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EDITORIAL

THIS IS THE FIRST issue of the Journal under the new Editor, and is therefore an opportunity to thank the previous Editor, Professor Peter Kunzlik. Professor Kunzlik was the Editor for six years, during which time his hard work and dedication has proved invaluable in establishing the Journal's reputation. His contribution has been enormous. Not only has he improved the Journal's content and style, but it was his initiative which brought about the establishment of our impressive Advisory Board. It was also his initiative which was responsible for the very successful reception, held in London on 5 July 2000, to mark the establishment of the Advisory Board. Under Professor Kunzlik's leadership and vision, the Journal has gone from strength to strength. It gives me great pleasure to thank him, not only for his past work, but also for his continued support of the Journal. He continues to act for the Journal in business matters, and has also agreed to become a member of our Advisory Board.

Readers may note the glut of inaugural lectures in this issue of the Journal. It might almost be called a special "inaugural lecture" issue. In this academic year, there have been four inaugural lectures by professors in Nottingham Law School, which is a reflection of the growing reputation of the School. Three of the lectures are published as articles in this issue, and they cover topics as diverse as international arbitration, land law and ombudsmen. Professor Michael Gunn's lecture, which will be published in the next issue, deals with mental health law. Readers will also note that there is no linking theme in the contributions in this issue. The Journal continues to be a "broad church", reflecting a variety of interests. We hope that the Journal will continue to be so, and we continue to welcome scholarly contributions from academics and practitioners in the law from this country and abroad.

Finally, it is my pleasure to thank contributors to the Journal, the members of the Editorial and Advisory Boards, those who have acted as referees, and those who have assisted in the production of this issue.

MARY SENEVIRATNE, EDITOR.

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REMEDIES IN LAND LITIGATION – THE TAIL STILL WAGS THE DOG

RICHARD BUTLER*

THE FORMS OF ACTION AT COMMON LAW

FROM 24 OCTOBER 1852,¹ for the first time in 700 years, a lawyer preparing a writ of summons to commence civil proceedings in England and Wales has been able to state his client's case without referring to a form of action. In principle it has been sufficient to state the legally relevant facts and the relief sought, after which the action proceeds along a common track irrespective of the ancient classification which would previously have attached to the cause.

Modern litigation practitioners reeling under the weight of the new Civil Procedure Rules, which came into force on 26 April 1999, may have some passing sympathy for their brethren 147 years ago. Measures designed to simplify processes do not generally make practitioners' lives any easier in the short term. Even in comparison with the revolution which we have lived through in 1999, the 1852 reforms, taken with the Judicature Acts 1873-5 which completed the series, were profound. Nevertheless, Frederic Maitland's famous apophthegm, that although buried, the forms of action still rule us from their graves, was in important respects a premature obituary.

Although this is not a lecture on procedural history (which the writer would not be competent to deliver) this paper briefly looks at the pre-1852 system to permit the comparison between it and the modern regime for land actions which is central to this paper.

Inevitably a process which evolved over 700 years looked rather different towards the end of the period in comparison with its early days. That makes generalisations about its characteristics approximate. Nevertheless, for present purposes it is accurate enough to say² that the form of action dictated many crucial aspects of the procedure which

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¹ The date on which the Common Law Procedure Act 1852 came into force. See s. 1 for commencement and s. 3 for abolition of forms of action.

² No discussion of the forms of action can fail to pay tribute to Frederic Maitland. This is a distillation of the first of his seven lectures on the subject, reprinted many times but here taken from F. W. Maitland, *The Forms of Action at Common Law* (Cambridge, 1971). See also F. Pollock and F. W. Maitland, *The History of English Law Before the Time of Edward I* (Cambridge, 1898), Vol. II, pp. 556 – 571.

had to be followed: which court was competent (King's Bench, Common Pleas or Exchequer); the means of making the defendant appear to answer the cause; the speed of process; the sanctions available against contumacious defendants; whether default judgments were available; the requirements for pleading the case; the mode of trial (grand or petty assize, compurgation or wager of law, or even trial by battle); and the means of executing a judgment (imprisonment of the defendant, having him outlawed, obtaining possession of the thing in issue or execution by a writ of *fieri facias*). Punishment of the unsuccessful defendant could follow in some forms of action but not others. So, the initial classification of the cause was all important for determining its procedural course.

Procedures for obtaining possession of land were especially fragmented, with subtle differences in the profile of cases eligible for each form. *Novel Disseisin* was available at the suit of a person recently turned out of land (but not his successor) against the person who turned him out (but not his successor). *Mort d'Ancestor* was for the heir of the person who died seised of land, so long as that heir was the child, sibling, nephew or niece of the deceased. The equivalent for the grandchild was the writ of *Aiel*, for the great grandchild it was *Besael* and for the cousin it was *Cosinage*. The further forms which grew up along side these ancient procedures (but which did not abolish them) to remedy some of their procedural disadvantages, such as Writs of Entry, *quare ejecit infra terminum* and trespass *quare clausam fregit* themselves were subject to minute differences in procedure.

With the final abolition of the forms of action in 1852 and the fusion of the courts of equity and common law in 1875, Frederic Maitland felt able to conclude³ that:

the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be diverted to the real problem of what are the rights between man and man, what is the substantive law?

THE THESIS

The general proposition advanced in this paper, delivered less than a year after the Civil Procedure Rules came into force, is that the categorisation of claims, especially in property disputes, is still highly influential in determining the procedural route which they will follow. In itself, that is, perhaps, something of a technical footnote. Of far greater importance is the fact that this procedural route will in many cases dictate the practical outcome irrespective of the parties' substantive legal rights. Put another way, Maitland's antithesis between procedure and substantive law does not strike at the heart of the question whether the reformed system delivers a just result as between the parties.

The writer believes that it does not, for the reasons given below. However, before exploring the evidence, one or two preliminary questions should be addressed. Why are the examples drawn from real property disputes, principally possession claims, and are these disputes a unique case?

WHY DO REAL PROPERTY DISPUTES PRESENT A STRONG CASE?

The examples are taken from real property disputes for a number of reasons. First, property litigation presents a marked example of fragmented, specialised procedures.

³ *The Forms of Action at Common Law*, *op. cit.*, at p. 66.

That does make it a special case. That said, it is maintained that the prescription which is recommended below is of general application to civil litigation. Second, the bulk of the forms of action at common law were concerned with real property and so there is a wealth of material for comparative study.⁴ Finally, certain characteristics of land mean that those involved in disputes over it are peculiarly affected by vagaries in procedure, most particularly where those vagaries affect the time taken to reach a substantive result.

This last point needs some explanation. There are at least four separate aspects of land which make the practical outcome of disputes peculiarly sensitive to procedural distinctions. First, land and the ability to occupy it has great social importance and emotional resonance, most particularly where a home is involved. Procedural distinctions which dictate the length of time it will take to be restored to or turned out of one's home are of enormous practical significance. Second, occupation of land has relatively high economic value over time. Third, having good marketable title to land has relatively high economic value at any given point in time. Fourth, quite apart from shifts in prevailing market prices, the right to occupy land, *de facto* occupation of land and also the ability to prove title to an interest in land can each have economic values which are hugely different at any given point in time to that which they had before and which they will have after that point. For example, a piece of scrub land, Whiteacre, may be virtually valueless on day one. From the moment a developer of an adjacent site, Blackacre, announces his intention to build on Blackacre, Whiteacre may have hugely inflated value. That could either be as a potential addition to the development site or perhaps because it provides the best access to the Blackacre development. However, suppose the owner of Whiteacre fails to reach agreement with the developer, who then commits himself to the development of Blackacre to the exclusion of Whiteacre. Depending on its future developability, the value of Whiteacre plunges back to a nominal sum.

So, time is money in the property world, but is land really different? After all, a personal injuries claimant in need of compensation, a trade creditor being held out of his money and a patent owner seeking redress for an infringement (to take three random examples) can also make out a genuine and compelling need for prompt treatment by our legal system. Well, to a point that must be accepted. On a case by case basis, some of these claimants will have a compelling argument for jumping the queue. That supports the view advanced below that the suggested prescription is a general one and is not specific to property litigation. But the point should also be made that procedural devices such as summary judgment, interim payments and interim injunctions do go some way towards alleviating the adverse effect of delay for some of these claimants.

That land is a special case is also suggested by the appetite which our society shows for creating and preserving self-help remedies in land disputes. Examples include forfeiture of leases by physical re-entry, distress for rent, *Jervis v. Harris* clauses for the remediation of dilapidations, the recently dispossessed occupier's right to reinstate himself by force and the mortgagees' automatic power of sale. No doubt the survival of some of these anachronistic procedures says much about the power of the vested interests involved, but surely it is also indicative of a civil justice system which is failing to deliver timely and therefore any adequate remedy in many of these types of case.

⁴ Fertile ground for future study, but not covered in this paper.

