagrancy offences extended under the statute 23 Geo III c88, "are of a very dubious nature, and that it must frequently require nice legal acumen to distinguish whether a person incurs any, and what, penalty, under the vagrant laws": Sir Frederick Morton Eden, *The State of the Poor*, published 1797, ed and abridged A G L Rogers, (Routledge and Sons Ltd., republished 1928), vol I, at p 55.

The subtext to this treatment was the belief that all vagrants were also thieves and rogues who did not deserve, and were therefore not entitled to, the parochial protection afforded to the rest of the population under the laws of settlement and removal: that is a personal right to poor relief.⁴²

There is some evidence that, after the Act for the Relief of the Poor 1601,⁴³ officials confronted with paupers who were entitled to relief from either their birthplace or their last place of residence used the criminal jurisdiction to prosecute paupers for vagrancy.⁴⁴ This enabled officials to deny certain poor people, now legally defined as vagrants, the right to relief, therefore giving the authorities the legal right to return them to their birthplace. The Act for the Better Relief of the Poor 1662 provided a safety net for that marginal group,⁴⁵ and the justices increasingly required parish officials to accept responsibility for the relief of those who formerly had been designated vagrants.⁴⁶ Succeeding Vagrancy Acts ran until the Vagrancy Act 1824, part of the contemporary codification, rationalisation and reform of the criminal law. That Act was also a response to concerns about the increase in begging, both in London and elsewhere, recorded in the report of the Select Committee on Mendicity in the Metropolis of 1815–16. At the same time, in an opinion still echoed today, there was concern expressed that destitution should not go unrelieved, tempered by a view that:

... “indiscriminate alms-giving” – charity with more heart than head in it – was the real root of the begging evil. If the public were confident that some organised aid were readily available to the genuine unfortunate, impulsive hand-outs would cease and professional beggars would wither away.⁴⁷

Just as Liverpool City Council, in partnership with many local organisations, works to house and support the homeless, so in the early 19th century, voluntary Mendicity Societies, the earliest established in Bath in 1805,⁴⁸ organised relief to be given to deserving beggars in a structured and disciplined way. Hockey, at 56, old enough to know better, and as a drug addict hardly acceptable to the good burghers of Manchester, would have recognised the operation of the private constables of the societies as they patrolled the streets, giving aid tickets to the deserving and arresting “fakes”. Sometimes, this was a difficult operation, as not only did beggars resist arrest but occasionally they were assisted by sympathetic passers-by.

Legally, a vagrant is a person convicted of the various offences listed under the Vagrancy Act 1824. By the 19th century, the criminal conviction of a particular type of pauper emphasised the legal division in the status of paupers: between the respectable pauper who could seek aid, and the pauper labelled “vagrant”, who was an individual to be punished. The stigma of a conviction could ruin decent people, as illustrated by Charles Dickens in his Christmas story “The Chimes”.⁴⁹ The hero, Will Ferris, articulated the despair felt by the arbitrary processes by which a pauper could

⁴² For a short explanation of the law of settlement and removals see Lorie Charlesworth, “A Brief History Of English Poor Law”, (1999) 2 *Journal of Social Security Law*, 79–92. A fuller analysis can be found in L R Charlesworth, *Salutary and Humane Law, A Legal History of the Law of Settlement and Removals, c 1795–1865*, unpublished Ph D thesis (University of Manchester, 1998).

⁴³ Eliz, c 2. (1601).

⁴⁴ A L Beier, *Masterless Men. The Vagrancy Problem in England 1560–1640* (Methuen, 1985), at p 11.

⁴⁵ 13 & 14 Car II c12, *op cit*.

⁴⁶ This may have been Nolan’s opinion as to the meaning of the Act, but all the practitioners’ texts and the case law as well as the legal processes themselves differentiated between vagrant and removable pauper. A better reading of Nolan is that such arrivals had no more status than vagrants, not that they were to be punished as such: Nolan, *op cit*, at p 46.

⁴⁷ Lionel Rose, “*Rogues and Vagabonds*”. *Vagrant Underworld in Britain 1815–1986*. (Routledge, 1988), at p 17.

⁴⁸ *Ibid*.

⁴⁹ Charles Dickens, *Christmas Books*, (Oxford World’s Classics Edition, 1988), at pp 174–5.

be designated a vagrant. In the *Poor Law Report* of 1834, the term “vagrant” appeared in its legal sense; by the 1840s the word vagrant appeared in parliamentary reports to include all the casual poor. Eventually, all workhouses had to build specific, segregated accommodation for the casual poor, those passing through the area. Those poor were expected to perform some type of work in return for a night’s lodgings. Refusal to perform a task could lead to a conviction for vagrancy and a prison sentence. Some of these wards (spikes) remained in operation for homeless and destitute people until comparatively recently.⁵⁰

FROM BEGGAR TO VAGRANT

It appears that the legal response to begging has always contained punitive, negative measures linked to control, with an assumption that people should stay put. That was the message of the ordinance of 1349, of the Vagrancy Act 1824, still partly in force, and of the “myth and fact” section of Liverpool City Council’s leaflet. This link, between moving about (homelessness) and begging either as unacceptable, (in early modern society) or unnecessary, (today) appears strong. However, the history of begging contains another strand.

Not all begging was considered bad, and giving to beggars was once encouraged. Charitable giving was an important aspect of social and religious duty in pre-Reformation England. Poverty itself had virtue, thus, in the 14th century, William Langland wrote:

And much more boldly may a man claim that bliss (of the Kingdom of Heaven) who, though he might have all he could wish for on earth . . . yet for the love of God abandons all and lives as a beggar.⁵¹

Before the Reformation, religious houses had provided much charitable support for the poor. The full extent of this has only recently been revealed.⁵² There were also separate hospitals for the sick and frail. These were for the most part founded during the 12th and 13th centuries during a period of population growth. Many hospitals later fell into decline but it has been estimated that more than 400 still existed in the 1530s.⁵³ Some hospitals survived the Reformation to become almshouses. Hospitals were originally founded not only for the sick but also for the housing and care of the poor, and for travellers (often pilgrims) who needed temporary shelter. Their very existence demonstrated the value society placed upon supporting the poor and needy. For example, the hospital of St Cross at Winchester, founded in 1136, still in existence today with the original church and sacristy intact, was established at a time of great dearth when the Anglo-Saxon Chronicle recorded that “some, who had been great men, were driven to beggary”.⁵⁴

⁵⁰ The Streatham Spike can be seen, sometime during 1968, at the beginning of Antonioni’s film *Blow Up*, filmed early in the morning with the inmates [played by actors] leaving.

⁵¹ Langland, *op cit*, at p 174.

⁵² Neil S Rushton, “Monastic charitable provision in Tudor England”, (2001) 16 *Continuity and Change*, 1 at pp 9–94. Examples of that provision at their dissolution in 1535 include, for example, Cockersand, (an independent Premonstratensian house) originally founded as an hospital, which gave 8% of its gross income in doles to the poor, and also kept 15 poor men in the house. Whalley, a Cistercian foundation, spent £116 18s 10d, 20% of its gross annual income of £551 4s 6d, in alms. This consisted of doles at Christmas and Maundy Thursday, and the maintenance of 24 poor men in the house. Whalley was exceptional but there is evidence that monastic foundations in Lancashire were more generous in supporting all classes of poor than those in the south: Christopher Haigh, *The Last Days of the Lancashire Monasteries and the Pilgrimage of Grace*, (vol XVII Third series, Chetham Society, 1969), at pp 39, 53–4.

⁵³ Slack, *op cit*, at p 15.

⁵⁴ *Ibid*, at p 34.

The effect of the dissolution of the monasteries upon these charitable foundations was dramatic.⁵⁵ For 30 years few new foundations were established and many paupers were evicted from those in existence. A contemporary complained of the loss of monastic charity in 1546 that:

the pore impotent creatures (had) some relefe of theyr scrappes, where as nowe they have nothyng. Then they had hospitals, and almshouses to be lodged in, but nowe they lye and starve in the stretes.⁵⁶

The full extent of this loss on the size of parochial support in this period is only beginning to be revealed, but the surviving records indicate much suffering.⁵⁷ Bury St Edmunds lost five medieval hospitals. The commissioners of Henry VIII closed many establishments, allegedly for fostering both superstition and vagrancy, and these closures occurred as the new punitive laws against vagrancy were enacted. One such closure was the Savoy Palace; restored as a hospital at the order of Henry VII in 1509, it was finally suppressed at the order of Edward VI for it had become “little more than a dosshouse for vagabonds and disreputable women”.⁵⁸

The dire effects upon the lives of the truly poor were considerable but Protestants did not turn their hearts against helping the poor. Sir Thomas More in his *Utopia* envisaged a pension for the aged, and the Protestants, Latimer and Ridley, advocated the use of the wealth of the Church for the benefit of the poor. Almshouses began to be built again in the middle of the 16th century but now in small towns and villages as well as in large towns.⁵⁹ Charities were given gifts of land in perpetuity to aid the poor. Many rural parishes held church-stocks, sometimes called town-stocks, in the form of a few cattle or sheep, cottages, fields or money that could be lent or given to the use of the poor. Later, further charitable gifts and doles of bread and clothing were granted in both towns and villages.⁶⁰ There is therefore evidence of a continuing tradition of ecclesiastical and parochial support in a structure that operated throughout 16th century England.

Parishes had a duty to maintain their settled poor and one method of achieving this was to license the destitute settled poor to beg within their parish boundaries, to supplement whatever other income they may have had.⁶¹ Thus, both giving to the poor and the act of begging were normalised within local communities. Examples of both these aspects, some of many to be found in contemporary diaries, can be found in Dorothy Wordsworth’s *Lakeland Journals*:

May 14th 1800. At Rydale, a woman of the village, stout and well dressed, begged a half-penny; she had never she said done it before, but these hard times. June 9th 1800. A poor girl came to beg, who had no work at home, and was going in search of it to Kendal. She slept in Mr Benson’s [?], and went off after breakfast in the morning with 7d and a letter to the Mayor of Kendal.

November 13th. A poor woman from Hawkeshead begged, a widow of Grasmere.⁶²

This section suggests that historically the treatment of begging has been extremely nuanced, and that begging has not been viewed exclusively as a social evil. Thus giving

⁵⁵ *Ibid*, at p 81.

⁵⁶ *Ibid*, at p 82.

⁵⁷ *Ibid*, at p 115.

⁵⁸ Brian Bailey, *Almshouses*, (Robert Hale, 1988), at p 5.

⁵⁹ Slack, *op cit*, at p 90.

⁶⁰ *Ibid*, at p 114.

⁶¹ *Ibid*, at pp 118, 123, 126.

⁶² Dorothy Wordsworth *Diaries*, reprint illustrated edition, (HarperCollins Publishers Ltd, 1991, reprinted 1994) at pp 24–30.

to beggars is also a significant part of our cultural heritage and may still be echoed in the more positive approach by charities and local authorities to the homeless beggar.

CONCLUSION

This article has considered, *via* a study of the history of the legal response to begging that, not only has begging sometimes been regarded as a positive act, but that no consistent policy has emerged towards the act of begging. Rather, an historical study shows the existence of multiple, conflicting and perhaps legally incompatible practices. In today's pluralist society, where there is still no consensus about the simplest aspect of social policy, begging continues to attract very divergent, even contradictory, responses in both the political and private sphere. Such conflicting perspectives must influence both any individual's response to a request for aid from a beggar, and the ways in which both central government and local authorities deal immediately with the presence of beggars in our midst.

Thus, for example, Liverpool City Council has adopted much of the government's approach and language in dealing with begging. The council has set up support networks for housing, benefits, drug counselling and medical care. However, the beggars remain. Elsewhere, Camden and Islington Mental and Social Care Trust has set up a team called "Focus" that sends community psychiatric nurses amongst the rough sleepers to give the necessary care and support so many of them need. They have helped some to secure medical treatment, found housing for some and keep an eye on others who are vulnerable but have rejected any aid offered. This is a civilised solution, but it is one that concentrates upon the individual beggar and his or her personal needs. Hockey's story, used as a case study for this article, might almost be viewed as a mirror image of that approach. It can be characterised as a demonstration of the consequences of a social collectivism aimed at protecting the majority from the type of "anti-social influence" he personified.⁶³ He might, perhaps, have lived a little longer, in spite of his poor health caused by his addiction to heroin, had he been left to the mercy of the citizens, rather than the authorities, of Manchester. The legal policy that removed him from Kendalls' car park has, in its turn, been superseded by the extensive use of ASBOs, accompanied by a more punitive vagrancy law. It could be concluded, in the context of the historical analysis above, that neither policy is evidence of improved law concerning the treatment of begging, or of a rational linear, purposive evolution within that law.

⁶³ See, for example, Arthur Greenwood, MP, "I take the view that there is a moral responsibility on the community to ensure that its members are fitted to undertake the heavy responsibilities of citizenship and parenthood . . . through collective effort on the part of the nation to create an inspiring social environment for itself, to protect its members from anti-social influences". Foreword to J J Clarke, *Social Administration including the Poor Laws* (Pitman, 1935), at p viii.

CASE AND COMMENT

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

FAIRNESS AND PROPORTIONALITY IN DEFAMATION PROCEEDINGS

Steel and Morris v United Kingdom [2005] EMLR 15 (European Court of Human Rights)

(Pellonpää, Bratza, Strážnická, Casadevall, Maruste, Pavlovschi, Garlicki JJ)

INTRODUCTION

What are the requirements of fairness and proportionality when a multinational corporation brings defamation proceedings against two low-income activists who had campaigned against its policies? This was the question with which the European Court of Human Rights dealt in *Steel and Morris v UK*.¹

THE FACTS

The applicants were members of a small campaign group which in the mid-1980s had begun a campaign against McDonald's. They were involved in the distribution of a leaflet which alleged that the company was exploiting the resources of developing countries; destroying the environment; producing food which causes health problems; using misleading advertising methods to attract children; applying cruel practices in the slaughter of animals and providing sub-standard working conditions for their staff. McDonald's issued defamation proceedings against the two applicants. The defendants' application for legal aid was refused, since defamation proceedings fell outside the scope of the Legal Aid Act 1988. When they complained to the European Commission on Human Rights of a violation of article 6(1), their application was declared inadmissible.² Consequently, they represented themselves throughout the proceedings, with some sporadic help from volunteer solicitors and barristers, while £40,000 was raised to help them cover expenses such as payment for transcripts and photocopying. The proceedings in the High Court involved 40,000 pages of documentary evidence and 130 witnesses, and lasted for two and a half years, with 313 days spent in court, while before the trial there were 28 interlocutory hearings. Bell J awarded the claimants £60,000 (reduced by the Court of Appeal, after a 23-day hearing, to £40,000).

¹ [2005] EMLR 15 (hereinafter: *Steel and Morris*).

² *Steel and Morris v UK* (1994) 18 EHRR CD 172.

The applicants complained of a violation of articles 6(1) and 10 of the Convention. They argued that the denial of legal aid in such a complex case, when contrasted with the vast resources available to McDonald's, deprived them of their right to a fair trial. They further suggested that the lack of legal aid coupled with the requirement to prove the truth of every allegation and the amount of damages awarded to the claimants violated their right to freedom of expression, because it stifled the open debate on matters of public interest.

THE UNAVAILABILITY OF LEGAL AID

A unanimous Court found in favour of the applicants. With regard to the article 6(1) complaint, it reiterated its earlier position that there is no obligation for the state to ensure total equality of arms between the parties through public funds. However, a litigant must not be denied the opportunity to present his or her case effectively before the court: whether this requires the provision of legal aid depends on what is at stake for the applicant, the complexity of the proceedings and the ability of the applicant to represent him- or herself. In the present case, the applicants were trying to defend their freedom of speech, an important right guaranteed by the Convention itself, and the financial consequences they faced were significant, given their very low incomes. The Court contrasted the applicants' position with the extensive legal representation enjoyed by McDonald's. Although the applicants had availed themselves of some *pro bono* legal assistance and were shown considerable latitude by the national courts with regard to the conduct of the proceedings, the Court concluded that in a case of this scale and complexity this was not enough to satisfy the requirements of article 6(1).

The present judgment does not disturb the states' right to exclude, *prima facie*, certain categories of civil cases from a legal aid scheme. However, such a scheme should allow the relevant authority to take into account the particular circumstances of each dispute, even if it is, in principle, excluded from its scope, and grant legal aid if it is necessary for a fair trial. Thus, cases such as *W v UK*³ and *Munro v UK*,⁴ which seem to have implied that the complete unavailability of legal aid for defamation proceedings is compatible with the Convention, should now be read in the light of *Steel and Morris*, which calls for a flexible, case-by-case approach. Similarly, the Commission's decision to declare inadmissible the first application by Ms Steel and Mr Morris with regard to the lack of legal aid is now of very limited importance, given that it was taken more than a year before the start of the trial at the High Court, when, as the Court observed, it was not possible to anticipate "the length, scale and complexity of the proceedings".⁵ It is, thus, clear that the question of when legal aid should be granted is sensitive to the nature of each dispute, and blanket exclusions will violate the Convention.

The Access to Justice Act 1999 brought a fundamental change in the public funding of civil litigation with the creation of the Community Legal Service system.⁶ Under the old system, the litigants who qualified could, to a great extent, choose their legal representatives and received legal assistance without upper limits and regardless of the cost of their case in relation to the available resources.⁷ On the contrary, under the

³ App no 10871/84, 10 July 1986.

⁴ (1998) 10 EHRR CD 516.

⁵ *Steel and Morris* at para 70.

⁶ See generally, *Cook on Costs* (Butterworths, 2004) at p 465.

⁷ The defects of the old legal aid system are discussed in A Zuckerman, "Reform of Civil Procedure: Rationing Procedure rather than Access to Justice" (1995) 22 *Journal of Law and Society* 155.

Community Legal Service scheme, a more cost-conscious approach was adopted: the Legal Services Commission must fund individual civil cases in a way that is proportionate to the overall available resources and through law firms with which it enters into contracts for the provision of services, so as to have a measure of control over the costs. Moreover, the Act lists in Schedule 2 various categories of proceedings, including defamation and malicious falsehood, which fall outside the scope of public funding. However, this is not an absolute exclusion: section 6(8) provides that the Lord Chancellor (now the Secretary of State) may require the Legal Services Commission to fund the provision of any of the excluded services or to authorise the provision of such services upon request by the Commission.

It is submitted that, following *Steel and Morris*, the Secretary of State and the Commission, when dealing with an application to fund proceedings listed in Schedule 2, should apply an “effectiveness test”, *ie* whether the applicant will be actually able to present his or her case effectively before the court if Legal Services Commission funding is denied, taking into account what is at stake for him or her, the complexity of the case, and his/her ability to handle the proceedings herself. This approach is in line with the overriding objective imposed on the court of dealing “with cases justly” (CPR r 1.1(1)), which includes, “so far as is practicable ensuring that the parties are on an equal footing” (CPR r 1.1(2)(a)). In fact, the disparity of economic resources was one of the main concerns of Lord Woolf, who explained that the high cost of litigation can undermine the principle of equality of arms between the parties.⁸

It is clear that the three criteria applied by the Court to assess the ability of the applicants to present their case effectively (nature of the right at stake, complexity of the proceedings, capacity to represent oneself at court) do not constitute an exhaustive list.⁹ However, the Court did not clarify whether they are cumulative or alternative and what relative weight each of them carries. In *Steel and Morris* the applicants satisfied all three requirements: they were defending an important right guaranteed by the Convention itself; if they lost they were facing serious financial consequences; the proceedings were extremely complex and they lacked the skill to handle a case of this scale without proper legal representation. Yet, the Court’s emphasis is undoubtedly on the complex and very demanding nature of the judicial proceedings, which exerted an overall influence over the assessment of the applicants’ ability to present their case effectively. It is suggested that, given the importance of the article 6 rights for the Convention mechanism and for contemporary systems of civil justice in general, a liberal approach to the question of effective representation is required: if the Legal Services Commission is satisfied that a litigant clearly meets even one of the three criteria, then funding should be granted.

In addition to legal aid, conditional fee agreements (CFA) may now be used to provide legal services for poorer litigants.¹⁰ However, conditional fee representation will be easier to arrange for claimants with strong money claims, while defendants are much less likely to obtain a CFA,¹¹ especially in cases like *Steel and Morris*, where they

⁸ *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, 1995, p 199.

⁹ *Steel and Morris* at para 61: “The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent him or herself effectively”.

¹⁰ For a discussion of CFAs within the framework of the common law tradition see A Walters, “Contingency Fee Arrangements at Common Law” (2000) 116 LQR 371 and M Spencer, “The Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Legal Aid” (2000) 9(2) *Nott LJ* 32.

¹¹ A Zuckerman, *Civil Procedure* (Butterworths, 2003) at p 98.

were defending their right to free speech against an opponent with unlimited resources. It is precisely in these cases that public funding should be available in order to limit the effects that resource inequality can have for one of the parties.

FREE SPEECH AND DEFAMATION

The European Court further concluded that the applicants' right to freedom of expression under article 10 of the Convention was violated. After summarising the basic principles relating to freedom of expression, it noted that the leaflet contained allegations on very serious topics of general importance which enjoyed the high level of protection of political speech, regardless of the fact that the applicants were not journalists. Requiring a defendant to prove the truth of his or her defamatory statements and allowing a multinational corporation to sue in defamation does not, in principle, violate the Convention. However, in such cases the state must provide a degree of procedural fairness and equality of arms, so as to safeguard the counter-vailing interest in free expression. The Court also found that the size of the award of damages was problematic, considering the modest incomes of the two applicants and the fact that, as these were defamation proceedings, McDonald's was not required to prove any actual financial loss. Given that the proceedings had already been found unfair under article 6(1), the Court concluded that the interference with the applicants' right to freedom of expression was disproportionate to the aim pursued and breached article 10.

The finding of a violation of article 10 rests heavily upon the earlier conclusion with regard to the violation of article 6. The Court seems to have accepted that the procedural unfairness stemming from the lack of public funding was so grave that it contaminated every aspect of the proceedings. There are three points in the article 10 analysis worth noting. At first, the present case confirms the earlier case law that a defamation award must be proportionate to the injury to the claimant's reputation. The European Court has dealt in detail with this point in *Tolstoy Miloslavsky v UK*.¹² The applicant had circulated a pamphlet accusing Lord Aldington of perpetrating "a major war crime" with regard to his role in the forced repatriation of Cossacks and Yugoslavs at the end of World War II, and the jury awarded the latter £1.5 million. The European Court noted that this sum was three times the size of the highest libel award ever made in England and Wales and that no comparable award had been made since. Although it was legitimate to allow the jury some measure of discretion in awarding damages in libel cases, judicial control over the jury's decision was so limited, at the material time, that it did not offer adequate safeguards against a disproportionately large award. There are now two important guarantees against excessive damages which could stifle investigative journalism or an open debate on matters of public concern. Firstly, the Court of Appeal has the power to substitute its own award in place of the sum awarded by the jury.¹³ Secondly, the trial judge can offer the jury concrete guidance as to the appropriate level of damages, including information about the compensation awarded in personal injury cases, as was established in *John v MGN*.¹⁴ In the latter case, the Court of Appeal found that there was "continuing evidence of libel awards in sums which appear so large as to bear no relation to the

¹² (1995) 20 EHRR 442.

¹³ S 8(2) Courts and Legal Services Act 1990.

¹⁴ [1997] QB 586.

ordinary values of life”¹⁵ and concluded that it was “offensive to public opinion” that a defamation claimant could recover greater damages for injury to reputation than if the same claimant had suffered a very serious bodily injury.¹⁶ Thus, the awards usually made in serious personal injury cases must now be considered as the upper limit on libel damages.¹⁷

In addition to the injury suffered by the claimant, the Court took into account the low incomes of the applicants in holding that the amount of damages awarded violated article 10:

The Court notes . . . that the sums eventually awarded . . . although relatively moderate by contemporary standards in defamation cases in England and Wales, were very substantial when compared to the modest incomes and resources of the two applicants.¹⁸

This somewhat cryptic statement seems to imply that the financial position of the parties is a factor that the national court must consider before deciding on damages in defamation cases. If this develops into a requirement under article 10, it will have a very significant impact on domestic defamation law: the trial judge would have to direct the jury to take into account the parties’ respective incomes before making an award and the Court of Appeal would also need to consider them when exercising its jurisdiction under the Courts and Legal Services Act 1990, section 8(2). Furthermore, although at first sight this appears to be a free speech-friendly approach to damages, it can cut both ways since it could be relied upon by a claimant of limited means who has been defamed by a defendant with deep pockets (eg, a national newspaper or television station) to *increase* the award. If the financial position of the parties is thought to be relevant for the issue of damages, then it is only fair that both the defendant and the claimant should be able to rely on it and it should be taken into account by the court whether it reduces or increases the amount of the award.

Secondly, the Court rightly rejected the government’s argument that the applicants, not being journalists, were not entitled to the high level of protection enjoyed by the press in the Convention jurisprudence. Thus, the criterion to determine the appropriate level of protection for a certain publication is not the identity of the speaker but the content of the speech: campaign groups and activists not related to the mainstream press are entitled to a high degree of article 10 protection when commenting on matters of general importance.

Finally, the Court emphasised that large corporations knowingly lay themselves open to close scrutiny of their activities, so they must tolerate even harsh criticism. A similar conclusion was earlier reached by the Court with regard to the businessmen involved with such companies in *Fayed v UK*.¹⁹ This approach resembles the well-established principle in Strasbourg case law that politicians and public officials who voluntarily participate in public life and exercise power must put up with much stricter scrutiny of their acts than a private individual.²⁰ Although the Court did not expressly equate large companies and their managers to political entities and politicians, the underlying

¹⁵ *Ibid* 611.

¹⁶ *Ibid* 614.

¹⁷ G Robertson and A Nicol, *Media Law*, 4th ed, (Penguin, 2002) at p 142.

¹⁸ *Steel and Morris* at para 96.

¹⁹ (1994) 18 EHRR 393 at para 75: “The limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals”.

²⁰ *Eg, Lingens v Austria (No 2)* (1986) 8 EHRR 407; *Castells v Spain* (1992) 14 EHRR 445; *Oberschlick v Austria (No 1)* (1995) 19 EHRR 389.

rationale seems to be that the special position and power enjoyed by such companies in modern society necessitates an uninhibited and rigorous debate about their activities similar to the traditional political debate.

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JILBAABS IN SCHOOLS

R (On The Application Of Shabina Begum) v Headteacher And Governors Of Denbigh High School [2005] EWCA Civ 199, [2005] 1 WLR 3372, [2005] 2 All ER 396, (CA)

(Brooke, Mummery and Scott Baker L JJ)

INTRODUCTION

The Court of Appeal recently delivered a well-publicised judgment declaring that 16-year-old Shabina Begum had been unlawfully excluded from Denbigh High School when she insisted on wearing the Islamic “jilbaab”.¹ The dispute received huge national and international press coverage, but despite this, few appear to understand the real significance of the case. Some emphasise that the judgment is very liberal and provides Muslim girls with a right to wear Islamic dress in schools.² Others express concern that the judgment imposes restrictions upon head teachers and that schools cannot request pupils to obey uniform policies when the latter conflict with dress of a religious nature.³ Upon closer examination, however, neither of these arguments accurately reflects the implications of the Court of Appeal decision. Shabina’s victory was the result of a procedural error on the part of Denbigh High School when considering her case under the Human Rights Act 1998 (“HRA”), and far from creating a precedent that Muslim schoolgirls (or other pupils) can wear any item of clothing of a religious nature in school, the judgment is narrower than most appreciate.

THE FACTS

When 12 years old, Shabina began her secondary education at Denbigh High School in Luton, where approximately 79 *per cent* of its pupils are Muslim. The school’s uniform policy was designed in consultation with the governing body of the school, parents and local mosques and consisted of the shalwar kameez (trousers and tunic) if pupils did not wish to wear the traditional school uniform. As Sikh and Hindu schoolgirls also wore the shalwar kameez, it minimised religious differentiation amongst pupils, which for obvious reasons, was advantageous. Shabina happily wore the shalwar kameez from September 2000 until September 2002, when she insisted on wearing a jilbaab (a long cloak covering the whole body except the hands and face). The school informed Shabina that she had to wear the correct uniform, which included the shalwar kameez and the traditional hijab (headscarf). However, Shabina said that she was not prepared to compromise over the issue because, in her opinion, the shalwar kameez did not comply with the strict requirements of Islam, as it did not conceal the shape of her body. Denbigh High School refused to accommodate Shabina’s request and stated that there was a consultation process with parents that did not reveal any objection to the shalwar kameez. The school maintained that it was not required to make any alteration to its uniform policy, nor do any more than adopt a policy that was suitable for a secular school in England.

¹ *R (On The Application Of Shabina Begum) v Headteacher And Governors Of Denbigh High School* [2005] EWCA Civ 199; [2005] 1 WLR 3372; [2005] 2 All ER 396 (judgment of 2 March 2005); *The Times*, 4 March 2005, 85. See also J Gau, “Muslim Dress – School Exclusion – Human Rights” (2005) 8(37) *Ecc LJ* 239.

² *The Daily Telegraph*, 3 March 2005, 1.

³ *The Daily Express*, 3 March 2005, 5.

Shabina then began judicial review proceedings against the school seeking a declaration that it had: (1) unlawfully excluded her, contrary to the School Standards and Framework Act 1998, sections 64–68 and the Education Act 2002, section 52; (2) unlawfully denied Shabina access to suitable and appropriate education in breach of article 2 of the First Protocol to the European Convention on Human Rights; and (3) unlawfully denied Shabina the right to manifest her religion in breach of article 9(1) of the Convention. However, on 15 June 2004, Bennett J of the Queen’s Bench Division of the High Court dismissed her claim for judicial review against the school and its governors, ruling that Shabina had not been excluded from Denbigh High School and that neither her religious freedom under article 9(1), nor her right to education under article 2 of the First Protocol, had been breached.⁴ Bennett J held that any violation of the right to freedom of religion within the meaning of article 9(1) fell within the scope of article 9(2) as being “necessary in a democratic society” for the “protection of the rights and freedoms of others”. The judge said that

... it is clear from the evidence that there are a not insignificant number of Muslim female pupils at Denbigh High School who do not wish to wear the jilbaab and either do, or will, feel pressure on them either from inside or outside the school. The present school uniform policy aims to protect their rights and freedoms⁵

Shabina petitioned the Court of Appeal and in September 2004, after nearly two years without an education, Shabina was accommodated in a different school that accepted her wish to wear the jilbaab.

THE COURT OF APPEAL’S JUDGMENT

The Court of Appeal did not agree with the view of Bennett J at first instance and held that Denbigh High School “approached the issues in this case from an entirely wrong direction and did not attribute to the claimant’s beliefs the weight they deserved.”⁶ Brooke, Mummery and Scott Baker LJJ heard the appeal and were concerned only with Shabina’s application for declarations that she had been unlawfully excluded from school, that her rights under article 9(1) had been unjustifiably limited and whether she had been denied access to suitable and appropriate education under article 2 of the First Protocol. Brooke LJ provided the leading judgment of the court and overruled the High Court on all three issues. On the issue of exclusion, Brooke LJ ruled that the school had excluded Shabina because under of the Education Act 2002, section 52(10) and Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002, regulation 3, a headteacher may exclude a child on “disciplinary grounds” but any fixed period of exclusion must not exceed more than 45 school days in any one school year. He went on to state that after nearly two years without receiving an education:

They [Denbigh High School] told her [Shabina], in effect: “Go away, and do not come back unless you are wearing proper school uniform”. They sent her away for disciplinary reasons ... Education law does not allow a pupil of school age to continue in the limbo in which the claimant found herself ... If the statutory procedures and departmental

⁴ *R (On The Application Of Shabina Begum) v Headteacher And Governors Of Denbigh High School* [2004] EWHC 1389 (Admin).

⁵ *Ibid*, para 90, *per* Bennett J.

⁶ [2005] EWCA Civ 199, para 78, *per* Brooke LJ.

guidance had been followed, the impasse would have been of very much shorter duration, and by one route or another her school career (at one school or another) would have been put back on track very much more quickly.⁷

Brooke LJ's conclusion would appear to be correct, because the impasse lasted for nearly two years and Shabina found herself prevented from entering school for not wearing the correct school uniform on account of her religious beliefs. It is clearly stated in DfES Circular 10/99, paragraph 6.4, that exclusion should not be used for breaching school uniform policy and furthermore, it is stated in DfES Circular 0264/2002, paragraph 11, that pupils should not be disciplined for non-compliance with school uniform policy resulting from adherence to particular religious codes. Since Shabina had been barred from entering school for disciplinary reasons as a result of her religious beliefs, Denbigh High School had unlawfully excluded Shabina.

The Court of Appeal then questioned whether Shabina had been excluded because the school limited her freedom to manifest her religion under article 9. Article 9(1) provides that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom . . . in public or private to manifest his religion or belief.

However, article 9(2) states that:

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or the protection of the rights and freedoms of others.

The judge at first instance concluded that there had been no breach of article 9(1) because Shabina chose to enter a school outside her catchment area being fully aware of its school uniform policy.⁸ He held that that it was not an infringement of article 9(1) that the school was not prepared to change its policy in order to accommodate Shabina's changed religious beliefs, and furthermore, that there were two other suitable schools to which she could have transferred. However, in direct contrast, the Court of Appeal held that Shabina's freedom to manifest her religious belief in public had been limited and that as a matter of the ECHR, it would be for the school as an emanation of the state under the HRA, section 6 to justify the limitation on Shabina's freedom.⁹ Brooke LJ explained that there are many schools of thought on Islam, which differ in their interpretation over the Islamic dress code.¹⁰ His Lordship provided various accounts of Islamic organisations that believe the wardrobe of a young Muslim woman can be as varied as one would like it to be, so long as modesty is observed, while other stricter organisations believe that to fulfil religious obligations prescribed by the Holy Quran, a Muslim woman must wear a loose-fitting jilbaab that does not show the bodily shape in public. It was accepted by the court that the shalwar kameez is an appropriate dress for the majority of Muslim schoolgirls, but that the jilbaab is also a requirement for other stricter Muslims and that Shabina honestly believed that she had to wear the jilbaab. This approach by the court placed the minority "strict Muslim view" on par with the "liberal Muslim view", by ruling that religious identity and expression were to be personally decided by Shabina as a claimant. The Court of

⁷ *Ibid*, para 24, *per* Brooke LJ.

⁸ [2004] EWHC 1389 (Admin), para 74.

⁹ [2005] EWCA Civ 199, para 49.

¹⁰ *Ibid*, para 34.

Appeal stated that pupils have a right under article 9(1) to manifest their religious beliefs in schools and recognised that under Islamic law, the two main schools of thought on the Islamic dress code are sincerely held by Muslims. The court accepted Shabina genuinely believed that Islam prohibited her from displaying as much of her body as would be visible if she wore the shalwar kameez.¹¹

However, the Court of Appeal stated that the freedom to manifest one's religion is subject to limitations that are prescribed by law and necessary in a democratic society. Brooke LJ considered the school uniform policy and the fear that if the school uniform policy were to change, this would lead to divisiveness and would threaten the cohesion within the school because there would, in effect, be two classes of people: those who wore the jilbaab and those who wore the shalwar kameez, with those wearing the jilbaab regarded as "better Muslims" than those who did not. Denbigh High School argued that the school had a duty to protect its pupils from inappropriate peer pressures and radicalism, and it was claimed that a number of girls relied on the school to help them resist pressures from certain extremist groups. If stricter forms of dress were allowed it was argued that they would be forced upon some girls against their will. At first instance, the High Court accepted Denbigh High School's argument that the limitations on Shabina's right to manifest her religion were proportionate and necessary for the protection of the rights and freedoms of others,¹² but the Court of Appeal disagreed. The court referred to the case of *Leyla Sahin v Turkey*¹³ where the applicant had been denied access to written examinations at the University of Istanbul because she was wearing a hijab. The European Court of Human Rights held that Turkey was permitted to take such a stance against political movements based on its historical experience. The Court of Appeal considered this authority in some detail because it is a recent judgment that sets out carefully the structured way in which issues involving Islamic dress are to be considered under the ECHR. The Court of Appeal explained that the judgment demonstrates that placing all the issues in context is all-important because there are considerations to be applied in a state that professes the value of secularism in its written constitution that are not necessarily to be applied in the UK. The court further explained that the judgment makes it clear that a decision-maker is entitled to take into account concerns, such as those expressed by Denbigh High School, in relation to "rights and freedom of others" when it is deciding whether it is necessary to prohibit a person from manifesting their religion in public. However, Brooke LJ concluded that the values held and believed in the UK differ from that of Turkey, most notably because the UK is not a secular state and does not have a written constitution. He stated that express provision is made for religious education and worship in schools and noted that the position of schools in the UK is distinctive because many already permit Muslim schoolgirls to wear the hijab that is likely to identify them as Muslims. Brooke LJ therefore distinguished the *Sahin* case from the position in the UK, explaining that the European Court of Human Rights might not necessarily reach the same conclusion if a case were ever brought against the UK.¹⁴

Brooke LJ stated that the central issue, given that Muslim schoolgirls can already be identified as Muslims through the hijab, is whether it is necessary in a democratic society to place restrictions on those schoolgirls who sincerely believe that when they arrive at the age of puberty, they should cover themselves more comprehensively than

¹¹ See also *Hasan and Chaush v Bulgaria* Application No 30985/96, 26 October 2000, para 78.