POSSESSION ORDERS

As we have already seen, a particular characteristic of land is the relatively high value of actual occupation over time. This means that a person whose substantive rights entitle him or her to occupy land ought to be able to eject a usurper and to resume occupation as swiftly as is possible if, as a practical matter, that substantive right is to be vindicated. Of course, the usurper must be given the opportunity to put forward any grounds for asserting a superior right to occupy. Also, any relevant social policies, such as delaying a person's ejection from his or her home to provide time to find somewhere else to live, must be brought into the equation. This is what one would expect to find in an effective system.

What we find in fact is a complex web of rigid rules, which one can see as reaction and counter reaction in this type of sequence:

- (1) It takes time for a case to reach trial.
- (2) Specialised short cuts are devised to mitigate the hardship which these delays can cause to a person seeking possession of land, such as the squatter procedure,⁵ the accelerated possession procedure,⁶ and interim possession orders.⁷ In most types of litigation, the default judgment represents the main short cut for a claimant whose opponent takes no part in the proceedings. This was available to those seeking possession of land until 26 April 1999,⁸ but has now been virtually abolished.⁹
- (3) As already discussed, due to pressure from parties with vested interests, society continues to tolerate the use of anachronistic self-help remedies, such as peaceable re-entry.¹⁰
- (4) Short cuts are set about by closely defined eligibility criteria and special rules of procedure to prevent their abuse.¹¹
- (5) Self help remedies require especially sophisticated regulation.¹²

So, our rule book grows ever larger. Special procedures are pasted in to alleviate specific injustices which the general procedures have manifested in certain circumstances. The rules governing those special procedures have to be tightly drafted to avoid abuse and so the complexity is compounded. The tight drafting inevitably leaves some people on the wrong side of the line, leading either to further amendment or to continued injustice.

⁵ Still to be found in RSC Order 113 (and CCR Order 24, Part I) , as preserved, for now, by CPR 50.

⁶ CCR Order 49, rules 6 and 6A.

⁷ CCR Order 24, Part II.

⁸ RSC Order 13, rule 4.

⁹ Judgment for possession in default can now only be entered if the court grants permission after a hearing with notice (CPR 12.4 (2)(a)).

¹⁰ The Law Commission recommended the abolition of forfeiture by peaceable re-entry in 1985 (*Report on Forfeiture of Leases* (1985) Law Com. No. 142) and prepared a draft bill to give effect to that recommendation in 1994 (*Landlord and Tenant Law: Termination of Tenancies Bill* (1994) Law Com. No. 221). The proposal was abandoned in 1999.

¹¹ The squatter procedure is available against those who entered without consent and also those who entered under a contractual right to occupy falling short of a tenancy, so long as that right has ended (*Bristol Corporation v. Persons Unknown* [1974] 1 W.L.R. 365). It is not available against tenants whose tenancy has ended. The procedure is quite different to the standard model under the Civil Procedure Rules.

¹² Both statutory (for example, the Protection from Eviction Act 1977, and the Criminal Law Act 1977) and judge made (see the House of Lords decision in *Billson v. Residential Apartments Limited* [1992] A.C. 494).

Consider this example of two different owners of business premises. The first grants a contractual right to occupy his premises for a period of time. The arrangement does not create a tenancy.¹³ The occupier fails to leave when his right to occupy expires. In these circumstances, the owner can use the special squatter procedure, even though the defendant entered under a contract, and can expect possession within a week. On the facts, there may be no particularly compelling reason why the case should receive such a measure of priority in the system - it simply fits within the fixed blue print for a squatter case and so that is what happens.

The second owner in our example has contracted to sell his building with vacant possession. Having committed himself to the sale, a former tenant who has remained in occupation after the end of his tenancy refuses to leave, despite having made contractually binding promises to do so. He has no statutory right to remain.¹⁴ Some landlords might try to use a self help remedy in these circumstances, but suppose in our example he does not, perhaps for fear of physical violence. What does our legal system have to offer him?

He cannot use the special squatter procedure or the interim possession order procedure because the occupier was originally a tenant. To exclude the occupier he must therefore start an ordinary action seeking possession. He issues and serves the claim form on the occupier. The occupier is given two weeks to indicate an intention to defend, but he does nothing in response. Despite this, the owner cannot get a default judgment and must apply on notice for permission to enter judgment. If there is any prospect of the occupier producing a defence, tactically the owner would benefit if he could apply for summary judgment to be heard at the same time as his application for permission to enter a default judgment, but he is precluded from doing that unless the occupier files an acknowledgement of service.¹⁵ He must therefore wait a period of time which, in most courts, is likely to be three weeks or more (on top of the initial two weeks) before he gets his judgment for possession against a defendant who has not bothered to indicate an intention to defend. A defendant intent on delay will easily be able to double that period.

In neither of these examples has any thought been given to any of the factors which common sense and fairness suggest should be relevant to the selection of the procedure available to the claimant. At no stage was it relevant to ask whether there was a reason for expediting or protracting the process. At no stage did the penalty which the second owner is incurring under the contract of sale have any procedural relevance. At no stage up to the hearing of any application relating to the default judgment was it relevant to ask whether the defendant had any excuse for failing to indicate an intention to defend (perhaps the claim form is only deemed served and has not come to his attention, or maybe he is illiterate). No-one considered whether there was a compelling social reason for putting the defendant's ability to remain in occupation above the claimant's legitimate desire to recover premises against a person who, he says, has no right to occupy. There is nothing in the procedure which each claimant follows which permitted any of these factors to be considered. In the first example the rules entitled the claimant to a substantive hearing within a week and so that is what happened. In the second, the rules required the claimant to wait and so wait he did.

¹³ If the occupier enjoys the right to exclude others it is likely that he is a tenant (*Street v. Mountford* [1985] A.C. 809), but on the facts he need not be.

¹⁴ In many cases business tenants do enjoy a right to remain after their lease ends by virtue of Part II of the Landlord and Tenant Act 1954, but for a variety of reasons the Act may not apply.

¹⁵ CPR 24.4(1). The court can be asked for permission to allow a summary judgment application in the absence of an acknowledgement of service. No doubt this is primarily to assist claimants wishing to obtain a judgment which can be enforced in foreign jurisdictions which frown upon default judgments, but it is not limited on its terms.

That raises the question whether the second owner should be seen as getting justice in the end, after an annoying and expensive wait, or whether this set of circumstances illustrates a denial of justice irrespective of the eventual outcome. The point which this paper makes is that, in real life, it is almost certainly the latter.

In the first example, once it becomes apparent that the hearing will take place within a week, the occupier may be forced to pay a ransom to the owner for the benefit of a few extra days in order to save his business. In the second example, once the inevitability of the delay becomes apparent to both parties, the owner is likely to be forced to offer money to the occupier to leave. The decision which would be made if the case proceeded to a hearing, however predictable, plays little part. The inflexibility of the procedure has dictated the result and the claimant had to adopt this procedure because the tightly defined rules governing the selection of the procedural route permitted of no other choice.

One way of looking at what is happening here is this. Assume that the claimant's substantive right has an intrinsic value, X. If, in practice, the claimant has to pay the defendant £100,000 to achieve what his substantive right suggests should be his for free, the market value of the right is X minus £100,000. It is the legal system which has devalued the right in this way.

No doubt the eighteenth century practitioner would find the emphasis given to substantive law in the modern law reports strange and alien. Unquestionably he would be baffled by our new procedural language.¹⁶ The awful reality of our modern civil justice system is, however, that the concept of characterising a claim, deciding what procedure can be used in connection with that claim and then predicting the practical outcome on the basis of the procedure which must be used, would all be entirely familiar to him.

“ACCESS TO JUSTICE” AND THE PROSPECT OF REFORM

So far in this paper, virtually no attention has been given to the April 1999 civil justice reforms. That it has been possible to reach this stage of this paper with scarcely a nod in the direction of the Civil Procedure Rules is because, to date, they have left specialist property litigation procedures largely untouched. Of course, the overriding objective applies to these cases as to any other. The principle of active case management also applies, at least in theory, as do a host of pervasive procedures.¹⁷ These are, however, exceptions to the general principle that the old Rules of the Supreme Court and County Court Rules still govern these specialist procedures. This is because reform in these areas has been left to the next phase of reforms planned for 2000 and later. So, what can we expect from these planned reforms?

In his final report on *Access to Justice*,¹⁸ Lord Woolf looked at some but not all of the types of procedure considered in this paper. For housing cases, he rejected the idea of a Housing Court and considered that reform of the substantive law is more likely to bring benefits than procedural reform.¹⁹ He concluded that all claims for possession of domestic property should start in the county courts and said that he accepted that “a single, standard procedure for all possession cases will not be feasible, but special

¹⁶ As indeed are many modern practitioners.

¹⁷ Such as the use of application notices where previously a summons would have been used.

¹⁸ *Access to Justice*, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, July 1996.

¹⁹ *Ibid.*, p. 198

provisions should be restricted to cases such as the eviction of squatters”.²⁰ However, later in his report, Lord Woolf concluded that a further special procedure should be available to deal with anti-social behaviour by tenants. This was despite the fact that respondents to the consultation process said that they wanted expedition and not a special procedure.²¹

Lord Woolf set out four principles common to all residential possession cases on which he thought reform should be based:

- (a) Possession should be granted only to a claimant who can prove his right to possession;
- (b) The claimant must prove that any statutory conditions have been met;
- (c) There should always be a judicial determination of the proceedings; and
- (d) All proceedings should be determined at an oral hearing or on a specified date.

At very best, therefore, we can hope for a new regime which provides for five different possession procedures, governed by different procedural rules and each with its own fixed entry criteria:

- (1) Squatter proceedings
- (2) Special residential possession proceedings embodying the four principles
- (3) Anti-social behaviour cases
- (4) Mortgage possession proceedings
- (5) Other possession proceedings.

Looking beyond possession proceedings, we can expect continued existence for a whole host of other specialised procedures relating to land disputes, such as the curiosity which is the application under Part II of the Landlord and Tenant Act 1954²² and the expedited procedure for a declaration as to whether a landlord is unreasonably withholding consent to an assignment of the lease.²³ There are many others.

The writer welcomes many of the changes introduced in April 1999. The belief is, however, that the one single procedural innovation which would be capable of addressing the concern highlighted in this paper is as far out of reach now as it was before *Access to Justice* was published. That is, there is absolutely no provision in the rules or any likely reform of the rules which would allow active case management to take place at a sufficiently early stage.²⁴ If active case management can be seen as parental guidance and correction, then it is simply too late to introduce it for the first time when the child is in its teens. In the types of case we are considering here, the damage has by then already been done.

²⁰ *Ibid.*, p. 201.

²¹ *Ibid.*, p. 209.

²² Section 29 of the Act. The Law Commission recommended abolition of this procedure in 1992, but the recommendation has not been implemented. See Law Com 208, *Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II*, and the subsequent DOE response, *Consultation Paper: Proposed Amendments to Part II of the Landlord and Tenant Act 1954*, July 1996.

²³ Section 53 Landlord and Tenant Act 1954. In practice, it is little used because it is not swift enough to save the transaction in most cases.

²⁴ The Commercial Court Guide provides for the possibility of a case management conference before a defence is filed (see para D7.3) but the Commercial Court is an exceptional forum for exceptional cases. Certainly cases of the kind discussed in this paper are not dealt with in that list.

ROSCOE POUND, INDIVIDUALISM AND STRICT LAW

Before suggesting how these cases should be dealt with, this paper now briefly steps back from the minutiae of procedure in order to look at some theoretical considerations which, it is suggested, should inform the way in which we look at the judge's role in mapping procedures.

The American legal philosopher, Roscoe Pound, gave a great deal of thought to the respective roles of rules and judicial discretion in legal systems. He recognised that the balance between the two ebbs and flows over time, but that in periods of rule dominance, individualisation in decision making tends to be achieved by covert means. His concern was largely with decision making at trial, but as his criticisms of New York's strict rule based procedural code of the late 19th century shows, his thinking applied to procedural matters as well.

Pound was not an advocate for a wholly discretionary (or, in his term, administrative) approach to the administration of justice:

The last century would have eliminated individualisation of application. Now, as in the sixteenth and seventeenth century reaction from the strict law, come those who would have nothing else; who would turn over the whole field of judicial justice to administrative methods . . . May we not learn something from the futility of all efforts to administer justice exclusively by either method?²⁵

On the dangers of an unbalanced system, Pound said:

Typically judicial treatment of a controversy is a measuring of it by a rule in order to reach a universal solution for a class of causes of which the cause in hand is but an example. Typically administrative treatment of a situation is a disposition of it as a unique occurrence, an individualisation whereby effect is given to its special rather than to its general features. But administration cannot ignore the universal aspects of situations without endangering the general security. Nor may judicial decision ignore the special aspects and exclude all individualisation in application without sacrificing the social interest in the individual life through making justice too wooden and mechanical.²⁶

The Second Edition of *Civil Procedure* is 1926 pages long. That compares with 2167 pages of *The 1999 Supreme Court Practice*, but the latter contains many hundreds of pages of exegesis so far lacking from the newer text. The various rules committees are still drafting us towards a set of rules (by which is included practice directions and protocols, because they are rules too) which, in its vastness, will exceed anything we have ever seen in our legal system. Many of the rules are couched in plain English, but the accessibility which that should bring is more than outweighed by the sheer size and incoherent arrangement of the monster which Lord Woolf has unleashed. The litigant in person cannot confine his or her researches to the Civil Procedure Rules. He or she must look too at the Practice Directions, the Protocols, the relevant Guide and, at present, any residual Rules of the Supreme Court or County Court Rules which may be relevant. Should he or she be venturing into the realm of the specialist property procedures, he or she will have the additional and difficult task of working out which of the general provisions from each of these sources apply to his or her procedure and which do not.

²⁵ R. Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1954), at pp. 63-64 (Based on lectures before the Law School of Yale University 1921).

²⁶ *Ibid.*, at p. 53.

In respect of the types of procedure we are considering, cases receive too little individualised procedural treatment. The new Civil Procedure Rules provide for active case management which, in cases to which it applies, is capable of supplying the need at later stages of the case. But if it applies at all to the procedures we are looking at, it comes too late in the day to remedy injustice already suffered. It is not apparent from *Access to Justice* that the new rules will address this at all.

Before looking at a possible solution, it is worth looking at a procedure which seems to strike the balance between strict law and discretion which Pound recognised as necessary in a healthy system. It will be of no surprise that it is an equitable remedy.

INTERIM (INTERLOCUTORY) INJUNCTIONS

An important example of individualised justice at work in our system arises when a party to actual or incipient litigation asks the court to make an order compelling or restraining his opponent in some way before the court is in a position to try the dispute. The brutal reality of commercial life is that in the bulk of cases the grant or refusal to grant an interim injunction determines the cause between the parties. Only in a minority of cases does the action proceed to trial from that point, but even without this last dynamic, these applications often present an example of very hard decisions.

On the face of it, the issues are straightforward enough. The judge must decide how to hold the ring in the fairest possible way until a trial judge is put in a position of being able to decide all of the justiciable issues between the parties. In practice, there is often potential for great unfairness whichever way the judge jumps. Take a typical example. The occupier of Blackacre House, a city office block, is horrified to discover that a developer is about to erect a tall office building very near by. The new building will cut out a large amount of light from many of the windows of Blackacre House. Blackacre's occupier immediately takes advice from rights of light surveyors and lawyers and is told that he stands a good chance of getting a final injunction at trial to restrain the construction of the building. However, the position is not entirely clear cut as a result of various rights of light deeds and notices. Despite the uncertainty, he issues proceedings seeking a perpetual injunction and then an application for an interim injunction to stop the building until trial.

The judge hearing the interim injunction application has a very difficult problem to solve. If the injunction is granted, the developer may lose his funding, lose a tenant, incur huge penalties to his builders and miss a strong letting market. On the other hand, if the injunction is not granted, the office will be built and the prospect of the trial judge ordering it to be knocked down is remote. It is tempting to say that the judge should take a view on the merits of the right of light issue and decide accordingly, but that runs the risk of holding a trial on incomplete evidence.

The solution which has evolved over the last 150 years is an example of a mixed rule based and personalised (or administrative) approach. First, the courts of equity developed the requirement for a cross undertaking in damages to be given by the applicant as a condition of his getting an injunction. If it later transpires that the injunction should not have been granted, the other party is entitled to damages by virtue of this undertaking. Then the courts evolved the balance of convenience test - projecting oneself into the future, which is likely to have caused the greater injustice or inconvenience - wrongly to have restrained the defendant or wrongly to have allowed him to continue with the activity?

In parallel with the development of the balance of convenience test, there began a search for a suitable threshold test for the applicant to fulfil. This search ended with the unanimous decision of the House of Lords in *American Cyanamid v. Ethicon*²⁷ in which Lord Diplock said:

The use of such expressions as “a probability” “a prima facie case” or a strong prima facie case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.²⁸

So that settled the limit of strict law in the context of interim injunctions. A serious question to be tried must be identified. Once that threshold is passed, the case receives individualised treatment.

In comparison with the court’s approach to interim injunctions, it can be seen that many procedures of the type we are discussing measure poorly in the balance of rule based strictures as opposed to individualised justice.

THE COST OF BESPOKE TAILORING

In the present environment, proposals for reform must cost the state, or the parties, or both, less and not more if they are to be favourably received. Indeed, so profoundly linked have economy and procedural justice become in the minds of those responsible for the new code that economy is now part of the very definition of procedural justice.²⁹ The off the peg procedures to which fast track cases³⁰ are subjected are prime examples of this principle at work. Although the general case management powers apply to all types of case,³¹ fast track cases are ordinarily subjected to a standard set of procedures³² and it is only in multi-track cases that flexibility of procedure is the norm.³³ No proposal for reform which fails to conform to the requirements of economy and proportionality has any chance of acceptance. In particular, an early case management hearing in every case would obviously not be a practicable proposal.