¹² [2004] EWHC 1389 (Admin), paras 89–91.

¹³ Application No 44774/98, 29 June 2004; [2004] ELR 520; anonymous case comment: "Freedom of Religion: Ban on University Students Wearing Islamic Headscarves", [2004] 5 EHRLR 590; Z Leventhal, "Case Comment" (2005) *Ed Law* 6(1) 40; M Rubenstein "Case Comment – Hijab Ban" (2004) *EOR* 133, 27.

¹⁴ See also DC Decker and M Lloyd, "Case Comment – *Leyla Sahin v Turkey*" [2004] 6 EHRLR 672.

is permitted by the school uniform policy.¹⁵ He stated that the decision-making process of the school was procedurally flawed because the school did not start from the premise that Shabina had a right which was recognised by the law of England and Wales, and that the onus should be on the school to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed and if Shabina did not like it, she could go to a different school. Since the school approached the matter from an entirely wrong direction, Shabina was entitled to the declarations sought.¹⁶ Brooke LJ stated that the school's decision should have been made along the following lines:

- 1) Has the claimant established that she has a relevant Convention right which qualifies for protection under article 9(1)?
- 2) Subject to any justification that is established under article 9(2), has that Convention right been violated?
- 3) Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
- 4) Did the interference have a legitimate aim?
- 5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
- 6) Was the interference justified under article 9(2)?¹⁷

However, Brooke LJ made it clear that it would be possible for the school to justify its stance if it reconsidered the uniform policy. Brooke LJ qualified his judgment by stating that "[n]othing in this judgment should be taken as meaning that it would be impossible for the school to justify its stance if it were to reconsider its uniform policy in the light of this judgment . . .".¹⁸ Scott Baker LJ further stated:

Had the school approached the problem on the basis it should have done, that the claimant had a right under article 9(1) to manifest her religion, it may very well have concluded that interference with that right was justified under article 9(2) and that its uniform policy could thus have been maintained.¹⁹

COMMENTARY

This is a thought-provoking case that demonstrates the contemporary conflict between Western norms and Islamic ideology. It also highlights how legally aware students have now become and the case has been described as a serious show of "pupil power".²⁰ The case epitomises the very passionate and political debate about the treatment of ethnic minorities across Europe, in particular Muslims, and is part of a wider debate about whether religious clothing should be allowed in state schools.²¹ Some may celebrate Shabina's victory because it is an affirmation that religious minorities have a general right to wear religious clothing in schools and is tolerant and respectful of the rights

¹⁵ [2005] EWCA Civ 199, para 74.

¹⁶ *Ibid*, para 75, *per* Brooke LJ.

¹⁷ *Ibid*.

¹⁸ *Ibid*, para 81.

¹⁹ *Ibid*, para 92, *per* Scott Baker LJ.

²⁰ J Robins, "Class Actions" (2005) 102(11) LSG 20.

²¹ The case also follows swiftly on the heels of the House of Lords decision regarding the Muslim detainees in Belmarsh: *A v Secretary of State for the Home Department* (also known as *X v Secretary of State for the Home Department*) [2004] UKHL 56, [2005] 2 AC 68, [2005] 2 WLR 87; *The Times*, 17 December 2004, 1; *The Independent*, 17 December 2004, 1 and 2.

of minorities. It recognises the different interpretations of dress codes in Islamic law and seeks to accommodate those differences, and expresses patience with those devout Muslim women who wish to observe their religion in school.²² The original High Court decision may be interpreted as echoing the French ban on “conspicuous religious symbols” because the original High Court decision was a limitation on the personal freedom of Muslim schoolgirls,²³ yet the Court of Appeal’s ruling recognises that the Muslim community in this country is very diverse and adopts different ways of dressing. Shabina sincerely felt that she had to wear the jilbaab and the Court of Appeal concluded that Shabina’s religious beliefs should have been taken into account. Some have argued that Denbigh High School applied an arbitrary boundary to the right to wear religious dress in school because it accommodated the shalwar kameez and the hijab, but refused to accommodate the jilbaab. It would not have been such a great leap to accommodate a long dress that is an important part of the Muslim religion.²⁴ Implicit in the decision also was the recognition that policies that affect school pupils’ expression of religious belief may have the effect of reducing equal access to education, and thereby indirectly affecting gender equality. The Court of Appeal also gave little weight to the finding of the judge at first instance that the interference with Shabina’s right to manifest her religion was justified because of concerns that some Muslim schoolgirls would be pressurised against their wishes by certain Islamic extremists into wearing the jilbaab. Nor was there much acknowledgment of the concerns expressed by the European Court of Human Rights in *Leyla Sahin v Turkey*, when the Court of Appeal emphasised that the UK’s historical experiences differ from that of Turkey.²⁵

However, from a secular perspective, the Court of Appeal’s judgment may surprise some because one could argue that no one should have the right to affect school uniform policies simply because they believe their interpretation of religious scripture gives them the right to dress as they please. The HRA has now transformed the school uniform issue into a human rights matter, arguably limiting the independence and autonomy of schools to control their own affairs as school pupils may now challenge uniform policies by voicing their religious objections. Further, no fewer than 79 *per cent* of pupils in Denbigh High School are Muslim; the headteacher is a Bengali Muslim and the school uniform policy allowed Muslim pupils to wear the shalwar kameez and the hijab. Shabina’s victory was also against a policy formed through collaboration with the DfES, pupils, parents, schools and leading Muslim organisations. One must not forget that Shabina had never been requested to wear Western clothes and nor did the dispute involve a blanket ban on Islamic dress of the kind so harshly imposed in France. Some even believe that the decision will have little bearing on the lives of Muslim schoolgirls because some schools already permitted the jilbaab well before the Court of Appeal’s decision. In addition, commentators such as Thomas Poole believe that the Court of Appeal’s decision was, legally, wrongly decided. Poole has argued that, from a legal point of view, there is a very important difference between striking down a decision because it violates the ECHR (in substance), and striking down a decision because the decision-making body has failed properly to bring its mind

²² Or what has been described by Yvonne Spencer, the solicitor-advocate who represented Shabina in the High Court, as finally “lifting the *veil* from human rights”: Y Spencer, “Lift the Veil from Human Rights” (2005) 102(10) LSG 14.

²³ See M M Idriss, “Laïcité and the Banning of the Hijab in France” (2005) LS 25(2) 260 and S Knights, “Religious Symbols in the School: Freedom of Religion, Minorities and Education” [2005] 5 EHRLR 499.

²⁴ See *The Independent*, 16 June 2004, 30.

²⁵ Note that the Grand Chamber of the European Court of Human Rights recently affirmed the earlier decision of the Chamber of the European Court of Human Rights, ruling that Miss Sahin’s article 9(1) right had not been violated by the University of Istanbul: *Leyla Sahin v Turkey*, Application No. 44774/98, 10 November 2005.

“to bear on the question of rights irrespective of whether or not the decision itself violates those rights (in procedure)”.²⁶ It will be recalled that the Court of Appeal essentially found against Denbigh High School on procedural grounds, a point made clear by Brooke LJ, but Poole argues that there are problems with this approach taken by the Court of Appeal. Poole argues that proportionality is a test that judges are required to apply in cases that involve Convention rights and cites *R (On the Application of Daly) v Secretary of State for the Home Department*,²⁷ in which Lord Steyn said that “the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck” (emphasis added).²⁸ Poole further argues that from this *dictum* it is clear that proportionality is a test to be applied by the court when reviewing decisions of public authorities after they have been made (*ex post*) and that it is *not a test which means public authorities should themselves adopt a proportionality approach to the structuring of their own decision-making (ex ante)*. Poole concludes that there is nothing in the HRA which would seem to require public authorities to act in this way and that the wording of the HRA, section 6 indicates that the obligations public authorities are required to fulfil relate to the *substance* of their policies, decisions and actions (*ie*, it is result-orientated). Poole submits that the process by which the public authority came to violate the claimant’s Convention rights “is irrelevant” and suggests that striking down a decision on “pure” procedural grounds was “a basic mistake” because the decision-making process by Denbigh High School was both “thoughtful and thorough”.²⁹

Nevertheless, it would appear that schools across the UK will now have to review their policies to ensure that they do not prohibit or deter religious minorities from wearing clothing that is part of religious codes, since school pupils may now be treated differently according to their own personal determination of what their sacred duties involve, and where a rights-based approach demands that exceptions be made to uniform policies that clash with these religious duties. However, while the Court of Appeal stated that pupils have a right to wear the jilbaab in school, this right could be legitimately limited under article 9(2) if there are compelling reasons why this should be. Not every Muslim schoolgirl will, therefore, have the right to wear the jilbaab in school because article 9(1) is subject to article 9(2), and if schools can provide justifications limiting that right, there will be no violation of the ECHR. It is this aspect of the judgment that considerably diminishes the liberal conferment of the right to wear the jilbaab because schools could successfully oppose religious clothing on the ground of protecting the “rights and freedoms of others”. Nor does the Court of Appeal’s ruling (contrary to some media reports) effectively end the current right of each school to decide its policy on uniforms. The Court of Appeal did not rule that headteachers could *never* prevent pupils from wearing religious clothing in schools. So long as rights are recognised under article 9(1) and schools provide justifications limiting that right under article 9(2), schools still retain power over their uniform policies. This is where Denbigh High School ultimately failed. The school refused to acknowledge that Shabina had a right to wear the jilbaab under the HRA and the Court of Appeal

²⁶ T Poole, “Analysis Of Headscarves and Heresies: The Denbigh High School Case and Public Authority Decision-Making under the Human Rights Act” [2005] PL, Win, 685, 689.

²⁷ [2001] UKHL 26, [2001] 2 AC 532.

²⁸ *Ibid*, at para 27.

²⁹ T Poole, *op cit* note 26, 689–691 and 694. However, whether Denbigh High School’s refusal to accommodate the jilbaab was thoughtful is open to question, especially if one questions whether such a restriction was ever necessary in a democratic society, given the fact that some schools in the UK (like Shabina’s new school) already accommodated the shalwar kameez, the hijab and the jilbaab peacefully. On the issue of process, see also I Leigh, “Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg” [2002] PL 265.

therefore had no difficulty in finding the actions of the school and its governors to be unlawful.

However, it would appear that in any future litigation, compelling reasons would have to be provided to restrict the right to wear the jilbaab, considering that the UK is not a secular state; that religious education is provided in schools and some schools already accommodate the jilbaab.³⁰ Some important questions remain unanswered. Would it ever be valid for schools to justify limiting the wearing of the jilbaab on the basis that this may create divisiveness, especially since many schools already permit the hijab and jilbaab and when pupils can already be identified as Muslims? Are comments on the comfort of the jilbaab, its exoticism or the reactions that it could inspire superfluous? Are objections to the jilbaab on health and safety grounds spurious, especially when clothes can be tied back or cloaks can be worn during scientific activities? On a similar note, could pupils be requested to wear a uniform *underneath* the jilbaab in order to enable schools to have a more coherent school uniform policy? Can schools insist on jilbaabs of the same uniform colours as the school code? The Court of Appeal favoured the view that school authorities should not select between religious beliefs (*ie*, the views between liberal and stricter Muslims): would this individualised view of religious belief extend protection to a right to wear the full-bodied burqa in schools? The Court of Appeal did not provide answers to any of these questions and this leaves unexplained the issue of what limits upon religious requirements in a multi-cultural society are permissible under the HRA.³¹ However, Brooke LJ recognised that discussion on the limitations provided by article 9(2) was for the future because, for the present purposes, Denbigh High School unlawfully excluded Shabina and procedurally did not recognise that she had a human right. This judgment now ensures that schools must set about deciding issues of this kind in the manner required under the HRA. Both Scott Baker and Mummery LJ concurred with Brooke LJ that the appeal should be allowed and stated that it was desirable for the DfES to give schools further guidance in light of this judgment. Mummery LJ stated that it would be a great pity if, through lack of expert guidance, schools were to find themselves frequently in court having to use valuable time and resources which could be spent on improving the education of pupils. This is important, as the school managers were asked to make decisions in areas where human rights are involved and where legal tests to review executive decisions have been developed in a specific context. It is unfair to assume that such tests (like the six-stage test developed by Brooke LJ) can be easily translated by those working in public administration, especially where the public authority is neither a legal specialist nor has ready (and cheap) access to legal advice.³²

Interestingly, Shabina's successful application followed swiftly the House of Lords judgment delivered on 24 February 2005 in *R (On the application of Williamson) v Secretary of State for Education and Employment*.³³ This was a case concerning a group of school principals, teachers and parents of four independent Christian schools who sought a declaration that the use of corporal punishment in independent schools was permissible and that physical chastisement was a fundamental part of the claimants' Christian beliefs. The House of Lords concluded that the claimants had engaged article 9(1) but that the interference was prescribed by law and necessary in a democratic society for the protection of the rights and freedoms of others. Baroness Hale concluded that if a child has a right to be brought up without institutional violence, that right

³⁰ See also *The Times*, 13 Jul 2004, 13.

³¹ L Thio, "School Dress Codes, Religious Freedom and Human Rights" (2005) 121 LQR 572, 574.

³² T Poole, *op cit* note 26, 692.

³³ [2005] UKHL 15, [2005] 2 AC 246.

should also be respected whether or not his parents and teachers believe otherwise. While the appeal to the House of Lords was dismissed, there are some major interrelated issues characterising the *Begum* and *Williamson* cases. First, both cases illustrate that the courts essentially have to perform a balancing exercise when determining rights that they have been asked to protect in relation to other competing interests. In *Begum* the Court of Appeal accepted that religious convictions are personal and thus there is a presumption that the state should respect them. As a qualified right, the onus is upon the state to justify exclusions to the article 9(1) right and in so doing, the Court of Appeal demonstrated that there has to be an evaluation between conflicting rights and freedoms. Consequently considerable evidence must be produced to support a denial of the freedom of religion.³⁴ Secondly, Brooke LJ commented that nothing in his judgment should be taken as meaning that it would be impossible for the school to justify its stance. This demonstrates that the balance of rights and freedoms is clearly a matter of fact to be determined by the courts in each case, with the courts the final arbiters to decide on the legitimacy thereof. Third, in *Williamson*, most of the *dicta* focused on the rights of parents to delegate their common law powers of chastisement and the protection of children, whereas, in *Begum*, emphasis was upon the views of Shabina, a reflection of her growing maturity and autonomy. Such a judicial move, illustrating a progressive transformation in considering the rights of the child, are encouraging and it will be interesting to see the extent to which children's rights are explicitly protected in future proceedings. Both cases support the positive aspects of the HRA and demonstrate what has been described as the evolution in judicial consideration of the crossover between education and religion in schools.³⁵ The *Begum* case clearly confirms the need for thorough and careful decision-making processes before limiting any fundamental rights, although commentators such as Poole argue that the *Begum* case imposes too high a standard on public authorities, representing a new type of "formalism".³⁶ On the other hand, others argue that the Court of Appeal has finally found its "human rights" feet and that domestic courts are now beginning to carve the law in accordance with an appropriate domestic interpretation of Convention rights.³⁷ Commentators such as Thio argue that the *Begum* case demonstrates that the HRA is finally coming of age because in their judicial watchdog role, the courts are ensuring that the decision-making processes comply with the rights-based approach and that this places a heavier, yet desirable, burden on public authorities.³⁸

The *Begum* case has now been heard by way of appeal to the House of Lords after Denbigh High School won permission to appeal.³⁹ Whatever the outcome, it is certain that the debate over the jilbaab and Islamic dress in Western schools is set to continue.⁴⁰

MOHAMMAD MAZHER IDRIS*

NB: On 22 March 2006, Shabiha lost her fight in the House of Lords to wear the jilbaab in school. See M M Idriss "The Defeat of Shabiha Begun in the House of Lords" (2006) *Liverpool L R* (forthcoming).

³⁴ R Smith "Judicial Review of the Delineation Between Rights of Religion and Education" (2005) 6(1) *HR & UK P* 11, 14.

³⁵ *Ibid* 13.

³⁶ T Poole, *op cit* note 26, 691.

³⁷ R Smith, *op cit* note 34, 14

³⁸ L Thio, *op cit* note 31, 575.

³⁹ [2006] UKHL 15.

⁴⁰ See generally A Blair and W Alps, "What Not to Wear and Other Stories: Addressing Religious Diversity in Schools" (2005) 17(1-2) *Ed L* 1.

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VICTIMISATION DISCRIMINATION

St Helens MBC v Derbyshire & Others [2005] EWCA Civ 977, [2005] IRLR 801 (CA)

(Mummery, Jonathan Parker, Lloyd L JJ)

INTRODUCTION

In *St Helens MBC v Derbyshire & Others*¹ the Court of Appeal was asked to consider alleged victimisation discrimination by an employer in the course of litigation brought by 39 employees seeking to enforce their rights under the Equal Pay Act 1970. The case illustrates the difficulties litigation poses to the employment relationship. Once proceedings are commenced, the parties are not only employer and employee but also adversaries in litigation. The proximity of such an ongoing relationship can, and frequently does, create further difficulties. For example, to what extent can the employer take steps to preserve its tactical position in the litigation? If the employer fails to protect its position as employer sufficiently, it risks undermining its litigation position. Conversely if it adopts an aggressive strategy toward the litigation, it leaves itself as employer vulnerable to the possibility of an additional claim for victimisation from the employee-litigant. The present case is a model example of such conflicts in practice.

THE FACTS

In 1998, 510 female schools catering staff employed by St Helens MBC (“the Council”) brought equal pay claims against the Council. The majority of the applicants agreed to settle their claims against the Council. However 39 employees, including Mrs Derbyshire, did not accept the settlement and proceeded with their claims. Some two months prior to the hearing, the Council’s acting Director of Environmental Protection, Mr Sanderson, drafted and sent two letters.

One letter was sent to all catering staff, including the applicants. It referred to the forthcoming tribunal hearing and the costs of a successful equal pay claim. It stated, *inter alia*, that:

The above costs will make provision of the service wholly unviable. In such circumstances the council will be forced to consider ceasing the provision of the service other than to those who are entitled to receive it by law i.e. free school meal provision. Only a very small proportion of the existing workforce would be required for this . . . Regrettably, although many of you have chosen to work with the council to address the issues of equality outside of the tribunal by way of single status/job evaluation process, the continuance of the current claims and a ruling against the council will have a severe impact on all staff.

The second letter was individually addressed to each of the remaining 39 applicants. It stated:

I am greatly concerned about the likely outcome of this matter as stated in the letter to catering staff. . . . The original offer of settlement remains open to you and I would urge you to consider this, together with the information provided in this and my other letter

¹ [2005] EWCA Civ 977, [2005] IRLR 801.

regarding our commitment to achieving equality by other means, aimed at preserving the service and jobs . . . I cannot overstate the impact that the current course of action will have on the service and everyone employed within it.

CASE HISTORY

The applicants brought claims of victimisation under the Sex Discrimination Act 1975 (“the Act”) against their employers. They claimed that the letters had caused them considerable distress and would adversely impact upon their working relationships. An initial employment tribunal dismissed the complaints. The Employment Appeals Tribunal (“EAT”) then allowed an appeal against that decision and remitted the case to a fresh employment tribunal for rehearing in order to consider the issues of less favourable treatment, detriment and the reason for any less favourable treatment. The second employment tribunal upheld their claims unanimously and the Council appealed to the EAT. The EAT upheld the applicants’ complaints of victimisation and the Council was given leave to appeal to the Court of Appeal.

THE LEGAL ISSUES

The main question for the Court of Appeal was whether the sending of the two letters by Mr Sanderson breached section 4 of the Act.² Section 4 (1) of the Act is concerned with discrimination by way of victimisation within the arena of sex discrimination. It states that:

A person (“the discriminator”) discriminates against another person (“the person victimised”) in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has –

(a) brought proceedings against the discriminator or any other person under this Act or the Equal Pay Act 1970 . . .

or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

Upon reading the above, it is apparent that the section involves asking two distinct, albeit related, questions. First, did the applicants receive less favourable treatment? Secondly, if so, was it by reason of their having brought proceedings under the Equal Pay Act 1970? For the purposes of clarity, this case will be analysed by reference to the above questions. However, it should be remembered that the two issues significantly interact with one another and, often “the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue”,³ a point recognised by Mummery LJ in the present case.⁴

² Section 6 (2) (b) of the Act was also relied upon by the applicants, although it received little attention in the Court of Appeal’s judgment.

³ Per Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, at para 8.

⁴ [2005] EWCA Civ 977, [2005] IRLR 801, para 24.

LESS FAVOURABLE TREATMENT

In Mummery LJ's opinion, the employment tribunal was entitled to conclude that the sending of the letters by the Council amounted to less favourable treatment of the 39 applicants. In this instance, the appropriate comparators were the Council employees who had either not brought claims or had discontinued them. Due to the imminent tribunal hearing, the applicants were particularly susceptible to pressure from the Council either to settle or to withdraw their claims. This pressure was only increased by the sending of letters to them and to their colleagues which detailed the possible consequences of successful claims. Indeed, "the more usual and acceptable means of communication would have been with the applicants' union or their solicitors".⁵ Consequently, the receipt of the letters by the applicants was capable of provoking a reaction of fear, threat and intimidation, which the employment tribunal was entitled to conclude amounted to a detriment to, and less favourable treatment of, the applicants. Jonathan Parker LJ agreed with Mummery LJ, whilst Lloyd LJ did not comment specifically upon this issue.

"BY REASON THAT . . ."

It was upon the issue of causation that their Lordships significantly differed in their judgments.

The Council contended that the reason for sending both letters was not because of the applicants' proceedings under the Act, but rather its concerns over financial difficulties, the possible future of the school meals service and the protection of its litigation position in the proceedings. Mummery LJ disagreed. In his opinion, the Council went further than necessary to protect its litigation position. This was not an honest and reasonable attempt by the Council to compromise the proceedings, rather an attempt to intimidate the applicants. As the applicants were legally represented, the correct course of action would have been for the Council to enter into communication regarding settlement either with the applicants' legal representatives or their union.⁶ Consequently, the employment tribunal was entitled to examine not only the contents of the two letters but also all relevant surrounding circumstances. In doing so, it was entitled to conclude that the reason for the sending of the two letters was the fact that the applicants had brought, and were continuing, claims against the Council.

Jonathan Parker LJ referred to the House of Lords' decision in *Khan*,⁷ a claim of victimisation under the Race Relations Act 1976, which concerned the refusal to provide a reference whilst a race discrimination claim was pending. Significantly, he relied on Lord Nicholl's comment that:

. . . Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation . . . An employer who conducts himself in this way is not doing so because of the fact that the complainant has brought discrimination proceedings. He is doing so because, currently and temporarily, he needs to take steps to preserve his position in the outstanding proceedings.⁸

⁵ *Ibid*, para 27.

⁶ See, in particular, Mummery LJ's remarks, *ibid*, at para 38.

⁷ *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] 1 WLR 1947.

⁸ *Ibid*, para 31.

In both the opinion of Parker and Lloyd LJJ, the employment tribunal had misdirected itself and failed to consider whether the sending of the letters by the Council could be construed as an honest and reasonable attempt to compromise the proceedings. They therefore allowed the Council's appeal and remitted the case to the employment tribunal for its consideration on this specific point.

CONCLUSION

All three of their Lordships agreed that the employment tribunal had been entitled to conclude that the 39 applicants had been treated less favourably by the Council. However, whilst Mummery LJ considered that the tribunal was entitled to conclude that the reason for such less favourable treatment was the commencement and continuance of proceedings under the Act, Lloyd and Jonathan Parker LJJ disagreed. Applying the House of Lords' decision in *Khan* they reasoned that the tribunal had failed to consider whether the Council's actions amounted to an honest and reasonable attempt to compromise the proceedings.

There is nothing unreasonable in attempting to persuade an employee to agree to a compromise. However, in doing so, employers must behave honestly and reasonably if they wish to acquire the protection afforded by *Khan*. In this instance one must take into account the fact that the applicants had retained the services of legal advisers. In such cases one would expect all negotiations regarding a potential compromise of the proceedings to be directed to the applicants' solicitors. The Council's decision to contact the applicants directly may, at best, be viewed as poor judgment and, at worst, as a dishonest and unreasonable attempt to exert pressure upon the applicants which does not merit the exception provided for by *Khan*.

Coupled with this is the point that two letters were sent; one to only the 39 applicants and the second to all catering staff including the applicants. Whilst all judges involved in the decision examined the receipt of the letters by the applicants as one single event, it is submitted that they are best considered individually. When viewed in such a manner, subject to the concerns raised in the preceding paragraph, it is arguable that the letter to the 39 applicants only could potentially be viewed as an honest and reasonable attempt to compromise the proceedings. Of greater concern, however is the second letter which was sent to all members of the Council's catering staff. There was, in fact, no need for the Council to communicate with these individuals for settlement purposes. When viewed objectively, it is reasonable to conclude that the Council's primary intention in sending these letters was to direct the other catering staff to believe that the applicants' actions were jeopardising not only the security of their jobs but the future of the catering service as a whole. Indeed, it is difficult to comprehend how correspondence from the Council to individuals not party to the ongoing proceedings could be viewed as action necessary for the purposes of preserving their litigation position. Consequently, in the absence of an adequate explanation from the Council, an employment tribunal would be entitled to conclude that they had committed an unlawful act of discrimination against the applicants. Further, as such correspondence was not for the purposes of a potential settlement, the protection afforded by *Khan* is inapplicable.

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THE END FOR FORUM NON CONVENIENS?

Owusu v Jackson Case C-281/02, [2005] QB 801 ECJ

(Judges Jann (President), Timmermans and Rosas (Presidents of Chambers),
Gulmann, Puissechet, Schintgen, Colneric, Von Bahr and Cunha Rodrigues)

INTRODUCTION

The courts of England and Wales have long asserted a discretionary power to stay proceedings brought before them in favour of the courts of another jurisdiction which they consider the more natural forum for the trial of the action. The essence of this discretionary power was set out by Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd.*¹

a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, *i.e.* in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

The operation of the doctrine of *forum non conveniens* has, however, been severely curtailed as a consequence of the landmark ruling of the European Court of Justice in *Owusu v Jackson*,² delivered on 1 March 2005. This decision constitutes a further blow to the jurisdictional discretion of the domestic courts, following two other recent decisions of the ECJ in this regard. In *Turner v Grovit*,³ the ECJ ruled that the Brussels Convention precludes the courts of a contracting state from granting an anti-suit injunction restraining a party from commencing or continuing proceedings in another contracting state. In *Gasser (Erich) GmbH v MISAT Srl*,⁴ it was held that a court second seised, whose jurisdiction had been claimed in accordance with article 17 of the Brussels Convention by virtue of an agreement conferring jurisdiction was nonetheless obliged to stay proceedings, under article 21, until the court first seised had determined whether it itself had jurisdiction.

FORUM NON CONVENIENS IN DOMESTIC LAW PRE-OWUSU

The Brussels Convention has been replaced, in respect of all contracting states except Denmark (which remains subject to the Brussels Convention), with the Brussels Regulation (No 44/2001), which came into force on 1 March 2002. The Brussels Convention and Brussels Regulation (and the Lugano Convention applicable to members of the European Free Trade Association) are broadly similar.⁵

In considering *forum non conveniens*, three possible scenarios should be distinguished: (i) where none of the Conventions or Regulation applies; (ii) where a Convention or the Regulation applies and the apparently more appropriate forum is another contracting state; and (iii) where a Convention or the Regulation applies and the apparently more appropriate forum is a non-contracting state.

¹ [1987] AC 460, 476.

² Case C-281/02, [2005] QB 801.

³ Case C-159/02, [2005] 1 AC 101.

⁴ Case C-116/02, [2005] QB 1.

⁵ The Regulation and Conventions can, for the limited purposes of this article, be treated as identical.

In the first scenario, the issue of jurisdiction will (subject to any other relevant treaties) be determined in accordance with the common law and thus the doctrine of *forum non conveniens* will apply, notwithstanding the decision of the ECJ in *Owusu*.

In the second scenario, the domestic courts have accepted that they have no discretion to stay proceedings in favour of another contracting state. This was established in *Aiglon v Gau Shan*,⁶ in which it was held that for a judge to interfere with the unfettered choice of forum granted to the claimant by the Lugano Convention would be to subvert the Convention and its comprehensive system for the allocation of jurisdiction both within and between contracting states.

The position regarding the third scenario, which is addressed in *Owusu*, has until now been less clear. In *Re Harrods (Buenos Aires) Ltd*,⁷ the Court of Appeal held that the domestic courts retained a discretion in such circumstances to stay proceedings properly served on a defendant domiciled in England and Wales where the court was satisfied that a non-contracting state was clearly the more appropriate forum. Although this approach was confirmed and followed in subsequent cases, including *Haji-Ioannou and Others v Frangos and Others*⁸ and *Ace Insurance Company v Zurich Insurance Company*,⁹ some doubt has been cast on its veracity in, for example, *Lubbe v Cape plc*¹⁰ where Lord Bingham emphasized that he did not “consider the answer to that question to be clear” and by the ECJ decision of *UGIC v Group Josi*,¹¹ in which the view was taken that the Brussels Convention applies whenever a defendant is domiciled in a contracting state, subject only to the derogations contained in the Convention itself, and the fact that the claimant happens to be domiciled in a non-contracting state is generally irrelevant.

Further doubt must have been cast on *Re Harrods* by the ECJ decisions in *Turner* and *Gasser*. Whilst the purpose of, and the conditions for applying, the mechanism of “anti-suit injunctions” considered in *Turner* and the *forum non conveniens* doctrine differ considerably and, in contrast to the *Owusu* case, the *Turner* case raised no question of the territorial scope of persons covered by the Brussels Convention, as Advocate General Ruiz-Jarabo Colomer stressed in his Opinion in *Turner*, both mechanisms “presuppose some assessment of the appropriateness of bringing an action before a specific judicial authority”.¹² Coupled with the similarly restrictive decision in *Gasser*, it is clear that the ECJ has firmly disapproved of the discretion of domestic courts to restrain proceedings that they consider improper.

OWUSU IN THE ENGLISH COURTS

The *Owusu* case arises from an accident in 1997, in which Mr Owusu, an English domiciliary on holiday in Jamaica, was rendered tetraplegic after hitting a submerged sandbank when he dived into the sea off a private beach. He subsequently brought proceedings for breach of contract in England against Mr Jackson (the English domiciliary from whom he had rented a holiday villa with access to the private beach), and also brought a tort action against the owner of the beach and two hotel operators

⁶ [1993] BCLC 321.

⁷ [1992] Ch 72.

⁸ [1999] 2 Lloyd's Rep 337, CA.

⁹ [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep 618.

¹⁰ [2000] 4 All ER 268, at 281.

¹¹ Case C-412/98, [2001] QB 68.

¹² Case C-159/02, *Turner v Grovit* [2005] 1 AC 101, at [35].

that had been granted licences to use the beach, all of whom were domiciled in Jamaica. Mr Owusu obtained permission to serve proceedings on the three Jamaican-domiciled defendants pursuant to CPR r 6.20(3)(b) on the basis that they were necessary and proper parties to the claim.

Mr Jackson and the Jamaican-domiciled defendants sought a stay of the English proceedings on the basis of *forum non conveniens*, arguing that Jamaica had a more real and substantial connection with the dispute and was thus the more appropriate forum in which to try the action. The judge at first instance considered that he was precluded from staying the proceedings against Mr Jackson on the basis of the ECJ decision in *Group Josi* and article 2 of the Brussels Convention (which provides that “persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State”). In those circumstances, the likelihood of the same factual issues being tried on substantially the same evidence in two different jurisdictions, led him to conclude that England must be the appropriate forum and he therefore also refused to stay the proceedings against the Jamaican-domiciled defendants.

On appeal, the Court of Appeal referred the following two questions to the ECJ for a preliminary ruling:

- (1) Is it inconsistent with the Brussels Convention . . . , where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State: (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue; (b) if the proceedings have no connecting factors to any other Contracting State?
- (2) If the answer to question (1)(a) or (1)(b) is yes, is it inconsistent in all circumstances or only in some and if so which?¹³

OWUSU IN THE ECJ

The ECJ answered the first question in two parts. As a preliminary issue, it held that the Brussels Convention was applicable to the facts of the case: nothing in article 2 suggests that the application of the general rule of jurisdiction laid down therein (which is based entirely on the defendant’s domicile in a contracting state) is dependent on there being a legal relationship involving more than one contracting state, although it is necessary for there to exist an international element to the case.

The ECJ then went on to consider whether the Brussels Convention precludes a court of a contracting state from declining to exercise the jurisdiction conferred on it by article 2 on the basis of the doctrine of *forum non conveniens*, in respect of which it concluded, for the five principal reasons below, that the courts were so precluded.

First, the ECJ held that article 2 is mandatory and there can be no derogation from it except where expressly provided for by the Convention: since no derogation on the basis of *forum non conveniens* is included in the Convention, there cannot be any such derogation. It remains unclear though whether, on this reasoning, the doctrine of *forum non conveniens* might nonetheless apply where jurisdiction has been assumed on the basis of an article other than article 2, such as article 5 or 6, which allow jurisdiction to be assumed on the basis, *inter alia*, that the contracting state is the place for performance of the contract or is the place (in a tort action) where the “harmful event”

¹³ Case C-281/02, *Owusu v Jackson* [2005] QB 801, at [22].

occurred or is the place where at least one of multiple defendants is domiciled. While *Owusu* is authority only for the situation where jurisdiction is assumed on the basis of article 2, the rest of the ECJ's reasoning does suggest that the use of *forum non conveniens* in the context of other articles would be similarly disapproved.

Secondly, it was held that the principle of legal certainty, which is fundamental to the Convention in general and article 2 in particular, could not be guaranteed if the court having jurisdiction under the Convention were allowed to apply the doctrine of *forum non conveniens*. In particular, the ECJ held that legal certainty requires, *inter alia*, that the jurisdictional rules which derogate from the general rule laid down in article 2 of the Brussels Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he or she is domiciled, he or she may be sued. This argument has its weaknesses. First, it has no application where there is only one defendant since it is the defendant who chooses to raise the defence of *forum non conveniens* and he or she cannot therefore be prejudiced by any uncertainty as to jurisdiction. Indeed, it is only in a case where there is more than one defendant and – unlike in *Owusu* – the defendants are not in agreement as to the appropriate forum, that the doctrine can subject a defendant to uncertainty. Secondly, whilst a strict adherence to the Conventions and Regulation allows for legal certainty as to the rules to be applied, it is only a “weak” form of certainty in that there could, in a complex case involving multiple defendants, be any number of contracting states that could assume jurisdiction. The “certainty” that one might be sued in one of, say, ten different jurisdictions, is surely no real certainty at all. Thirdly, there is an inherent uncertainty in the application of any jurisdictional rules. The provisions of the Conventions and Regulation are themselves open to interpretation and the answer may not always be that clear cut, for example, in the context of article 5, what constitutes the place of performance of the contract or where the harmful event occurred is arguably no more certain or foreseeable than would be the choice of appropriate forum. The same can be said of the *lis alibi pendens* provisions which require an assessment of whether actions are “so closely connected” that it would be expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Fourthly, whilst there is uncertainty as to which forum a court may then choose, this level of uncertainty is comparable with that which arises in any case from the claimant's freedom to sue otherwise than in the domicile of the defendant in accordance with alternative provisions of the Conventions, such as article 5.

The third principle invoked by the ECJ in its reasoning is the principle of uniformity. The ECJ held that the application of the doctrine of *forum non conveniens*, which is recognized only in a limited number of contracting states, would be likely to affect the uniform application of the rules of jurisdiction contained in the Brussels Convention. This would be contrary to the objective of the Brussels Convention, which is to lay down common rules to be applied consistently amongst contracting states in order to aid the functioning of the internal market. While it must be correct that there will not be uniformity if certain contracting states employ the doctrine of *forum non conveniens*, whether this has any greater impact on the uniform application of the rules than does the intrinsic variation between jurisdictions in judicial approach and jurisprudence is questionable, as is the practical effect (if any) on the functioning of the internal market. For such a bureaucratic objective to override the interests of preventing arbitrariness and injustice may seem unpalatable to many. In *Owusu* for instance, had Mr Jackson not been an English domiciliary, the case could, without question, have been heard in Jamaica, an undoubtedly more appropriate forum.

Fourthly, it was held that where a plea is raised on the basis that a foreign court is a more appropriate forum in which to try an action, the legal protection of claimants would be undermined, as the onus is on the claimant to establish either that the foreign court has no jurisdiction to try the action or that he or she does not, in practice (but without reference to the cost and time involved in bringing a fresh action before a court of another state), have access to effective justice before that court. The mere fact that an evidential burden is put on a claimant does not necessarily mean that his or her position is undermined any more than if he or she had sued in a state which simply had no jurisdiction: which is, in effect, the outcome of the doctrine of *forum non conveniens*. Indeed, the presumption that his or her interests are best served in the jurisdiction in which he or she sued would appear to be without logical foundation and finds little support from the history of the use of the doctrine.

Fifthly, the ECJ observed that the defendants' concerns about the practical difficulties, costs and enforceability of English proceedings, however genuine, were not, for the reasons set out above, such as to call into question the mandatory nature of the rule of jurisdiction contained in article 2 of the Brussels Convention. This is unfortunate as there are genuine benefits to the doctrine. It is clearly preferable to try a claim in a jurisdiction that has the most connecting factors with that jurisdiction and in which, therefore, the most efficient and effective justice can usually be done. The emphasis on domicile means that in many instances a case will be heard in a jurisdiction with no obvious and real connection with the facts. In particular, where there are multiple defendants, the domicile of one defendant, however, minor his or her role in the context of the claim, can dictate where a case is heard. This is not only an inflexible and, in some cases, impractical approach, but it is likely to fuel the growth of forum shopping, for reasons unconnected with justice. There are many practical reasons for taking the location of witnesses, experts and evidence into account and not relying rigidly on one arbitrarily chosen determining factor such as domicile.

The ECJ refused to answer the second question, holding that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. Since the second question did not relate to the facts of the case and was not necessary for its resolution, it did not fall to the ECJ to answer it.

THE IMPACT OF THE ECJ'S DECISION

As before, where a Convention or the Regulation applies and the more appropriate forum is another contracting state, the courts have no discretion to stay proceedings in favour of another contracting state. Now, as a result of *Owusu*, where a Convention or the Regulation applies and the apparently more appropriate forum is a non-contracting state, then, where jurisdiction is assumed on the basis of article 2, a domestic court no longer has the discretion to decline jurisdiction in favour of the non-contracting state.

It is clear that where the Conventions and Regulation do not apply, the issue of jurisdiction will (subject to any other relevant treaties) be determined in accordance with the common law and thus the doctrine of *forum non conveniens* will apply. Furthermore, a party domiciled in the UK can still raise *forum non conveniens* arguments in favour of another jurisdiction within the UK, as the allocation of

jurisdiction within contracting states is unaffected by the Conventions and Regulations.¹⁴

There are, however, a number of other instances in which it is not yet clear whether the doctrine may still have application. First, it is arguable that the doctrine may still apply where jurisdiction is assumed other than on the basis of article 2, although this is doubtful given the reasoning of the ECJ in *Owusu* and its generally restrictive approach to jurisdictional discretion. Secondly, article 16 of the Brussels Convention and Lugano Convention (article 22 of the Regulation) provides that in proceedings which have as their object rights *in rem* in, or tenancies of, immovable property, the courts of the contracting state in which the property is situated are the only courts which can have jurisdiction. As this concerns only contracting states, then arguably in a case concerning immovable property in a non-contracting state, the domestic court would be able to employ the doctrine of *forum non conveniens*.

What is clear is that the decision in *Owusu* marks another step, following on from the ECJ's rulings in *Turner* and *Gasser*, in the increasing circumscription of the jurisdictional discretion of the courts of England and Wales. As a result, the circumstances in which a court may decline jurisdiction are now extremely limited. The ECJ has already made it clear that if there is a valid arbitration agreement, there are no courts of any state that have jurisdiction as to the substance of the case for the purposes of the Convention. In that case, the court has no choice but to decline. Whilst neither the Conventions nor Regulation addresses the situation in which there is an exclusive jurisdiction agreement in favour of a non-contracting state, as opposed to a contracting state, there is a strong argument that a domestic court could in these circumstances decline jurisdiction in favour of the non-contracting state, not least because such an approach would promote consistency and uniformity in accordance with the Conventions and Regulation.

Having considered when the doctrine of *forum non conveniens* might still be invoked, one question remains: what is to become of those cases where there is already a stay in this jurisdiction on the grounds of *forum non conveniens* which involve a defendant domiciled in the UK? As the court does not have the power to order a stay against the UK defendant, it is arguable that the court ought not to have the power to continue an existing unlawful stay. It must only be a matter of time before this argument is tested in the courts; the implications for the hearing of such cases, and the award of costs, remain to be seen.

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¹⁴ *Cumming v Scottish Daily Record* [1995] EMLR 538.

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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

AN ACCOUNT OF THE TWENTIETH CENTURY IN LEGAL ACADEME: OR TWO NATIONS DIVIDED BY A COMMON LANGUAGE

Pragmatism and Law: From philosophy to dispute resolution,
by MICHAL ALBERSTEIN, Ashgate, Dartmouth, 2002, viii + 359 pp,
Hardback, £60, ISBN 0 7546 2208 8

Pragmatism and Law includes a treatment of three distinct subjects. First, there is a historical account of American jurisprudence from the late 19th century to the dawn of the 21st century. Second, there is an analytical account of various species of “pragmatism” over this period. Third, there is an evaluative attempt to solve the problems identified in the historical narrative and analysis. The author identifies what she feels to be the most promising aspect of legal teaching at Harvard, and suggests a direction for gainful future development. The book is centred on Harvard, and one aspect of the treatment of all three subjects is the proposition that Harvard occupies an iconic place in American jurisprudence and education.

Despite an American earnestness in its structure and ambition, *Pragmatism and Law* is a response to the same problem as a book recently reviewed in this journal: *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century*.¹ However, the differences between the two treatments is so great that a review for a British audience demands a very cursory reminder of how fundamental is the difference in the juristic approach in these two common-law English speaking nations. In effect, the allegation of “earnestness” in the American juristic tradition needs to be justified.

Unlike the judicial committees of the House of Lords and Privy Council, institutions that developed from more powerful legislative and executive bodies, the Supreme Court of the United States of America was created with vital constitutional objectives. There were two political functions for the Supreme Court that were necessary if the overarching purpose for the adoption of the Constitution of the United States of America – the conservation and deepening of the union of the states of North America – was to be achieved. First, the Supreme Court had to mediate between the states and the federal government, acting to restrict or extend the reach of federal power. The second function of the Supreme Court was a result of the process that led to the adoption of the constitution. A concession had to be made by the supporters of the draft constitution to secure adoption by the states. It was necessary to endorse the human rights rhetoric of the revolution, as expressed by Jefferson in the *Declaration of Independence*. This Enlightenment commitment to human rights was given expression by the Bill of Rights. It fell to the Supreme Court to develop the human rights provisions of the constitution, giving substance to the rhetoric by legal enforcement of

¹ (2004) 13 (2) *Nottingham LJ* 67.

human rights against both state and federal action, and on occasion striking down legislation that it felt violated the constitution. There simply are no equivalent functions traditionally associated with the highest courts in the United Kingdom.

In the United Kingdom law has played an important but relatively subordinate role in political rhetoric: we remain subjects rather than citizens; it is law *and* order that is called for; it was Christianity and civilization the Empire purported to export. In the United States political rhetoric is far more likely to give centre stage to aspects of the constitutional: the union; the pioneering experiment in, and experience of, representative democracy; the language of human rights. The American rhetoric is legalistic in nature when compared with the British. The resonance of this language tends to generate a regard for, and interest in, law that is not associated with the interests involved in individual disputes resolved through litigation. Principles are at stake. Furthermore, core American values are in issue.

Thus, it is submitted that one cause for American earnestness about much juristic material is that the issues are felt to be more important. They include the future of the union, what it means to be American, and the identification of the ideal form of the United States of America. With so much at stake, errors seem more important. The historical, institutional and cultural context of public and constitutional law is powerfully different to the context of the United Kingdom.

There is a second factor – again one that derives from the federal structure of the United States – creating a demand for earnest endeavour from American jurists. There is a natural tendency for the law of the states to develop independently of each other, a centrifugal tendency in the sphere of law encouraged by differences in social, economic, geographical, political and legal factors. In each state the legislative process responds in the first instance to local political forces. This centrifugal tendency in the 19th century encouraged a legal scholarship that emphasised the need and importance of principles of universal application, a common law that was the common law of all the states rather than a multitude of common laws for each state (with apologies to Louisiana). In the 20th century, the emphasis has been less on universal principles and more on unified legal codes, which can be adopted by states as a deliberate choice for uniformity and comity over local autonomy. The United States of America does not have the institutional devices for generating uniformity of private law that the European Union has. The academic legal community has traditionally felt a duty to attempt to resist legal localism.

The final difference we need to note is the relative strengths of the academy and the profession in the two countries. To be brutal, the legal academy is stronger in influence and prestige in the United States when compared with Britain, where the legal academy is weak relative to the profession. The United States has traditionally shown a willingness to appoint academics to the highest ranks of the judiciary. Dame Brenda Hale is a rare and recent exception to the British preference for practitioners (although formerly politicians were also appointed in significant numbers). In Britain, it remains the case that the professions determine what constitutes an acceptable legal education.

Thus it is that Michal Alberstein is able to describe the intellectual (not the institutional) history of the legal academy (rarely feeling the need to step outside that community) in the United States of America (ignoring developments in Britain and Europe) and not only fill her 350 pages but struggle to contain the amount of material she needs for her narrative account. The story she relates has been told before, being a large enough subject to have attracted previous accounts. Indeed, she chooses to use the accounts of other academics to deal with the interwar period of the legal realists. The narrative, grossly abridged, is as follows.

In the late 19th century a new American philosophical approach called “pragmatism” was developed by Harvard academics Charles Pierce (a social outcast and academic failure) and William James (Henry the novelist’s brother). One of the earliest members of the group that would be associated with pragmatism was a lawyer academic, Oliver Wendell Holmes Jr (his father Oliver Wendell Holmes Snr discovered puerperal fever was contagious, and, by introducing hygienic methods into childbirth hospitals, must have saved thousands of lives). Holmes became a Justice of the Supreme Court and probably the most influential jurist of the 20th century. Holmes was the master of the enigmatic epigraph, his most famous being: “The life of the law has not been logic: it has been experience”. Holmes is one source for pragmatism in legal thought. The other major prophet of pragmatism was John Dewey, a philosopher, educational theorist, political activist, and prodigiously productive academic of the “progressive school”.

Pragmatism, either *via* Holmes or Dewey, influenced most of the leading American jurists of the 20th century. However, its most vocal juristic progeny, and soon the practitioners of a unique form of legal pragmatism, were the legal realists. This heterodox band of scholars, represented in *Pragmatism and Law* almost exclusively by Karl Llewellyn and Jerome Frank, challenged the underlying premises of the “formal” school of jurists that had dominated American academe in the late 19th and early 20th centuries. The realists denied the efficacy of doctrine alone for resolving legal problems, and placed emphasis on the effects of law, viewing law as vitally concerned with consequences rather than being pre-determined by juristic entities such as principles. In educational terms they decried the “case-law” method as practised at Harvard as impoverished in the range of materials used, impractical in its educational aims, and distorting in the manner it presented and handled cases for pedagogic purposes.

After the Second World War there was a new attempt to establish a juristic approach founded upon a consensus approach to law and legal education at Harvard, known as the “legal process” method. Legal process was developed by two scholars: Henry Hart and Albert Sacks. The method attempted to demarcate an area that was legal rather than political, and to inculcate a consensus view of law which developed through “reasoned elaboration”. Amongst the stars of this movement was Lon Fuller. However, the shock of the success of civil rights litigation, and in particular the desegregation case of *Brown v Board of Education*,² shattered the political consensus upon which the legal process method was founded. Henry Hart and Albert Sacks were faced by a series of decisions by the Warren Supreme Court that they felt were “right” but which their method could not justify. Henry Hart was, literally, unable to articulate a juristic defence of the legal process approach. He stood up to deliver a prestigious public lecture on the jurisprudence of the legal process method, announced his planned theory did not work, and sat down again.

There followed a period of juristic activity which led to a fragmentation of the juristic world. Different schools developed on the left, right, and in a rather uncertain centre. European thought known as “post-modernism” suggested that relativism was unavoidable. Efforts to separate law and politics were unconvincing. Schools of thought developed in the academy that were antagonistic and showing a tendency to develop into ever greater divergence. Meanwhile, at Harvard, the Harvard Negotiation Project was developing a body of learning and technique that seemed ever more successful as it became ever less “legal” in orientation, open to other disciplines and hostile to juristic theory. At the end of the 20th century the legal academy was divided

² 347 US 483 (1954).

into two branches, the high theorists unable to agree about anything except the errors and inadequacies of others, and the negotiation and skills people eschewing all theory and merging with non-legal disciplines.

At this point in the narrative we finally reach the point where the common thesis of this book and *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century*³ becomes apparent. Both books, although written about different systems, and with very different approaches to their subject matter, find a problem of identifying and defending the discipline known as “law”. The problem of law as a discipline is that it has a subject matter (law, legal institutions, legal processes) but no distinct methodology. Legal scholarship is distinctive in style, but utilises no method or technique that is not in use in some other discipline. This creates a fear of an immanent risk that law will dissolve into an aspect of the disciplines that provide its various methods of inquiry and analysis.

Bradney, in *Conversations, Choices, and Chances*, met this problem of definition by advancing a 19th century approach to the question of what a “liberal degree” should aspire towards, modelling legal education as a species of this genus. Alberstein inclines towards a resolution that combines the approach of the skills-based Harvard Negotiation Project with theoretical insights gleaned from post-modernism. I am in some sympathy with Alberstein on this broad question of approach, and certainly her book demonstrates that one can be both interested in an approach to legal education that is based on student experience and serious about theory at the same time. However, her account reveals a schism in the United States between high theorists and skills-based approaches similar to the one that reading Bradney suggests exists in Britain between liberal scholars and trainers.

In support of her conclusion Alberstein relies upon the analysis that has proceeded throughout her narrative account of American juristic thought through the 20th century. The very long first chapter is foundational, as it provides the classifications for the later analysis. Unfortunately, this analysis has flaws. The analytical method is eclectic and relies upon the positing of meaning from congruity. This is a deliberate attempt to learn the lesson of post-modernist theory, that there is no one path to truth.⁴ However, along with much of “post-modern” writing there is a double tendency towards mystification.

First, the attractiveness of verbal imagery and suggestiveness of analogies tends to “persuade” by colour of language and repeated use of examples rather than attempting demonstration. To give an important example drawn from a crucial stage of Alberstein’s analysis we are presented with: “pragmatism” reified as a castrated ghost (“spirit” – also referred to as: the “spectre that haunts my paper”); non-biological sex assigned to scholars or their work (Holmes male, Dewey female); the stereotypical characteristics of the genders then applied to said scholars (Dewey is “practical”; “hysteric”; “takes care of the education of the children”; he is “the happy harmonizer”: Holmes is “obsessive”; a “responsible, insensitive, rational and sophisticated actor”; who will “encounter the outside world”); these scholars are then placed in an imagined cultural family (“traditional liberal family”) and assigned roles, all of which

³ A Bradney, (2003, Hart Publishing).

⁴ I think this is what she means when she writes at xii: “To say that I go beyond the dichotomies is to repeat the clichés. Still, I must declare that I indeed try to do so and more – not to merely go beyond, but to go right through, to endure them with passion: the internal and the external; the fantastic and the real; the progressive and the conservative; the theoretical and the practical; the philosophical and the common-sense-like; the literary and the scientific. My writing is as much about fiction as about reality – reality as a fiction, as a story, a text, which unfolds through time-and-place matrices, and where the dichotomies find their play each time in different ways.” However, I find this style sufficiently obscure to feel the need to quote in order to avoid the risk of misreading.

leads the author to ask (“of course”!) “what do the children do, and what is the horizon of their choices in the promised land?” (pages 65–70). This is not a style that allows clarity of thought.

Second, the method of analysis encourages reification. The refusal to make arbitrary decisions about definition, or preferred criteria of evaluation, leads to the setting-up of ideas or movements or the works of scholars as “things” that exist and have a life of their own. Oddly for a movement that insists upon the centrality of “the text” there is no requirement that “the text” be “any text”. The “text” becomes almost any feature of social life that is of interest to the theorist. This approach is articulated by Alberstein:

By using pragmatism as a text, which functions as a proper name, a singular identity that wears different costumes in time and place, I try to trace its operation within the theoretical legal discourse.
(page 1).

Pragmatism is not “a text”, it is not “a singular identity” or a person of any type, pragmatism does not wear clothes, it does not act. Pragmatism is not a thing at all; it is how an approach within American philosophy was described by an early exponent of the approach.

The analysis also employs the rather obscure and metaphorical language typical of the “post-modern” approach to analysis. Occasionally, I think this borders on the misuse of language, *eg* “locus” for “fulcrum” (at ix), “rapture” for “rupture” (at page 24), “pathos” for “ethos” (at pages 72, 247 *et passim*). In short, the very considerable scholarly effort displayed in chapter one is deeply mired in an analytic method that aspires to persuasion by analogy and confirmatory classification, and yet uses a form that is painfully obscure. I suspect that the first chapter is the remains of a re-worked thesis, and that this partially explains both its impressive use of the work of many authors, and its unsatisfactory form.

The later chapters of *Pragmatism and Law* are clearer in style. However, their reliance upon the classification structure developed in the first chapter leaves them unable to stand alone, and the general style and analytical method remain. As the book approaches the Harvard Negotiation Project the author seems to start to feel some irritation at the very work and method that was her focus and guide in chapter one: “For me, Schlag’s ‘nowhere to go’ metaphor seems emblematic to the academic discourse, with its proliferation of schools and economy of diversity” (page 286). It is clear that she sees the Negotiation Project – the work that has not been influenced by “post-modern” theory – as the most exciting and attractive work being undertaken at Harvard today.

In conclusion, *Pragmatism and Law* is a difficult book, somewhat overambitious and built on a method of analysis that seems destined to produce mystification and obscurity of style. However, it is a serious attempt to organise the last 100 years of American jurisprudence into some sort of overall story without distortion, using the idea of “pragmatism” and its forms as the unifying theme. It is an interesting book that displays great industry, scholarly integrity, and a considerable intelligence at work.

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CONSUMER LAW

Product Liability, by C JOHN MILLER and RICHARD S GOLDBERG 2nd ed,
Oxford, Oxford University Press, 2004, ciii + 971 pp, Hardback, £160-00, ISBN
0-19-825678-7

In this book, the authors deal with all the facets of the law relating to product liability. The book is divided into six parts and comprises a total of 19 chapters, dealing in turn with contractual liability, strict liability in tort, negligence liability, issues common to strict and negligence liability, conflict of laws, and product safety. This is preceded by an introduction and “modern historical outline”, which features several interesting cases pre-dating the famous House of Lords’ decision in *Donoghue v Stevenson*.¹

It is, therefore, immediately apparent that this book deals with a wide field. This raises the immediate question whether the authors may have set themselves an unachievable task: to give a full account of the law, without cutting corners. This question can be answered in the negative immediately: this book succeeds in covering all the relevant issues, and does so in a thorough manner.

The main focus of the book is on the law of England and Wales, but this is inevitably subject to a discussion of the various European Union rules which now apply in the field of product liability. Thus, the various directives and judgments by the European Court of Justice are dealt with as well. The authors cast their net wider, however, and take into account developments in the United States, a jurisdiction where product liability laws and litigation have been at the forefront of legal developments. It is not surprising that the inclusion of US materials can assist in the discussion of the legal position in the UK, especially because there have still only been a few authoritative cases in the domestic courts. In addition to US law, other Commonwealth jurisdictions are also considered, as are some of the European countries such as France and Germany. This book is a good example of the way in which comparative law can assist in understanding domestic law.

Part I focuses on contractual liability. It starts with a useful discussion of the difficulties posed by the doctrine of privity of contract, and the various legal tools that have evolved to soften its impact. This is followed by a detailed account of the law on express warranties and misrepresentations, an aspect of contract law of some complexity. Here, the authors make good use of comparative material to illustrate the various points that are raised in the discussion of the law of England and Wales. A particularly interesting section deals with liability between manufacturers and remote consumers. It is well-known that a consumer cannot bring a claim against a manufacturer for poor-quality goods where these have not caused any injury or damage, unless he or she is in a contractual relationship with that manufacturer. This may, for example, be the case where the manufacturer has offered a guarantee, but this may not be sufficiently generous to enable the consumer to obtain redress from the manufacturer. However, it is often the case that promises in advertising or in brochures give rise to expectations of quality. Whilst some jurisdictions have accepted that some liability should fall on manufacturers in such circumstances, domestic law has been reluctant to take a similar approach. It is notoriously difficult to demonstrate that such situations give rise to a collateral contract between manufacturer and consumer, for example. In this book, the authors present an interesting discussion of these difficulties, including a reference to guarantees and extended warranties. The remainder of this part

¹ [1932] AC 562.

then concentrates on the terms implied by the legislation on the sale and supply of goods, remedies and exemption clauses. A strength here is the analysis of many of the relevant cases in some detail.

Part II, dealing with strict liability in tort, is unsurprisingly the longest part in the book, running to almost 330 pages. Starting with a discussion of the background that eventually led to the adoption of a strict liability regime, the book soon turns to the EC Directive in this field² and its implementation into the law of England and Wales. Each aspect of the legal régime is discussed in considerable depth, and much use is made of relevant case-law as well as academic commentary. As with all the other parts in this book, it is well-structured, accessible and readable, and allows a reader looking for a particular point to find the relevant section quickly, whilst also offering useful guidance to a reader seeking a more general overview of this area. Particular areas of controversy are once again discussed in the light of developments in other jurisdictions, which is welcome. Parts III and IV are of similar rigour and provide a lot of detail on the relevant law.

An interesting chapter is chapter 18 in Part V, which was contributed by Professor Jonathan Harris. This deals with conflict of laws issues in the field of product liability, and it includes a discussion of the relevant English and European principles. The final part/chapter deals with product safety regulation under the Consumer Protection Act 1987 and the EC Directive on General Product Safety.³ This section is considerably shorter than most chapters in this book, and has the feel of having been added for the sake of completeness. This is perhaps not surprising if it is borne in mind that safety regulation tends to be a criminal law or administrative matter, rather than an area involving individual consumer rights.

In this short review, it has only been possible to give a general feel for the book. It is without doubt a valuable addition to the literature in this area, and it should be consulted by anyone working in this field, be they a practitioner dealing with product liability litigation, a scholar researching in the area, or a student seeking to understand a particular aspect of it.

CHRISTIAN TWIGG-FLESNER*

² Council Directive 85/374/EEC.

³ Council Directive 2001/95/EC.

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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 NOTTINGHAM LAW SCHOOL OVERSEAS SUMMER SCHOOLS PROGRAMMES

Every June for the last ten years, the Centre for Health Law has organised a one-week summer school for NTU law students in Strasbourg, France. The summer school introduces students to key European institutions such as the Council of Europe, European Court of Human Rights and the European Parliament. Staff from these institutions also provide lectures to the students. A particular focus taken on the Strasbourg programme is on the work of the Council of Europe on bio-ethics and human rights. NTU law students are joined by law students from Loyola University, Chicago and they have joint visits, some joint classes and social activities. NTU law student interest in the Strasbourg programme continues to grow and, for the 2005 programme, numbers doubled with 55 students participating. Due to the success of the Strasbourg programme, we decided to expand our provision in 2005 to Tallinn, Estonia. The Tallinn programme focuses on international trade-related issues and was a great success, attracting 25 students. We have now decided to expand further our summer school programmes course provision for 2006 by adding two new programmes in Berlin and Geneva.

TALLINN

The focus of this programme is on International Trade Law and it is run in conjunction with Concordia Audentes International University based in Tallinn. NTU students study alongside Tallinn students for the week. There were visits to the Tallinn Parliament building and the Office of the Estonian Prime Minister. There was also a talk from a Tallinn judge and a visit to the local prison. A day trip to Finland and a buffet lunch on board the ferry returning from Helsinki were also organised. Tallinn also has a beach which is proving very popular with students.

BERLIN

The Berlin programme will take place in the Humboldt University where we have received the very kind co-operation of the International Law Department. The focus of the programme is on international criminal law and the law of terror. Human rights

issues will also be discussed. There will be visits to the Jewish Museum, Checkpoint Charlie, the Allied Museum, Sachsenhausen Concentration Camp and the German Resistance Memorial Centre, along with guest lectures from staff at the Humboldt.

GENEVA

The Geneva programme is based on links that the law school has developed with the Patient Safety Unit at WHO (World Health Organisation). The focus of the programme will be on international humanitarian law and sports law. Visits will take place to the UN, WHO, International Red Cross and the Olympic Museum in Lausanne.

THE STUDENTS

Students on the programme receive certificates of attendance and they find the programmes very enriching. The programmes also help them develop an international perspective on legal practice and provide them with something very useful to put on their CVs. Parents of students also seem to like the programmes as they provide a “controlled” overseas experience. Activities are planned and a good standard of accommodation is provided.

We are extending offers of places for the summer programmes for 2006 to law students on the foundation degree in law newly validated by NTU and based at New College Nottingham.

PROGRAMMES ATTRACT STUDENTS FROM ACROSS THE LAW SCHOOL

Students have joined our summer programmes from courses across all the law school. For example, full-time and distance learning Graduate Diploma in Law students feature strongly in the Tallinn programme. We have Bar Vocational and Legal Practice Course students on all the programmes and law undergraduates also feature strongly.

PROGRAMME ADMINISTRATION

The programmes are managed by John Tingle, Reader in Health Law, with day to management by Nina Tyler and Julie Stravino of the University Conference Office. Nina and Julie have long experience of managing the Strasbourg programmes.

ADDING TO THE QUALITY OF OUR LAW PROGRAMMES AND TO THE LIFE OF THE LAW SCHOOL

The summer schools also add something unique to all our courses in the law school by providing the students with educational opportunities to travel abroad and meet

students from other universities in informal settings. Staff development opportunities are also afforded as the programmes are all mainly taught by NLS teaching staff. Overall, this is an excellent educational enrichment experience for all concerned.

A SUMMER PROGRAMME FOR EACH YEAR OF THE LLB

We offer three years of study on our full-time LLB programme and four years on our LLB (Sandwich) degree. A pattern is now beginning to emerge of students doing different summer school programmes in each year of their study. It will be a unique feature of our degree and of the life in our law school if we can continue to offer a study abroad programme for each year of the degree.

JOHN TINGLE*

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The citation for this issue is (2006) 15(2) Nott. L.J.

ISSN No. 0965-0660

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EDITORIAL

This issue of the journal should appeal in particular to the property, public and European lawyers within our readership. Nicola Jackson takes issue with Charles Harpum's views on the nature of overreaching powers in the context of dispositions of land. Aisling O'Sullivan and Phil Chan consider the underpinnings and evolution of Irish constitutional theory and, in particular, the complex role played by natural law as a basis for determining the existence and recognition of rights under the Irish constitution. Ian Turner explores the extent to which the judiciary engage in "merits-based" review of administrative action under the guise of the "irrationality" test. Two of the case notes deal with different aspects of the recent jurisprudence emanating from the European Court of Justice, while the third discusses a potentially unhelpful development in the law of undue influence. We close this issue with a brief account of Nottingham Law School's foundation degree and its role in the widening of participation in higher education.

My thanks, as always, go to all those who have contributed to this issue. Many thanks also to my able deputy, Jane Ching and to the rest of the production team: Tom Lewis, Kay Wheat and our wonderful administrator, Carole Vaughan.

ADRIAN WALTERS

ARTICLES

OVERREACHING AND THE RATIONALE OF THE LAW OF PROPERTY ACT 1925

NICOLA JACKSON*

INTRODUCTION

Overreaching is a rule that allows a purchaser of a legal estate to take free from equitable interests under a trust of land or settlement.¹ *Megarry and Wade* states that “[t]he term is nowadays understood in two distinct senses”: first,

[i]n its traditional meaning, overreaching is the process whereby existing proprietary interests, whether legal or equitable, are subordinated to or “overridden” by some later interest or estate created pursuant to a trust or power.

Secondly, “[o]verreaching has tended to be used in a narrower sense to mean the process by which an interest in land is transferred from the land to the purchase money or other property acquired in exchange for it, leaving the land free from that interest”.² In *Williams & Glyn’s Bank v Boland*,³ although trust interests were held capable of being overriding, this was only the case if any capital money had not been paid to two trustees in accordance with the overreaching provisions in the Law of Property Act 1925, sections 2 and 27. This was confirmed in *City of London Building Society v Flegg*.⁴ In 1990, Harpum argued that the nature of the overreaching is “a necessary concomitant of a power of disposition”.⁵ Thus, only an authorised disposition will free

* University of Manchester. I am indebted to John Stevens, Mark Thompson, Martin Davey, Gerard McCormack and Jean Howell for comments on earlier drafts. I wish to acknowledge my debt to Anderson’s *Lawyers and the Making of English Land Law 1832–1940* (1992), though he does not necessarily support the views offered in this article. I have derived some ideas and arguments from an earlier article of mine: “Overreaching in Registered Land Law” (2006) 69 MLR 214. Parts of this article are reprinted here with kind permission of the *Modern Law Review*.

¹ Law of Property Act 1925, ss 2 and 27; Harpum, “Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation” [1990] CLJ 277, hereafter *Overreaching* [1990]; Sparkes, *A New Land Law* (Oxford: Hart Publishing, 1999).

² *Megarry and Wade The Law of Real Property* (London: Sweet & Maxwell, 6th ed, Harpum, 2000), hereafter Harpum, *Megarry and Wade*, paras 4–078–4–080, footnotes omitted. The work concludes that “[o]verreaching in [the] broad sense was well-known by the early years of the nineteenth century”: para 4–079.

³ [1979] Ch 312; [1981] AC 487.

⁴ [1988] 1 AC 54.

⁵ *Overreaching* [1990], 277; by the same author “The Stranger as Constructive Trustee” (1986) 102 LQR 67; An illustration given by Harpum is Law of Property Act 1925, s 99, by which a borrower, in granting a lease under his power to do so under this section, has the concomitant ability to subordinate the interest of the lender to that of the tenant. Harpum, *Megarry and Wade* at para 8–165 observes: “[O]verreaching is, and has always been, the necessary corollary of the

the purchaser from liability to the beneficiary. This was the case at common law.⁶ Harpum argues that there is nothing in the Law of Property Act 1925 to establish a novel basis for overreaching. Thus, it takes effect in the common law.⁷ However, it does seem that the Harpum argument is open to quite some level of doubt. If all along we had a very different datum from which to start, some new legislation,⁸ and much academic theory,⁹ is misconceived.

BACKGROUND TO THE 1925 LEGISLATION¹⁰

There are several points about the history of overreaching that are interesting when considering both the nature of overreaching and the Harpum argument.

The main reason for use of overreaching powers in the 1925 legislation was to free conveyancing from the doctrine of notice. One of the main difficulties associated with land transfer law was the extensive investigations of title required because of the doctrine of notice. Through this doctrine, beneficial interests became burdens on the land, rather than merely personal rights against the trustee.¹¹ Purchasers would take a good title at law because the trustees conveyed as owners of the legal estate, not *quā* trustees. But the equitable title would be encumbered with the beneficial interests unless a purchaser was deemed to have no notice of the trust.¹² Equitable interests were almost as well protected as legal interests, because of the broad interpretation of the doctrine of constructive notice.¹³ Purchasers were required to be diligent in investigating title. If they failed to carry out the requisite inspections and enquiries they would

exercise of a trust or power to sell or to make some other disposition. For this reason, the Trusts of Land and Appointment of Trustees Act 1996 makes no express provision for overreaching to take place on dispositions made by trustees of land under their powers”.

⁶ Harpum, *Overreaching* [1990], 279–282.

⁷ *Overreaching* [1990], 292; also Swadling, “The Conveyancer’s Revenge” (1987) *Conv* 451, 453–454.

⁸ For example, the Land Registration Act 2002, s 26.

⁹ Ferris and Battersby, “The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land”, [1998] *Conv* 168, hereafter Ferris and Battersby [1998], which was based on the Harpum argument; also Ferris and Battersby, (2002) 118 LQR 270–295; “The General Principles of Overreaching and the Modern Legislative Reforms 1996–2002” (2003) 119 LQR 94–126; compare Dixon, “Overreaching and the Trusts of Land and Appointment of Trustees Act 1996”, [2000] *Conv* 267, and Ferris and Battersby, “Overreaching and the Trusts of Land and Appointment of Trustees Act 1996 – a Reply to Mr Dixon”, [2001] *Conv* 221. Other aspects of the Harpum argument have been challenged previously: Sparkes, n 1 above, 129–130 (Harpum’s thesis “proceeds on a false analogy with bare powers”. Modern trustees now hold legal title, so the only question is “whether or not the beneficial interests stick to the lender”; the law provides some protection for purchasers under an unauthorised disposition; 1925 legislation is set up for the purpose of conveyancing with estates, so the power-based overreaching analysis will not always prevail. The first point is surely wrong. Trustees were always the legal owners of the land, and the question of equitable title was always regulated by the doctrine of notice (F W Maitland, *Equity: A Course of Lectures* (London: Cambridge University Press, 2nd ed, A H Chaytor & W J Whittaker (eds) revised J Brunyate, 1936), 124–125, hereafter Maitland, *Equity*). However, Sparkes does not pursue the point to its logical conclusion, offered in this article; Ferris and Battersby [1998] (arguing that there is a difference between “power” and “authority”, and that trustees have less power in registered land to overreach than Harpum suggests; Ferris and Battersby (2002) 118 LQR 270–295, arguing, *inter alia*, that Law of Property Act 1925, s 2 has more of a role to play in the protection of purchasers than Harpum’s theory suggests, but not along the lines suggested here).

¹⁰ Set out in detail by J S Anderson, *Lawyers and the Making of English Land Law 1832–1940* (Oxford: Clarendon Press, 1992), hereafter *Anderson*, and Harpum, *Overreaching* [1990], 288–289; also *Royal Commission on the Land Transfer Acts*, Second and Final Report Cd 5483, (1911) HCP xxx 1, para 100 hereafter *Royal Commission on the Land Transfer Acts* (1911), Second and Final Report; A Offer, “The Origins of the Law of Property Acts 1910–25” (1977) 40 MLR 505. I have derived many of the facts in relation to the various reform proposals and legislation, from these works, and also from an earlier article of mine: (2006) 69 MLR 214, 216–222. The following paragraph was taken from this article.

¹¹ It is “the rules of equity which make the trust a burden on the land”: *Report of the Registration and Conveyancing Commissioners* (1850) HCP xxxii 1, quoted by J E Hogg, *A Treatise on the Law Relating to Ownership and Incumbrance of Registered Land and Interests Therein* (London: William Clowes and Sons, 1906), 7.

¹² On the nature of this doctrine see Maitland, *Equity*, Lecture 10, 117–125; also reviser’s comments, 210–212; *Anderson*, 266–280; Swadling, n 7 above, 453–454; G Spence, *The Equitable Jurisdiction of the Court of Chancery* (London: V and R Stevens and G S Norton, 1846–1849) Vol II at 380.

¹³ Maitland, *Equity*; *Anderson*, 266–280

be bound by any interest that would have been disclosed had such inspections and inquiries been carried out.¹⁴ The main problem perceived by land transfer reformers was notice of the kind implied through documents.¹⁵ If there was a trust in the chain of title, a purchaser would be fixed with notice of limitations on the trustees' powers and would thereby be affected by all the equitable interests.¹⁶ Anderson shows how a purchaser had to ensure that the terms of the trust authorised the trustee to make the disposition. This gave notice of the contents of the whole document, and the purchaser then had to ensure that all matters were in order. This resulted in lengthy and costly requisitions.¹⁷ If the trust required consents to be given, the purchaser had to make sure that these were obtained. If the sale was for particular purposes such as the payment of debts, a purchaser with notice of the trust would also have to ensure that the purchase money was applied in accordance with the terms of the trust.¹⁸ Haldane, in the *Annotations* to the Conveyancing Bill 1913, observed that "the greatest difficulty now experienced by conveyancers is on account of the length to which courts have in the past extended the doctrine of notice". "[I]t is the effect of this 'notice' and of these equitable rights which is the most troublesome matter in investigating title".¹⁹ As Potter observes, "even before the present legislation, there was a tendency to cut it down by protecting purchasers of the legal estate".²⁰ Recitals were framed in the deed of conveyance, to declare the fact of the trust but to imply that the trustees also owned the land beneficially. The beneficial interest was thus accounted for and the purchaser could not be put on inquiry that there were trusts in the chain of title that required investigation.²¹ He or she would take free from the trust as a "*bona fide* purchaser for value without notice": "Conveyancers, nevertheless, do not seek to go behind [these recitals]; they abstain from inquiries which, if answered, would oust their client from the position of a purchaser for value obtaining the legal estate in good faith without notice of any trust".²² Such recitals of beneficial ownership would be taken by purchasers and the courts at their face value.

From Wolstenholme's Conveyancing Bill 1897 onwards, overreaching by trustees was achieved by assimilating the law of trusts of realty with that of trusts of personalty.²³ Transfer of title to money, stocks and shares was simpler. Beneficial

¹⁴ Maitland, *Equity*, 118–119.