INDIVIDUALISING PROCEDURES

So, how are we to achieve an appropriate degree of individualisation in property litigation procedures without affecting the public purse or infringing the proportionality principle? First, we should remind ourselves what we are trying to achieve. It is submitted that there are a number of principles which need to be reflected in the procedural arrangements for these cases:

²⁷ [1975] A.C. 396.

²⁸ *Ibid.*, at p. 407 G.

²⁹ CPR 1.1(2) (b), (c) and (e).

³⁰ Speaking rather inaccurately, fast track cases are those involving sums in excess of £5,000 but less than £15,000. The definitions of small claims, fast track cases and multi-track cases are to be found in CPR 26.6.

³¹ CPR 3.1 particularly.

³² PD28 2.7.

³³ PD29 3.2(2).

- (1) Whether a case ought to be expedited cannot be determined by the criteria which presently govern the procedural route the case will follow - there may be no good reason for expediting a particular claim against a squatter but an overwhelming case for expediting a claim against a former tenant.
- (2) The case management regime provided by the Civil Procedure Rules starts too late for these purposes. A procedure which suits the requirements of the case must be impressed on the case from the start. The parent who delays disciplining the child until its teens has left it too late.
- (3) An individualised procedure cannot be created without a procedural judge being involved, though this need not be at an oral hearing and if it is, it need not be attended by both parties.

It is not the writer's intention to try to design a procedure in this paper. The object has been to make out a case that individualisation is needed. However, arrangements along the following lines would go a long way to remedying the problems which this paper has identified. They would involve little extra expense either to the state or to the parties. Neither should they place undue strain on judicial resources, especially given the substantial decline in the number of cases going through the courts since April 1999.³⁴

The suggestion is this. The hard facts (Was the defendant originally a tenant or a licensee or a trespasser? Is he a mortgagor? Is the property a home, or used for business? What relief is sought? etc.) will only presumptively indicate the procedural route which the case will follow. In the first instance, it is for the claimant to make out a case for departing from the presumed route, but only if he wishes to. He would do so by filing a Request for Case Management ("RCM") form on issuing the claim form. The RCM form would set out any facts which the claimant believes should be taken into account in determining the procedural route which the case should follow. It would be placed before a master or district judge who would make early case management directions solely on the basis of the claimant's RCM form. Those directions could include a fixed date for an initial hearing and would allow the defendant to have those directions reconsidered on short notice. The timescale could be shorter than that envisaged by the usual periods for acknowledgement of service and defence and might depend on actual receipt of the claim form by the defendant as opposed to deemed service. The early case management directions would be served with the claim form and response pack.

On service of a claim form, it would be open to a defendant to file his own RCM form if the procedural route presumptively prescribed by the rules or any early case management directions made on the claimant's application do not, in his view, meet the requirements of the case.

CONCLUSION

A small adjustment to our new procedural code of the kind described would remove deserving cases from procedural shackles which, of necessity, are cast upon the mass of cases in our system. It would recognise that some disputes are resolved, not on the basis of what a judge would decide if the case went to trial but on the basis of what will be gained and lost in the meantime. Many practitioners in the field of property

³⁴ There is much anecdotal evidence for this, and there are some statistics - see (1999) 96 (42) LSG 4.

litigation have seen fortunes paid away due to the inflexibility of the procedures which their clients would have been obliged to follow to vindicate their undoubted rights. In the writer's view, cases of that kind represent a negation of justice which must not be allowed to exist in our new system.

Taken with the reforms already implemented, a change of the kind suggested, small and prosaic in itself, would also have a great historical significance. It would mean that our system really had gained the means of ensuring that the parties' substantive rights were not affected by the technical categorisation of the claim into a set procedure. The forms of action introduced in the reign of Henry II might still rule our substantive law from their graves, but our procedural law would at last be set free.

OMBUDSMEN 2000

MARY SENEVIRATNE*

INTRODUCTION

THE GROWTH OF OMBUDSMEN SCHEMES in both the public and private sector has been a feature of modern life. In the United Kingdom, these schemes originated in the public sector, their origin normally associated with a 1961 report, *The Citizen and the Administration*.¹ That report resulted in the setting up of the office of the Parliamentary Ombudsman, or rather, as he was named in the Act, the Parliamentary Commissioner for Administration, in 1967. Since then, the public sector has acquired ombudsmen for local government and the health service. The 1980s and 1990s have seen their development in the private sector as a consumer redress mechanism, so that they now cover such diverse areas as financial services, estate agents, funeral services and legal services.

The name “ombudsman” reveals the origin of the concept. Ombudsmen are a Scandinavian import. The word is Swedish and it means a representative or agent of the people, or a group of people. Sweden was the first country to establish an ombudsman’s office, in 1809, which was to investigate citizens’ complaints against public officials. A century later, the idea was taken up by another Scandinavian country, Finland, which created an ombudsman in 1919. In 1955, Denmark established an ombudsman scheme. Norway followed suit in 1963, basing its ombudsman for civil administration on the Danish model. It was the introduction of the Danish ombudsman, in 1955, which marked the beginning of the world-wide interest in such schemes. As well as providing the model for Norway, the Danish scheme was also the model for New Zealand, the first country outside Scandinavia to establish an ombudsman. The introduction of an ombudsman in New Zealand, a common law country, in 1962, sparked off a great deal of interest in the ombudsman concept throughout the world.

By the 1970s, ombudsmen had appeared in many parts of the world, and by 1983, the ombudsman idea had been accepted by almost every country in Western Europe. In the past 20 years, there has been an extraordinary spread of ombudsman systems across the world, the major exception being the USA. The European Union also has an Ombudsman, set up in 1995, who has the unique status of being the only supranational ombudsman in existence. His role is to deal with complaints about maladministration by European Community institutions and bodies.²

Why has this institution, established nearly 200 years ago and unheard of outside Scandinavia until 150 years ago, proliferated to this extent in the second half of the twentieth century? One explanation is the expansion of state activity during and after the Second World War, the new concern for the protection of human rights, and the growth of public education and participation.³ Ombudsmen came to be seen as useful in helping to meet the problem of an expanded bureaucracy in the modern welfare state,⁴ the activities of which had grown in range and complexity. The increase in the

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¹ JUSTICE, *The Citizen and the Administration: the Redress of Grievances* (Stevens, 1961) (The Wyatt Report).

² See M. Seneviratne, “The European Ombudsman” (1999) 21(3) *Journal of Social Welfare and Family Law* 269-278.

³ D. Rowat, *The Ombudsman Plan* (University Press of America, 1985), at p. 131.

⁴ *Ibid.*, at p. 3.

powers of discretion given to the executive side of government led to a need for additional protection against administrative arbitrariness, particularly as there was often no redress for those aggrieved by administrative decisions.

So, we can see how this 200 year-old institution has developed into new territories from its origins in the appointment of an officer appointed by one pole of government, the legislature, to handle complaints against the other poles, administrative and judicial action. Its modern equivalents have adapted to suit local conditions. The ombudsmen themselves, and their operating methods and objectives, vary from country to country. This is not surprising, given their different constitutional positions. The popularity of the institution can be seen from the way this public sector institution has been "flatteringly copied" by the private sector.⁵

OMBUDSMEN IN THE UNITED KINGDOM

As I have indicated, in the United Kingdom, ombudsmen were introduced in the public sector in the 1960s and 1970s, with the Parliamentary Commissioner Act 1967, the National Health Service Reorganisation Act 1973, and the Local Government Act 1974.⁶ The first incursion into the private sector⁷ was in 1981, with the establishment, by the insurance industry, of the Insurance Ombudsman's Bureau.⁸ The banks followed in 1986, with the Office of the Banking Ombudsman.⁹ These were voluntary schemes, set up by the industries themselves. Building societies had a different model. Their scheme, established in 1987, was set up by statute, the Building Societies Act 1986.¹⁰ In the 1990s, the use of ombudsmen was extended to legal services (1990),¹¹ estate agents (1990),¹² pensions (1990), investments (1994),¹³ funeral services (1994),¹⁴ rented housing (1997).¹⁵

Some of these ombudsmen are not so easily categorised as public or private. For example, the Building Societies Ombudsman, although created by statute, had

⁵ H. Woolf, *Protection of the Public – A New Challenge*, Hamlyn Lecture (Stevens, 1990), at p. 87.

⁶ See generally, M. Seneviratne, *Ombudsmen in the Public Sector* (Open University Press, 1994).

⁷ See generally, R. James, *Private Ombudsmen and Public Law* (Dartmouth, 1997).

⁸ See generally, J. Birds and C. Graham, "Complaints Mechanisms in the Financial Services Industry" [1998] *Civil Justice Quarterly* 313; P. E. Morris, "The Insurance Ombudsman Bureau and Judicial Review" [1994] *Lloyds Maritime and Commercial Law Quarterly* 358.