¹⁵ eg, Haldane's scheme of reform (examined below): Anderson, 266–273; Anderson, "The 1925 Property Legislation: Setting Contexts" in S Bright and J Dewar (eds), *Land Law Themes and Perspectives* (Oxford: Oxford University Press, 1998), 107–128, 112. Anderson calls it "documentary notice"; W T Murphy and S Roberts, *Understanding Property Law* (London: Sweet & Maxwell, 3rd ed, 1998), 197–198.

¹⁶ *In re Soden and Alexander's Contract*, [1918] 2 Ch. 258; Anderson, 268–271; Harpum, *Overreaching* [1990], 283; Anderson, "The 1925 Property Legislation: Setting Contexts", n 15 above, 107, 111–113 gives an account of the difficulties faced by purchasers.

¹⁷ Anderson, n 15 above, 112; Anderson, 267–268 (Haldane's view).

¹⁸ Spence, n 12 above, Vol II at 380–381; Harpum gives a detailed account of these principles: *Overreaching* [1990], 283–285; also S Anderson, "The Proper, Narrow Scope of Equitable Conversion in Land Law", (1984) 100 *LQR* 86, 89–90.

¹⁹ Anderson, 266–267, citing this quotation and idea; also Howell, "The Doctrine of Notice: An Historical Perspective" (1997) 61 *Conv* 431; Howell, "Notice: A Broad View and a Narrow View" (1996) 60 *Conv* 34.

²⁰ H Potter, *Goodeve and Potter's Modern Law of Real Property and Chattels Real* (London: Sweet & Maxwell, 1929), 69, referring to trusts for sale.

²¹ *In re Soden and Alexander's Contract*, n 16 above, per Younger J.

²² *In re Soden and Alexander's Contract*, n 16 above, 263, per Younger J; also *In re Chafer and Randall's Contract*, [1916] 2 Ch 8. This practice was settled in *In re Harman and Uxbridge and Rickmansworth Ry Co*, (1883) LR 24 Ch D 720; Anderson, 269–273 and Harpum, *Overreaching* [1990], 285–287 give accounts of this practice of misleading recitals; for a contemporary account: Anon, "Keeping a Trust Off a Title", [1919] *Conv* 53; Anderson also shows how conveyancers used the device of the trust for sale and then declared the powers of trustees. The equitable interests would be disclosed in a separate document so that purchasers could be satisfied of the powers of trustees "easily and safely": 269.

²³ For further detail on the principle of assimilation see Jackson, (2006) 69 *MLR* 214, 218–220. Part of this paragraph is quoted from this article. Note comments by Viscount Haldane to the effect that this policy of assimilation lay behind the Law of Property (Assimilation) Bill 1920: HL (1920) Vol 39, col 263–269, 265 (second reading 3 March 1920), and HL (1920) Vol 41, col 494–495 (Committee, 26 July 1920). The 1920 Bill was withdrawn following sustained objections to universal curtain provisions by Viscount Cave. The Law of Property Act 1922, with amended curtain provisions, took

interests under such trusts did not bind title as rights *in rem* but were purely personal interests, enforceable against the trustees only.²⁴ Trusts were kept off the face of title (or the register of shares) and thus, purchasers and other transferees could be said to have no notice of the trust. It is “the rules of equity which make the trust a burden on the land”.²⁵ By eliminating the doctrine of notice, a beneficiary under a trust would no longer have an interest that could be asserted against a purchaser. Purchasers would now be dealing with trustees as if those trustees were absolute owners. Beneficial interests would be reduced to personal rights against the trustees only. Assimilation may have seemed radical because it placed so much responsibility on trustees. But according to the 1857 *Commission on Registration of Title*,²⁶ the idea had its roots in a fundamental public policy. Owners of freeholds had always been chosen with care because they had social responsibilities, namely partial contribution to the defence of the nation.²⁷ And now, the social demand for the free transfer of land dictated that trustees should be invested with the responsibility of being the sole means by which their beneficiaries could assert their property rights.²⁸

Reformers had frequently observed that this effect would not be unjust to beneficiaries.²⁹ The Report of the Registration and Conveyancing Commissioners in 1850 shows “the attempt made by the Commissioners to grapple with the difficulty of the ‘equitable estate’ and ‘constructive notice’”.³⁰

... the motives for the establishment of a register do not prevent us from giving full effect to the distinction which the law recognizes between those contracts which are binding on the parties only and those which bind the land ... There appears to be no reason for compelling persons who are satisfied with a personal obligation and personal remedies to obtain a charge upon land, or to secure it by means of registration; ... land is vested in trustees selected by the parties themselves, and provisions are studiously framed for rendering it unnecessary that purchasers, mortgagees, and others dealing with the trustees, should be concerned to see to the circumstances under which the trust is performed. ... General experience has shown that the inconvenience, delay, and expense, occasioned to parties interested under trusts by the rules of equity which make the trust a burden on the land, far outweigh the benefit of a protection against the occasional deviation of the

its place: *Anderson*, 290–313; There is an extensive consideration of the rationale of assimilation throughout *Anderson*; also Sir A Underhill, *A Concise Explanation of Lord Birkenhead's Act (The Law of Property Act, 1922 in Plain Language)* (London: Butterworth & Co, 1922), 78; Hogg, n 11 above, Chapter 1 (on the ideology of the Land Transfer Acts of 1875 and 1897).

²⁴ Hogg, n 11 above, 8–9 *Anderson*, 66–67, 254–255; In general, the law of personality permitted no such extended concept of constructive notice as did the law of realty: *Anderson*, 94; Maitland, *Equity*, 146.

²⁵ *Report of the Registration and Conveyancing Commissioners*, (1850) HCP xxxii. 1, quoted by Hogg, n 11 above, 7, in the context of title registration.

²⁶ The idea of assimilation was expressed in its most complete form in the system of registration of title.

²⁷ Hogg, n 11 above, 12 (in the context of title registration), citing observations in the *Commission on Registration of Title* (1857) HCP xxi 245, para 50, p 29, that illuminated “the general nature and scope of the changes advocated”: “We next proceed to consider whether registration of the legal ownership will be compatible with due protection of the equitable or beneficial interests in land. ... We should be able to rely ... on our ancient law as affording for the present purpose a wise and useful precedent; for just as the feudal law required that the freehold should always be filled by one capable of contributing to national defence, and performing the duties of a feudal follower, so the spirit of commerce now demands that for its purposes also the fee simple in land shall always be represented and be in the possession of persons capable of fulfilling those new duties and offices which the ownership of land in the present state of society entails or involves”. (Editing, Hogg’s).

²⁸ *Ibid.*

²⁹ Also *In re Soden and Alexander's Contract*, n 16 above, Younger J observes: “it can hardly be doubted that the proper and beneficial disposition of trust estates by trustees, who either mediately or immediately have had confidence reposed in them by the author of the trust or the court, should not be hampered by the burden of answering elaborate domestic questions, even if the conventions necessary in the majority of cases to obviate them ... should destroy, in the comparatively rare instances of abuse, the claim of the cestuis que trust to follow the trust property into the hands of the purchaser. It is better this claim should be lost, and the cestuis que trust in these cases be left to their remedy against their trustees personally, than that the value, for the purpose of realization of trust property, should in the mass be generally prejudiced”: see *Anderson*, 271; also Anon, “Keeping a Trust Off a Title”, [1919] *Conv* 53, 53.

³⁰ Hogg, n 11 above, 6–7.

trustees in those cases where the operation of the rule is excluded. The efforts of conveyancers in this respect frequently fail, from the extreme difficulty, in some cases, of excluding the doctrine of equity as to constructive notice . . . We think the rule should be that a purchaser is not to be affected by a reference in a registered deed to any unregistered document, although the terms of the reference may express or imply the existence of a trust.³¹

In 1870, Wolstenholme concluded:

by common consent of conveyancers, trusts affecting mortgage money are not, in properly arranged transactions, allowed to encumber the title to land. . . . To leave the owner of the partial interest unprotected as against the persons in whose name the money is secured, and who is generally chosen by the owners of the partial interests, has become a habit, no inconvenience is felt, and there is no necessity to encumber the register for the purpose of affording a protection which is now waived in many cases where it is available.³²

But there might have been an element of gloss in the reformers' statements.

The conclusion was usually buttressed by the observation that although the doctrine of notice applied in theory to trusts of personalty, since there was no equivalent in practice of the rules concerning constructive notice beneficiaries were in fact reliant upon the honesty of their trustees. Yet this did not stop donors settling vast sums of money on such trusts, nor had lawyers developed mechanisms giving any greater protection to beneficiaries. These commonplaces among reformers were adopted by the 1857 Commissioners, though it should be noted that there was no quantitative evidence for the supposed practices concerning trusts of land.³³

If beneficiaries did not rely on the doctrine of notice in practice, and the type of trust mainly contemplated by the reformers was the express trust, it was thus reasonable to expect them to take appropriate steps to protect their interest, such as registration of a "caveat".³⁴ Later reforms added the protection for beneficiaries that any capital monies arising under the disposition should be paid to two trustees or a trust corporation.³⁵

Wolstenholme, assisted by Cherry (the architect of the 1925 legislation), produced a bill, which was read for the second time in the House of Lords in 1897.³⁶ The bill aimed to simplify the ordinary law of conveyancing by dividing ownership into

³¹ *Report of the Registration and Conveyancing Commissioners* (1850) HCP xxxii, paras 30–31, quoted by Hogg, n 11 above, 7, editing supplied. The report rejected the idea of registration of title in favour of a scheme of registration of assurances: Hogg, n 11 above, 6; also *Anderson*, 93–94.

³² *Royal Commission on Land Transfer* (1870) HCP xviii p xlv, Wolstenholme's note of dissent, quoted in *Anderson*, 255. Wolstenholme was arguing that it was unnecessary to register trust interests, thereby allowing beneficiaries potentially to block dealings with the land, as was the case with trusts of stock (*Anderson*, 66–67); Wolstenholme had later observed that "if you want to do away with the expense, you must give up some security": *Select Committee on Land Titles and Transfer*, (1878) HCP xv 467, qq 2449 ff, quoted in *Anderson*, 255. Morgan had similarly observed that "[s]uch a process . . . is constantly put in motion, not only under the Settled Estates Acts, but in the case of lands taken by railway and other public companies, and I have never heard that it has caused any complaint or worked any injustice": George Osborne Morgan, *Land Law Reform in England* (London: Chapman and Hall, reprinted with additions from the *Fortnightly Review*, 1880), 31. Morgan was the Chairman of the Select Committee of the House of Commons on Land Titles and Transfers, 1878–1897.

³³ *Anderson*, 94, footnotes omitted; compare the views of Harpum, *Overreaching* [1990], 291–292, examined below, and Sparkes, n 1 above, 101. On the reading of the Law of Property Bill 1920, Viscount Cave objected to the universal curtain provisions in it on the basis that there was insufficient protection for the beneficiaries: *Anderson*, 297–298.

³⁴ On the reformers' views as to this, expressed in the context of title registration: *Anderson*, 93.

³⁵ Law of Property (Assimilation) Bill 1920; Law of Property Act 1922; Law of Property Act 1925. The two-trustee rule appeared for the first time in relation to settled land in the Settled Land Act 1882, s 39: It was retained as applicable exclusively to settled land under the Conveyancing Bill 1913, clause 16. It was made generally applicable in the Law of Property Bill 1920 and the Law of Property Acts 1922–1925: Harpum, *Overreaching* [1990], 291; *Anderson*, 296.

³⁶ This paragraph is taken from (2006) 69 MLR 214; Harpum, *Overreaching* [1990], 288; Wolstenholme's bill had proposed "a system of unregistered conveyancing which would rival the registers of title": J Howell, "The Doctrine of Notice: An Historical Perspective" [1997] 61 *Conv* 431, 437.

“estates”, which included only fees simple or terms of years legal or equitable, “fiduciary rights”, and “paramount interests”. “Estates’ [were] the only interests which [would be] the subject of transfer as between vendor and purchaser”.³⁷ The owner of the estate was to have absolute powers of disposition, and nothing but the estate would need to appear on the title.³⁸ The purchaser would not be concerned with trusts.³⁹ The alteration of the description “trusts” to “fiduciary rights” was designed to reflect the alteration in their nature from interests capable of binding successors in title, to personal rights enforceable against the trustees only.⁴⁰ There was provision in the bill for the equitable owners to register cautions and inhibitions, *eg* to restrict the estate owner’s otherwise absolute powers of disposition.⁴¹ The scheme would result in a “statutory proprietorship of the fee simple”.⁴² Wolstenholme’s bill dealt with strict settlements in a materially different way. The tenant for life was to have the legal estate. He could transact with that estate, subject to the condition that the purchase money would be paid either to the trustees of the settlement or into court. “Trustees played only a secondary role”.⁴³ As an estate owner, the tenant for life technically had all the powers of any estate owner. The powers of the *tenant for life* to make dispositions could be found in the Settled Land Act 1882 and the settlement.⁴⁴ Against a purchaser, the powers of the tenant for life would only be restricted to the Settled Land Act powers if the beneficiaries, or other interested parties, had registered an “inhibition”.⁴⁵

Wolstenholme’s bill formed the basis of Haldane’s Real Property and Conveyancing Bills of 1913–1914.⁴⁶ Again, trustees would have absolute powers of disposition and beneficiaries could protect their interests by registration of a caution or inhibition.⁴⁷ Dealings would be in “proprietary estates”, legal and equitable fees simple and term of years absolute and the equity of redemption.⁴⁸ All other interests were classified either as “subordinate interests” or “paramount interests”. Alienation of land by trustees could be restrained, again by caution or inhibition, but in all circumstances trusts were turned into personal rights against the trustees. This was achieved directly by reference to the theory of equity. Trustees convey the legal title, *qua* owners of the land, under the powers inherent in legal ownership. It was only through the doctrine of notice that the beneficiaries could raise any equity against the purchaser.⁴⁹ If this

³⁷ Introductory Memorandum, quoted in *Royal Commission on the Land Transfer Acts* (1911), Second and Final Report, para 100.

³⁸ *Ibid*; Harpum, *Overreaching* [1990] 288.

³⁹ Also Harpum, *ibid*.

⁴⁰ *Royal Commission on the Land Transfer Acts* (1911), Second and Final Report, para 100.

⁴¹ Harpum, *Overreaching* [1990], 288.

⁴² Brickdale’s wording: *Royal Commission on the Land Transfer Acts* (1909), Minutes of Evidence, para 1368. (Mr Charles Fortescue Brickdale was Registrar of the Land Registry: (2003) 119 LQR 660, 666); The scheme provided an alternative to registration of title: *ibid* paras 1367–1368. Brickdale was sceptical.

⁴³ *Anderson*, 255; *Royal Commission on the Land Transfer Acts* (1911), Second and Final Report, para 100.

⁴⁴ *Anderson*, 255–256.

⁴⁵ Harpum, *Overreaching* [1990], 288.

⁴⁶ *Anderson*, 256.

⁴⁷ *Anderson*, 257.

⁴⁸ *Anderson*, 257–258, and the methods of disposition thereby defined: *ibid*.

⁴⁹ Maitland, *Equity*, 124–125: “Let us now see this difference between legal and equitable rights in its practical operation. We will put two cases which in the eyes of the moralist may seem closely similar but between which the lawyer will see a vast difference. (1) A is tenant in fee, B is occupying his land as his tenant at will; B forges a complete set of title deeds showing that he is tenant in fee; he sells the land to X; X diligently investigates the title, finds nothing suspicious; pays his purchase money and takes a conveyance. (2) T is tenant in fee holding land in trust for S, T forges title deeds concealing the trust and showing him to be simply tenant in fee subject to no equitable liability; he sells to Y, who investigates the title; the forgery is clever and it deceives him, he pays his money and takes a conveyance. The two cases may be like enough to the moralist, but how different to the lawyer. In the first A is legal owner of the land and X has had the misfortune to buy from one who had nothing to sell, to take a conveyance from one who had nothing to convey.

could not be done, it did not matter to the purchaser that the disposition was unauthorised in equity.⁵⁰ Remembering that it is only “the rules of equity which make the trust a burden on the land”,⁵¹ a purchaser without notice would take free from the equitable interests, even under an unauthorised disposition.⁵² Equity always deferred in this manner to the owner of the legal estate. Maitland observes:

As between merely equitable interests in land the rule is “*qui prior est tempore potior est jure*” – the older equity is the better. But let the purchaser get the legal estate without notice, there is no place for this maxim. The rights concerned are . . . rights of different orders; the purchaser is legal owner and the *cestui que trust* has no means of attacking him.⁵³

Haldane’s bill made express provision that a purchaser would take subject to paramount interests automatically,⁵⁴ and to subordinate interests that had been registered as a caution or inhibition; but would take free from all other unregistered subordinate interests, *whether he had notice thereof or not*.⁵⁵ By means of the removal of the doctrine of notice, a purchaser would take a clear equitable title. An accidental reference to a trust would be irrelevant. A purchaser with notice was put in the position of a purchaser without notice, who was then necessarily able to take a good title from trustees. Clause 7(2) of the Conveyancing Bill 1913 provided:

a conveyance to a purchaser shall have the same effect whether he has or has not notice of the existence of any subordinate estates or interests, or of any other liabilities, rights or claims which the proprietor has power to overreach.⁵⁶

Of this clause, Anderson observes:

Haldane’s explanatory memorandum shows the limits of his concern. After describing in a somewhat exaggerated way how mention or necessary implication of a trust upon the title to a piece of land gave a purchaser notice of the whole contents of the document creating it, it concluded that “it is the effect of this “notice” and of these equitable rights which is the most troublesome matter in investigating title”.⁵⁷

Given the context of my argument, the reference in clause 7(2) to “power to overreach” needs some consideration. Is it the case that the doctrine of notice would only be abrogated where the disposition was within the powers of the trustees? This is what the phrase “overreaching powers” might seem to imply. Harpum states that

In the other case the purchaser is the legal owner of the land, and having come to legal ownership *bona fide* for value and without notice, actual or constructive, of S’s rights, S has no equity against him; S’s only remedy is against the fraudulent trustee”.

⁵⁰ On the difference between “powers” at law and “authority” in equity: Ferris and Battersby [1998], 170.

⁵¹ *Report of the Registration and Conveyancing Commissioners* (1850) HCP xxxii 1, quoted by J E Hogg, n 11 above, 7.

⁵² A purchaser only took an impeached title under an *ultra vires* disposition when he had notice of the trust: *In re Soden and Alexander’s Contract*, n 16 above, 264, per Younger J; *Perham v Kempster* [1907] 1 Ch 373. Hayton and Marshall, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (10th ed, Hayton), 6 n 26; Harpum, *Overreaching* [1990], 283: “any person who takes from one whom he knows to be the trustee . . . otherwise than under a conveyance or transfer authorised by the trusts or powers thereof, property which he knows to be part of the trust estate, takes such property subject to all the trusts and equities to which it was subject in the hands of the trustee as such. It is not in my opinion required that he should know or have specific notice of the particular trusts and equities”: *Perham v Kempster* [1907] 1 Ch 373, 380, per Joyce J, quoted by Harpum, *Overreaching* [1990], 283. Where there is an improper exercise of a bare power, the purchaser does not obtain the legal estate and thus cannot have this hope of taking free from any equitable claims. Generally, “a fraudulent appointment is void even against a bona fide purchaser”: Hanbury and Martin, *Modern Equity* (16th ed, Martin), 186; Harpum, *Overreaching* [1990], 280–281.

⁵³ Maitland, *Equity*, 125.

⁵⁴ Certain “paramount interests” would be preserved ahead of the purchaser’s title, the forerunning category to “overriding interests” contained in the Land Registration Act 1925, s 70(1). The rights of actual occupiers fell into this category: Harpum, *Overreaching* [1990], 288; Anderson, 257–258, 274–280.

⁵⁵ cl 7: Anderson, 257.

⁵⁶ Quoted by Anderson, 266–267.

⁵⁷ Anderson, 267.

The draftsman's first thoughts, found in the Law of Property Act 1922, s 7, are revealing, because they clearly demonstrate the connection between overreaching and powers. Section 7(1) provided:

Where title can be made to a legal estate under the powers conferred by the Settled Land Act (as extended by this Act) available to bind an equitable interest or power in or over the land without an application to the court, then a purchaser shall, notwithstanding any stipulation to the contrary, be entitled to require that title be made under such powers without the concurrence of the person entitled to an equitable interest or in whom the equitable power is vested.⁵⁸

Harpum also observes that

Trustees for sale can only overreach if the transaction is one which they are empowered to make. In the last edition of Wolstenholme and Cherry's *Conveyancing Statutes to be edited by Sir Benjamin Cherry* [the 1932 edition], it is stated by way of comment on section 2(1)(ii) that trustees for sale "have the same overreaching powers as a tenant for life".⁵⁹

The whole issue here turns on the meaning of the word "power". It is dangerous to take a reference to the power to do something as coterminous with dispositive power.⁶⁰ It has a much wider meaning than this. As *Bowstead* observes, the "power" to do something is the description of a particular legal effect:

Authority, like possession, is thought of as *fact* from which *legal* consequences should arise. In the paradigm case the reason why it seems logical for the agent to have the power is that the principal has conferred something on him from which it stems, called authority. Thus, cases where the agent has the power but cannot be regarded as having been given authority by the principal seem exceptional and it is said that there is only "apparent authority". Yet the power is the same: there is no temptation to talk of "apparent power". "Authority", like "possession", carries the image of a paradigm case justifying a legal result; "power" is neutral and simply states the results regardless of the reasons for them.⁶¹

Power is a question of what is legally possible. It is necessary to determine whether a conveyance can alter the purchaser's liability relationship with the beneficiary, *ie*, overreach, or whether the owner of the interest could protect its priority by registration. This is a question of the jural nature of the interest.⁶² Thus, where it is said that a trustee has "overreaching powers", this could be taken as a reference to the fact that the interest is overreachable in theory. The terms of the trustees' authority have nothing to do with this matter; it is a constant legal result. Thus, one might say, a disposition by trustees would only overreach a particular interest if the bill gave the trustee the power to overreach it (*eg*, it was not a paramount interest or a registered subordinate interest). This objection thus cleared, *any* "conveyance to a purchaser" would have the effect of abrogating the doctrine of notice. The reason being that the bill placed the purchaser in the presumptive position of "equity's darling", who would, by reason of this, take a clear equitable title. Equitable validity had been equated with legal validity. The equitable interests may have been unenforceable against the purchaser, but they could be vindicated in the ordinary way against the trustee(s). The interest was "shifted" to the proceeds of sale or other disposition.

⁵⁸ *Overreaching* [1990], 293, n 87.

⁵⁹ *Overreaching* [1990], 294, footnotes omitted.

⁶⁰ Ferris and Battersby [1998], 181 point out that Harpum falls into this error. The authors adopt Harpum's argument that an *ultra vires* disposition will fail to overreach, and argue that it applies only to *unauthorised* dispositions.

⁶¹ *Bowstead on Agency* (13th ed, 1968), 10, quoted in Markesinis and Mundy, *An Introduction to the Law of Agency* (London: Butterworths, 1998), 10. Ferris and Battersby [1998], from 170, give a detailed analysis of the difference between "power" and "authority". I hereby acknowledge a debt to this article.

⁶² I acknowledge a debt to S Gardner, "'Bleak House' Latest – Law Lords Dispel Fog?" [1988] 51 MLR 365, 367, whose analysis helped me on this point. I do not suggest that he agrees with the point argued here.

As under Wolstenholme's bill, overreaching by the tenant for life under a settlement operated differently. This re-allocation of risk in favour of the purchaser was to take place only in relation to trusts, not settlements. "[Haldane's] White Paper accepted that settlements were a general problem, but rejected the expanded role for trustees that was the inevitable consequence of the out-and-out assimilation schemes".⁶³ The estate, which was the subject matter between vendor and purchaser, was vested not in trustees but in the tenant for life. As an estate owner, the tenant for life had the absolute powers of disposition given by the bill to estate owners.⁶⁴ It appears correct that interests under the settlement were subordinate interests only, and therefore that a purchaser would take free from them, whether he had notice thereof or not. Consequently, the tenant for life could give good title under his powers *qua* estate owner. The powers of the tenant for life were to be limited by the registration of an inhibition, but in the later bill of 1914, there was a clause that rendered void any conveyance outside the powers conferred by the Settled Land Act or the settlement.⁶⁵ This position was replicated by the Settled Land Act 1925, section 18 and the Law of Property Act 1925, section 2(1)(i). Also, for a settlement that was endorsed on the conveyance, the purchase money had to be paid to trustees of the settlement.⁶⁶ Thus with settlements, it was not the trustees who held and transacted with the estate, and who had sole responsibility for the beneficial interests – each and every conveyance changing the nature of the equities. Overreaching was more restrictive.⁶⁷

THE 1925 LEGISLATION

The Law of Property Act 1922, section 3(1) provided:

- 3.-(1) After the commencement of this Act a purchaser of a legal estate in land shall not be concerned with or affected by any equitable interest or power affecting that land, whether he has notice thereof or not, save as provided by subsection (2) of this section.
- (2) A conveyance of a legal estate (other than a conveyance made by a mortgagee or personal representative in exercise of his powers) shall not, in favour of a purchaser, over-reach an equitable interest or power of which the purchaser has notice, unless-
- (i) Such equitable interest or power-
 - (a) is independently of subsection (3) of this section over-reached by trustees for sale, or by the exercise of the powers conferred by the Settled Land Acts (as amended), or the powers conferred by a settlement; or
 - (b) is bound by an order of the court; or
 - (c) is over-reached by virtue of subsection (3) of this section; and
 - (ii) If any capital money arises from the transaction, the same is paid into court, or the requirements of this Act respecting the payment of capital money arising under a trust for sale or a settlement, are complied with.⁶⁸

⁶³ Anderson, 256.

⁶⁴ Anderson, 266.

⁶⁵ Anderson, 266. Real Property and Conveyancing Bill 1914, cl 84.

⁶⁶ Anderson, 258.

⁶⁷ Anderson, 266. Haldane's bills resembled the old conveyancers' practice of misleading recitals; also Harpum, *Overreaching* [1990], 288–289; Commentators have observed that Wolstenholme's and Haldane's schemes were very similar to the system of title registration under the Land Registration Act 1925, eg, Harpum, *Overreaching* [1990], 305 (on Wolstenholme's scheme); Anderson, 257 (on Haldane's scheme).

⁶⁸ Subsection (3) provided means whereby interests could be overreached, *ie* where trustees had been approved by the court. Section 3 contains a wider drafting of these *ad hoc* provisions than that contained in the Law of Property Act 1925, s 2(2).

The provision that superseded section 3, the Law of Property Act 1925, section 2, expresses the same idea in shorthand form: “2.-(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, *whether or not he has notice thereof*”. The section specified that the interest would be overreached by conveyances (i) under the powers conferred by the Settled Land Act 1925; (ii) by trustees for sale; (iii) by mortgagees or personal representatives in the exercise of their paramount powers; (iv) under an order of the court. The Law of Property Act 1925, section 27(1) (prior to its amendment by Trusts of Land and Appointment of Trustees Act 1996) provides that:

A purchaser of a legal estate from trustees for sale shall not be concerned with the trusts affecting the proceeds of sale of land subject to a trust for sale . . . or affecting the rents and profits of the land until sale, whether or not those trusts are declared by the same instrument by which the trust for sale is created.

This ensures that, once the proceeds have been paid to two trustees or a trust corporation, trustees can give a receipt which discharges the purchaser from any concern as to the application of the proceeds of sale.⁶⁹ The 1922–1925 legislation introduced for the first time the requirement for purchase money to be paid to two trustees for sale as a necessary condition for overreaching.⁷⁰ This was intended to protect beneficiaries from the possibility of embezzlement.⁷¹

Harpum argues that the drafting of the Law of Property Act 1922, section 3(2) was in negative form and expressed in such tortuous language that if it “was intended to *confer* a power to overreach, rather than to regulate when overreaching might take place, it did so in a remarkably oblique way”. Thus, the Law of Property Act did not provide for overreaching, which took effect as it did at common law, *ie* on the exercise of a power of disposition.⁷² Harpum looks exclusively here at subsection 3(2). Section 3(1) is a direct abrogation of the doctrine of notice. The abrogation takes place in respect of “a purchaser of a legal estate in land”. A purchaser of a legal estate in land is to have the priority status of a purchaser without notice (“whether he has notice thereof or not”). He or she will be “unconcerned with and unaffected by” any equitable interest under the trust. There is no express requirement that the conveyance must be within the powers of trustees, so under an *ultra vires* conveyance a purchaser will attract this same priority status. Purchasers would be under no risk of liability to the

⁶⁹ Harpum, *Overreaching* [1990], 296. Section 27 represents only a small extension of the pre-1925 law, but brought into line with the amendments effected by the 1925 legislation, *eg* some interests that had arisen prior to the trust for sale were made to take effect as if they had arisen under it: Sir Benjamin Cherry, D Hughes Parry and J R Perceval Maxwell (eds), *Wolstenholme and Cherry's Conveyancing Statutes* (London: Stevens & Sons, 12th ed, 1932), 268, (hereafter *Wolstenholme and Cherry* (12th ed)); B L Cherry, *The New Property Acts* (1926, London: The Solicitors' Law Stationery Society), A series of lectures, with questions and answers given by Sir Benjamin L Cherry at the Law Society's Hall, November–December, 1925. With preface by Viscount Haldane and index by W G Fossick, 35–36, hereafter Cherry, *The New Property Acts* (1926).

⁷⁰ The two-trustee rule appeared for the first time in relation to trusts for sale in the Law of Property Bill 1920: *Anderson*, 296; Harpum, *Overreaching* [1990], 291.

⁷¹ *Anderson*, 292: “It had been a commonplace that trustee fraud virtually only arose where a single trustee had the title”. Harpum, *Overreaching* [1990], 291–292; Gardner, n 62 above, 369; *Wolstenholme and Cherry* (12th ed), 268: “The safeguard against mistake or fraud of having at least two trustees or a trust corporation where capital money falls to be received, is a fairly obvious reform; it became essential when additional powers . . . to overreach equitable interests were conferred”, quoted in *Transfer of Land Overreaching: Beneficiaries in Occupation* (1989) Law Com No 188, para 2.19. The Law Commission observed that Sir Benjamin Cherry's description “may be seen as over-optimistic about the strength of the safeguard for beneficiaries”. This observation was made about *City of London Building Society v Flegg*, n 4 above.

⁷² *Overreaching* [1990], 292. According to Sparkes, n 1 above, 119–120, the connection between overreaching and powers of disposition was also made in an article by Harold Potter: “The Repetition of History in the Statute of Uses and the Settled Land Act, 1925” (1928) 44 LQR 227; also Potter, n 20 above, 234–235.

beneficiaries, as they had no notice of their rights.⁷³ A purchaser takes a good legal title from trustees, who convey *qua* owners of the legal estate.⁷⁴ Good equitable title follows because of the removal of the only doctrine that allows a trust beneficiary to raise an equity against the purchaser. This priorities effect is linked in the following subsection with the word “overreach”, as if to define that word. Potentially, this provides a novel basis for overreaching.⁷⁵ Ferris and Battersby argue that Harpum’s analysis left insufficient function for section 2(1):

The role of section 2(1) of LPA, in relation to a disposition by trustees of land (and previously trustees for sale), is to protect purchasers from an improper exercise of the authority that would otherwise be a breach of trust, but for section 2(1) to be activated the disposition must be *intra vires* and the statutory requirements respecting the payment of capital money must be complied with.⁷⁶

The problem with this construction is that the wording in the Law of Property Act 1922, section 3(1) is too broad to bear it. If a purchaser is not “concerned with” or “affected by” the equitable interests under the trust, there would be no reason to ensure that the disposition was within the power (or authority) of the trustees. It was only when the purchaser had notice of the trust that he or she was concerned with or affected by the equitable interests: that is, if the disposition was not within the powers of the trustee.⁷⁷ If purchasers are deemed to be “unconcerned with or unaffected by” the equitable interests, then they need not ensure that the disposition is within the powers of the trustee.

The only remaining question is whether the later, and somewhat oblique, wording within section 3, cuts down its potentially broad effect, so that only *intra vires* dispositions will overreach. Harpum cites certain words within the 1925 Act, subsection 2(1)(ii) (previously the Law of Property Act 1922, section 3(2)), which limit overreaching by trustees to situations in which they could have overreached “independently of subsection (2)”. He argues that this shows that section 2 was not intended to confer a power to overreach, and that overreaching therefore takes effect at common law, *ie* as the necessary concomitant of the power of disposition.⁷⁸ Because overreaching is not otherwise defined, this *must* have been the draftsman’s meaning.⁷⁹ However, not only has it been overlooked that the draftsman *did* prescribe a potentially novel basis for overreaching, but there are other possible explanations for the 1925 draftsman’s use of the phrase “independently of that subsection”.

⁷³ A purchaser from trustees executing an *ultra vires* disposition would only take subject to the equitable interests if he or she had notice: n 52 above.

⁷⁴ As Ferris and Battersby point out: (2003) 119 LQR 94.

⁷⁵ Harpum considers that the purpose of section 3(1) of the 1922 Act was to obviate the previous common law rule that a purchaser had to enquire into the terms of the trust: *Overreaching* [1990], 290. It is unclear what is meant by this, as it is an unambiguous abrogation of the entire doctrine of notice, and this is not tied to an *intra vires* requirement. The Law Commission in its Working Paper *Trusts of Land – Overreaching*, Working Paper No 106, appears to be of the view, as Harpum points out (*ibid*, 293), that s 2 confers a power to overreach. By virtue of the relationship of the word “shall” with the expression “conveyance to a purchaser of a legal estate”, every such conveyance will overreach automatically upon compliance with the statutory requirements for the payment of capital monies. However, this explains very little. Sparkes also observes that Harpum’s analysis does not account for the fact that conveyancing under the 1925 legislation was estates-based, and that this was a novelty: n 1 above, 119–121, but does not pursue the point much further, also 129–130.

⁷⁶ (2003) 119 LQR 94, 94.

⁷⁷ N 52 above.

⁷⁸ Harpum argues that s 2 was also required in order to lay down the rule that purchase money must be paid to two trustees: *Overreaching* [1990], 291; see also n 75 above.

⁷⁹ Harpum, *Overreaching* [1990]; Hopkins, “Overreaching and the Trusts of Land and Appointment of Trustees Act 1996”, [1997] *Conv* 81; D Fox, “Overreaching” in P Birks and A Pretto (eds), *Breach of Trust* (Oxford: Hart Publishing, 2002), 95–96.

Any provision must identify those interests that could be protected against a purchaser and those that could not.⁸⁰ Haldane's bill gave limited owners the power to overreach all subordinate interests. To similar effect, the Law of Property (Assimilation) Bill of 1920 prescribed that all equitable interests would take effect behind a trust for sale or a settlement. They would thus be overreachable.⁸¹ The curtain that enabled purchasers to ignore all matters except ownership of the legal estate was indeed universal. The Law of Property (Assimilation) Bill 1922, which became the Law of Property Act 1922, retained the provision that purchasers would be unconcerned with equitable interests on the conveyance of a legal estate by trustees for sale or the tenant for life, but removed the clause that ensured that all interests fell within this regime. The change was the result of a bitter and protracted disagreement amongst the reformers.⁸² The overreaching provisions of the Law of Property Act 1922 reflected Viscount Cave's successful objection to universal curtain provisions.⁸³ It was no longer the case that all interests had to arise under a trust for sale, and overreaching was to apply only to interests under a trust for sale.⁸⁴ To make sense alongside these changes, the Act needed to provide that trustees for sale could only overreach interests that they could have overreached "independently of this subsection", *ie*, interests that arose under the trust for sale and not interests like covenants or interests that were prior to it. Otherwise, a conveyance by trustees for sale could, by virtue of the general statement in section 3, technically overreach all interests: which is exactly what Cave did not want. The section needed to identify those interests that could be overreached and those that could not. Thus, the requirement that the interest must be overreachable "independently" refers only to the fact that not all interests would be overreachable by trustees for sale, in contrast with the original position under the Law of Property Bill 1920. It does not mean that the trustees could only overreach the interest if *the conveyance* is of a nature that would have overreached prior to the Act, *ie*, *intra vires*. Lightwood, also in the sense identified here, observes that the trust for sale would only have its "ordinary conveyancing effect":

When it was reintroduced in 1921 the clause had been materially altered, and after the further changes . . . the Law of Property Act, 1925, provided in substance that a conveyance under a trust for sale should have such overreaching effect as was given by s.-s. (2), or as it would have independently of that sub-section. Now s.-s. (2) allowed the creation of an *ad hoc* trust for sale . . . Apart from that sub-section, a trust for sale had only its ordinary conveyancing effect; that is, a conveyance made under it would overreach the interests arising under the trust, but not interests paramount to it.⁸⁵

By the 1925 Act,

the dreadful clause 3 of the 1922 bill [had been] rewritten as the cryptic section 2 of the 1925 Act, still lacking the universal curtain to which Cave had taken such successful objection, but implying a curtain none the less.⁸⁶

⁸⁰ See *eg* Gardner, n 62 above.

⁸¹ *Anderson*, 295–297.

⁸² For a detailed account of the reforms between 1920 and the Law of Property Act 1922: *Anderson*, 295–313; also Lightwood, "Trusts for Sale" [1927–29] *CLJ* 59, 67–69.