⁹ See generally P. Morris, "The Banking Ombudsman" [1987] *Journal of Banking Law* 133; P. Morris, "The Banking Ombudsman – five years on" [1992] *Lloyds Maritime and Commercial Law Quarterly*, 227; C. Graham, M. Seneviratne and R. James, "Publicising the Bank and Building Societies Ombudsman Schemes" [1993] 3(2) *Consumer Policy Review* 85; M. Seneviratne, R. James and C. Graham, "The Banks, the Ombudsman and Complaints Procedures" [1994] *Civil Justice Quarterly* 253.

¹⁰ Part IX and Schedules 12 and 13. See generally, C. Graham, M. Seneviratne, R. James, "Publicising the bank and building societies ombudsman schemes" [1993] 3(2) *Consumer Policy Review* 85; R. James, C. Graham and M. Seneviratne, "Building Societies, Consumer Complaints, and the Ombudsman" [1994] 23(2) *Anglo-American Law Review* 214.

¹¹ See R. James and M. Seneviratne, "The Legal Services Ombudsman: Form versus Function?" (1995) 58(2) *Modern Law Review* 187-207; M. Seneviratne, *The Legal Profession: Regulation and the Consumer* (Sweet and Maxwell, 1999), Ch. 6.

¹² See generally, P. E. Morris, "The Ombudsman for Corporate Estate Agents" [1994] *Civil Justice Quarterly* 337; R. James, "The Ombudsman for Corporate Estate Agents – Putting Half the House in Order" [1995] 3(5) *Consumer Law Journal* 188; M. Seneviratne, "Estate Agents, the Consumer and the Ombudsman for Corporate Estate Agents" [1997] *Consumer Law Journal* 123-133.

¹³ The Personal Investment Authority was set up as a self-regulatory body under the Securities and Investment Board, and it is within the regulatory framework set out in the Financial Services Act 1986. The Authority set up the Personal Investment Authority Ombudsman Bureau to deal with complaints against its members. The Investment Ombudsman deals with disputes between members of the Investment Management Regulatory Organisation and their customers.

¹⁴ Funeral Ombudsman Scheme.

¹⁵ The Independent Housing Ombudsman scheme, which deals mainly with social housing, although some landlords who are not social landlords are also members of the scheme.

jurisdiction over private sector organisations.¹⁶ The Legal Services Ombudsman is a complete hybrid: set up by statute,¹⁷ publicly funded, accountable through the Lord Chancellor to Parliament, her jurisdiction is over the legal profession, which operates mainly in the private sphere. The Pensions Ombudsman, too, is a hybrid, imposed by statute¹⁸ over the pensions industry in both the public and private sectors. In addition, it has been argued that he is more like a tribunal than an ombudsman, and his work is partly subject to the supervision of the Council on Tribunals.¹⁹ Now that the ombudsman schemes operating in the financial services area²⁰ are to be combined into one Financial Ombudsman Service, it seems that there will be few truly private sector schemes left – perhaps only the estate agents and funeral ombudsmen.

In addition to this plethora of Ombudsmen, there are organisations carrying out ombudsman-like functions, which, although they fulfil the criteria²¹ for acceptance as full members of the ombudsman community, do not bear that name. For example, the independent organisation dealing with complaints against the police is known as the Police Complaints Authority. The Broadcasting Standards Commission provides redress for those who complain that they have been unfairly treated or subjected to unwarranted infringement of privacy by the broadcasting authorities. This variety of nomenclature may cause confusion, and it has been suggested that any organisation or individual admitted to full membership of the British and Irish Ombudsman Association²² should be required to take the title “ombudsman”.²³

On the other hand, there are organisations called ombudsmen,²⁴ which do not satisfy all the accepted criteria for ombudsman schemes, usually because they are not independent from the body they investigate. By way of example, the Prisons Ombudsman does not meet the criteria of independence, because he is appointed by and accountable to the Home Secretary. He is also subject to the overall jurisdiction of the Parliamentary Ombudsman. This is in no way a criticism of the office-holder, who has fought hard to maintain the independence of the office.²⁵ And it may be that

¹⁶ This is one of the schemes which will be incorporated into the Financial Ombudsman Service.

¹⁷ Courts and Legal Services Act 1990.

¹⁸ Social Security Act 1990, section 12 and Schedule 3, consolidated in the Pensions Schemes Act 1993, and amended in the Pensions Act 1995.

¹⁹ R. James, *Private Ombudsmen and Public Law* (Dartmouth, 1997), at p. 154. This is not the place to discuss the differences between ombudsmen and tribunals in any detail. Both are mechanisms for dealing with those areas where, on the one hand the dispute should not be resolved by litigation, but on the other, may not be amenable to settlement by negotiation. The Pensions Ombudsman believes that ombudsmen combined with final determination powers are a better mechanism than tribunals for dealing with these areas. However, he also believes that ombudsman schemes and tribunal systems “should not be separated by semantics but co-ordinated in substance” (J. Farrand, “Ombudsman or Tribunal? The Ombudsman as an Adjudicative Mechanism” in M. Harris (ed.) “The Ombudsman and Administrative Justice”, in M. Harris and M. Partington (eds.) *Administrative Justice in the 21st Century* (Hart Publishing, 1999), at p. 141).

²⁰ These are the Banking Ombudsman, the Building Societies Ombudsman, the Insurance Ombudsman the Investment Ombudsman, the Personal Investment Authority Ombudsman, the Personal Insurance Arbitration Service, SFA Complaints Bureau and arbitration scheme, the Financial Services Authority Direct Regulation Unit and Independent Investigator.

²¹ The British and Irish Ombudsman Association, set up in 1993 (as the United Kingdom Ombudsman Association – the name change in 1994 followed the inclusion of three ombudsman schemes from the Irish Republic as members), on a self-regulatory basis, has set out criteria which an ombudsman scheme must meet in order to be a full voting member of the organisation. These are: independence from those whom he or she has power to investigate; effectiveness; fairness; public accountability.

²² The British and Irish Ombudsman Association was formed as a result of concern that the title “ombudsman” was being used inappropriately.

²³ J. Farrand (Pensions Ombudsman and former Insurance Ombudsman), *Symposium on Consumer Redress* Office of Fair Trading, 27 September 1995.

²⁴ In New Zealand, the title is restricted by law. There is no such restriction in the United Kingdom.

²⁵ See M. Seneviratne, “Prisons Ombudsman: Annual Report 1996” (1998) 20(1) *Journal of Social Welfare and Family Law* 95-97; M. Seneviratne, “The Prisons Ombudsman: Annual Report 1998-99” (1999) 21(4) *Journal of Social Welfare and Family Law* 389-396.

the status of the Prisons Ombudsman will soon be rectified, as there has been an assurance that the post will be put on a statutory basis at the next legislative opportunity.

WHAT IS AN OMBUDSMAN?

It should be clear from the above discussion, that there is some concern that the title “ombudsman” should be strictly defined. This is not only to avoid confusion, but also to ensure that its currency is not undervalued. In 1974, the International Bar Association, resolved that an ombudsman was:

An office provided for by the constitution or by an action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.²⁶

This comprehensive, if unwieldy, definition describes traditional, or classical, ombudsman schemes. It is clearly not appropriate for private sector or hybrid schemes. Even in respect of the traditional ombudsmen, it has been noted that the search for definitions disguises the fact that there are “significantly different interpretation of what exactly the Ombudsman’s functions are” in the world community.²⁷ The focus in the United Kingdom is on maladministration, whereas in some countries, the emphasis is on human rights. The latter role is often adopted in emergent democracies, where ombudsmen are seen as “instruments of good government”, “protectors of human rights” and leaders of the “fight against corruption that is endemic in many developing and transitional economies”.²⁸

In the United Kingdom, ombudsmen are complaint-handlers, providing “an impartial, accessible, informal, speedy and cheap means of resolving complaints”.²⁹ It was the proliferation of ombudsman schemes which focused attention on the characteristics which must be displayed by such complaint-handling schemes, before they are deemed to be worthy of the title.

In 1991, following the United Kingdom Ombudsman conference,³⁰ a working party³¹ was set up to agree criteria for the use of the term “ombudsmen”. Four key criteria were identified: independence from those investigated, effectiveness, fairness and public accountability.³² In order to be effective, the ombudsman should be accessible, the right to complain should be adequately publicised, and those complaining should be able to do so free of charge. Ombudsmen should have adequate powers of investigation, with

²⁶ Quoted in W. Haller, “The place of the ombudsman in the world community” (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 29.

²⁷ K. Friedmann, “Realisation of ombudsman recommendations” (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 105.

²⁸ G. Drewry, “The Ombudsman: Parochial Stopgap or Global Panacea?” in P. Leyland and T. Woods (eds.) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997), at p. 94.

²⁹ P. Giddings, “The ombudsman in a changing world” (1998) 8(6) *Consumer Policy Review* 202-208, at p. 203.

³⁰ This was held at Meriden on 17-18 October 1991.

³¹ The working party consisted of five members: the Secretary of the Commission for Local Administration, the Scottish Local Government Ombudsman, the Director of the National Consumer Council, an academic and the Banking Ombudsman, who chaired the group.

³² Full voting membership of the British and Irish Ombudsman Association is restricted to those who meet these criteria.

the ability to make recommendations. Where ombudsmen do not possess the authority to make binding awards (which is the case in the public sector), they should have the moral authority to secure redress. In other words, there should be a reasonable expectation that those investigated will comply with the ombudsman's decisions. Independence is a very important characteristic of ombudsmen schemes. Ombudsmen in the United Kingdom do not see their role as consumer champions, or complainants' advocates. It is the fact that they are impartial that gives them their authority, and the respect of those who are the subject of their investigations.

POPULARITY OF OMBUDSMAN SCHEMES

There are several reasons why ombudsmen, who were unknown in this country before the 1960s, have expanded, and become such a phenomenal success. First, on grounds of cost alone, they are a valuable mechanism for dispute resolution. They are free to the users of the scheme, the consumers. In terms of the volume of cases they deal with, they are probably cost effective for those funding them, whether they are private sector industries, or public bodies. They therefore present good value for money for all the parties. Costs are kept to a minimum because, unlike the courts, legal representation is neither required nor advantageous.

Their operating methods also account for their success. Each scheme has a different way of operating, but they can all be characterised by two words – informality and flexibility. Although ombudsmen must act fairly, they are not constrained by rules of evidence. In the private sector, most deal with matters by correspondence. Some allow for telephone and/or personal contact. Their procedures tend to be inquisitorial rather than adversary. Ombudsmen can attempt a negotiated settlement, and can use conciliation techniques. They aim to be accessible and user-friendly. A particular advantage for consumers is that there is no risk to complainants using the schemes. The complainant has nothing to lose financially by using an ombudsman to deal with her or his grievance. Importantly, complainants do not lose their right to take the matter to court, if appropriate, after a case has been decided by an ombudsman.

It will be apparent that the advantages of ombudsmen mirror the disadvantages of the courts. In other words, some of the problems of the civil justice system can be side-stepped by the use of ombudsmen. It would be a mistake however to assume that ombudsman schemes are a panacea for all the problems associated with litigation. Although the problems of cost and complexity are overcome, many ombudsman systems still suffer from problems of delay. However, ombudsman schemes clearly present an alternative to the courts, which many complainants find attractive. This attraction is not limited to procedural difficulties. Ombudsmen are also successful because they provide remedies where none may be available in the courts.

ALTERNATIVE TO THE COURTS

Ombudsmen, as originally conceived in the public sector, were not intended to present an alternative dispute resolution mechanism to the courts. They were established to deal with grievances where no remedy was available in court, because the matter was not justiciable, as no legal right was infringed. The Parliamentary Ombudsman was originally established as an adjunct to Parliament, and thus a part of the political and

administrative regimes.³³ The ombudsman thus supplements “the work of Members of Parliament in investigating complaints from members of the public regarding injustices caused by maladministration in a Government Department of Agency”.³⁴

The remit of the Parliamentary Ombudsman (along with the other public sector ombudsmen) is essentially to provide remedies for maladministration,³⁵ rather than to adjudicate legal claims or appeals against the merits of discretionary decisions. Maladministration has never been defined in legislation, but was referred to during the debate on the Bill which established the Parliamentary Ombudsman as including “bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness”.³⁶ It is a flexible concept, and to this list can be added: “failure to give proper advice, harassment . . . discrimination and failure to handle claims to benefit properly”.³⁷ Its shifting boundaries means that a “failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment” can also constitute maladministration.³⁸ Even a departure from good practice has been held to be maladministration by the Local Government Ombudsman.³⁹

The public sector ombudsmen, it should be noted, provide additional remedies, rather than an alternative mechanism for pursuing legal rights. Indeed, they cannot investigate a complaint where there is a legal remedy.⁴⁰ The grievances they investigate have no cause of action in court, except perhaps judicial review. The powers granted to the ombudsmen in the public sector thus allow them to address administrative problems that the courts cannot effectively resolve.

In the private sector, many of the schemes were established on a voluntary basis to improve the image of the industry,⁴¹ although for some, it was the threat of statutory intervention⁴² which encouraged their introduction. By contrast with ombudsmen in the public sector, they are generally not confined to issues of maladministration. They frequently deal with issues of a contractual nature, where court action, although theoretically possible, would be inappropriate, because for example the amount at stake is small. Private sector ombudsmen do however go beyond issues of illegality, and can

³³ P. Birkinshaw, *Grievances, Remedies and the State* (Sweet and Maxwell, 1985), at p. 127.

³⁴ M. Buckley, “The Parliamentary Ombudsman” (1998) 68 *Adviser* 6-8, at p. 6.

³⁵ Remedies are provided where injustice has been caused by maladministration. The Health Service Ombudsman can also investigate: complaints of “hardship”; that there has been a failure of service or a failure to provide a service that should have been provided; complaints about clinical judgment. As both the Parliamentary and Local Government Ombudsmen regard “hardship” as a possible injustice consequent on maladministration, it is confusing that the legislation establishing the Health Service Ombudsman expressly mentions “hardship” in addition to injustice. It is also the case that the Parliamentary and Local Government Ombudsmen find that a failure of service or a failure to provide a service amounts to maladministration. It is therefore confusing that the Health Service Ombudsman legislation expressly refers to these failures in addition to maladministration (See “A Commission for Public Administration in England”, a note by the Local Government Ombudsmen for England and the Parliamentary and Health Service Ombudsman. Annex A in the *Review of the Public Sector Ombudsmen in England*, a Report by the Cabinet Office, conducted by P. Collcutt and M. Hourihan. April 2000, at pp. 81-82, para. 16).

³⁶ This is sometimes referred to as the *Crossman catalogue*.

³⁷ M. Buckley, “The Parliamentary Ombudsman” (1998) 68 *Adviser* 6-8, at p. 6.

³⁸ *Maladministration and Redress*, First report of the Select Committee on the PCA. 1994/5 (HMSO, 1994) para.10.

³⁹ The Commission for Local Administration in England, *Report on an Investigation into Complaint No 98/1A14244 against London Borough of Enfield*.

⁴⁰ They have a discretion to investigate even if there is a legal remedy where it would not be reasonable for the complainant to go to court.

⁴¹ For example, corporate estate agents, anxious to improve the image of estate agency practice, set up the Ombudsman for Corporate Estate Agents scheme. See M. Seneviratne, “Estate Agents, the Consumer and the Ombudsman for Corporate Estate Agents” [1997] *Consumer Law Journal* 123-133.

⁴² For example, the banking industry. See P. Morris, “The Banking Ombudsman – five years on” [1992] *Lloyds Maritime and Commercial Law Quarterly* 227.

base their decisions on a “fair and reasonable” outcome.⁴³ It has been said that they are dealing with cases which “go well beyond the type of complaint for which ombudsmen were traditionally invoked”.⁴⁴ Moreover, their caseload is no longer confined to resolving “comparatively ‘minor’ grievances”.⁴⁵ The private sector schemes therefore often do present a genuine alternative dispute resolution mechanism to the courts, both for consumers and the industries concerned.⁴⁶

THE OMBUDSMAN'S ROLE

It would be a mistake to conclude from this, however, that the only function of ombudsman schemes is dispute resolution. It is true that in both public and private sectors, ombudsmen schemes were set up as a method of handling individual grievances. Indeed, it has been said that the modern ombudsman institution is “primarily a client-orientated office, designed to secure individual justice in the administrative state”.⁴⁷ But their work is not confined to this. All the ombudsmen in the United Kingdom claim that they are also in the business of improving standards and practice in the sector or industry over which they have jurisdiction. This is unlike the courts, which do not claim to be in the business of improving standards.

Ombudsmen therefore have two roles. They provide redress for individual grievances, but they are also concerned to improve standards.⁴⁸ Thus, an ombudsman is not merely an instrument of redress, but also has the function of quality control.⁴⁹ By investigating individual cases, ombudsmen may highlight more generalised weaknesses in practices, rules and attitudes. Uncovering these weaknesses is of advantage to individuals who have not complained, because the resulting improvement in the system is a generalised benefit. These two functions are not in conflict, nor can they be separated. Indeed, it could be suggested that anyone who handles complaints is only performing half the task if they are not using the casework function to provide feedback to the organisation concerned. This feedback can relate to improvements in the way the organisation deals with complaint handling internally, so that fewer cases need to involve the ombudsman. It can also relate to improvements in other procedures, where for example the complaints reveal a failure in the system.

Of these two functions, which should take precedence? Most ombudsmen see the dispute resolution function as being the primary role. For example, the present Parliamentary Ombudsman notes that his “primary objective is to obtain a remedy for those who have suffered injustice”; working to ensure good public administration is

⁴³ Many ombudsmen are able to use “fairness” as an overriding consideration in making their decisions. Thus, “where the legal provisions work against the interests of the consumer most ombudsmen are able to “trump” the legal rules by recourse to what is “fair in all the circumstances” or “unfair treatment” or good practice” (R. James *Private Ombudsmen and Public Law* (Dartmouth, 1997), at p. 210. See generally pp. 210-212).