⁸³ *Anderson*, from 299. Cave had insisted that substantial inroads be made into the principle, on the basis that further protection was needed for beneficiaries; also Harpum, *Megarry and Wade*, para. 8–168; Sparkes, n 1 above.

⁸⁴ *Anderson*, 297–302; Lightwood, n 82 above, 67–68.

⁸⁵ Lightwood, n 82 above, 68.

⁸⁶ *Anderson*, 309.

As under the 1922 Act, interests that did not come into being under the trust for sale could be overreached by the establishment of an *ad hoc* trust for sale.⁸⁷ Section 4 forbade the creation of new equitable interests and there was a “minute enunciation of equitable interests in the Land Charges schedule”, which went some way towards ensuring that fewer interests would fall within the scope of the *ad hoc* overreaching power.⁸⁸ This may go some way to explaining why the *ad hoc* provision in the 1925 Act is narrower than its predecessor.⁸⁹

There is an argument of internal construction that supports this view. The Law of Property Act 1922, section 3 may support the conclusion that trustees can only overreach the beneficial interests if *the conveyance* is of a nature that would have overreached prior to the Act. The Law of Property Act 1925, section 2 does not. Compare the different enunciations of the overreaching provisions:⁹⁰

2.- (1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if –

(i) the conveyance is made under the powers conferred by the Settled Land Act 1925, or any additional powers conferred by a settlement, and the equitable interest or power is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money arising under the settlement are complied with;

(ii) the conveyance is made by trustees for sale and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of subsection (2) of this section or independently of that subsection, and the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with;

(iii) the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, and the equitable interest or power is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representative;

(iv) the conveyance is made under an order of the court and the equitable interest or power is bound by such order, and any capital money arising from the transaction is paid into, or in accordance with the order of, the court.

All the overreaching provisions have identical grammar. By the presence of the conjunctive “and”, each enunciation reveals three conditions: i) that there is a qualifying conveyance; ii) that the equitable interest is capable of being overreached and iii) the capital money requirements are complied with, if necessary. The nature of the conveyance required to trigger overreaching is contained within condition i), all references to when a conveyance must take place within the powers of the donee are contained within this part of the provision. The presence of the conjunctive “and” between the first and the second condition suggests strongly that another quality is required for qualification for overreaching and that that quality is something different from the preceding *intra vires* requirement. As indicated by my arguments above, this second part of the overreaching provision describes the legal power to overreach, namely, it identifies which interests are *overreachable*. The presence of this as a separate

⁸⁷ Law of Property Act 1922, s 3, Law of Property Act 1925, s 2(2); On the *ad hoc* provisions see Lightwood, n 82 above, 68–69, *Anderson*, 301–302; Harpum, *Megarry and Wade*, para 8–168; also Megarry and Wade, *Law of Real Property*, (London: Stevens and Sons Ltd, 1975, 4th ed), 379–383.

⁸⁸ *Anderson*, 309.

⁸⁹ Indeed, Snell, *Principles of Equity* (London: Sweet and Maxwell, 22nd ed 1939, Rivington ed), 38, observes that “there are so many equitable interests which are excepted from this provision (eg, restrictive covenants and most interests protected by registration under the Land Charges Act), that this overreaching power is of little practical importance”. Harpum had observed that “Some provision was thought to be necessary to enable interests that existed prior to any settlement or trust for sale to be overreached. This was a vexed and difficult task, and the draftsman produced at least four drafts, each narrower than its predecessor”: *Overreaching* [1990], 296.

⁹⁰ Section 2 is cited prior to its amendment by the Trusts of Land and Appointment of Trustees Act 1996.

condition suggests that the nature of the interest as overreachable has nothing to do with whether or not the conveyance is within the dispositive authority of the overreacher. This grammatical pattern in subparagraphs (i) and (iii) is replicated identically in subparagraph (ii), the overreaching provision for trusts for sale. It is within condition ii) that the words “independently of that subsection” are contained. Condition i), unlike the other enunciations, only requires a conveyance to be made. It does not say that it must be within the powers of the trustees.⁹¹

Harpum considers that the 1925 draftsman adopted as his model the provisions of the Settled Land Act 1882:

Instead of equating trustees for sale with absolute owners by keeping all reference to trusts off the title, he adopted with some exactitude the parallel of the life tenant under the Settled Land Act 1882. The three essentials of his scheme which were borrowed from the legislation on settled land were:

(a) to place on the face of the title the existence but not the terms of the trust so that a purchaser would know that he was dealing with a vendor whose powers of disposition were limited:

(b) to define what powers of disposition the trustees had;

(c) then to rely on the principle that *intra vires* dispositions would overreach the interests under the trust.⁹²

Harpum points out that the legislation was drafted on the assumption that the purchaser would be legally advised. The inference is that the draftsman intended that the purchaser should be aware when the trustees were acting within their powers, because this was the intended condition for overreaching. The fact that trusts were identified on the face of title may be undeniable but there is little support for Harpum’s conclusion as to the *reason* for this action. Not only does the paradigm of the tenant for life seem unlikely, given that, from 1894, settlements and trusts were treated materially differently,⁹³ but there is a simpler and more policy-consistent explanation for the draftsman’s actions. The 1922–1925 legislation introduced for the first time the requirement for purchase money to be paid to two trustees for sale as a necessary condition for overreaching. This meant that purchasers must be aware *when* to pay the purchase money to two trustees. The problem had arisen under Haldane’s bills in relation to dispositions of settled land, which provided that any capital money arising under the disposition should be paid to trustees and not to the tenant for life (the vendor). The bill provided that “in favour of a purchaser, land would be treated as settled only if Settled Land Act trustees were appointed or nominated in the conveyance to the vendor or their later appointment or nomination was recorded in a memorandum endorsed on that conveyance”.⁹⁴ Given that the draftsman’s decision to retain reference to trusts on the face of title coincided with his decision to make the two-trustee rule generally applicable as a condition for overreaching, it is at least

⁹¹ Snell, n 89 above, 37, gives a clue as to this construction: “A conveyance to a purchaser of a legal estate for money or money’s worth will overreach any equitable interest or power affecting that estate, whether the purchaser has notice of it or not, if the conveyance is made (i) under the Settled Land Act, 1925, or (ii) by trustees for sale, or (iii) by a mortgagee or personal representative in the exercise of his paramount powers, or (iv) under an order of the Court – provided that the equitable interest or power is capable of being overreached by the conveyance, and that any capital money arising from the transaction is paid in cases (i) and (ii) to the trustees, who must be at least two in number, or a trust corporation, and in case (iii) to the mortgagee or personal representative, and in case (iv) into, or in accordance with the order of, the Court”: see also a later edition: Snell, *Principles of Equity* (London: Sweet and Maxwell, 26th ed. 1966, Megarry and Baker eds), 69.

⁹² Harpum, *Overreaching* [1990], 289–290; also Swadling, n 7 above: One contemporary practice tended to function along these lines. Trustees were identified, their powers were set out, and the equitable interests were identified in a separate document so as to avoid further investigations on the part of the purchaser: *Anderson*, 269.

⁹³ See text from nn 42 and 63.

⁹⁴ *Anderson*, 258, citing cl 16(2).

arguable that the purpose of retaining reference to trusts on the title was intended to notify the purchaser of the need to pay any monies arising under the conveyance to two trustees or a trust corporation.⁹⁵

In addition, Harpum over-emphasises the reason why the draftsman should have retained the *ultra vires* doctrine: “The prevalent practice prior to the 1925 legislation of concealing trusts for sale behind the apparent beneficial ownership of the trustees suffered from the drawback that it gave little protection to the beneficiaries”.⁹⁶ “It seems highly probable that the draftsman was relying upon the vulnerability of *ultra vires* dispositions as a means of providing an additional safeguard for the beneficiaries”.⁹⁷ Thus, in addition to the two-trustee rule, “the draftsman confined trustees for sale to a managerial role by restricting their powers, again taking as his model the Settled Land Act”.⁹⁸ The author gave no authority supporting this argument, apart from an oblique reference to *In re Soden and Alexander's Contract*, a case which is generally cited in favour of limiting the doctrine of notice.⁹⁹ It appears that Viscount Cave thought that beneficiaries needed further protection,¹⁰⁰ but the amendments he made in response to this related to whether or not the interest was of an overreachable kind.¹⁰¹ By this stage, Cherry’s “trusts on title” scheme had been established. The reformers’ statements are against Harpum’s view; the essence of these observations was that misleading recitals of beneficial ownership, far from being a source of injustice for beneficiaries, were a positive advantage.¹⁰²

Harpum argues that the 1925 draftsman adopted limited powers for trustees for sale, by reference to the Settled Land Act powers. This must have been intended to affect a purchaser: “It would be very curious if an *ultra vires* disposition could overreach. Why did the draftsman go to such lengths to set out in detail the powers which trustees for sale were to have if they, and any person dealing with them, could ignore them with impunity?”¹⁰³ In the legal regulation of trusts, there are two distinct relationships of liability: that between trustee and beneficiary and that between purchaser and beneficiary.¹⁰⁴ One will not necessarily be co-existent with the other. There is nothing unusual in a statutory provision that provides for differing liability relationships.¹⁰⁵ Furthermore, the legislation is neither particularly forward-looking nor all-embracing. It provided best practice solutions to the conveyancing problems existing at the time.¹⁰⁶ Trustees for sale were given the management powers of the Settled Land Act because the type of trust for sale envisaged to arise was “a combination of an inheritance tenancy in common and land already settled”. The Settled Land Act powers were

⁹⁵ The draftsman contemplated that trusts for sale would be express, as Harpum points out; Brunyate, *Maitland Equity*, 214.

⁹⁶ Harpum, *Overreaching* [1990], 291; also 286.

⁹⁷ *Overreaching* [1990], 295.

⁹⁸ *Overreaching* [1990], 292.

⁹⁹ *In re Soden and Alexander's Contract*, n 16 above, 264, per Younger J, notes that the instances of abuse of trust were rare and that “[i]t is better this claim should be lost, and the cestuis que trust in these cases be left to their remedy against their trustees personally, than that the value, for purposes of realization of trust property, should in the mass be generally prejudiced”. This also appears to be the view in Anon, “Keeping a Trust Off a Title”, [1919] *Conv* 53.

¹⁰⁰ *Anderson*, 297–298.

¹⁰¹ Text from n 80 above.

¹⁰² Text from n 29 above.

¹⁰³ Harpum, *Overreaching* [1990], 295.

¹⁰⁴ Maitland, *Equity*, 87.

¹⁰⁵ For example, Law of Property Act 1925, s 113; Trustee Act 2000, s 24; Land Registration Act 2002, s 26; Trusts of Land and Appointment of Trustees Act 1996, s 16.

¹⁰⁶ Murphy and Roberts, n 15 above, Ch 10.

ample for the management of such trusts.¹⁰⁷ The draftsman had not thought beyond the immediate problems associated with a particular form of tenancy in common.¹⁰⁸ In any event, as we have seen, the best conveyancing practice was that, whatever happened between trustee and beneficiary, even if all were not properly done, the purchaser was to be kept well out of it.

Harpum relies on wording within section 28 to place the point “beyond doubt”. This provides that the trustees’ Settled Land Act powers, “when exercised shall operate to overreach”.¹⁰⁹ However, there was a certain contemporary hostility to overreaching. It might be unduly burdensome on occasions for trustees, who, with the purchaser, might have wished to regulate their own affairs.¹¹⁰ The draftsman might have wished to emphasise that overreaching was mandatory. This is Harpum’s own interpretation of the imperative “shall overreach” contained in section 2.¹¹¹ The draftsman used the same grammar to describe the overreaching imperative within the *ad hoc* provisions within the Law of Property Act 1925, section 2(2):

[[A]]ny equitable interest or power having priority to the trust for sale] *shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale.*¹¹²

Thus, a more internally consistent view of section 28 is that it directs that the Settled Land Act powers cannot be exercised in such a way as not to overreach.

CONCLUSION

The Harpum argument has been adopted universally by judges and commentators. In *State Bank of India v Sood*, Peter Gibson LJ accepts this as the true nature of overreaching.¹¹³ Relying on the argument, Ferris and Battersby argued that there will be more “*ultra vires*” dispositions following the Trusts of Land and Appointment of Trustees Act 1996, which had profound consequences for purchasers of registered land prior to 2002.¹¹⁴ But if the Law of Property Act 1925 *did* establish a novel basis for overreaching, these opinions are invalid. It would also affect the way in which recent legislation is perceived. Although section 26 of the Land Registration Act 2002 allows a purchaser to take a title free from any limitation on the validity of a disposition, an

¹⁰⁷ *Anderson*, 290. The settled land machinery was rejected: “it would be just as difficult to decide who had the powers as it is now to effect a partition. Far better to use a trust for sale, which also passed good title”: *ibid*.

¹⁰⁸ An argument more to the point of establishing that the draftsman limited his basis for overreaching, is the apparent appearance of an *intra vires* requirement within the *ad hoc* overreaching provision: Law of Property Act 1925, s 2: *Wolstenholme and Cherry* (12 ed), 234–235, although this could be explained on a similar basis.

¹⁰⁹ Harpum, *Overreaching* [1990], 294.

¹¹⁰ *Re Ryder and Steadman’s Contract* [1927] 2 Ch 62, 82 (in the context of the ultimately unsuccessful argument of the purchaser).

¹¹¹ The Law Commission Working Paper 106, para 2-1 had argued that section 2 states when overreaching *shall* take place, rather than provides for when it should not (as with Law of Property Act 1922, s 3(2)). This confers a power to overreach; a new basis for overreaching. Harpum counters that “there is internal evidence from the Act that the draftsman intended these provisions to be mandatory in a different sense. When a conveyance falls within those opening words of section 2, a vendor is required to employ the overreaching machinery and cannot compel the purchaser to accept a title made with the concurrence of any person entitled to an equitable interest”: *Overreaching* [1990], 293; note also Harpum’s interpretation of Law of Property Act 1922, s 7: *ibid*, 293.

¹¹² Emphasis mine.

¹¹³ [1997] Ch 276, 281D-F.

¹¹⁴ Ferris and Battersby [1998], which was based on the Harpum argument; Ferris and Battersby, (2002) 118 *LQR* 270–295, “The General Principles of Overreaching and the Modern Legislative Reforms” (2003) 119 *LQR* 94–126, compare Dixon, “Overreaching and the Trusts of Land and Appointment of Trustees Act 1996” [2000] *Conv* 267, and Ferris and Battersby, “Overreaching and the Trusts of Land and Appointment of Trustees Act 1996 – a Reply to Mr Dixon” [2001] *Conv* 221.

ultra vires disposition by private trustees never did “affect the validity of the disposition” against a purchaser.¹¹⁵ The same applies to the Trusts of Land and Appointment of Trustees Act 1996, sections 6, 8 and 16. Section 16 provides that a purchaser of unregistered land without actual notice of any limitation on the trustees’ powers will take free from the beneficial interests under the trust. Thus, because of the “actual notice rule”, overreaching is more restricted under the Trusts of Land and Appointment of Trustees Act 1996 than under the Law of Property Act 1925. In the final analysis, it appears that the legislature, judges and commentators are giving relevance to doctrines that have no place in the system, and attributing to equitable interests under trusts long-forgotten proprietary characteristics.

¹¹⁵ I have argued elsewhere that overreaching in registered land does not take effect through the Law of Property Act 1925, s 2: (2006) 69 MLR 214.

JUDICIAL REVIEW IN IRELAND AND THE RELATIONSHIP BETWEEN THE IRISH CONSTITUTION AND NATURAL LAW

AISSLING O'SULLIVAN* and PHIL C W CHAN**

Nature, natural, and the group of words derived from them, or allied to them in etymology, have at all times filled a great place in the thoughts and taken a strong hold on the feelings of mankind. That they should have done so is not surprising, when we consider what the words, in their primitive and most obvious signification, represent; but it is unfortunate that a set of terms which play so great a part in moral and metaphysical speculation, should have acquired many meanings different from the primary one, yet sufficiently allied to it to admit of confusion. The words have thus become entangled in so many foreign associations, mostly of a very powerful and tenacious character, that they have come to excite, and to be the symbols of, feelings which their original meaning will by no means justify; and which have made them one of the most copious sources of false taste, false philosophy, false morality, and even bad law.¹

John Stuart Mill

INTRODUCTION

Bunreacht na hÉireann or the Constitution of Ireland, promulgated in 1937 upon a referendum, largely reflects the political, social and moral tenets of the time. In particular, the participation of the Roman Catholic clergy in the drafting of the constitution has infused it with Christian philosophy with a liberal-democratic character in its regime of rights protection. This fusion of communitarian and individualist philosophy has, in turn, resulted in a higher norm, namely natural law, being evoked from time to time as superior to positive law in determining the existence and recognition of rights within Ireland's constitutional order. In 2003, the European Convention on Human Rights Act was enacted, implementing the European Convention on Human Rights ("the Convention")² into Irish domestic law. This was in pursuance of Ireland's obligation to strengthen the protection of human rights in its jurisdiction and designed to ensure human rights protection comparable with that in Northern Ireland under article 9(6) of the 1998 Good Friday Agreement. Of the various options on implementation that were open to the government, the indirect, or interpretative, approach was chosen, whereby the courts are not empowered to apply the Convention directly in domestic law but are obliged to take into account the Convention's various rights and freedoms guarantees in disputes that raise such issues within the framework contemplated by the Convention. Under the section 2 2003 Act, any statute or rule of law must be interpreted insofar as is possible in a manner compatible with the Convention. Through this interpretative approach, the constitution preserves its position as the "primary source of fundamental rights" in Irish domestic law.³ Nonetheless, due to references to Christian-democratic and liberal-democratic philosophy within the text of the constitution, there have existed conflicting judicial and

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¹ John Stuart Mill, *Three Essays on Religion* (AMS Press, 1970 reprint ed), p 3.

² Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No 005), opened for signature on 4 November 1950; and entered into force on 3 September 1953.

³ Anthony Lowry, "Practice and Procedure under the European Convention on Human Rights Act 2003", (2003) *Bar Review* 183, 185.

scholarly opinions as to the constitutional position of natural law in Ireland, and its use in judicial interpretation has been a source of both praise⁴ and criticism.⁵ As Humphreys points out,

It is not difficult to see why the framers of constitutions and great charters of international rights have chosen to phrase their documents in terms of natural law. Natural rights theory is poetic, overarching, mysterious, immense. It places us in awe of the wonder of the human condition. It asserts that the challenges of our condition have meaning, and that the denial of life, liberty and well-being violates an awesome moral charter which pre-exists the insignificant circumstances of mere human governments and laws. Natural law is an affirmation of the significance of the human person and of his or her sacred entitlement to respect. It refutes, with the ultimate argument of the transcendent, the sometimes horrendous suffering inflicted upon our fellow men and women.⁶

Clarke, however, argues that

An appeal to natural rights or natural law raises a number of far-reaching questions for constitutional lawyers, for members of the judiciary and more generally, for anyone concerned about political justification for a kind of judicial review which has, in principle, almost unlimited scope for frustrating the democratically enacted laws of the Oireachtas [*ie*, Parliament of Ireland].⁷

In this article, we will first discuss the background to the Irish Constitution and then outline the three judicial review mechanisms set out in the constitution. Then, we will explore the relevant judicial precedents concerning the relationship between the constitution and natural law, against which we will scrutinise the fundamental issue of the basis of legal validity. It is hoped that, in tracing Ireland's constitutional jurisprudence, readers may discern that the debate on the peculiar juridical marriage of the positivist constitution and the indeterminable natural law has ramifications for the protection of rights and freedoms beyond the Irish Sea.⁸

THE 1937 CONSTITUTION: "A CATHOLIC CONSTITUTION"⁹

The 1937 constitution was described at the time of its drafting as one "worthy of a Catholic country",¹⁰ whose framers during the drafting process held consultations with the Catholic clergy on moral questions¹¹ and sought approval from the Vatican on the text of the religious liberty guarantee in article 44.¹² With its formulation by one political party only, namely de Valera's Fianna Fáil, the constitution is considered to

⁴ Roderick J O'Hanlon, "Natural Rights and the Irish Constitution", (1993) 11 *Irish Law Times* 8, 8.

⁵ Desmond M Clarke, "The Role of Natural Law in Irish Constitutional Law", (1982) 17 *Irish Jurist* 187, 220.

⁶ Richard Humphreys, "Interpreting Natural Rights", (1995) 30 *Irish Jurist* 221, 222.

⁷ Clarke, *loc cit*, n 5, 187.

⁸ For instance, in his inaugural lecture, "The Role of Judges in the Development of Constitutions", at the Queen's University of Belfast in April 2006 (available at <http://www.law.qub.ac.uk/humanrts/hrevents/bdicksoninaugural.doc>), Brice Dickson argued that English judges, in line with the common law tradition, were suitably placed to check the power of the executive and the prerogatives of the Crown and, most significantly, that they "should claim for themselves the power to declare Acts of Parliament to be unconstitutional". Dickson reminded us that "[w]e should never forget that the doctrine of Parliamentary sovereignty, which supposedly lies at the base of our constitution, is itself a construct of the common law".

⁹ Basil Chubb, *The Politics of the Irish Constitution* (Institute of Public Administration, 1991), p 39.

¹⁰ *Ibid*, p 33.

¹¹ Dermot Keogh, "Church, State and Society", in Brian Farrell (ed), *De Valera's Constitution and Ours* (Gill and Macmillan, 1988), p 114.

¹² Chubb, *loc cit*, n 9, p 33.

be semi-authoritarian.¹³ Opposition parties vilified the draft as “a peculiarly Fianna Fáil response” to constraints of the Irish political system, incapable of symbolising a “national consensus” or, more significantly, embodying a true constituent instrument of the state.¹⁴

Although the constitution lacked broad political support, approved only by a slim majority in a referendum, Chubb considers both the procedures of church approval and the content of the religious aspects of the constitution as “thoroughly in keeping with the cultural climate of the 26 counties at that time”.¹⁵ Up until the drafting of the 1937 constitution, Irish politicians had continually sought support from the Irish clergy and the Vatican for the state and its institutions and endorsed Christian ethics as a source of guidance for legislative standards. Whilst article 8 of the 1922 Free State Constitution,¹⁶ – since repealed by the 1937 constitution¹⁷ – guaranteed religious liberty and expressly prohibited legal endowment of any religion by the state,¹⁸ many subsequent legislative enactments did embody particular Roman Catholic overtones. For instance, the Censorship Act 1929 was enacted to restrict the importation of cheap pornography and literature advocating the use of contraceptives despite the more liberal views of the Protestant denominations.¹⁹ President de Valera himself referred to Catholicism as the “ancestral faith” to which the Irish had been “ever firm in their allegiance”.²⁰

As late as 1953, Blanshard described Ireland “as constituted today” as perhaps “the only integral Catholic State in the world” with a culture where the predominance of Catholicism was not resented but, rather, accepted as “an organic and established part of Irish life”.²¹ Martin argues that an “indissoluble union” of church and state occurs in circumstances where the church constitutes the sole agent of nationalism against political and cultural domination by a foreign power.²² The author avers that

in nations like Britain and Holland where the myth of origins is some four centuries old, where the external threats associated with it have long since receded and where nationhood is not experiencing any other contemporary threat, there the sense of linkage between nation and religion lies dormant. In nations, like Poland, there has never been a time when the myth is irrelevant and very similar threats are posed at the present time to those of the past.²³

These latter nations therefore remain “areas of high practice and belief”.²⁴ Historically, religion had become more than solely a belief system but an integral part of the

¹³ Michael Forde, *Constitutional Law* (First Law, 2004 2nd ed), p 12. This occurs where a very small group of individuals drafted a constitution which was then endorsed by the people in a referendum; examples, *ibid*, include Napoleon’s Constitution of Year VIII and de Gaulle’s Constitution of the Fifth French Republic.

¹⁴ *Ibid*, p 11.

¹⁵ Chubb, *loc cit.*, n 9, p 33.

¹⁶ Irish Free State Constitution Act 1922, 13 Geo 5 (Session 2), c 1 (since repealed by article 48 of the 1937 constitution).

¹⁷ 1937 constitution, art 48.

¹⁸ John Henry Whyte, *Church and State in Modern Ireland 1923–1979* (Gill and Macmillan, 1984, 2nd ed), p 14, where the author states that the insertion of non-discrimination on the basis of religious belief and protection of religious property was to abide by article 16 of the Anglo-Irish Treaty of 1921, as scheduled to the Irish Free State (Agreement) Act 1922, 12 Geo 5, c 4, in ensuring religious equality.

¹⁹ *Ibid*, p 57.

²⁰ *Ibid*, p 48.

²¹ Paul Blanshard, *The Irish and Catholic Power: An American Interpretation* (Beacon Press, 1953), p 4. However, John Archer Jackson, after surveying literature on defections amongst Irish Catholics in Britain, suggests in *The Irish in Britain* (Routledge & Kegan Paul, 1963), p 149, that “the Catholicism of the Irishman is internalised only to a very slight degree. In general his religious life is made up of social and ritual forces which through the person of the priest bind him to God”.

²² David A Martin, *A General Theory of Secularisation* (Harper & Row, 1978), p 107.

²³ *Ibid*, p 106.

²⁴ *Ibid*, p 107.

cultural identity between the two political communities on the island of Ireland, and religious denomination the source of identification with – or against – oppressive legislation. With Irish Protestantism strongly connected to the Union and Irish Catholicism to the movement for Catholic Emancipation in the 1820s and the petition for Home Rule at the end of the 19th century, the direct interdependence between religious belief and the nationalist movement permeated the acceptance of religious values as national values. References within the 1937 constitution to a Christian deity and natural rights were thus considered as recognition of the Roman Catholic church's role in the struggle for independence and acted as endorsement of Catholic moral values as the political morality of the state.²⁵

Nonetheless, both Chubb and Whyte consider that the constitution should be viewed as the result of a difficult compromise between two traditions: religious and nationalist²⁶ or Christian-democratic and liberal-democratic,²⁷ with the difficulty stemming from the distinction between the communitarianism of the former and the individualism that inheres in the latter.²⁸ In a communitarian rights regime, primacy is given to rights as “positive empowerments over rights as negative immunities”.²⁹ In Catholic philosophy, it is considered possible “to discern, through reason and revelation, the existence of an objective moral order [which] is the recognition of the mutual interdependence of individual and social progress”.³⁰ Upon an individualistic theory of rights, however, “the world . . . is divided between two mutually exclusive spheres designated the ‘public’ (State) and the ‘private’ (civil society), where the primacy rests with the individual over all sources of public power”.³¹ The 1937 constitution has thus resulted in a curious mix of both rights regimes. For the communitarian, article 41, which guarantees protection of the family, states that “[t]he State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”.³² The state is therefore under a duty “to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack”.³³ This is a reflection on the objective moral order within Christian belief, where marriage is established by God with its own nature, essential properties and purpose and is the sole institution within which sexual relations are morally acceptable. The preamble to the constitution explicitly invokes a Christian deity, and Barrett refers to the authority of the state as derives from the “Christian doctrine of God”.³⁴ The communitarian thought, and its idea of mutual interdependence, is most pronounced in the preamble which emphatically states that

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
We, the people of Éire,
Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

²⁵ Richard Barrett, “Church and State in light of the Report of the Irish Constitutional Review Group”, (1998) 20 *Dublin University Law Journal* 51, 57.

²⁶ Chubb, *loc cit.*, n 9, p 40.

²⁷ Gerard Whyte, “Some Reflections on the Role of Religion in the Constitutional Order”, in Patrick Tuomey and Tim Murphy (eds), *Ireland's Evolving Constitution 1939–1997: Collected Essays* (Hart Publishing, 1998), pp 60–61.

²⁸ *Ibid.*, p 61.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, p 60.

³² 1937 constitution, art 41.1.1.

³³ *Ibid.*, art 41.3.1.

³⁴ Barrett, *loc cit.*, n 25, 54.

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution.³⁵

As for the individualist, article 40.3 guarantees the personal rights of the citizen, and three obligations are imposed upon the state: to respect personal or individual rights in its laws; to ensure vindication of such rights by its laws and attendant appropriate remedies; and to protect by its laws such rights as best it may from unjust attack.³⁶

JUDICIAL REVIEW MECHANISMS IN IRELAND

Article 15.4.1 of the constitution prohibits the Oireachtas exercising its powers of legislative jurisdiction in contravention with the provisions of the constitution. Consequently, any repugnancy or inconsistency will render null and void the legislation in question. Two canons of review have developed, namely the presumption of constitutionality and the double construction rule.³⁷ The former canon places the onus on the complainant to establish the alleged lack of constitutionality,³⁸ a presumption enshrining the respect that “one great organ of the State owes to another”,³⁹ meaning in this context judicial deference to the legislature. The latter canon requires that in construing a law where two or more interpretations are available, the interpretation that is capable of construing the law as not unconstitutional should prevail.⁴⁰

Against this framework, three forms of judicial review are provided for in the constitution. Under article 34.3.2, the courts have the competence to determine the validity of any law with regard to the provisions of the constitution. In *The State (Sheerin) v Kennedy*,⁴¹ Supreme Court Justice Walsh explained that “the validity in question is a validity to be determined by the provisions of the Constitution in respect of something purporting to have been done within the terms of the Constitution and within the powers conferred by the Constitution”, which consequently refers only to a law enacted by the Oireachtas.⁴² In 1940, three years after the promulgation of the constitution, High Court Justice Gavan Duffy in *The State (Burke) v Lennon*⁴³ emphatically declared that by promulgating the constitution

With the greatest solemnity, the People, invoking the Most Holy Trinity, gave to themselves “*Dochum Glóire Dé agus onóra na hEireann*” [*trans*: To the Glory of God and

³⁵ 1937 constitution, Preamble.

³⁶ *Ibid*, art 40.3.

³⁷ Gerard Hogan and Gerry Whyte, *J M Kelly's The Irish Constitution* (Butterworths, 1994 3rd ed), p 448 and pp 458–460. An important sub-category of the presumption of constitutionality is the principle of judicial restraint, which operates to self-limit the exercise by the judiciary of constitutional review only to instances where it is necessary for deciding the dispute. Its importance, as the authors assert, *ibid*, p 449, is due to the grave effect of a declaration of unconstitutionality, that it immediately gives rise to a lacuna within the law.

³⁸ *Ibid*, p 448. See also *Pigs Marketing Board v Donnelly (Dublin)* [1939] IR 413; *In re Article 26 and the Offences Against the State (Amendment) Bill, 1940* [1940] IR 470.

³⁹ Hogan and Whyte, *op cit*.

⁴⁰ *Ibid*, p 460.

⁴¹ [1966] IR 379.

⁴² *Ibid*, per Walsh J, 386.

⁴³ [1940] IR 136.

the honour of Ireland]; a noble Christian polity; they enshrined the guiding principles in language simple and direct; and they entrusted to the Judiciary the tremendous responsibility of maintaining their constitutional monument against legislative attack.⁴⁴

The second form of judicial review is an application under article 50, which applies to pre-1937 constitution legislative enactments. Article 50 carries forward the legal continuance of these enactments insofar as they are not inconsistent with the terms of the present constitution. In contrast to post-1937 constitution laws, the courts do not determine an issue of validity, for, as noted above, validity refers only to a law enacted by the Oireachtas as established by the 1937 constitution. If the law is in force at the date of the dispute, it is considered valid on that date, and the relevant legal question is whether the law shall cease to have legal effect on account of its inconsistency, if any, with the provisions of the 1937 constitution.⁴⁵

Lastly, under article 26 of the constitution, the President, before signing a bill into law, may refer the bill to the Supreme Court to determine whether it is repugnant to the constitution.⁴⁶ In *The State (Sheerin) v Kennedy*, Supreme Court Justice Walsh explained that it is only proposed, and not enacted, legislation that can be the subject matter of an article 26 reference.⁴⁷ Unlike the other two forms of review, in an article 26 reference

The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.⁴⁸

Within the rich body of constitutional jurisprudence, three modes of constitutional interpretation can be discerned, namely, literal interpretation; interpretation on the basis of internal consistency; and a balance between conflicting provisions on the basis of an examined hierarchy of importance. The mode of literal interpretation should be able to speak for itself. Interpretation based on internal inconsistency is referred to as a “horizontal balancing” where two or more of the provisions are not viewed in isolation but “blend with each other” so as to avoid the fundamental purposes of the constitution being defeated if literal interpretation were to be held as controlling.⁴⁹ In *Tormey v Ireland*,⁵⁰ Supreme Court Justice Henchy maintained that

A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such global approach that, save where the Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to the other. Thus, where there are two provisions in apparent conflict with one another, there should be adopted, if possible, an interpretation which will give due and harmonious effect to both provisions.⁵¹

Nonetheless, it is important to note that in the event that such a due and harmonious approach proves to be impossible, a hierarchy of the conflicting rights provisions, as

⁴⁴ *Ibid*, per Gavan Duffy J, 143.

⁴⁵ *The State (Sheerin) v Kennedy* [1966] IR 379, per Walsh J, 385–86.

⁴⁶ 1937 constitution, art 26.1.

⁴⁷ *The State (Sheerin) v Kennedy*, *loc cit*, n 45, per Walsh J, 386.

⁴⁸ 1937 constitution, art 26.2.2.

⁴⁹ Hogan and Whyte, *loc cit*, n 37, p 54.

⁵⁰ [1985] IR 289.

⁵¹ *Ibid*, per Henchy J, 296.

Supreme Court Justice Griffin held in *The People v Shaw*,⁵² “must be examined, both as between themselves and in relation to the general welfare of society”,⁵³ so that the more important right is secured.⁵⁴ A balance must be drawn in the process.⁵⁵

One final aspect of constitutional interpretation is the importance that has been placed on the preamble to the constitution. In its report, the Constitutional Review Group concluded that the fact that the preamble had been cited as a mode of constitutional interpretation in various judicial decisions illustrated that it had “legal effect”.⁵⁶ However, Forde holds a more reserved view and considers that the Preamble may be a possible source of guidance only.⁵⁷ In *Buckley v Attorney General*,⁵⁸ Supreme Court Justice O’Byrne was of the opinion that the preamble informed the provisions of the constitution and that those provisions should therefore be construed in accordance with its terms of prudence, justice and charity.⁵⁹

Supreme Court Justice Walsh, writing extra-judicially, looks upon the constitution as the “basic law of the State” which, within our common law legal system, “controls the Statute and Common law” where, in cases of conflict the constitution, as the superior norm, prevails.⁶⁰ The jurist considers the constitution to be the “law that embraces both social and political objectives and one that gives force to certain moral concepts”.⁶¹ Thus, the constitution is not intended to be a “detailed legal code” but “lays down general principles to which both current and future problems can be addressed by the courts”.⁶² Walsh maintains that the Supreme Court is the “ultimate interpreter of the law” and that judges are entrusted with the duty of interpreting the constitution and the law. Competence, therefore, falls upon the judiciary to take necessary measures to vindicate constitutional rights in order to ensure the provision of an “effective remedy against the infringement of those rights”.⁶³

In achieving this task, the religious and secular flavour of the constitution has generated a rich body of jurisprudence. The case law hitherto, to which we now turn, has illuminated the difficulty in establishing the precise relationship between the constitution and its Christian natural law references. Is it natural law, interpreted from the combination of the preamble and the fundamental rights provisions, or the will of the people, interpreted from Ireland’s constitution as an independent, sovereign and democratic state, or both that shall prevail?

JURISPRUDENCE ON THE RELATIONSHIP BETWEEN THE CONSTITUTION AND NATURAL LAW

During the 1960s and 1970s, global political movements of progression and modernisation were at their peak, and judicial activism in Ireland in response to constitutional

⁵² [1982] IR 1.

⁵³ *Ibid*, per Griffin J, 56.

⁵⁴ *Ibid*, 54.

⁵⁵ *Ibid*.

⁵⁶ Constitutional Review Group, *Report of the Constitutional Review Group* (Author, 1996), pp 4–5.

⁵⁷ Forde, *loc cit*, n 13, p 56.

⁵⁸ [1950] IR 67.

⁵⁹ *Ibid*, per O’Byrne J, 80–81.

⁶⁰ Brian Walsh, *The Constitution: A View from the Bench*, in Farrell, *loc cit*, n 11, p 191.

⁶¹ *Ibid*, p 193.

⁶² *Ibid*, p 192.