⁴⁴ *Ibid.*, at p. 223.

⁴⁵ *Ibid.*, at p. 225.

⁴⁶ Perhaps the common factor, in relation to the courts, is that both public and private schemes provide an alternative means of obtaining access to justice.

⁴⁷ K. Friedman, “Realisation of ombudsman recommendations” (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 105.

⁴⁸ In a world-wide survey of ombudsmen, conducted in 1988, 41 of 43 ombudsmen throughout the world said that one of their functions was to improve administrative practices. The same number included proposals for improving legislation and administrative rules as one of their functions. Indeed, only six respondents to survey regarded the seeking of satisfactory action for the individual as their prime task. The majority (27) believed that this task was as important as ensuring that the authorities within their jurisdiction fulfilled their duties (W. Haller, “The place of the ombudsman in the world community” (1988) *Fourth International Ombudsman Conference Papers*, Canberra, at p. 29).

⁴⁹ G. Drewry, “The Ombudsman: Parochial Stopgap or Global Panacea?” in P. Leyland and T. Woods (eds.) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997), at pp. 88-89.

stated to be “another important aim”.⁵⁰ There is clearly a strong linkage between these two roles, but the question, particularly for the public sector ombudsmen, is whether they should be devoting their main energies into resolving individual cases, or to tackling the systemic faults in public administration which produce such cases.

Most individual ombudsman cases have limited significance. On the other hand, ombudsmen can with justification be categorised as a “deterrent to maladministration”, and cumulatively their decisions “help to propagate principles of good administrative practice”.⁵¹ In view of this, it can certainly be argued that ombudsmen should see their main task as seeking out systemic causes of injustice in a way courts and tribunals are ill-equipped to do.⁵² Raising standards is the most appropriate way of improving consumers’ position in general. The resolving of individual disputes, while clearly of great importance, should be one of the means to this end, rather than an end in itself.

RETHINKING THE SYSTEM

Ombudsmen are a huge success story. Between them, they have handled thousands of cases, and brought redress to thousands of consumers and citizens, where none may have been available. They have helped to improve industry practice and administrative procedures. They have demonstrated that informal, inquisitorial methods of dispute resolution can provide access to justice in both quality and quantity. But the institution is not sacrosanct. Indeed, there are few institutions which “work so well that they cannot be improved”.⁵³ The time perhaps has come when the present system needs rethinking.

In some ways it is their very success which necessitates this. In both sectors, ombudsmen have increased and multiplied. Their proliferation has occurred with little thought as to how they relate to each other, the civil justice system, or the administrative justice system. There is now a need for rationalisation, as this proliferation of schemes causes confusion for consumers, as well as jurisdictional overlaps and gaps.

Consumerism is also driving the impetus for change. In the public sector, the acceptance that citizens have rights to redress for poor service delivery⁵⁴ has led to a proliferation of internal adjudicator schemes, and internal redress mechanisms. The place of the ombudsmen in this new approach to service complaints needs to be addressed. In the private sector, there have been calls for a consumer ombudsman, which raises the question of the extent to which ombudsmen can solve the problems of dubious trading practices.

FINANCIAL SERVICES

“Rationalisation” was one reason for the reform of the system of ombudsmen in the area of financial services. Eight separate schemes have been integrated, in order to rationalise the existing arrangements through the creation of a single ombudsman

⁵⁰ M. Buckley, “The Parliamentary Ombudsman” (1998) 68 *Adviser* 6-8, at p. 7.

⁵¹ G. Drewry, *op.cit.*, at p. 83.

⁵² N. Lewis *The Classical Ombudsmen* (1992) University of Sheffield, Centre for Socio-Legal Studies (unpublished).

⁵³ R. Gregory and J. Pearson, “The Parliamentary Ombudsman after twenty-five years: problems and solutions” (1992) 70 *Public Administration* 469-498, at p. 484.

⁵⁴ The Citizens’ Charter has been important in this respect.

scheme and a single compensation scheme.⁵⁵ In this sector, there will now be one single scheme, the Financial Ombudsman Service, which will operate under the supervision of the Financial Services Authority. Now, not only will consumers be able to have one point of entry, whoever the provider of the financial services, but jurisdictional gaps and overlaps may also be removed. This should produce a more efficient and comprehensive system of investor redress.

The role of the ombudsman within this new scheme is also of interest. The Financial Ombudsman⁵⁶ is closely attached to the regulator of the industry, the Financial Services Authority. Although the authority will not be concerned with individual complaints, the ombudsman will report complaints statistics to the complaints authority. He will also be expected to report systems failures to the authority. Thus, the ombudsman will deal with individual complaints and provide redress to consumers, but these will be used (by another body) to perform a regulatory function. Ombudsmen are not, and should not be, regulators, but they should see their role as providing a means of suggesting improvements in systems, where the casework reveals systems failures.

Current concerns for the those private sector schemes which still exist,⁵⁷ are in relation to the coverage of the schemes, and what should be done about those in the industry who are not prepared to join the scheme.⁵⁸ Outside the public sector, there are also questions to be addressed in relation to ombudsman schemes which deal with professional services. At present, there is a scheme for legal services. Should other professional services operate ombudsman schemes? If so, what is the appropriate role for such ombudsmen, how should their jurisdiction relate to the self-regulatory mechanisms of the professional bodies for dealing with complaints, and to regulation of the profession in general?

JOINED-UP OMBUDSMEN

Rationalisation is also needed in the public sector. Here, ombudsman systems developed when citizen problems could be categorised into central government, local government and the health service. The relevant legislation creating the public sector ombudsmen assumed that any publicly provided service would be the discrete responsibility of either central government, local government or the National Health Service. This is no longer valid. There are complaints which cross these jurisdictional boundaries. This is especially so in the area of health and social services, but similar problems can arise in other areas.

By way of an example, a recent Local Government Ombudsman investigation⁵⁹ involved a complaint about the care an elderly woman received in a private nursing home, where her place had been purchased by a local authority. There are some legal concerns in relation to the respective responsibilities of local authorities and the health

⁵⁵ *Financial Services and Markets Bill: A Consultation Document*, HM Treasury, July 1998, para 10.

⁵⁶ The first Financial Ombudsman is Walter Merricks.

⁵⁷ These are the estate agents ombudsman and funeral ombudsman.

⁵⁸ There is some disappointment that only a few independent estate agents have joined the Estate Agents Ombudsman scheme. The DTI and the OFT see increased membership of the scheme as a way of ensuring that consumers have a better deal from estate agents. Take up of membership of the scheme is to be reviewed in May 2000. If there has been no voluntary increase in membership, the option of a statutory scheme will be explored (*The Ombudsman for Estate Agents 1999 Annual Report*, p.10).

⁵⁹ The Commission for Local Administration in England, *Report on an Investigation into Complaint No 97/A14002 against the London Borough of Bexley*.

services, which can only receive a definite answer through the courts. However, a concern in this case was the fact that the complainant⁶⁰ was “forced to go to two Ombudsmen”, the Health Service Ombudsman and the Local Government Ombudsman, about what was “essentially, the same complaint”.

Has the time now come to have a single, public sector ombudsman system, bringing together the present three systems? Some 25 years ago, the then Parliamentary Ombudsman, Sir Alan Marre, recognised that in the long term there would need to be consideration of how a more co-ordinated total system, more directly related to the interests of the public, could be brought about.⁶¹ This idea was examined in 1988, to explore whether there should be an integrated service, under which all the ombudsmen would operate under the same legislation. The decision then was against recommending the creation of a single scheme.⁶²

The proposal now however is that there should be an integrated service for the public sector ombudsmen in England. This recommendation is the result of the review⁶³ conducted by the Cabinet Office, which reported on 13 April 2000. The review, which was announced in March 1999, was into the organisation of the public sector Ombudsmen in England. It was the ombudsmen themselves, who had suggested a review, on the basis that the present boundaries between their work no longer reflected service delivery in the public sector. The jurisdictional boundaries were confusing for the public. The review considered whether the present organisational arrangements of the ombudsmen were in the interests of complainants, given the move towards integrated provision.

The review acknowledges that now that there is greater emphasis on collaboration in the delivery of public services, there should be a more integrated avenue of redress. Although the public sector ombudsmen have always maintained the closest co-operation, conducting composite investigations, and re-routing complaints where necessary, the time seems to have come for a one-door approach, a “one-stop shop”, as it is often described, for consumers. The review recommends that a new Commission be established,⁶⁴ which will bring the three ombudsman schemes together. A collegiate structure is suggested, with all the ombudsmen being able to cover the complete jurisdiction. The review does however acknowledge the advantages in retaining functional roles, for example, for local government and the health service.

Another model would be that adopted in financial services, with a chief ombudsman, and regional or sectoral ombudsmen operating under an umbrella structure. The review rejected this model, believing that each ombudsman should be responsible for her or his own cases, and not subject to any other ombudsman. It was suggested that the new integrated service⁶⁵ would be chaired by one of the ombudsmen for the purposes of representing it externally, for management purposes, and when there is a requirement to answer to Parliament. The English public sector ombudsmen have warmly welcomed the recommendations of the Cabinet Office review. There can be little doubt that an integrated service is the way forward for the public sector ombudsmen.