⁶³ *Ibid*, p 193.

challenges was in line with this trend. In *Ryan v Attorney General*,⁶⁴ High Court Justice Kenny, as he then was, examined whether a right to bodily integrity was recognised and protected by article 40.3 of the constitution, which guarantees the personal rights of the citizen. His Honour concluded that personal rights under article 40 are not confined to those expressly enumerated in the provision but include all rights “which result from the Christian and democratic nature of the State”.⁶⁵ In devising the doctrine of unenumerated rights, Justice Kenny examined the inherent contrast between the general guarantee in sub-section 1 of the provision, which states that “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”,⁶⁶ and the words “in particular” in sub-section 2, which states that “[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”.⁶⁷ His Honour emphasised the words “in particular” in sub-section 2 as embodying “a detailed statement of something which is already contained in sub-s 1 which is the general guarantee” which in turn “must extend to rights not specified in Article 40” as a consequence of the “Christian and democratic nature of the State”.⁶⁸

In elucidating the court’s finding of jurisdiction in construing unenumerated rights, where the enumeration of rights was generally within the ambit of the legislature, Justice Kenny pointed out that jurisdiction had long been assumed and exercised by Irish courts as part of the common law tradition, and thus “there is no reason why they should not do it now”.⁶⁹ His Honour then proceeded to find that a constitutional right to bodily integrity did exist, on the basis of a passage in the Papal Encyclical Letter *Peace on Earth*.⁷⁰ As a result, Justice Kenny outlined a doctrine of unenumerated constitutional rights and harmoniously construed the various provisions of the constitution as resulting in a constitutional right that was not enumerated therein, in accordance with Christian theology and moral teaching so empowered by the “Christian and democratic nature of the State” traceable to the preamble to the constitution itself. Accordingly, the terms of the preamble and the natural law references rejecting positivist legal theory and application happily married with positivist constitutional interpretation in His Honour’s vision and formulation of a rights regime.

In *McGee v Attorney General*,⁷¹ the plaintiff sought a declaration of inconsistency under article 50, alleging that section 17 of the Criminal Law Amendment Act 1935, contravened her right to marital privacy under articles 40.3 and 41 respectively. Supreme Court Justice Henchy, in reiterating the doctrine of unenumerated rights under article 40.3, maintained that in order to determine the existence of her right as alleged “it must be shown that it is a right that inheres in the citizen in question by virtue of [her] human personality”.⁷² His Honour considered that any lack of precision of the doctrine would be “reduced” by harmoniously interpreting the constitution and,

⁶⁴ [1965] IR 294.

⁶⁵ *Ibid*, per Kenny J, 312.

⁶⁶ 1937 constitution, art 40.3.1. It should be noted that in *Northampton County Council v ABF and MBF* [1982] IRLM 164, High Court Justice Hamilton, as he then was, maintained, at 166, that “natural law is of universal application and applies to all human persons, be they citizens of this State or not”.

⁶⁷ 1937 constitution, art 40.3.1.

⁶⁸ *Ryan v Attorney General*, *loc cit*, n 64, per Kenny J, 313.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*, 314.

⁷¹ [1974] IR 284.

⁷² *Ibid*, per Henchy J, 325.

in particular, by discerning “what the Constitution, expressly or by necessary implications, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution”.⁷³ His Honour took the opportunity to caution that “[t]he infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible”.⁷⁴

Meanwhile, Justice Walsh referred to the natural law references in the constitution as

emphatically [rejecting] the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control.⁷⁵

His Honour considered that the text of the constitution made clear its rejection of the positivist legal theory (and application) and that it acknowledged the existence of natural law as antecedent and superior to positive law which existence must be afforded constitutional protection. Justice Walsh declared that “[t]he very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. In particular, the terms of s 3 of Article 40 expressly subordinate the law to justice”, which “[b]oth Aristotle and the Christian philosophers have regarded . . . as the highest human virtue”.⁷⁶ However, His Honour did concede that “it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society”.⁷⁷

In establishing the relationship between the Constitution and natural law, Justice Walsh viewed the explicit reference in the preamble and in article 6 to Christianity as evidence of constitutional recognition of God as the ultimate source of all authority.⁷⁸ His Honour considered that rather than purely re-affirming “the ethical content of law in its ideals of justice”,⁷⁹ the constitution acknowledged and guaranteed “natural human rights”.⁸⁰ Whilst acknowledging that the precise content of natural law had perplexed theologians for centuries; that lack of agreement remained and that His Honour held that

In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law,⁸¹

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, per Walsh J, 310.

⁷⁶ *Ibid.*, 318.

⁷⁷ *Ibid.*, 310.

⁷⁸ *Ibid.*, 317–18.

⁷⁹ *Ibid.*, 317.

⁸⁰ *Ibid.*, 318.

⁸¹ *Ibid.*

Thus, His Honour held that it was sufficient to establish the existence of the particular natural right or human right as alleged. Once the existence of the alleged right was established, “it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable”.⁸² Having concluded that the preamble to the constitution contained virtues that were esteemed by Aristotle and the Christian philosophers – namely prudence, justice and, most importantly, charity, which His Honour found to embody mercy⁸³ – Justice Walsh declared that

the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with *their* ideas of prudence, justice and charity.⁸⁴

Consequently, they must determine only the existence of the right as alleged and not its precise nature, in accordance with *their* ideas of the aforementioned concepts.⁸⁵ Murphy, thus, wonders “Who is to decide, irrespective of the Christian or any other tradition, what the objective morality is in any given instance? Judges, indeed lawyers generally, can claim no special ability in this regard?”.⁸⁶ In *Norris v Attorney General*,⁸⁷ Supreme Court Justice McCarthy opined that Justice Walsh appeared to demand the determination of rights on the basis of the (particular judge’s) human personality, rather than on the basis of the Christian and democratic constitution of the state.⁸⁸

Ultimately, Justice Walsh concluded that “[t]he private morality of its citizens does not justify intervention by the State into the activities of those [other] citizens unless and until the common good requires it”.⁸⁹ His Honour held that the plaintiff did not have to establish the source of her alleged natural right, for where such a right was anterior and superior to positive law and did not impinge upon the common good it was beyond the reach of the positive laws and decisions of the state.⁹⁰ His Honour, thus, reasoned that it was *ultra vires* the state to intrude into the privacy of the plaintiff’s marital relationship with her husband “for the sake of imposing a code of private morality” on the marital couple to which they did not consent.⁹¹ Furthermore, His Honour stated that “[i]t is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the constitution is intended to be final for all time”.⁹² Subsequent to the *McGee* judgment, Justice Walsh, writing extra-judicially, opines that the courts should view the constitution as a “contemporary fundamental law that speaks in the present tense”.⁹³ The jurist states that “as a document, [the constitution] speaks from 1937, but as law

⁸² *Ibid.*

⁸³ *Ibid.*, 318–19.

⁸⁴ *Ibid.*, 319 (emphasis added)

⁸⁵ *Ibid.*

⁸⁶ Tim Murphy, “Democracy, Natural Law and the Irish Constitution”, in (1993) *Irish Law Times* 81, 82.

⁸⁷ [1984] IR 36.

⁸⁸ *Ibid.*, per McCarthy J, 98.

⁸⁹ *McGee v Attorney General*, loc cit, n 71, per Walsh J, 312.

⁹⁰ *Ibid.*, 313.

⁹¹ *Ibid.*

⁹² *Ibid.*, 319.

⁹³ Walsh, loc cit, n 60, p 195.

it speaks from today”⁹⁴ and that it should not be interpreted as “having a static meaning determined 50 years ago but on the basis that it lays down broad governing principles that can cope with current problems”.⁹⁵

In *Norris v Attorney General*, the plaintiff sought from the Supreme Court a declaration under article 50 of the constitution that sections 61 and 62 of the Offences Against the Person Act 1861, and section 11 the Criminal Law Amendment Act 1885, (all of which were, in fact, legislative enactments passed by Parliament in Westminster prior to the founding of the then Irish Free State in 1922) were inconsistent with the 1937 constitution. The plaintiff contended that the right to privacy as was identified as an unenumerated natural right in *McGee* was not confined to marital privacy. The plaintiff argued that this right limited the competence of the state in legislating against private conduct which neither the exigencies of the common good nor the protection of public order or morality required.

Chief Justice O’Higgins disagreed. In His Honour’s opinion, the Irish people by promulgating the 1937 constitution, who “humbly acknowledge their obligation to ‘our Divine Lord, Jesus Christ’”, proclaimed “a deep religious conviction and faith and an intention to adopt a constitution consistent with that conviction and faith and with Christian beliefs”.⁹⁶ In refuting the assertion that the people by promulgating the constitution intended to render inoperative legislative enactments prohibiting “unnatural sexual conduct which Christian teaching held to be gravely sinful”,⁹⁷ His Honour declared that such intention would require unequivocal and express evidence within the provisions of the constitution itself in order to be substantiated.⁹⁸ His Honour then went on to hold that the state had “an interest in the general moral wellbeing of the community and [was] entitled, where it is practicable to do so, to discourage conduct which is morally wrong and harmful to a way of life and to values which the State wishes to protect”.⁹⁹ As to whether decriminalisation of homosexuality would be harmful to the common good, His Honour found that homosexuality caused “frustration, loneliness and even suicide”¹⁰⁰ and that it had a serious adverse impact upon the institution of marriage, endorsing the conclusions reached by the Wolfenden Committee in 1957 in respect of England and Wales, that serious harm would be caused to the institution of marriage “in turning men away from [marriage] as a partnership in life but also in breaking up existing marriages”.¹⁰¹ (The question of whether such harms were the result or the cause of societal prejudice against homosexuality and homosexuals was nonetheless left unanswered.) As article 41.3.1 of the constitution obliges the state to guard the institutions of family and marriage “with special care”, His Honour concluded that prohibition against conduct that was harmful to these pivotal institutions of society cannot be inconsistent with the constitution and that no right to privacy could prevail against criminal sanctions that were necessitated for the promotion of the common good.¹⁰²

The right to privacy as alleged by the plaintiff was received more warmly by Justice Henchy in his dissenting opinion. His Honour held that the onus lay with the state to prove that the laws in question were not inconsistent with the constitution. He

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Norris v Attorney General*, *loc cit*, n 87, per O’Higgins CJ, 64.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 64–65.

¹⁰¹ *Ibid.*, 65.

¹⁰² *Ibid.*

concluded that the state must show that the degree of privacy that the plaintiff sought would be inconsistent with the maintenance of public order and morality, which onus it had completely failed to discharge as the Attorney General did not produce any witness to rebut the plaintiff's argument that decriminalisation would not constitute a threat to public order or morality. Indeed, the consensus of sworn evidence presented during trial showed that submissions presented by the plaintiff stood entirely uncontroverted. His Honour held that the trial judge was therefore bound in law to uphold the plaintiff's claim of inconsistency, which he nonetheless failed to do.¹⁰³ Instead, the trial judge appeared to lay "undue stress on the fact that the prohibited acts, especially sodomy, are contrary to the standards of morality advocated by the Christian Churches in this State".¹⁰⁴

Justice Henchy maintained that church dogmas should not be treated as a "guiding consideration". His Honour maintained that

What are known as the seven deadly sins are anathematised as immoral by all the Christian Churches, and it would have to be conceded that they are capable, in different degrees and in different contexts, of undermining vital aspects of the common good. Yet it would be neither constitutionally permissible nor otherwise desirable to seek by criminal sanctions to legislate their commission out of existence in all possible circumstances.¹⁰⁵

His Honour explained that

To do so would upset the necessary balance which the Constitution posits between the common good and the dignity and freedom of the individual. What is deemed necessary to his dignity and freedom by one man may be abhorred by another as an exercise in immorality. The pluralism necessary for the preservation of constitutional requirements in the Christian, democratic State envisaged by the Constitution means that the sanctions of the criminal law may be attached to immoral acts only when the common good requires their proscription *as crimes*. As the most eminent theologians have conceded, the removal of the sanction of the criminal law from an immoral act does not necessarily imply an approval or condonation of that act.¹⁰⁶

Meanwhile, in his opinion, also dissenting, Justice McCarthy adopted the decision by Chief Justice O'Higgins in *The State (Healy) v Donoghue*¹⁰⁷ "as a correct statement of the proper judicial approach in testing the constitutionality of a statute",¹⁰⁸ where, following Justice Walsh's dictum in *McGee*, the Chief Justice maintained that the preamble to the constitution

makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment.¹⁰⁹

Justice McCarthy discerned that "it would plainly be impossible to identify with the necessary degree of accuracy of description the standards or mores of the Irish people

¹⁰³ *Ibid*, per Henchy J, 76–77 (dissenting).

¹⁰⁴ *Ibid*, 77.

¹⁰⁵ *Ibid*, 78.

¹⁰⁶ *Ibid*.

¹⁰⁷ [1976] IR 325.

¹⁰⁸ *Norris v Attorney General*, loc cit, n 87, per McCarthy J, 95 (dissenting).

¹⁰⁹ *The State (Healy) v Donoghue*, loc cit, n 107, per O'Higgins CJ, 347.

in 1937".¹¹⁰ His Honour went on to refute the correlations between personal rights and Christian theology, "the subject of many diverse views and practices"; what should be followed instead was Christianity itself and especially "the example of Christ and the great doctrine of charity which He preached".¹¹¹ Accordingly, His Honour held that such natural rights as were provided for in the constitution derived from the human personality.¹¹² The actions of the state must therefore be examined according to the constitutional objective of the promotion of the common good so that the dignity and freedom of the individual may be assured. In His Honour's words, "[t]he dignity and freedom of the individual occupy a prominent place in these objectives and are not declared to be subject to any particular exigencies but as *forming part of the promotion of the common good*".¹¹³

In the Supreme Court's reference in *In re Article 26 and the Information (Termination of Pregnancies) Bill, 1995*,¹¹⁴ the bench was confronted with the question of whether the bill, (endorsed by a referendum) to amend the constitution so as to remove the prohibition on the provision of information about abortion services outside the jurisdiction of the state,¹¹⁵ was repugnant to the constitution. Natural law, it was argued, was the fundamental law of the state and was thus antecedent and superior to positive law (including the constitution). When amending the constitution, the people were thus prohibited from doing so in a manner contrary to natural law.

Chief Justice Hamilton firmly rejected the argument. His Honour considered that by virtue of the legislative, executive, and judicial powers deriving from the people, the people must be "paramount". It was the people who ultimately decided all questions of national policy in accordance with the requirement of the common good.¹¹⁶ His Honour discerned that certain provisions within the constitution clearly indicated the supremacy of the constitution with respect to the legislative, executive, and judicial powers. These were, namely, article 15 which mandates the non-enactment of laws that will be contrary to the constitution; article 26 which provides the President with power to refer a bill to the Supreme Court, as in the case at bar, in order to resolve whether repugnancy between the bill and the constitution exists; and articles 28 and 34 subjecting the powers of the executive and judicial organs, respectively, to the provisions of the constitution.¹¹⁷

Chief Justice Hamilton then deduced from the relevant judicial precedents that whilst the courts recognised the constitution as the fundamental law of the state, they did "at no stage" recognise natural law as superior to the constitution.¹¹⁸ His Honour in particular referred to Justice Walsh's dictum in *McGee* – which Whyte remarks was perversely cited "in support of a positivist understanding of the Constitution which

¹¹⁰ *Norris v Attorney General, loc cit*, n 87, *per* McCarthy J, 96 (dissenting).

¹¹¹ *Ibid*, 99.

¹¹² *Ibid*.

¹¹³ *Ibid*, 100 (emphasis added). In *Sinnott v Minister for Education* [2001] 21R 545, Supreme Court of Ireland Justice Murphy was adamant that "[t]he preamble to the Constitution, which is frequently cited in identifying and construing the rights and duties which it confers or recognises, contains the following assertion: 'In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and states must be referred. ...' It is that destiny which provides the logical basis for the constitutionally recognised rights of the individual. They exist, and are exercisable primarily, as a means of achieving the goal identified in the preamble. However desirable it may appear economically or practically to permit or require the State to engage in activities, or provide facilities or services, the Constitution is careful to restrain the State and any other organisation from usurping the functions of the individual in his or her right and duty to achieve his purpose and fulfill his destiny to the best of his ability".

¹¹⁴ [1995] 1 IR 1.

¹¹⁵ *Attorney General (Society for the Protection of the Unborn Child or SPUC) v Open Door Counselling* [1988] IR 593; *Attorney General (SPUC) v Grogan* [1989] IR 753.

¹¹⁶ *In re Article 26 and the Information (Termination of Pregnancies) Bill, 1995, loc cit*, n 114, *per* Hamilton CJ. 38.

¹¹⁷ *Ibid*, 39.

¹¹⁸ *Ibid*, 43.

[Justice Walsh] would never endorse¹¹⁹ – that pluralism in society must be a controlling factor in any constitutional interpretation; Chief Justice O’Higgins’ *dictum* in *The State (Healy) v Donoghue* on the importance of prevailing ideas of prudence, justice and charity; and Supreme Court Chief Justice Finlay’s opinion in *Attorney General v X*¹²⁰ where the learned Chief Justice applied the guiding interpretative principles as stated by Chief Justice O’Higgins. Chief Justice Hamilton considered that where the existence of an unenumerated right was in issue the court concerned must be satisfied that the right can reasonably be implied from the constitution in accordance with its ideas of prudence, justice and charity.¹²¹ Natural law not being antecedent and superior to the constitution, the people were entitled to amend the constitution; once the constitution was amended, it becomes and embodies the “fundamental and supreme law of the State, representing as it does the will of the People”.¹²²

THE BASIS OF LEGAL VALIDITY

Conflicting constitutional jurisprudence, as has been seen, has resulted in the issue of the relationship between the constitution and natural law remaining unresolved. On the 1992 referendum on information regarding abortion services abroad, High Court Justice O’Hanlon in an extra-judicial capacity – prior to the Supreme Court’s reference on the matter – argued that there were limitations upon the people’s capacity to legislate (or to amend the constitution) contrary to basic natural human rights: in this instance, the unborn’s right to life.¹²³ In O’Hanlon’s view, such limitations were imposed beyond doubt by the acknowledgment within the constitution of a norm antecedent and superior to positive law.¹²⁴ The references within the constitution to “inalienability” and “antecedent to positive law” were, the Jurist asserted, “important indicators of the legal philosophy on which the Constitution is based and they must govern our understanding of Irish law”.¹²⁵ Furthermore, the relevant judicial precedents, the Jurist maintained, confirmed such an understanding. Natural law, in his view, was “in essence” immutable and “not contingent” on contemporary standards, as it was constituted by and, in turn, constituted the “common denominator of all humankind”: human reason.¹²⁶

However, Clarke argues that the O’Hanlon thesis is *reductio ad absurdum*, as

it justifies members of the court using their own philosophical or religious convictions to rule that an amendment to the Constitution is unconstitutional – even when it is explicitly enacted by the people in accordance with Article 46.1 following widespread public debate – on the grounds that it is inconsistent with provisions of an unwritten Law which was implicitly enacted into the Constitution by those who voted, by a relatively small majority, for the original text in 1937.¹²⁷

¹¹⁹ G F Whyte, “Natural Law and the Constitution”, (1996) *Irish Law Times* 8, 11.

¹²⁰ [1992] IR 1.

¹²¹ *In re Article 26 and the Information (Termination of Pregnancies) Bill, 1995*, *loc cit*, n 114, *per* Hamilton CJ, 43.

¹²² *Ibid.*

¹²³ O’Hanlon, *loc cit*, n 4, 8.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Desmond M Clarke, “The Constitution and Natural Law: A Reply to Mr Justice O’Hanlon”, (1993) *Irish Law Times* 177, 179.

In due course, the Supreme Court was called upon in *In re Article 26 and the Information (Termination of Pregnancies) Bill, 1995* to resolve this fundamental issue of legal validity, and the court, as we have seen, firmly decided that natural law was not antecedent and superior to the constitution and that the people may amend the constitution as they please, and such amendment thenceforth becomes and embodies the fundamental and supreme law of the land.

Nonetheless, the reference itself was fraught with logical weaknesses. Whyte observes that

Though this is never made explicit, the term “Constitution” appears to be understood exclusively in a positive law sense. Quite how the Court managed to arrive at this refined understanding of the Constitution, from which any natural law influence has been expunged, is never made clear. This, of course, is a serious weakness in the Court’s reasoning for until such an understanding is established, the constitutional provisions cited do not necessarily support the ultimate rejection of the O’Hanlon thesis.¹²⁸

Doyle, meanwhile, suggests that the reference only illuminated the “paradox at the core of the legal validity problem”: for natural rights to be legally enforceable and enforced, they must be recognised through the application of positive law which perforce “diminishes their antecedent status”.¹²⁹ Such paradox, in Doyle’s opinion, arises where “an agent of positive law (the judge) determines what is superior to positive law”, particularly where “some judges at least relied on natural law as a source of implied rights”.¹³⁰ Duncan is of the same view, that

The difficulty here is that the theory that the natural law stands above the Constitution is being justified by the terms of a human instrument, the Constitution, which is itself subject to the natural law. The Constitution cannot be both subject to the natural law and the legal justification for that subjection. One or other, the natural law or the Constitution, must finally have priority over the other as the ultimate source of legal validity in any potential area of conflict, if indeed the natural law stands above the Constitution. It is necessary to find authority for this proposition outside the Constitution, perhaps within the natural law itself.¹³¹

In examining the natural law claim that natural law is superior to the constitution thus necessitating unquestioned compliance, and the positivist contention that the people are paramount and have an unfettered and inherent power of amending the constitution under article 46, Doyle argues that they are “two related claims”.¹³² Each claim, the author asserts, is a claim of political morality that seeks to be recognised as the ultimate source beyond legal positivist argument.¹³³ Natural law, so it is generally maintained, consists of those laws that are descendent from God and are inherently binding upon man by virtue of the human personality.¹³⁴ Popular sovereignty, on the other hand, embodies and illuminates the people, a concept equally external to the constitution.¹³⁵ Both of the ostensibly opposing claims that constitutional measures must comply with natural law and that the measures must represent the will of the people are claims premised upon positive law, as they constitute legal rules “about the

¹²⁸ Whyte, *loc cit*, n 119, 10.

¹²⁹ Oran Doyle, “Legal Validity: Reflections on the Irish Constitution”, (2003) 25 *Dublin University Law Journal* 56, 65.

¹³⁰ *Ibid*, 66.

¹³¹ William Duncan, “Can Natural Law Be Used in Constitutional Interpretation?”, (1995) 45 *Doctrine and Life* 125, 127.

¹³² Doyle, *loc cit*, n 129, 61–62.

¹³³ *Ibid*, 67.

¹³⁴ *Ibid*, 65.

¹³⁵ *Ibid*, 67.

boundaries of the legal system".¹³⁶ Furthermore, Doyle points out that the "deeper paradox" for both claims is that whilst locating the source beyond the constitution, *their* location is dependent upon the constitution, which is positive law, and therefore requires successful establishment of their authority "from within the constitutional order itself".¹³⁷ Whilst both claims have a "dual status" as moral and legal claims, with each claim dependent upon positive law and asserted as political morality, they are circular as they locate the legal validity externally and then use positive law as authority for *their* location.¹³⁸ For these reasons, the author argues that "each argument for moral justification is undermined by the fact that it derives its own authority from within the legal system".¹³⁹ Theoretical difficulties accordingly persist with both claims, which will not resolve the question of whether it is the constitution or natural law that constitutes the ultimate source of legal validity within the Irish constitutional order.¹⁴⁰

Further fundamental confusions and (in)compatibility as to the relationship between the constitution and natural law arise, as we recall that Supreme Court Chief Justice Kennedy in his dissenting opinion in the 1935 decision in *The State (Ryan) v Lennon*¹⁴¹ maintained that

The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend, or repeal), that all lawful authority comes from God to the people, and it is declared by Article 2 of the Constitution that "all powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland . . ." It follows that every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that if any legislation of the Oireachtas (including any purported amendment to the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the people to the Oireachtas, as, for instance, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.¹⁴²

It follows from the Chief Justice's reasoning that popular sovereignty and natural law may after all be one and the same, and may nonetheless annihilate each other. The syllogism is startling indeed, that juridically natural law and popular sovereignty are both of a self-annihilating character!

If the constitution, which embodies and mandates the superiority of natural law, is the supreme law of the land, then natural law's claim of superiority contains yet another logical contradiction in article 28.3.3 of the constitution, which states that

Nothing in this Constitution other than Article 15.5.2 [which prohibits the imposition of the death penalty] shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law.¹⁴³

¹³⁶ *Ibid.*, 61–62.

¹³⁷ *Ibid.*, 67.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, 68.

¹⁴⁰ *Ibid.*

¹⁴¹ [1935] IR 170.

¹⁴² *Ibid.*, per Kennedy CJ, 204–05 (dissenting).

¹⁴³ 1937 constitution, art 28.3.3.

As Clarke suggests, the constitutional provision

implies that emergency legislation which takes advantage of the constitutional immunity from challenge which it provides is superior in the relevant sense to all rights guaranteed by the Constitution. Thus: (i) some rights (i.e. those derived from natural law) are antecedent and superior to all positive law; (ii) the same rights are not superior to some positive laws (viz. emergency legislation which is immune to constitutional challenge under Article 28).¹⁴⁴

Lastly, whilst rejecting the application of Christian theology in a pluralist society, Justice Walsh in *McGee* advocated the application of the individual judge's concept of the principles of prudence, justice and charity, all of which His Honour enthusiastically acknowledged to be premised within Christianity itself which, in turn, informed the nature and extent of natural law.¹⁴⁵ However, the Supreme Court's subsequent notions in *The State (Nicolaou) v An Bord Uchtála*¹⁴⁶ and *G v An Bord Uchtála*,¹⁴⁷ respectively, that natural rights as provided for in the constitution may by one's consent be transferred or dispensed with, respectively, immediately rid natural rights of their alleged divinity. Clarke laments that

The question therefore arises: to what extent, if any, might natural law provide guidance to members of the court in deciding constitutional issues? I argue that it provides no valid guidance at all to the courts; rather, natural law is primarily a negative thesis about law which is equally consistent with a variety of mutually incompatible views on any specific issue which the courts may have to decide.¹⁴⁸

The Supreme Court's recognition in *The State (Nicolaou) v An Bord Uchtála* and *G v An Bord Uchtála*, of natural rights on the basis of a "natural" biological or social relationship, only exacerbated the predicament and confused the metaphysics and legal basis of natural law itself even further. Indeed, in *G v An Bord Uchtála*, Justice Kenny noted the acute ambiguity of the word "natural" itself.¹⁴⁹

CONCLUSION

In construing the fundamental rights provisions in accordance with the tenor of the 1937 constitution, the Supreme Court has consistently rejected any attempts at interpreting the constitution on the basis of the political, social and moral tenets prevailing at the time of its promulgation. The view of the Supreme Court has been overwhelmingly to interpret the constitution solely "in light of the prevailing ideas and concepts".¹⁵⁰ Whilst the constitution – in particular the preamble thereto – epitomises such political, social and moral precepts as continue to guide the people and the state of Ireland to this day, the constitution as it now stands, represents and embodies the fundamental and supreme law of the land. It is the duty of the judiciary, as the ultimate guardian of all laws including the constitution, to ensure that the objectives of the constitution are upheld and implemented and that the necessary equilibrium between conflicting laws is maintained. Thus, it falls upon the judiciary to deduce and apply

¹⁴⁴ Clarke, *loc cit*, n 127, 178.

¹⁴⁵ *McGee v Attorney General*, *loc cit*, n 71, *per* Walsh J, 318–19.

¹⁴⁶ [1966] IR 567.

¹⁴⁷ [1980] IR 32.

¹⁴⁸ Clarke, *loc cit*, n 5, 213.

¹⁴⁹ *G v An Bord Uchtála*, *loc cit*, n 147, *per* Kenny J, 97.

¹⁵⁰ *McGee v Attorney General*, *loc cit*, n 71, *per* Walsh J, 319.

these political, social and moral guidelines from the text of the constitution itself. The duty becomes especially pronounced when rights and the limitations thereon are in issue. According to Justice Walsh in *McGee*, this task is achieved according to the individual judge's concept of such natural law principles as are positively laid down in the preamble to the constitution: prudence, justice and charity.¹⁵¹ Thus, the precise mode of deduction becomes fundamental and has been the subject of much scholarly debate.

From the beginning of the life of the constitution, the courts have viewed the explicitly Christian references in the preamble and the references to natural rights within the fundamental rights provisions as embodying constitutional recognition of the existence of a superior norm: natural law. The consequence of this recognition, Justice Walsh in *McGee* concluded, was the "rejection of legal positivist theory",¹⁵² which gave rise to and emphasised a communitarian rights regime that was illuminated in the majority decision in *Norris*.

Nonetheless, the *Abortion Information* reference has resolved that as Ireland is a sovereign democratic state the people are thus "paramount", and the power of amending the constitution is an unfettered power of, and inheres in, the people under article 46. This power is unconstrained by any requirement to amend the constitution in accordance with natural law, which is indeterminable. Supreme Court Chief Justice Hamilton maintained that both the constitution and the relevant judicial precedents rejected the subjection of the constitution to any alleged superiority of natural law, even as the doctrine of unenumerated rights must be applied in accordance with the principles of prudence, justice and charity.¹⁵³ The non-superiority of natural law is therefore compatible with the unfettered right and capacity of the people to amend the constitution. The constitution so amended becomes and embodies the fundamental and supreme law of the state.¹⁵⁴ It would thus appear at first sight that the constitution has undergone a radical change, from being the embodiment of a "Christian polity", carrying the fundamental superiority of natural law as then alleged, at its birth; to its gradual renaissance as the fundamental and supreme law of the land and within the constitutional order of Ireland. The evolution of constitutional jurisprudence nonetheless has resulted in a serious conflict as to the relationship between the constitution and natural law, and raised the problematic issue of the basis of legal validity within the Irish constitutional order. In *McGee*, Justice Walsh supported rather than rejected, the notion of natural law as a higher law indicated by and within the constitution itself, premising his judicial conclusions upon Christianity. The problem with such juridical syllogism is that positivism inheres in the recognition of the superiority of natural law through the preamble to and the fundamental rights provisions of the constitution. In complicating the matter further, Chief Justice Hamilton declared – contrary to Justice Walsh's *dictum* that natural law was superior to the constitution – that natural law had *not* been recognised in previous decisions (thus including *McGee* itself) as encompassing any such superiority.¹⁵⁵

The *Abortion Information* reference, however, was itself logically unsatisfactory. Under the reference a constitutional amendment by the people in conflict with natural law, as discerned from Christian moral teaching, nevertheless becomes and embodies the fundamental and supreme law of the state and such an amendment is itself not *ultra*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, 310.

¹⁵³ *In re Article 26 and the Information (Termination of Pregnancies) Bill, 1995*, *loc cit*, n 114, *per* Hamilton CJ, 43.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

vires the power of amendment under article 46. On the other hand, a legislative amendment passed by the democratically-elected Oireachtas to existing legislation may yet be held unconstitutional if the amendment is considered to impinge disproportionately upon the “common good” as deduced by the unelected judiciary in accordance with the principles of prudence, justice and charity descendent from Christian moral teaching. At the same time, the judicial organ as the ultimate guardian and interpreter of the constitution is mandated thereby to resolve whether a positive law, *ie*, the constitution, acknowledges a higher, unexpressed norm, *ie*, natural law, as the ultimate legal basis of validity within the Irish constitutional order,¹⁵⁶ even though article 28.3.3 of the constitution simultaneously exempts emergency legislation from constitutional challenges on the basis of constitutional provisions (excluding article 15.2.2 prohibiting the imposition of the death penalty) including those embodying and mandating the superiority of natural law. There is, thus, a “permanent possibility of paradox”.¹⁵⁷

¹⁵⁶ Doyle, *loc cit*, n 129, 66.

¹⁵⁷ Clarke, *loc cit*, n 127, 178.

JUDICIAL REVIEW, IRRATIONALITY AND THE REVIEW OF MERITS

IAN TURNER¹

INTRODUCTION

There is a cluster of issues which could be addressed under the broad theme indicated by the title of this article. These include: how has the irrationality of administrative action and decision-making become variously defined and interpreted by the judiciary within the last two decades? If it is possible to identify a coherent legal definition of irrationality, have the judges acted in a reasonably consistent manner when applying it; that is, is it necessary to compare the standards supposedly applicable with the actual practice of judicial decision-making in this area, identifying areas of discrepancy within the case-law? If we can identify such areas of clear discrepancy between principle and judicial practice, what questions arise relating to the legitimacy and constitutionality of this judicial review of merits, or the meaning, scope and implications of judicial decision-making in relation to the role of the executive?

Insofar as issues of legitimacy and constitutionality can be raised, should we be suspicious of academic analysis which deploys ostensibly objective conceptions as a possible cover for the expression of subjective dislike of an interventionist welfare state, and a related, if concealed, ideological commitment to classic liberal interests?² Furthermore, is it now time to abandon the traditional doctrinal fixation upon the abstract semantics of formal legal definition in favour of a broader concern with the policy grounds for mapping particular “standards” of appropriate judicial intervention?

In addition, which, if any, contextual factors must be taken into account when interpreting the new standards? Having identified such contextual factors, are we able to classify these according to a single context of application, or is it necessary to refocus on multiple, not necessarily, compatible contexts? Moreover, if substitution of judgment (in other words, the universally accepted limit on judicial intervention³) is able to provide a legitimate benchmark for the constitutional boundaries of the courts of review, then is it possible to support such claims by reference to clear case law? In both cases, is it possible to provide clear and compelling answers to these questions? If not, then does it follow that academic analysis should abandon its traditional

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² See, for example: H Wade, “Law, Opinion and Administration”, (1962) 78 LQR 188. For more modern, and conciliatory liberal democratic approaches to the welfare state see, for example: T Allan, “Legislative Supremacy and the Rule of Law” (1985) 44 CLJ 111; J Jowell and A Lester, “Beyond *Wednesbury*: Substantive Principles of Administrative Law” [1987] PL 368; J Jowell and A Lester, “Proportionality: Neither Novel Nor Dangerous”, in J Jowell and D Oliver (eds), *New Directions in Judicial Review* (Stevens, 1988) at 51–72; T Allan, “Pragmatism and Theory in Public Law” (1988) 104 LQR 422; T Allan, “Constitutional Rights and Common Law” (1991) 11 OJLS 453; J Jowell, “Is Proportionality an Alien Concept?” (1996) 2 EPL 401; J Jowell, “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] PL 671; A Lester, “Developing Constitutional Principles of Public Law” [2001] PL 684; J Jowell, “Human Rights and the British Constitution”, in J Jowell and D Oliver (eds), *The Changing Constitution*, 5th ed (Oxford University Press, 2004) at 62–87; J Jowell, “The Rule of Law Today” in J Jowell and D Oliver (eds), (*ibid*, 2004) at 5–25; A Lester, “Beyond the Powers of Parliament” [2004] JR 95; A Lester, “The Utility of the Human Rights Act: A Reply to Keith Ewing” [2005] PL 249. For more general discussions of political theory and public law, see, for example: M Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992); and C Harvey, “Talking About Human Rights” [2004] EHRLR 500.

³ P Craig, “Unreasonableness and Proportionality in UK Law”, a paper presented at a conference at the Institute of European Law, The University of Birmingham on 20 March 1998. At the conference Craig described substitution of judgment as “extreme [review upon the] merits”. (The substance of Craig’s conference paper is published in P Craig, “Unreasonableness and Proportionality in UK Law”, in E Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999) at 85–106. Substitution of judgment has also been described as “primary-facts reviews of executive action”: F Klug and C O’Brien, “The First Two Years of the Human Rights Act” [2002] PL 649, at 659.

concerns for the unity of public law doctrine in favour of focusing upon the potentially overlapping contexts of application? Finally, is one of the implications of recent legal developments, including attempts to come to terms with the demands of the Human Rights Act 1998, the notion that academic analysis can no longer start from the premise of judicial independence? Instead, should we take seriously recent academic claims for a “democratic dialogue”,⁴ “due deference”⁵ or “cultures of justification”⁶ in which the political and executive role of the judges is arguably more transparent and institutionalised?

It is not, of course, possible for a single study to address all of these interrelated questions and issues in adequate depth. For pragmatic reasons, this article focuses upon defining “irrationality” and analyses the standard of intervention that this definition imposes. It then considers examples of the judicial deployment of the so-called “standard of irrationality”, questioning whether, in practice, there is a discrepancy in its application by the courts. The conclusion to the present article calls for an evaluation of the legitimacy of such identified discrepancies. Such an evaluation must give particular attention to the manner of the review and the context of the administrative decision under examination since these may be factors that affect the adoption of different standards of intervention by the courts. Assessing the constitutionality of these discrepancies will be the purpose of further work that I intend to carry out.

THE PRINCIPLES OF JUDICIAL REVIEW

Judicial review has been variously described as the courts regulating governmental power, the courts protecting individual rights, the courts ensuring efficient administration and the courts enforcing governmental accountability.⁷ Nevertheless, whatever the purpose of judicial review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of executive action because they are not the recipients of discretionary power.⁸ Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant’s favour. Rather, it is a supervisory procedure whereby a judge rules only upon the lawfulness of an executive decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was “lawful or unlawful”; the question for appeal by contrast is whether the decision was “right or wrong”.⁹

⁴ R Clayton, “Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention Under the Human Rights Act 1998” [2004] PL 33. Clayton calls for an approach to breaches of the ECHR based on a “democratic dialogue” between the legislature and the judiciary (p 42).

⁵ Hunt – M Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2004) at 337–370 – has recently called for an approach to judicial review in ECHR called “due deference”. “Due deference” is where a court would only accord deference to a decision by a public body after it has earned the respect of the court by openly demonstrating the justification for the decision it has reached (at 347).

⁶ Taggart – M Taggart, “Reinventing Administrative Law” in N Bamforth and P Leyland (eds), *ibid*, at 311–335 – calls for a similar approach to Hunt (see endnote above): “a culture of justification” by the executive (at 332–334).

⁷ P Craig, *Administrative Law*, 5th ed (Sweet and Maxwell, 2003) at 3.

⁸ S De Smith, H Woolf and J Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

⁹ This dichotomy between review and appeal is arguably unsatisfactory. It is simplistic and gives the impression that a court is always acting in an appellate capacity when it is reviewing merits. This is not the case; a court can be reviewing merits but not substituting its judgment, which is what a review court would be doing if acting in an appellate manner. See note no.2.

Craig has sought to justify this distinction between review and appeal by reference to the source of judicial powers: powers of review derive from the courts' inherent jurisdiction, whereas appeals do not: they are statutory.¹⁰ Others, however, have justified this distinction in less neutral terms. For instance, Lord Irvine, the previous Lord Chancellor, has argued that the courts should not review merits. His argument is that to do so violates the constitutional imperative of judicial self-restraint. Lord Irvine identifies at least three bases for this imperative. First, "a constitutional imperative": public authorities should exercise discretionary powers that have been entrusted to them by parliament.¹¹ Every authority has within its influence a level of knowledge and experience which justifies the decision of parliament to entrust that authority with decision-making power. Second, "lack of judicial expertise": it follows that the courts are ill-equipped to take decisions in place of the designated authority. Third, "the democratic imperative": it has long been recognised that elected public authorities, and particularly local authorities, derive their authority in part from their electoral mandate.¹² On this argument, these imperatives clearly show that the courts should not engage in a review of the merits of administrative action and ought to be reluctant to exercise their powers of review for reasons of democracy and good government.¹³

This, at least, is the theory. However, Galligan submits that in practice there is no clear line between the merits of discretion and questions of lawfulness.¹⁴ Without explicit statutory guidance about the proper exercise of discretionary powers, the boundary between review and appeal is likely to become blurred. This, therefore, raises the question whether the courts are, to some extent, engaging covertly in a review of the substantial merits of executive decision-making when exercising their review powers. This question is addressed by reference to one ground of judicial review in particular – irrationality – since, by determining the legality of discretionary powers, in my view it affords the greatest opportunity for courts to review the merits.

¹⁰ P Craig, *op cit* (2003), p 7.

¹¹ Not all decision-makers derive their discretionary powers from statute. Nevertheless, several administrative decisions, such as those taken under the royal prerogative or royal charter, are amenable to judicial review even though parliament has not conferred the power to take them upon the executive. See, for example, the speech of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Recent cases where the courts have extended the boundaries of judicial review (albeit "victims" for the purposes of enforcing Convention rights under the Human Rights Act 1998: see later article) include *Regina (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 where the court entertained a challenge to the arbitrary detention of British Al-Qaeda suspects by US authorities at Camp Delta, Guantanamo Bay, Cuba; *Regina (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606 where the Court of Appeal found that the applicant was able to pursue judicial review proceedings notwithstanding that he was living in the USA and had been refused a right to enter the UK; and *Al-Skeini v Secretary of State for Defence* [2004] EWHC 2911 (Admin) where the relatives of a deceased Iraqi man who had died in suspicious circumstances in British military custody in Iraq were able to pursue a claim notwithstanding the events occurred abroad. (There was an appeal to the Court of Appeal – [2005] EWCA Civ 1609 – but as regards this issue the case was sent back to the Administrative Court for consideration again in the light of new evidence. At the time of writing the case is still pending.)

¹² Lord Irvine, "Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review" [1996] PL 59, at 60–61. The argument that Lord Irvine objects to the judicial review of merits is strictly incorrect. He rejects the review of merits where the courts are employing principles of the common law (*ie* irrationality), but does not do so when they are applying the proportionality to certain breaches of the European Convention on Human Rights (ECHR). See, for example: Lord Irvine, "The Impact of the Human Rights Act: Parliament, the Courts and the Executive" [2003] PL 308, at 313; Lord Irvine, "The Development of Human Rights in Britain" [1998] PL 221, at 229.

¹³ For further support, see, for example, J Griffith, "The Political Constitution" (1979) 42 MLR 1; J Griffith, *The Politics of the Judiciary*, 5th ed (Fontana Press, 1997). Griffith was famously suspicious of the unelected judiciary so preferred a system where there was less legal accountability of the executive and more political accountability. Adam Tomkins is perhaps Griffith's modern day standard bearer: see, for example, A Tomkins, "In Defence of the Political Constitution" (2002) 22 OJLS 157; A Tomkins, *Public Law*. (Oxford University Press, 2003); A Tomkins, "What is Parliament For?" in N Bamforth and P Leyland (eds.), *op. cit.*, at 53–78; A Tomkins, "Readings of *A v Secretary of State for the Home Department*" [2005] PL 259. Other recent academic criticism of judicial power includes: R Ekins, "Judicial Supremacy and the Rule of Law" (2003) 119 *LQR* 127.

¹⁴ D Galligan, *Discretionary Powers*, (Clarendon Press, 1986) at 323.

Irrationality as a Ground of Judicial Review

The courts conduct the judicial review of administrative action on several grounds. In *Council of Civil Service Unions and Others v Minister for the Civil Service*¹⁵ (*GCHQ*), Lord Diplock classified these as “illegality”, “irrationality” and “procedural impropriety”.¹⁶

“Illegality” prevents power from being exceeded: administrative bodies must act within the powers granted to them by parliament.¹⁷ This head of judicial review includes examples where a decision-maker has acted for an improper purpose,¹⁸ or failed to take account of relevant considerations, or ignored relevant ones.¹⁹ “Irrationality” prevents power from being abused: it allows the court to interfere with an administrative decision that is not within a range of options open to a reasonable decision-maker.²⁰ “Procedural impropriety” prevents a breach of natural justice: it imposes fair decision-making procedures including the recognition of a legitimate expectation,²¹ the right to a hearing²² and a trial by an impartial judge.²³ This head of review can also include the failure of an administrative body to observe a procedural rule specified by statute.²⁴

In *GCHQ*, Lord Diplock described an irrational decision as a decision which was: “so outrageous in its defiance of logic and accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.²⁵ The courts use forceful language to define unreasonableness²⁶ as a way of showing that the standard of review is far higher than the standard applied in an appeal. Definitions of irrationality, including the one given by Lord Diplock, and others such as “a pattern of perversity or absurdity of such proportions that the guidance could not have been framed by a *bona fide* exercise of political judgment on the part of the Secretary of State”,²⁷ emphasise the principle that a reviewing court’s

¹⁵ [1985] AC 374. For a more recent classification of the heads of review, see, for example, M Fordham, “The Judge at Your Shoulder: New Principles of Governmental Accountability” [2004] JR 122.

¹⁶ *Ibid.*, at 410–411. Lord Diplock countenanced the emergence of a fourth ground of judicial review, proportionality.

¹⁷ Judicial review is often justified on the basis that it is enforcing the will of parliament. See, for example: D Oliver, “Is the *Ultra Vires* Rule the Basis of Judicial Review?” [1986] PL 543. Other commentators have argued otherwise. Sir John Laws extra-judicially has described the enforcement of legislative will as the basis for judicial review as a “fig leaf”: see Sir John Laws, “Law and Democracy” [1995] PL 72. By expressing the fallacy of this argument, Laws is seeking to undermine the sovereignty of parliament so that the courts would be justified in exercising their common law powers of review over primary legislation (Acts of Parliament), and not just over secondary legislation and discretionary powers which is the case at present. This would be where there had been an infringement of a “higher-order” law. (If the reader wishes to follow the legitimacy of judicial review debate, including the justification that the courts are exercising their powers of review because of a common law right to do so – famously advanced by Christopher Forsyth in “Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 50 CLJ 122 – see eg C Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000) and P Craig *op cit.*, (2003) at 12–20.)

¹⁸ eg *Regina v Somerset County Council, Ex parte Fewings* [1995] 3 All ER 20; *Magill v Porter* [2001] UKHL 67.

¹⁹ eg *Roberts v Hopwood* [1925] AC 578; *Bromley LBC v Greater London Council* [1983] 1 AC 768.

²⁰ eg *Wheeler v Leicester City Council* [1985] AC 1054; *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457.

²¹ eg *Regina v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operator’s Association* [1972] 2 QB 299.

²² eg *Ridge v Baldwin* [1964] AC 40.

²³ eg *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759; *Magill v Porter* [2001] UKHL 67.

²⁴ eg *Agricultural Training Board v Aylesbury Mushrooms* [1972] 1 All ER 280. This sub-ground of review is very similar to the “illegality” rule that the executive must not ignore relevant considerations, take irrelevant ones into account or both. However, there it is a matter for the courts, being the final arbiters of the law, to decide which are, and which are not, relevant considerations; here the statute is explicit in which (procedural) rules must be followed

²⁵ [1985] AC 374 at 410.

²⁶ In *GCHQ* Lord Diplock, with reference to the judgment of Lord Greene in the Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, said that irrationality could now be succinctly referred to as “*Wednesbury* unreasonableness” (at 410). Thus in this article the terms irrationality and unreasonableness are used interchangeably, although universal agreement that they are synonymous in English administrative law is possibly lacking. For a contrary view, see the judgment of Sir Thomas Bingham MR (as then was) in the Court of Appeal in *Regina v Secretary of State for the Home Department, Ex parte Onibiyi* [1996] QB 768, at 785.

²⁷ Lord Scarman in the House of Lords in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240, at 248. In the House of Lords in *Regina v Chief Constable of Sussex, Ex parte International Trader’s Ferry*

ruling should not reflect what it would have done if it had been granted the power to take a decision. For example, Lord Lowry in the House of Lords in *Regina v Secretary of State for the Home Department, Ex parte Brind*²⁸ said:

The court's duty is not to interfere with a discretion which Parliament has entrusted to a statutory body or an individual but to maintain a check on excesses in the exercise of discretion. That is why it is not been enough if a judge feels able to say, like a juror or like a dissenting member of the Cabinet, 'I think that is unreasonable; that is not what I would have done.' It also explains the emphatic language that the judiciary use in order to drive home the message and the necessity for the act to be so unreasonable that no reasonable minister would have done it.²⁹

This *dictum* clearly illustrates the principle that a reviewing court ought not to intervene if it thinks that an administrative decision was wrong; interference is only justified if a decision was outrageous in its defiance of logic and accepted moral standards.

On a close examination of the strong language in Lord Diplock's definition, one would expect, therefore, an irrational decision to be a gross breach of discretion, possibly, on a par with the extreme facts of *Backhouse v Lambeth London Borough Council*.³⁰ Here, in its desire to avoid raising rents generally as required by the then the Housing Finance Act 1972, section 62(1), the council increased the rent of one of its unoccupied houses from £8 to £18,000 a year. Although it had technically complied with its legal responsibility to increase its rents by the required rates, the council's action was found to be unlawful. The court ruled that it was unreasonable to levy the increase upon one house. If the decision examined by the court in *Backhouse* is a case in point, unreasonable acts of the executive are, therefore, likely to be infrequent in practice. Cane agrees. He states: "Applied literally, [this head of review] is so stringent that unreasonable decisions are likely to be a very rare occurrence in real life".³¹

JUDICIAL REVIEW OF THE MERITS

Notwithstanding the seemingly unambiguous language describing the proper application of irrationality, judges, when employing this test, have engaged in a review of the merits, and it is the purpose of this article to identify examples of such judicial encroachments. Before doing so, however, I wish to clarify the meaning I attribute to merits review. There is obviously a critical difference between a judge thinking about the merits and a judge making a decision on the basis of merits. In order to apply even the irrationality test, a judge must inevitably consider the merits underlying an impugned decision. As Craig says: "All tests of substantive judicial review entail the

Limited [1999] 2 AC 418 Lord Cooke appeared to lessen the force of Lord Diplock's language (though this definition seems not have had its judicial supporters). Lord Cooke said that having an extreme definition of irrationality was unnecessary. The test for his Lordship was whether the decision was one which a reasonable authority could reach (at 452).

²⁸ [1991] 1 AC 696.

²⁹ *Ibid*, at 765. More recently, this principle has been emphasised extra-judicially by Lord Hutton. He says (Lord Hutton, "Reasonableness and the Common Law" (2004) 55 NILQ 242): "[The] essence of [irrationality] . . . is that when a local authority has exercised a discretion given to it by Parliament, it is not for the court to sit as a court of appeal and for the judge to substitute his or her view of what is a reasonable exercise of the discretion for the view of the authority". (at 255)

³⁰ *The Times*, 14 October, 1972. Though this case was reported only in *The Times*, it has been widely referred to in textbooks as a classic example of an irrational administrative decision, eg S Bailey, B Jones and A Mowbray, *Cases, Materials and Commentary on Administrative Law*, 4th ed (Sweet and Maxwell, 2005) at 574-575; and H Wade and C Forsyth, *Administrative Law*, 9th ed (Oxford University Press, 2004) at 389.

³¹ P Cane, *An Introduction to Administrative Law*, 3rd ed (Clarendon Press, 1996) at 209.

judiciary in taking some view of the merits of the contested action”.³² I therefore use the phrase “merits-review” to refer to a situation where a judge has more than thought about the merits: s/he has gone on to reach a decision on the basis of merits. For the purposes of this article, this can be evidenced, I suggest, from examples where a judge has clearly employed a standard of unreasonableness that is lower than the standard implied by Lord Diplock’s definition of irrationality in *GCHQ*. Why? Taking literally the language of Lord Diplock’s test, a judge applying a lower standard would be required to undertake a balancing exercise of the pros and cons of the administrative decision originally taken, since the extreme nature of the decision would not speak for itself. *Backhouse*, referred to above, which I associate with Lord Diplock’s standard, is an example where a court’s ruling upon the merits of the case was not required, since the result of the administrative decision – levying the rate rise on a single property – was clearly *in extremis*, and therefore irrational.

Jowell and Lester have argued that judges have reviewed decisions that are not unreasonable: “The courts are willing to impugn decisions that are far from absurd and are often coldly rational”.³³ Following this, certain cases will be identified where a judge has ruled that the substance³⁴ of an administrative decision was irrational, but it will be submitted that s/he conducted review upon the merits, because facts surrounding the case do not support the court’s ruling that the decision-maker was acting outrageously in the defiance of logic.

The first case to be analysed where I suggest that a low standard of unreasonableness was employed is *Wheeler and Others v Leicester City Council*³⁵ in the House of Lords. Here, Leicester Rugby Club challenged the council’s decision preventing it from using a recreation ground for a year. The applicants argued that the council had withdrawn the use of the ground because it had not prevented four of its players from accompanying a rebel rugby tour to South Africa.³⁶ In ruling that the council’s action had been unreasonable, Lord Roskill (with whom Lords Bridge, Brightman, Templeman and Griffiths concurred) stated: “In a field where other views can equally legitimately be held, persuasion, however powerful, must not be allowed to cross the line where it moved into the field of illegitimate pressure coupled with the threat of sanctions”.³⁷

Since the House of Lords in *Wheeler* published their speeches only about eight months after *GCHQ*, they ought to have been alive to the standard set by Lord

³² P Craig, *op. cit.* (2003), at 589.

³³ J Jowell and A Lester *op cit* (1987). In recognition that the courts review the merits of administrative decisions, Jowell and Lester called for the substitution of *Wednesbury* unreasonableness with “substantive principles of Administrative Law” derived from standards of administrative propriety, the basic rights and liberties of the individual and of citizenship (at 372).

³⁴ By the word “substance” the author is referring to the administrative decision itself rather than the process in arriving at a decision. Invariably, the courts state they should confine themselves to reviewing only the decision-making process rather than the substance of a decision (eg Lord Templeman in the Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521, at 526). However, it is common for the courts to review substance since Cane, *op cit*, discusses the judicial review of administrative activity on this ground of challenge in a separate chapter: “Output” (Chapter 9), to one examining “The Decision Making Process” (Chapter 7).

³⁵ [1985] AC 1054.

³⁶ At the time of this case, the government of South Africa operated a policy of apartheid which separated people of different races. This caused the country to be a pariah in the international community. Trade sanctions were imposed as a way of forcing South Africa to reverse its policy. Formal sporting links were severed, but there were unofficial (rebel) rugby and cricket tours from the United Kingdom.

³⁷ [1985] AC 1054, at 1078. There is possibly some doubt about the actual ground upon which the House of Lords found the council’s decision to be unlawful. Lord Templeman, despite agreeing with Lord Roskill, appeared to find that the decision was illegal, rather than irrational, for the reason that the council had exercised its powers for an improper purpose: “The club having committed no wrong, the council could not use their statutory powers in the management of their property or any other statutory powers to punish the club”.

Diplock, and indeed Lord Roskill specifically referred to it.³⁸ However, it is arguable that the court adopted a lower standard. If it had not done so, it could conceivably have ruled that the council's decision was not irrational as the council had been complying with its statutory duty under the Race Relations Act 1976³⁹ to promote race relations. To emphasise further that the decision was not irrational because of the fact that there were divergent views on this matter, Peiris notes:

In the light of the statutory duty imposed on the local authority to do all in its power to promote racial harmony, the council may well be forgiven the cynical reflection that abstention from the course which they followed could have entailed equal, if not greater, vulnerability in terms of the . . . *Wednesbury* formula.⁴⁰

By withdrawing the use of the recreation ground from the rugby club, the council was making a public statement. By severing its links with the club and four of its players, it was seeking to disassociate the City of Leicester (the council and its residents) from a tour that could have been seen to endorse the government of South Africa's policy of apartheid. Given the importance of the club as a sporting ambassador for the city, could it be said that the council was acting unreasonably?⁴¹

The decision of the Court of Appeal in *West Glamorgan County Council v Rafferty and Others*⁴² is another example where a judge, by finding an administrative decision to be irrational, was arguably employing a lower standard of unreasonableness than Lord Diplock in *GCHQ*. Here the court held that West Glamorgan County Council had acted unreasonably in seeking an order for possession of land occupied by travellers without providing the occupiers with alternative accommodation.⁴³ Was the decision of the council really irrational? First, they were not being evicted from land that had been granted to them by the council: they were trespassers causing a nuisance. Second, although the Caravan Sites Act 1968, section 6, imposed a duty upon the council to provide land for the accommodation of travellers, it did not oblige local councils to act in every case. Rather, the statute was only to apply "so far as may be necessary".⁴⁴

In view of the two arguments above, one may be entitled to argue that the Court of Appeal reviewed the merits of the council's decision. Indeed, this conclusion can be

³⁸ He said, *ibid*: "My Lords, the House recently had to consider problems of this nature in *Council for the Civil Service Unions v Minister for the Civil Service* [1985] AC 374. In his speech, at 410-411, my noble and learned friend Lord Diplock classified these already well established heads or set of circumstances in which the court will interfere. First, illegality, second, irrationality and third, procedural impropriety".

³⁹ The Race Relations Act 1976, s 71, stated (because it was amended by s 2(1) of the Race Relations (Amendment) Act 2000): "Without prejudice to their obligation to comply with any provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need - (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups".

⁴⁰ G Peiris, "Wednesbury Unreasonableness: The Expanding Canvas" (1987) 46 CLJ 53, at 81. Peiris is not the only person to express disbelief at the ruling of the House of Lords. For example, Cranston says (R Cranston, "Reviewing Judicial Review", in G Richardson and H Genn (eds), *Administrative Law and Government Action* (Clarendon Press, 1994) 45-80, at 52): "To the surprise of many sensitive to the need to promote better race relations the House of Lords held that the council had acted unreasonably".

⁴¹ Furthermore can the decision of Leicester City Council be regarded as unreasonable in a public law sense when the court of first instance (*Regina v Leicester City Council, Ex parte Wheeler* (unreported, 27 September, 1984)) and the Court of Appeal (*Wheeler and Others v Leicester City Council* [1985] AC 1054) both ruled that its decision to withdraw the use of the recreation ground from Leicester Rugby Club was not irrational?

⁴² [1987] 1 WLR 457.

⁴³ *Ibid*, at 477.

⁴⁴ The Caravan Sites Act 1968, s 6, stated (because it was repealed by s 80(1) of the Criminal Justice and Public Order Act 1994): "[It shall be the duty of local authorities] to exercise their powers . . . so far as may be necessary to provide adequate accommodation for gypsies residing in or resorting to their area".

supported by reference to *Bailey et al*: “Given that there were ‘admissible factors on both sides of the question’ in *Rafferty*, can it be said that the council ‘must have taken leave of its senses’ in coming to its decision?”⁴⁵

In *Regina v Secretary of State for Trade and Industry, Ex parte Lonrho Plc*,⁴⁶ Lonrho challenged two decisions of the secretary of state. First, the minister had withheld publication of the Director General of Fair Trading’s report into the takeover of House of Fraser by the Al Fayed brothers. Second, the minister had not referred the takeover to the Monopolies and Mergers Commission (MMC). The court held that the secretary of state had acted irrationally on both counts.

As regards the secretary of state’s second decision, it is arguable he gave a sensible explanation for not referring the takeover to the MMC. He was unwilling to make a referral as this would have involved divulging the contents of the Director General’s report. He did not wish to disclose the report’s contents (which was his first decision) because of the risk that a fraud investigation would have been compromised. In those circumstances, was it, therefore, irrational not to refer the takeover to the MMC? Borrie says: “The court’s grant of mandatory relief amounted to a blatant usurpation of the Secretary of State’s discretion”.⁴⁷

In *Regina v Cornwall County Council, Ex parte Cornwall and Isles of Scilly Guardians Ad Litem and Reporting Panel*,⁴⁸ Sir Stephen Brown P ruled that the respondent had acted unreasonably in quashing the decision of the Director of Social Services for Cornwall County Council.⁴⁹ The Director had declared that the *guardians ad litem* (GALRO) should spend no more than 65 hours on each child’s case and that no fees would be paid for time spent over that limit unless prior authorisation had been obtained.

For several reasons the Director of Social Services, it is submitted, did not act irrationally. First, he had taken his decision in a climate where there was a need for reductions in public expenditure. Advice from the Government had stated that panel committees and managers should ensure that expenses, fees and allowances claimed by guardians were proper and reasonable. Second, the costs of the GALRO scheme had increased by 100 *per cent* in four years. Third, although the director had reduced the average number of hours spent on each child’s case from 92 to 65, this lower figure (which he was prepared to exceed in exceptional circumstances) was still much higher than the average number of hours (44) spent on a case in the neighbouring county of Dorset. In view of these circumstances, it is arguable that the Divisional Court reviewed the merits of the director’s decision. Indeed, I am not alone in reaching this conclusion. Cane implies that the Divisional Court did so too. He argues, when

⁴⁵ S Bailey, B Jones and A Mowbray, *op cit*, at 575. Writing extra-judicially Carnwath J (Sir Robert Carnwath, “The Reasonable Limits of Local Authority Powers” [1996] PL 244) has implied that the Court of Appeal adopted a low standard of irrationality (at 261): “[In *Rafferty* it] was held unreasonable for an authority to evict gypsies from its property, when to do so would put it under a duty to them under the Caravan Sites Act which it was unable to fulfill. The authority had a genuine dilemma, and no-one categorised its conduct as outrageous”.

⁴⁶ *The Times*, 18 January, 1989.

⁴⁷ G Borrie, “The Regulation of Public and Private Power” [1989] PL 552, at 557. The decision of the Divisional Court was reversed by the Court of Appeal (*Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC* (1989) 139 NLJ 150) and the subsequent appeal was dismissed by the House of Lords (*Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC* [1989] 1 WLR 525). Both courts held that the minister had not acted unreasonably. Indeed, regarding the secretary of state’s second decision not to refer the bid to the Monopolies and Mergers Commission, Mustill LJ in the Court of Appeal said the Divisional Court had conducted merits-review (at 512).

⁴⁸ [1992] 1 WLR 427.

⁴⁹ *Ibid*, at 436.

referring to this case: “Even when a court purports to quash a decision because it is *Wednesbury* unreasonable, it may be applying a standard of unreasonableness less stringent than that specified by Lord [Diplock]”.⁵⁰

In *Regina v Cambridge District Health Authority, Ex parte B*,⁵¹ Laws J held that the decision of the Cambridge District Health Authority not to fund further medical treatment for B, a ten year old girl with cancer, had been unreasonable.⁵² In so doing, the judge cautioned the courts against second-guessing administrative decisions originally intended by the legislature to be taken by the primary decision-maker (which in this case was the health authority). The judge stated:

It is, of course, no part of my evidence to make medical judgments: not only because I have not the competence, but because the judicial review court does not . . . re-decide the merits of administrative decisions, since to do so would be to usurp the role of the decision-maker which has been confided to him by or under an Act of Parliament.⁵³

Despite Laws J’s warning, it is ironic that the standard he adopted may have caused him to conduct a review upon the merits. First, it is arguable that the health authority was not acting irrationally in a public law sense in refusing to offer the applicant the cancer treatment she required: it had a success rate of only between 10 and 20 *per cent*; it was at variance with the majority of medical opinion; and it was experimental rather than standard therapy. Second, the opinions of the doctors who had treated the child for much of her life were also of relevance. They thought that it would not be right to subject her to further suffering and trauma when the prospects for success were so slight and carried a high risk of early morbidity. Third, B had already undergone a course of total body irradiation. According to accepted medical opinion, this was therapy which no-one could undergo more than once. Finally, substantial expenditure on treatment with such a small prospect of success would arguably not have been an effective use of financial resources. With a limited budget, the authority, it is fair to say, had a responsibility to ensure that sufficient funds were available for the care of other patients.

Taking account of these factors, it is submitted that the authority’s decision to withhold further therapy from the child could not be categorised as irrational.⁵⁴ Indeed, Mullender supports this view:

[Laws J] departs from the long-understood purpose of judicial review which is merely to pass on a decision’s lawfulness. He instead adjudicates on its merits, for example, from his refusal to accept the Health Authority’s view that the remedial treatment at stake in the case could be characterised as experimental.⁵⁵

A final example of merits review under the guise of the irrationality test is the ruling in *Regina v Coventry City Council, Ex parte Phoenix Aviation*.⁵⁶ Here the court held that the council had acted unlawfully in restricting the flights of live animals from

⁵⁰ *Op cit*, at 209.

⁵¹ [1995] 1 FLR 1055.

⁵² *Ibid*, at 1063.

⁵³ *Ibid*, at 1056.

⁵⁴ The ruling of Laws J was reversed by the Court of Appeal (*Regina v Cambridge District Health Authority, Ex parte B* [1995] 1 WLR 898). Sir Thomas Bingham MR (as he then was) cautioned reviewing courts against determining issues other than the lawfulness of administrative activity. The judge said: “The courts are not arbiters as to the merits of cases of this kind. Were we to express opinions as to the likelihood of the effectiveness of medical treatment, or as to the merits of medical judgment, then we should be straying far from the sphere which our constitution has accorded to us. We have one function only, which is to rule upon the lawfulness of decisions” (at 905).

⁵⁵ R Mullender, “Judicial Review and the Rule of Law” (1996) 112 LQR 182, at 184–185.

⁵⁶ [1995] 3 All ER 37.

Coventry Airport, after breaches of airport security by public demonstrators opposed to the exports. Simon Brown LJ said: “The council’s resolution was wholly disproportionate to the security risk presented at the time”.⁵⁷

Warwickshire police were worried about the penetration of the airport’s perimeter fence by the demonstrators, so wrote to the airport manager. The Assistant Chief Constable expressed his concerns should the flights resume and urged the airport manager to undertake a comprehensive review of security (the police did not have a responsibility to protect the airport from trespass). In following the police’s advice, the council explored the option of improving the strength of the airport’s perimeter fence. This was rejected, however, because the likely time to complete the work – 2–3 months – was too long. In any case, the estimated cost for the work was prohibitive: £400,000. To deter further security breaches by the demonstrators, the next course of action was to stop the live animal exports, which the council did. This was, was it not, a practical, short-term option that addressed the unease of the police? If so, is it right to categorise the council’s decision as unreasonable in a public law sense?

A LEGITIMATE REVIEW OF MERITS?

The previous section identified examples of the courts applying a low standard of irrationality, and therefore reviewing the merits of the particular administrative decision in question. This, I suggested at the beginning of this article, is constitutionally improper. But are these low standards of irrationality in fact illegitimate? Perhaps the *true* manner in which the courts reviewed the merits of some of these decisions was not unconstitutional. So, for example, Jowell and Lester have argued that the ruling by the House of Lords in *Wheeler* was an example of the courts possibly employing the proportionality test:

Lord Templeman considered [the council’s decision] to be a misuse of power, “punishing the club where it had done no wrong”. Lord Roskill considered the withdrawal of a licence to be an unfair means of pursuing the council’s ends. Both speeches reflect the notion of proportionality, Lord Templeman concentrating on the lack of relation between the penalty and the wrong, Lord Roskill concentrating on the lack of relation between the penalty and the council’s legitimate objectives.⁵⁸

The proportionality test, depending on whether a “qualified right” is under consideration, is used, for example, in the jurisprudence of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Qualified rights are generally recognised as those which can be infringed by the state only where the infringement is prescribed by law, pursued for a legitimate aim, such as national security or the prevention of disorder or crime, and necessary in a democratic society.⁵⁹ That is, they require a reviewing court to ask itself whether there was a pressing social need for

⁵⁷ *Ibid.*, at 63.

⁵⁸ J Jowell and A Lester, “Proportionality: Neither Novel Nor Dangerous”, in J Jowell and D Oliver (eds), *op cit.*, (1988), at 61.

⁵⁹ “Qualified rights” are generally recognised as being articles 8–11 of the ECHR. (The test can be applied to other articles of the ECHR such as article 15, which allows a state to derogate from certain articles of the ECHR in times of war or public emergency threatening the life of the nation. However, in a domestic context, as article 15 is not a Convention right enforceable in UK law according to s 1 of the Human Rights Act 1998, a derogation is not lawful unless designated by s 14 of that Act.) A recent case illustrating the application of the proportionality test to an alleged breach of a qualified right is *Regina (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15. Here the claimants were teachers at independent schools and parents who sent their children to those schools. They believed that biblical sources supported the view that corporal punishment was necessary for the proper upbringing of children. Therefore s 548 of the Education Act 1996 – the statutory ban on corporal punishment in all schools – was incompatible with their right under article 9(1) of the ECHR: the right to freedom of conscience, thought and religion. However,

infringing the right, and if so, whether this was proportionate to the legitimate aim being pursued. This involves the court, therefore, in balancing the private interest of the applicant with the public interest of the administrative body. This is, without doubt, a more intensive method of review than what is required by a court when applying the irrationality test, where a review court is asking itself only whether a decision fell within the range of responses lawfully open to the executive body.⁶⁰

Wheeler is, perhaps, not the only case analysed above where the court adopted the proportionality test. It will be recalled that Simon Brown LJ in *Regina v Coventry City Council, Ex parte Phoenix Aviation*⁶¹ stated: “The council’s resolution was wholly disproportionate to the security risk presented at the time”.⁶² These words arguably imply that the judge may have reviewed the merits of the council’s decision. This was because he was employing the proportionality test rather than the *Wednesbury* test.⁶³ A question therefore to be posed from these two cases, *Wheeler* and *Ex parte Phoenix Aviation*, is whether judicial intervention on the grounds of irrationality – where it is arguably proportionality in all but name – is in fact a legitimate review of merits?

Similarly, what about another manner of judicial review disguised as irrationality, such as “hard look”? Is a judicial review of merits where this test has been adopted legitimate, too? It was submitted above that the Divisional Court in *Regina v Cambridge District Health Authority, Ex parte B*⁶⁴ may have adopted a low standard of unreasonableness in finding that the decision not to fund further medical treatment of a child with cancer was irrational. This is possible if Laws J was employing a different approach to irrationality: one based upon the “hard look” review of administrative activity in the United States.⁶⁵

Craig claims that the objective with “hard look” is to ensure that policy alternatives are adequately considered, that reasons are proffered for agency decisions, and that differing interests can present their views to the agency and have those views adequately discussed.⁶⁶ This test is clearly not the same as the irrationality test. Irrationality is concerned with the outcome of an administrative decision and whether it was outrageous in its defiance of logic: a not too difficult question for a court, it would seem. “Hard look” involves a court in a more intensive method of review: the legality of the administrative decision is determined by a process of identifying relevant factors in the exercise of the discretion and deciding the weight to be attached to them.

The manner in which the court reviewed the merits of a decision is not the only means of assessing the legitimacy of the judicial intervention identified in the cases

although ruling that article 9(1) was engaged, the House of Lords held that s 548 pursued a legitimate object of protecting the rights of others as allowed under article 9(2) and so was not disproportionate; that is, it promoted the welfare of children by protecting them from the infliction of physical violence in an institutional setting.

⁶⁰ For a useful explanation of how proportionality differs from irrationality see, for example: M Taggart, “Reinventing Administrative Law” in N Bamforth and P Leyland (eds), *op cit*, at 311–335. This revisits the *Wednesbury* case in the light of the enactment of the Human Rights Act 1998 (HRA) and the adoption of the proportionality test to infringements of articles 8 (the right to respect for one’s private and family life, home and correspondence) and 10 (the right to freedom of expression) of the ECHR. These would be the convention rights at issue if the same case facts – prohibiting children under the age of 15 from attending cinemas on a Sunday without an adult – were to arise again in the post HRA era.

⁶¹ [1995] 3 All ER 37.

⁶² *Ibid*, at 63.

⁶³ M Fordham, *Judicial Review Handbook*, 2nd ed (John Wiley Press, 1997) at 505.

⁶⁴ [1995] 1 FLR 1055.

⁶⁵ R James and D Longley, “Judicial Review and Tragic Choices: *Ex Parte B*” [1995] PL 367 at 371. For an American case where “hard look” was employed, see, for example: *Motor Vehicle Manufacturers Association v State Farm Mutual Automobile Insurance Company* 463 US 29 (1983).

⁶⁶ *Op cit*, 3rd ed (1994), at 438.

above: one could evaluate them from the perspective of the context of the administrative decision under examination, such as the protection of the applicant's fundamental rights. For example, the issue of rights clearly affected the standard of irrationality employed by Simon Brown LJ in *Ex parte Phoenix Aviation*.⁶⁷ Here the judge sought to uphold the rule of law and prevent lawful trade from being disrupted because of public protest:

Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour. This is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.⁶⁸

Similarly, Laws J arguably justified the adoption of a low standard of irrationality in *Ex parte B*⁶⁹ to account for the infringement of the applicant's right to life. He stated:

The law requires that where a public body enjoys a discretion whose exercise may infringe [a basic liberty], it is not to be permitted to perpetrate any such infringement unless it can show a substantial objective justification on public interest grounds.⁷⁰

Laws J was evidently not assessing the respondent's decision to make a judgment as to whether it had fallen within the range of responses lawfully open to the health authority, which is what he ought to have been doing if he was adopting the irrationality test. Can it be said, therefore, that Laws J was in fact acting in a constitutionally improper way by deploying a low standard of irrationality where the motive for doing so was the recognition of the applicant's fundamental right to life?

CONCLUSION

This article has analysed the judicial application of the irrationality test of review in practice. It finds that the courts have deployed an irregular standard of irrationality where a traditional interpretation of the case facts does not arguably support judicial intervention.⁷¹ Some traditionalists within public law, such as Lord Irvine, may consider this development to be a usurpation by the judiciary of the power of the executive and a threat to the constitutional doctrine of the separation of powers.⁷²

⁶⁷ [1995] 3 All ER 37.

⁶⁸ *Ibid*, at 62.

⁶⁹ [1995] 1 FLR 1055.

⁷⁰ *Ibid*, at 1060.

⁷¹ Supporting the author's conclusion is a study undertaken by Le Sueur where he analyses the application of the irrationality principle in the period between January 2000 and July 2003: A Le Sueur, "The Rise and Ruin of Unreasonableness?" [2005] JR 32. He does not attempt the same method of identifying merits-review as the author of this article, preferring a more quantitative approach. He looks at 41 cases where irrationality was adopted and discovers a finding of unreasonableness by the courts in 18 of them. He concludes (at 43): "[G]iven what is often described as the high 'threshold' of the unreasonableness test, is it not surprising that claimants seem to succeed in a relatively large proportion of cases?"

⁷² C Montesquieu, *De l'Esprit des Lois*, 1748, Chapter XI, at 3–6, famously said there would be no liberty if the judicial power were not separated from the legislative and executive functions of the state. Though this principle of separation has never been strictly enforced in the UK (see, for example, E Barendt, "Separation of Powers and Constitutional Government" [1995] PL 599 and N Barber, "Prelude to the Separation of Powers" (2001) 60 CLJ 59) the tenets of such a philosophy still hold true (see, for example, Lord Hoffman, "The Separation of Powers" [2002] JR 137; Lord Steyn, "The Case for a Supreme Court" (2002) 118 LQR 382 and Lord Steyn, "2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom" [2005] EHRLR 349). Furthermore, parliament has recently affirmed this constitutional principle by enacting the Constitutional Reform Act 2005, most sections of which became law in April 2006. Section 3, for example, enshrines in law a duty on government ministers to uphold the independence of the judiciary. In addition this legislation reforms the Office of the Lord Chancellor, creates a Supreme Court for the UK to replace the Appellate Committee of the House of Lords and introduces an independent Judicial Appointments Commission.

However, I have posed the question whether the adoption of low standards of irrationality by the courts here were in fact legitimate. To this end I propose to undertake further research to reassess the classic limits of judicial intervention, reflecting the possible constitutional repositioning of the courts which I have identified. I will question whether the judicial reviews of merits here under the guise of the irrationality test were within constitutional norms, not least since the coming into force of the Human Rights Act 1998 in October 2000, obliging a court, *inter alia*, to interpret legislation in line with “Convention rights”⁷³ “so far as it is possible to do so”.⁷⁴ It must be noted that I have deliberately omitted to examine this important legislation in this article for good reason, namely, the impossibility of addressing it with any degree of confidence in a short article. Accordingly, I have reserved to a later occasion an analysis of the effect this statute has had on the constitutionality of merits-review.

The question for further consideration is whether the courts in the cases considered may have been justified in reviewing merits because of the *manner* in which they applied a low standard of irrationality. Since the Human Rights Act came into force, the House of Lords in *Regina (Daly) v Secretary of State for the Home Department*⁷⁵ held that proportionality was the correct test to be adopted where there was a suspected breach of a “qualified right” under the ECHR.⁷⁶ Following this, the Court of Appeal in *Regina (British Civilian Internees Far East Region) v Secretary of State for Defence*⁷⁷ showed little enthusiasm for the continued use of the irrationality test.⁷⁸ The reader may, therefore, legitimately question whether the constitutionality of proportionality, not least as a separate principle of review, but also as a substitute for irrationality, still requires determination. However, whilst drawing some initial conclusions about the judicial review of merits being within constitutional norms where proportionality has been used as a cover for irrationality, some commentators may have confused the adoption of proportionality in practice with degrees of judicial intervention such as substitution of judgment where the courts are indeed overstepping their constitutional

⁷³ The Human Rights Act 1998, s 1, identifies articles 2 – 12 and 14 of the ECHR, articles 1–3 of the 1st protocol of the ECHR and protocol 13 of the ECHR as “Convention rights”.

⁷⁴ Section 3. If a court cannot interpret a statute “so far as it is possible to do so”, s 4(2) of the Human Rights Act 1998 provides: “If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility”. The dilemma whether to interpret the legislation to make it Convention compliant or to issue a declaration of incompatibility, which excludes the courts from judicially reviewing an act of parliament on the basis that it infringes a Convention right, has proved difficult for the courts, providing much fertile ground for academic comment, not least in the last couple of years (eg A Kavanagh, “The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998” (2004) 24 OJLS 259; D Nicol, “Statutory Interpretation and Human Rights After Anderson” [2004] PL 274; A Kavanagh, “Statutory Interpretation and Human Rights After Anderson: A More Contextual Approach” [2004] PL 537; A Kavanagh, “Unlocking the Human Rights Act: The “Radical” Approach to Section 3(1) Revisited” [2005] EHRLR 259; A Young, “*Ghaidon v Godin-Mendoza*: Avoiding the Deference Trap” [2005] PL 23; Lord Steyn, “Deference: A Tangled Story” [2005] PL 346; Lord Steyn, “2000–2005: Laying the Foundations of Human Rights Law in the United Kingdom” [2005] EHRLR 349; Laying the Foundations of Human Rights Law in the United Kingdom” [2005] EHRLR 349; and S Sayeed, “Beyond the Language of ‘Deference’” [2005] JR 111). This issue is explored in more detail in a later article of this study.

⁷⁵ [2001] UKHL 26.

⁷⁶ See endnote 58 above.

⁷⁷ [2003] EWCA Civ 473.

⁷⁸ Dyson LJ said there was a strong case for recognising proportionality as part of domestic law which did not involve community law or human rights but it was not for the Court of Appeal to perform the *Wednesbury* “burial rites”. The continuing existence of the *Wednesbury* test had been acknowledged by the House of Lords on more than one occasion ([2003] QB 1397, CA at 1413–1414). The longevity of irrationality, with its possible replacement by proportionality, is discussed in more detail in a later article. Suffice it to say the reader my wish to see, in particular, T Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” (2004) 63 CLJ 166; and, more selectively, M Elliott, “The Human Rights Act 1998 and the Standard of Substantive Review” [2002] JR 97; M Fordham, “Common Law Proportionality” [2002] JR 110; M Fordham, “Administrative Law: A Practitioner’s Long Range Forecast” [2003] JR 67; I Thomas and N Greaney, “Wither *Wednesbury*?” (2003) 153 NLJ 829; K Olley, “Proportionality at Common Law” [2004] JR 197; A Le Sueur, *op. cit.*

boundaries. This then possibly raises a more pressing question than that identified above, namely the viability of classifying any review of merits according to acceptable judicial limits by reference to the test of review employed by the court.

A further consideration is the argument that the courts in the cases referred to in this article may also have been justified in reviewing merits because of the infringement of the applicants' fundamental rights. Again, there is a legitimate question whether this, too, is an issue that still requires determination given the courts' acceptance of a low standard of irrationality in cases such as *Regina v Ministry of Defence, Ex parte Smith*,⁷⁹ as subsequently endorsed by the European Court of Human Rights,⁸⁰ (arguably one of the reasons for the enactment of the Human Rights Act in October 2000). Again, I challenge this assertion. Further analysis of *Smith* and related cases may cast light on the constitutionality of merits-review where fundamental rights have been infringed but raise questions whether there are identifiable boundaries to legitimate judicial intervention based on the subject matter of the claim under review. This, too, raises further pressing questions concerning the viability of classifying any review of merits according to acceptable constitutional limits by reference to the context of the administrative decision in question. It may be that the difficulties of identifying the legitimate boundaries of judicial intervention that I have discussed may arguably present a greater threat to the principle of the separation of powers than those isolated cases where individual judges have mistaken the extent of the degree of discretionary power conferred upon an administrative body by parliament, when finding a decision to be irrational.

⁷⁹ [1996] QB 517. Here Sir Thomas Bingham MR (as he then was) accepted the submission of counsel for one of the appellants, Mr Pannick QC, regarding the standard to be employed by the courts when reviewing decisions that have infringed fundamental rights. He stated (at 554): "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable".

⁸⁰ In *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 the ECtHR said (at 543): "The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention".

CASE AND COMMENT

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

EU LAW: DATA PROTECTION FOR AIRLINE PASSENGERS AFTER 9/11

*European Parliament (supported by the European Data Protection Supervisor (EDPS))
v Council (supported by the Commission and the United Kingdom)*

and

*European Parliament (supported by the European Data Protection Supervisor (EDPS))
v Commission (supported by the United Kingdom)*

Joined Cases C-317 and 318/04, judgment of 30 May 2006, not yet reported (European Court of Justice, Grand Chamber)

(V Skouris, President, P Jann, CWA Timmermans, A Rosas and A Borg Barthet, Presidents of Chamber, R Schintgen, N Colneric (Rapporteur), S von Bahr, JN Cunha Rodrigues, M Ilešić, J Malenovský, J Klučka and U Löhmus, Judges)

BACKGROUND TO THE JUDGMENT

After the terrorist attacks of 11 September 2001, the United States passed legislation providing that air carriers operating flights to or from the United States, or across its territory, had to provide the United States customs authorities with electronic access to the data contained in their automated reservation and departure control systems, referred to as Passenger Name Records (PNR). The EC Commission informed the United States authorities that these provisions could come into conflict with European Community and member state legislation on data protection, but the United States authorities refused to waive the right to impose penalties on airlines failing to comply with the legislation and a number of European airlines granted them access to their PNP data. However, the United States authorities and the Commission entered into negotiations which resulted in a document containing undertakings by the United States Bureau of Customs and Border Protection (CBP) with a view to adoption of a decision on adequacy under article 25(6) of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, adopted on the basis of article 95 EC.¹

The directive provides that member states must ensure that personal data is collected and processed only for limited purposes and to the extent strictly necessary for those

¹ OJ 1995 L281/31.

purposes. However, article 3(2) of the directive provides that it does not apply to the processing of data in the course of an activity which falls outside community law, such as those provided for by Titles V (provisions on a common foreign and security policy) and VI (provisions on police and judicial co-operation in criminal matters) EU and in any case to processing operations concerning public security, defence, state security and the activities of the state in areas of criminal law. Article 25(1) of the directive provides that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if the third country ensures an adequate level of protection. Article 25(6) provides that the Commission may find that a third country ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into, for the protection of the private lives and basic freedoms and rights of individuals.

The Commission adopted *Decision 2004/535/EC* of 14 May 2004 on the adequate protection of personal data contained in the PNR of air passengers transferred to the CBP (“the Decision on Adequacy”)² on the basis of the directive. Article 1 of the decision stated that the CBP was considered to ensure an adequate level of protection for PNR data transferred from the community concerning flights to or from the United States, in accordance with the undertakings of the CBP annexed to the Decision on Adequacy.

Three days after the adoption of the Decision on Adequacy, the Council adopted *Decision 2004/96 of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection*³ on the basis of Article 95 EC. Article 95 EC provides that the Council shall adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment or functioning of the internal market. Article 1 of *Decision 2004/96* stated that the agreement was approved on behalf of the Community. The agreement provided, *inter alia*, that the CBP could electronically access the PNR data from air carriers’ reservation/departure control systems located within the territory of the member states, in accordance with the Decision on Adequacy.

The European Parliament challenged both decisions and the Court of Justice gave a joint judgment on the challenges.

THE JUDGMENT

The challenge to the Decision on Adequacy

The parliament’s challenge to the Decision on Adequacy alleged *ultra vires* action, breach of the fundamental principle of the directive, breach of fundamental rights and breach of the principle of proportionality.

The Court of Justice held that the Decision on Adequacy concerned only PNR data transferred to the CBP. It was evident from the Decision on Adequacy that the requirements for that transfer were based on United States legislation relating to the enhancement of security and the conditions under which persons could leave and enter the country. The Decision on Adequacy also stated that the Community was committed to supporting the United States in the fight against terrorism within the limits imposed by Community law, and that PNR data would be used strictly for

² OJ 2004 L235/11.

³ OJ 2004 L255/168.

purposes of preventing and combating terrorism and related crimes, other serious crimes, including organised crime, that were transnational in nature, and flights from warrants or custody for those crimes. It followed that the transfer of PNR data to CBP constituted processing operations concerning public security and the activities of the state in areas of criminal law.

The Court acknowledged that PNR data might initially be collected by airlines in the course of an activities which fell within the scope of Community law, namely the sale of an airline ticket which provided entitlement to a supply of services, but held that the Decision on Adequacy itself concerned not data processing for a supply of services, but data processing regarded as necessary for safeguarding public security and for law-enforcement purposes. Although the activities mentioned in article 3(2) of the directive as examples of activities excluded from its scope were, as held by the Court in *Lindqvist*,⁴ activities of the state or of state authorities and unrelated to the fields of activities of private individuals, the fact that PNR data was collected by private operators for commercial purposes and it was they who arranged for their transfer to a third country did not mean that the transfer was not covered by article 3(2) of the directive. It fell within a framework established by the public authorities that related to public security.

The Court concluded that since the Decision on Adequacy concerned processing of personal data as referred to in article 3(2) of the directive, it did not fall within the scope of the directive. Article 3(2) had therefore been infringed and the Decision on Adequacy must be annulled. It was unnecessary to consider the parliament's other arguments in relation to the Decision on Adequacy.

However, the Court ruled that annulment of the Decision on Adequacy should not take effect immediately. First, the agreement which the decision approved could only be terminated on 90 days' notice of termination by either party, and the community could not rely on its own law as justification for not fulfilling the agreement, which remained applicable during the period of 90 days from termination. Second, the agreement provided that the CBP's right of access to PNR data and the obligation on air carriers to process them as required by the CBP existed only while the Decision on Adequacy was applicable, and thus the two documents were closely linked. It was therefore appropriate, in the interests of legal certainty and to protect the persons concerned, to preserve the decision for the 90 day period during which the agreement would continue. In addition, that account should be taken of the period needed for the adoption of the measures necessary to comply with the judgment. The Court therefore ruled that the effect of the Decision on Adequacy should be preserved until 30 September 2006, but not beyond the date upon which the agreement came to an end.

The challenge to Decision 2004/496

The parliament's challenge to *Decision 2004/496* alleged incorrect choice of article 95 EC as legal basis and breaches of article 300(3) EC, article 8 ECHR (the right to respect for private and family life, the home and correspondence), the principle of proportionality, the requirement to state reasons and the principle of co-operation in good faith.

The Court of Justice held that article 95 EC, read with article 25 of the directive, could not give the community competence to conclude the agreement. The agreement related to the same transfer of data as the Decision on Adequacy, and therefore to data processing operations which the Court had already found to be excluded from the

⁴ C-101/01 [2003] ECR I-12971.

scope of the directive. *Decision 2004/496* could therefore not have been validly adopted on the basis of article 95 EC and must be annulled. It was not necessary to consider the other pleas put forward by the parliament.

COMMENTARY

The legal dilemma here is clear; the need to balance protection of personal data with protection of public security. But it reflects an underlying moral and political dilemma, and its resolution raises fundamental questions of human rights, national security and international relations. The United States authorities have decided that the balance should lie in favour of national security.⁵ The United Kingdom, which was the only member state to intervene in these cases in support of the decisions, apparently agrees. Indeed, in the related area of detention of terrorist suspects without trial, the United Kingdom is the only member of the Council of Europe – and thus the only member state of the community – to have entered a derogation on grounds of public emergency from its obligations under article 5 ECHR to guarantee liberty and security.

The Court did not consider these fundamental issues. The judgment, correctly, concerned the legality of the decision, not their moral or political value. The task for the United States and the Commission and Council is to find a way round the legal objections.⁶ This, however, will not be easy. The fundamental difficulty is that matters of national security are not within Community competence, and so finding a legal basis for measures similar to those annulled presents a problem. One solution is for the United States to take the Community out of the equation, and deal directly with individual member states. If this approach is taken, the result in the United Kingdom is a foregone conclusion. Other states may be less enthusiastic, but at least some of them must have voted for the annulled decisions (since they were adopted by a qualified majority of the member states), and all will be influenced by the commercial reality of European airlines facing fines and loss of landing slots at US airports.⁷

The US authorities and their counterparts in Europe have a limited period of time in which to resolve the dilemma. If they fail to do so, the airlines themselves will have the unenviable choice between transferring data and breaching Community law, or refusing to transfer it and breaching US law.

ELSPETH BERRY*

⁵ The *Pittsburgh Tribune-Review*, 2 June 2006, commented on the judgment thus: "The European Union, a 25-member mélange of malaise in the war on terror, would rather protect data than lives": (http://www.pittsburghlive.com/x/pittsburghtrib/opinion/archive/s_456292.html).

⁶ Although the Court did not consider the parliament's other objections, Advocate General Léger rejected them in his Opinion, and it is thus unlikely that the Court would uphold them.

⁷ S Boggan "Q. What could a boarding pass tell an identity fraudster about you? A. Way too much", *The Guardian*, Wednesday 3 May 2006: <http://www.guardian.co.uk/idcards/story/0,,1766266,00.html>; J Booth and agencies "EU passengers could face long queues to enter US after ruling", *The Times*, 30 May 2006: <http://www.timesonline.co.uk/article/0,,13509-2202630,00.html>.

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CONTINUING PROBLEMS IN THE LAW OF UNDUE INFLUENCE

Wright v Hodgkinson

[2004] EWHC 3091 (Chancery Division) (Hegarty QC)

Wright v Hodgkinson was a recent High Court decision involving the law of undue influence.¹ It is submitted that the judge made a fundamental error in deciding the case. Given the obvious care displayed in the judgment, and the conscientious attention given to both the law and the facts, this is a matter of some concern. It would seem that despite the elaborate consideration given to the law of undue influence by the House of Lords in *Royal Bank of Scotland v Etridge*,² and a very considerable academic commentary in the area,³ the law of undue influence remains so ill articulated and understood that the dispositions of property owners are vulnerable to unpredictable challenges. This uncertainty interferes with, and undermines, the policy concerns advanced by the doctrine of freedom of disposition (certainty, autonomy, and low transaction costs) and threatens to lead to an escalation of transaction costs of gratuitous dispositions, and the proliferation of speculative litigation (or the threat thereof).

FACTS

The transaction at the heart of *Wright v Hodgkinson* was a transfer in 1997 by Mr Wright of his house and adjoining land to himself and Mr Hodgkinson as joint tenants in equity.⁴ In 1997 Mr Wright was an elderly man (75 years old), and Mr Hodgkinson was considerably younger (38 years old).⁵ The transfer was not intended to be an outright gift. Mr Hodgkinson agreed to spend a considerable amount of money on building works on the land.⁶ There was also another kind of consideration present. The older man hoped that the transfer would result in him having company and support in his old age.⁷ However, the transfer was a clear case of a transaction at an undervalue, the value of the interest acquired by the younger man would greatly exceed the amount of money he would expend.⁸ The relationship between the two men was a friendship grown out of an acquaintance. In the past Mr Wright had employed as seasonal labourers on his farm; first the father of Mr Hodgkinson, and then Mr Hodgkinson himself. From 1983 Mr Wright had allowed Mr Hodgkinson to run a business from the land that he eventually transferred into their joint names. Mr Wright was the social superior of Mr Hodgkinson, and had used his greater wealth to bestow favours on the younger man in the past.⁹ In the words of Mr Wright he had: “taken

¹ [2004] WL 3130738 at paras 73–74.

² [2001] UKHL 44.

³ Illustrative of this material would be: Rick Bigwood, “Undue Influence: ‘Impaired Consent’ or ‘Wicked Exploitation?’” (1996) 16 OJLS 503, to similar effect (2002) 65 MLR 435; Peter Birks and Chin Nyuk Yin, “On the Nature of Undue Influence”, in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law*, (1995); to the same effect Birks (2004) 120 LQR 34; David Capper, “Undue Influence and Unconscionability: A Rationalisation” (1998) 114 LQR 479; Martin Dixon, “The Special Tenderness of Equity: Undue Influence and the Family Home” [1994] CLJ 21; Belinda Fehlberg, “The Husband, the Bank, the Wife and Her Signature” (1994) 57 MLR 467; to similar effect (1996) 59 MLR 675; Mark Thompson, “The Enforceability of Mortgages” [1994] Conv 140.

⁴ [2004] WL 3130738 at paras 73–74.

⁵ *Ibid*, calculated from the ages at date of trial given at paras. 2–3.

⁶ *Ibid*, paras 20, 33, 97–99.

⁷ *Ibid*, para 16.

⁸ *Ibid*, paras 138 and 164.

⁹ *Ibid*, paras 2–6.

him [Mr Hodgkinson] under his wing".¹⁰ The transfer of the house and land was the last, and most valuable, of these favours. Mr Wright had suffered mental deterioration by the time the action came to trial, although the evidence was that this deterioration had not undermined his capacity at the time of the transfer.¹¹

The history of the transfer started with an idea of Mr Wright. He thought that Mr Hodgkinson should spend his money (received in compensation for an industrial injury), on developing Mr Wright's land.¹² It was Mr Wright's intention to leave Mr Hodgkinson the land when he died, and he felt the money provided an opportunity for the friends to arrange matters so that they could be neighbours. He proposed that Mr Hodgkinson build an extension to the house, so that they could both live there, together with Mr Hodgkinson's family. When Mr Wright died the property would pass under his will to Mr Hodgkinson. Upon taking advice, Mr Hodgkinson felt that he could not commit his capital to the project without some form of security. Wills, he learnt, are revocable, and the original suggestion would have left Mr Hodgkinson and his family entirely at the mercy of Mr Wright. Hence, the proposal to transfer the land into the joint names of the two friends was first raised.¹³ In the event the extension was never built, as relations between the friends deteriorated after the transfer. This deterioration was largely the result of a change of heart on the part of Mr Wright.¹⁴ However, Mr Hodgkinson did expend something of the order of £14,000, and considerable time and labour, on developments that had been agreed by the two men.¹⁵

DECISION

On the facts the judge held that there was:¹⁶ "no satisfactory evidence whatever of overt acts of improper pressure or coercion on the part of Mr Hodgkinson." Therefore, the decision turned on whether there was a presumption of undue influence on the facts, and if so whether sufficient evidence had been called to rebut it.¹⁷ The judge based his analysis on the determination of three issues: the existence of a relationship of trust and confidence, reliance, dependence, or vulnerability; the existence of a transaction that called out for an explanation; and whether Mr Hodgkinson had established that Mr Wright had effected the transfer after giving the matter full, free and informed thought.¹⁸ It is submitted that the handling of the first issue considered by the judge can be criticised as a matter of law.¹⁹

The first issue was concerned with the nature of the relationship between the parties to the transfer. A formal objection to the judge's reasoning is that the obvious case to consider on the facts found by the judge was *Re Brocklehurst*.²⁰ It would appear that counsel never cited the case. *Re Brocklehurst* concerned a gift of shooting rights over an estate, granted by the estate owner for 99 years to his much younger friend. There

¹⁰ *Ibid*, para 62.

¹¹ *Ibid*, para 52.

¹² *Ibid*, paras 14–15.

¹³ *Ibid*, paras 13–25 and 30–33.

¹⁴ *Ibid*, para 102–105.

¹⁵ *Ibid*, paras 97–98.

¹⁶ *Ibid*, para 131.

¹⁷ *Ibid*, para 132.

¹⁸ *Ibid*, paras 133, 138, and 141.

¹⁹ The handling of the second and third issues can also be criticised. However, it is the first issue that is central to the argument advanced here.

²⁰ [1978] Ch 14.

was no improper conduct on the part of the donee, and the case turned on whether the relationship gave rise to a presumption of undue influence, and if so whether the evidence at trial rebutted the presumption. The majority in the Court of Appeal held that no such presumption arose.²¹ In *Re Brocklehurst* the older donor was the social superior of the younger donee, and there was no evidence of dominance by the donee over the donor. On the contrary, the evidence suggested that the donor was the dominant party to the relationship. The importance of the direction of any asymmetry of power in a relationship of trust and confidence was effectively the key issue raised by the facts of *Re Brocklehurst*. The analysis in *Wright v Hodgkinson* seemed to demand no more than that “trust” should exist in a relationship in order to support a presumption of undue influence.²² The only other factors given any attention were the age disparity and the fact that the older man felt generous impulses towards the younger man. All three of these factors identified in *Wright v Hodgkinson* were also present in *Re Brocklehurst*, and, whilst the cases can clearly be distinguished, it is not readily apparent that they should be.²³

ANALYSIS

It seems wrong that a relationship can support the presumption of undue influence where there is no identified vulnerability of the claimant except age,²⁴ nor any dominance of the claimant by the defendant. In this failure to identify any basis for identifying any “paramount influence”²⁵ in Mr Hodgkinson, the judge in *Wright v Hodgkinson* failed to understand and apply the relevant law, in the same manner as the judge at first instance in *Re Brocklehurst* had fallen into error.

This error is fundamental, and of more than merely anecdotal importance. As Mummery LJ has commented:²⁶

With the increase in home ownership and the rising value of residential property more people have more property to dispose of in their lifetime and on death and more people expect to benefit substantially from inheritance . . . The elderly and infirm in need of full time residential care are vulnerable to suggestions that they should dispose of the home to which they are unlikely to return. In my view, these social trends are already leading to renewed interest in the law governing the validity of life time dispositions of houses, both in and outside the family circle, by the elderly and infirm.

If, as Mummery LJ suggested, this area of law is in the process of expansive development it is essential that the courts develop it in a manner that respects the autonomy of capable elderly property owners. It would be extremely damaging to this category of property owners if the law degenerated into unstructured judicial discretion in this area. In *Wright v Hodgkinson* it seems the judge lost sight of the crucial

²¹ [1978] Ch 14 at 36 and 48 *per* Lawton and Bridge LJJ respectively. The dissentient was Lord Denning MR in one of his most imaginative, and least successful, forays into equity jurisprudence.

²² [2004] EWHC 3091 paras 133–137. The features of a relationship identified by the quote from Lord Nicholls were: “trust and confidence”, “reliance”, “dependency”, and “vulnerability”. The analysis ignored all except “trust and confidence”, and seemed to drop any requirement for “confidence” in application. What was left was “trust”. A very large number of relationships can be identified which involve “trust” and all (given the nature of trust) are “potentially susceptible to abuse”, but most of such relationships are clearly not relationships that give rise to any presumption of undue influence.

²³ If generalised, the approach in *Wright v Hodgkinson* would raise a presumption of undue influence upon a gift by parent or guardian to child, or a gift by solicitor to client.

²⁴ Mr Wright was old, but not infirm in mind or body. Infirmary raises different considerations, initially of dependence, and eventually of capacity.

²⁵ The expression is taken from the judgment of Kekewich J in *Allcard v Skinner* (1887) LR 36 Ch D 145 at 158.

²⁶ *Niersmans v Pesticcio* [2004] EWCA Civ 372 at para 4.

importance of the direction of “dependence” within a relationship of trust and confidence that Mummery LJ referred to in his summary of the type of situation that called forth the protective operation of the law of undue influence (author’s emphasis):²⁷

A house is the most valuable asset that most people own. If a transfer is made by one person on the *dependent* side of a relationship of trust and confidence to a person in whom trust and confidence has been placed, it must be shown by the trusted party that the disposition was made in the independent exercise of free will after full and informed consideration.

GRAHAM FERRIS*

²⁷ *Ibid.*

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THE POWER TO ADOPT HARMONISING LEGISLATION ON THE BASIS OF ARTICLE 95 AND 308 EC

C-436/03 *European Parliament v Council of the European Union*, 2 May 2006.

(European Court of Justice, Grand Chamber) (Skouris, President, Jann, Timmermans, Rosas and Makarczyk, Presidents of Chambers, Puissochet (Rapporteur), Schintgen, Klučka, Löhmus, Levits and Ó Caoimh, Judges)

The European Court of Justice (ECJ) has had a further opportunity to define the scope of the European Community's (EC) power to adopt harmonising legislation on the basis of article 95 of the EC Treaty. Following its landmark judgment in the *Tobacco Advertising* case (*Germany v Parliament and Council*),¹ the availability of article 95 for harmonising the domestic laws of the member states in matters concerning the establishment and functioning of the internal market had already been curtailed. This most recent decision further refines the jurisprudence in this field.

ISSUES

In July 2003, the Council adopted Regulation No 1435/2003 on the Statute for a European Co-operative Society (SCE).² This establishes a new legal structure which allows domestic co-operative societies to operate on a pan-European basis by removing many of the difficulties regarding the movement of legal persons around the EC. It followed in the footsteps of the European Company Statute adopted in 2001.³ The regulation creates a European co-operative society, a new legal form recognised in all the EC member states, which is able to transfer its registered and head office across national boundaries without having to dissolve and reincorporate. The SCE is governed first by the regulation itself, then the provisions of its statutes, and then by the laws of the member state where its registered office is based.⁴

The original proposal for the SCE Regulation had been put forward on the basis of article 95 EC. The Council changed this to article 308 EC, and although parliament sought to substitute article 95, the regulation was adopted on the basis of article 308 EC. There are two fundamental procedural differences between these two provisions: article 95 requires the use of the co-decision procedure, giving the European Parliament a significant say in the legislative process, whereas article 308 only demands that parliament is consulted. Moreover, measures can be adopted on the basis of article 95 by qualified majority voting, whereas article 308 requires unanimity.

The European Parliament challenged the legality of the regulation before the ECJ, arguing that the Council had chosen the wrong legal basis and that article 95 should have been used instead. The ECJ therefore had to consider whether article 95 would, indeed, have been the appropriate legal basis for the regulation.

¹ C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419.

² (2003) O.J. L 207/1.

³ Regulation No 2157/2001 on the Statute for a European Company (2001) OJL 294/1. See J Birds *et al*, Boyle and Birds' *Company Law*, (5th edition, Bristol: Jordans, 2004), chapter 2 at 2.5.

⁴ Art 8(1) SCE.

ARGUMENTS OF THE PARTIES

Article 308 EC provides as follows:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

This provision therefore only provides a residual legal basis for circumstances where it is necessary to adopt legislation regarding the operation of the common market for which there is no other legal basis available in the EC Treaty. If there is such a legal basis, then article 308 EC cannot be used. The ECJ had to consider whether article 308 EC was the appropriate legal basis, or whether article 95 EC should have been used instead. Article 95(1) states that

[. . .] the Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

Both the Parliament and the Commission submitted that the objective of the SCE Regulation was to harmonise the divergent laws of the member states in order to facilitate the creation of the SCE. Accordingly, it served to improve the conditions for the establishment and functioning of the internal market. The SCE Regulation complements the relevant domestic measures applicable to co-operative societies.

Against this, the Council stated that the SCE Regulation creates a new European legal form which exists in addition to domestic co-operative societies. A measure adopted on the basis of article 95 EC should approximate domestic legislation and remove the barriers created by the divergence in domestic legislation. As domestic legislation could not bring about the creation of a European legal form such as the SCE, this outcome could not be achieved through the harmonisation of domestic laws. Consequently, article 308 was the correct legal basis.

Advocate General Six-Hackl observed that neither of the parties considered whether article 44 EC might have been a better legal basis than either article 95 or 308, but did not come to any firm views on this issue. She noted that the claim by the European Parliament required, in essence, a consideration of whether article 95 could be used for the creation of a new legal form such as the SCE. Having examined the conditions for the use of article 95, she concluded that the regulation created a Community structure which existed in parallel with national structures,⁵ albeit one that exists in conjunction with relevant national laws. As the creation of new Community legal forms could only be achieved on the basis of article 308, that provision was the correct legal basis. She therefore proposed that the ECJ should dismiss the parliament's application.

JUDGMENT

The ECJ reaffirmed the established position that article 308 could only be used as a legal basis in circumstances where there is no other power provided in the Treaty to

⁵ Para 87 of the A-G's opinion.

adopt the measure in question.⁶ Furthermore, article 95 could be used for measures which genuinely have as their object a contribution to the establishment and functioning of the internal market, which includes circumstances where obstacles to the internal market are likely to be caused by the heterogeneous development of domestic laws.⁷ It then considered whether article 95 could form an appropriate basis for the SCE Regulation, and concluded that it could not. It held that the regulation did not aim to approximate domestic legislation affecting co-operative societies, but to create a new type of co-operative society.⁸ It did not matter that the SCE Regulation was not exhaustive and referred to the law of the member states for particular aspects regarding the operation of the SCE.⁹

ANALYSIS

The decision by the ECJ in this case is significant for two reasons: first, it marks a further refinement of the scope of article 95; secondly, it clarifies when article 308 may be available as a legal basis.

Article 95 has been used extensively as a legal basis for the adoption of legislation in many areas of law. It has, for example, formed the basis for almost all of the directives in the field of private law, and consumer law in particular. Following the *Tobacco Advertising* judgment, it became clear that the threshold for invoking article 95 was higher than had previously been thought. After the judgment in the present case, it is also now confirmed that article 95 can only form the basis of legislation approximating the domestic laws of the member states, but cannot be used in the creation of new, supranational legal forms. It seems that, in general, article 308 is the appropriate legal basis for legislation seeking to do so.¹⁰

The motivation for the present case was, presumably, the fact that the involvement of the European Parliament was restricted by the choice of a legal basis which requires a legislative procedure involving only the consultation of the parliament, rather than the much more commonly used co-decision procedure which grants it greater powers. This raises an issue which could be problematic, if one keeps an eye on on-going developments at the European level. After this judgment, the approximation (harmonisation) of domestic laws can be pursued on the basis of article 95, provided that all its criteria are met, and the parliament can have a significant influence on the final text of any measure adopted on this basis. However, once the decision is taken to create a new, European, legal structure or right operating alongside existing domestic ones, article 95 is no longer available. Article 308 seems to be the only appropriate basis, but parliament can do very little to influence the creation of such European structure or rights. It is surprising that the many revisions to the EC Treaty have not resulted in an amendment to what is now article 308 to use the co-decision procedure, nor the insertion of a new legal basis which would permit the adoption of legislation for the common market that would operate alongside domestic laws. This situation would not change if the Treaty establishing a Constitution for Europe were to be enacted in its present form.

⁶ Para 36 of the judgment.

⁷ Paras 37–38.

⁸ Para 44.

⁹ Para 45.

¹⁰ The ECJ *int al* referred to its *Opinion 1/94* [1994] ECR I-5267, where it held that article 308 would be the appropriate basis for the creation of a new intellectual property right which would exist in addition to national rights.

One area where this problem may surface, and provoke debate, may be in the field of European contract law. Following a string of communications,¹¹ work is underway on the creation of a “Common Frame of Reference” on European contract law which, one day, may become a so-called “optional instrument”, *ie*, in effect, a regulation creating a European contract law that would operate alongside domestic contract laws. If that were to happen within the confines of the present Treaty arrangements, then article 308 would be the only available legal basis, but parliament would be limited to the role of consultee. Ironically, deeper harmonisation of domestic contract laws may well be much more difficult to achieve after *Tobacco Advertising*, which may, possibly, indicate a shift towards something like the “optional instruments”. Whether this will happen is uncertain; what is obvious now, is that article 95 has been restricted further, and article 308 may grow in significance.

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¹¹ Communication on European Contract Law (COM (2001) 398 final); A More Coherent Contract Law – An Action Plan (COM (2003) 68 final); The Way Forward (COM (2004) 651 final).

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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.

WIDENING ACCESS TO LEGAL EDUCATION

Nottingham Law School, a part of Nottingham Trent University, and New College, Nottingham, have together just made legal education history by becoming the first educational institutions, jointly, to be validated by the Joint Academic Stage Board (JASB) of the Bar and the Law Society to run in partnership an “articulated foundation degree”.

While many other foundation degrees (FdAs) in law exist, this is the first of its type to be recognised by the JASB where law subjects studied at a college of further education can count towards subsequently obtaining a qualifying law degree at a university. Students who successfully complete the FdA in Law at New College, Nottingham, will be automatically entitled to join the second year of the Nottingham Law School LLB degree and be given full credit for the subjects that they studied at New College.

FdAs are at the heart of the Government’s stated policy of opening up education to all, a policy that explicitly targets those who might not ordinarily choose to go down the traditional path of obtaining a degree over three years at university.

The Government has made the same public funding available for FdA as has always been available for further education qualifications such as higher national diplomas. Similarly, a number of bursaries exist (including a number for the LLB course) for those students facing financial difficulties. This allows the two institutions to provide a solution that fits with the Law Society’s intentions to open up access to the profession.

This unique programme is very much a partnership between Nottingham Law School and New College, Nottingham. Too often in the past, further education colleges have been viewed as the poor relation of the educational world, perceived as occupying a twilight zone between school and university. They have also been undervalued in general. That status, however, seems set to be reversed with the advent of the new FdAs. Times are changing and the Government has been making strenuous efforts to encourage both sectors to work together in order to encourage young people to go into further and then higher education. In this way the Government aims to develop the skills that industry and the professions so urgently need.

The FdA has since been established as the educational vehicle of choice to pursue this aim. The partnership is based on a mutual desire to encourage participation as a whole in higher education; and to deliver both the Government and the Law Society’s aims of opening up the legal profession to a range of students whose different abilities and routes into the profession will add to the diversity of the UK legal profession in future.

The FdA is a qualification in itself. Many students who complete the FdA successfully will subsequently use it to enter careers where they can take advantage of the study skills they have acquired during the course without becoming a solicitor. There is, of course, no shortage of industries, among them insurance, where a solid legal grounding would prove to be extremely helpful.

Alternatively, students could find themselves pursuing an entirely different career path, where the legal qualification would help them get a foot on the corporate ladder.

For those who do choose to go on to complete the further two years of study to earn a full qualifying LLB, the FdA will have given them a number of vocational skills which could prove to be of great benefit during the second part of the four-year degree course.

The FdA is designed to encourage students to consider a career with a legal slant, in particular to encourage those who may feel that the legal professions remain very much the preserve of a privileged elite. Recent initiatives have centred on opening up access to the profession and creating an environment in which genuine cultural diversity can be successfully engendered.

Recent media reports have suggested that in the future a greater proportion of judges may come from more working class backgrounds. The FdA in law offers one possible way of providing assistance for these from less privileged backgrounds to start on the path to such a post. Democratising the judiciary in such a manner may therefore no longer be quite as fanciful a goal as may once have been the case.

The new structure also provides an opportunity for many mature and part-time students to take a more flexible route into the profession. For those who have already worked in the legal industry, meanwhile, it is a chance to further enhance their practical skills while working towards the goal of full qualification.

Enrolment figures for this year are very encouraging, with about 20 students seeking places on the new course. A number of law firms in the region are also taking an active interest in developments, with many offering encouragement to FdA course planners as many see it as a way to promote diversity in the profession and to bring work related skills to the law curriculum.

While the next few years are unlikely to see the legal profession become truly representative of the ethnic and cultural make-up of the UK – a picture which is itself changing all the time – the FdA in law and the new-found opportunities afforded by its implementation undoubtedly represent a significant step in the right direction.

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