⁶⁰ In this case, the complainant was the grandson of the elderly woman, who had died in the nursing home.

⁶¹ *Parliamentary Commissioner for Administration Annual Report 1975*.

⁶² JUSTICE, *Administrative Justice: Some Necessary Reforms. Report of the Committee of the Justice-All Souls Review of Administrative Law in the United Kingdom* (Clarendon, 1988).

⁶³ *Review of the Public Sector Ombudsmen in England. A Report by the Cabinet Office, April 2000*, conducted by P. Colclutt and M. Hourihan.

⁶⁴ This would have to be done by primary legislation.

⁶⁵ No name is suggested for the new Commission, but Commission for Public Administration in England seems appropriate.

THE COMPLAINTS PYRAMID

In addition to integrating the public sector ombudsmen into one system, attention needs to be paid to their role and function. One of the considerations of the Cabinet Office review was the interaction between the ombudsmen and other relevant complaints authorities. In well-established ombudsman systems, the ombudsman is at the top of a pyramid of grievance handling machinery, the last port of call when other complaint-handling procedures have been exhausted.

The Citizens' Charter has been particularly influential in the area of consumer rights and complaints systems in the public services. There has been a change in the culture of service delivery and complaint handling. In the public sector, this has led to an intermediate layer of complaint handling, adjudicators funded by the relevant department or organisation, but operating independently of them.⁶⁶ Ombudsman systems are now one among many schemes for handling complaints.

The growth of these systems for internal and external reviews calls into question the appropriate function of ombudsmen. In view of this intermediate layer of complaints handling, should the ombudsman's function be moving towards that of quality assurance for these external review systems? If these external mechanisms are providing consumer satisfaction, there will be less need for the ombudsman to become involved in routine complaints. The ombudsman could then reserve her or his investigative function for the more complex cases, or those that were resistant to resolution at this level.⁶⁷ This approach, sometimes referred to as super-escalated complaints environment,⁶⁸ is not without its problems. It can be a lengthy process before there is a final outcome in resistant cases. This can be a source of dissatisfaction for complainants, which has consequences for the credibility of the system.

CONCLUSION

In all this rationalisation and rethinking, what really matters must not be forgotten. Any change must be made with the aim of making the system more effective rather than simply in order to be seen to making change. Consumers and citizens with a justified complaint must be able to obtain redress within a reasonable length of time. A rationalised system must not become more bureaucratic. One of the strengths of the ombudsman system has been its informality and flexibility. These must not be

⁶⁶ Examples of such schemes include the Revenue Adjudicator, appointed for complaints against the Inland Revenue in June 1993, in response to the Citizen's Charter initiative. The remit was extended in 1995 to include Customs and Excise and the Contributions Agency. The office is now known as "The Adjudicator" and its current holder is Dame Barbara Mills. Her role is to act as an "impartial referee" where people feel their affairs have been poorly handled, or they have been badly treated by the organisations within the remit (Adjudicators' Office *Annual Report 1998*, p. 8). The remit does not extend to complaints about the law, government policy, matters which are currently or have been before the courts, nor disputes about the amount of tax people pay. The latter disputes are dealt with by statutory procedures. The service is free. In 1997/98, the Adjudicator dealt with 2494 cases, at an average cost £94 per case. There is also a Child Support Agency independent case examiner, established in response to criticism by the Parliamentary Ombudsman of the agency's complaint handling procedures. The case examiner is Anne Parker, and the service started in April 1997. Over 1000 complaints were received in the first year of its operation, of which over 80% were cleared. Despite this, the Parliamentary Ombudsman still receives a large number of Child Support Agency complaints.

⁶⁷ The Parliamentary Ombudsman has been described as providing a Rolls-Royce service. If the office is primarily client-orientated, such an approach is probably unnecessary. It deals with too few complaints, and handles them too thoroughly. If it is primarily for individual remedies, there needs to be more cases put through the system. However, if it is a mechanism for drawing attention to administrative deficiencies, with the primary role of seeking out injustice at a systemic level (in a way a court could not do), this thorough approach is appropriate.

⁶⁸ *Satisfaction in a super-escalated complaint environment*. A report by the Customer Management Consultancy Ltd to the Office of the Legal Services Ombudsman (1998). Lord Chancellor's Department, Research Programme.

jeopardised in any proposed reforms. Ombudsmen are a great success. They have proved themselves capable of performing the tasks for which they were appointed. One of their great strengths is their remarkable adaptability to suit a wide range of political and constitutional contexts. Ombudsmen in the U.K. are capable of adapting themselves to meet the challenges of the twenty-first century.

SOCIETAL DYSTOPIAS AND LEGAL UTOPIAS? REFLECTIONS ON VISIONS PAST AND THE ENDURING IDEAL OF CRIMINAL CODIFICATION

JUDITH ROWBOTHAM* and KIM STEVENSON**

INTRODUCTION

PERIODICALLY, CONCERNS ABOUT THE LAW and its operations, and its relevancy to contemporary society, induce a variety of commentators (including politicians and legal practitioners) to reflect on the desirability of reform. In England, from the nineteenth century on, such reflections have frequently focused on the desirability of establishing the codification of the criminal law. Over the last fifteen years, with codification once more starting to appear on the reformist agenda, there has been an interest in examining the previous serious attempts at codification, those of the sixty-odd years between 1830 and the late 1880s, in order to extract lessons from them.¹ The assigning of 'blame' for the failure of these attempts provides a sub-text indicating a current regret for 'lost opportunity'.² *Heroes*, notably Sir James Fitzjames Stephen and Lord Brougham, and *villains*, including Sir Alexander Cockburn and other (often unspecified) leading members of the judiciary, have loomed large in the essentially narrative examinations of nineteenth century codification. The responsibility for the historic failure of this essentially utopian project is assigned primarily to the machinations of the *villains*, principally Cockburn. Some recent comment has also sought to explain the disappearance of the proposed Code Victoria from the politico-legal landscape of the 1880s by pointing to a supposed lack of contemporary support for the project, especially within Parliament.³ Yet neither interpretation can be fully sustained as explaining the demise of codification attempts, especially when the codification project is placed in the wider societal context.

There was considerable support, both inside and outside Parliament for this grand project. This included the judiciary, who have been unfairly landed with the largest share of the responsibility for the failure of the codification project, especially during the 1870s and 1880s. Indeed, had the project been persisted with, it is highly likely that it would have passed into law. It is also misleading to focus too much on Stephen, and the condemnation of his code by Cockburn. For one thing, Cockburn died in November 1880, and more importantly, there were alternative versions of a draft criminal code available during that decade. Thus, the 'disappearance' of the codification project later in the 1880s cannot be solely ascribed to either the 'failure' of Stephen or the machinations of Cockburn or other members of a hostile judiciary. Instead, this article explores the interfaces between law, society and politics to explain the disappearance of codification from the legal reform agenda.

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¹ The orientation of this article derives from an on-going project, based at Nottingham Trent University, examining the Victorian and contemporary parallels for social panics and legal responses, exploring the significance of the past through interdisciplinary research.

² See for example, J. Hostettler, *Politics and the Law in the Life of Sir James Fitzjames Stephen* (Barry Rose, 1995); L. Radzinowicz, *Sir James Fitzjames Stephen and His Contribution to the Development of the Criminal Law* (Seldon Society Lectures, Spottiswoode, Ballantyne & Co., 1957); K. J. M. Smith, *James Fitzjames Stephen, Portrait of a Victorian Rationalist* (Cambridge University Press, 1988).

³ J. A. Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (Macmillan, 1983); Hostettler, *op.cit.*

It is frequently presumed that legal discourse needs to be assessed, in scholarly terms, independently of the chronological dimensions provided by consideration of the historical societal contexts.⁴ However, the original motivations for the codification project, and the factors leading to genuinely determined efforts to place codification on the statute books, only become substantial when examined against a broad range of socio-cultural and economic factors. Aspirant legal reformers, and interested politicians, as well as the opponents of codification, were very powerfully influenced by contemporary considerations. Too narrow a focus, especially on James Stephen's efforts and reactions to his initiatives, encourages neglect of the full range of considerations driving nineteenth century personalities interested in codification. This provides lessons for assessments of current interest in codification. Efforts at legal remedies for social ills can be said to come to prominence at times when widespread contemporary fears, whether based in reality or not, seem to argue for the imminence of social dystopias. This article will thus place the issue of legal reform at the heart of the search for the ideal society in Britain, providing a framework for a consideration of current projects in the light of desires for the ideal or *utopian* European community.

VISIONS OF A CODE VICTORIA

Concerns about the impact of increases in population size and urbanisation in the early nineteenth century created a cultural climate in which fears of a potentially dystopian future for Britain could flourish. The perceived threat to the social order of public disorder, criminal behaviour and immorality arguably precipitated a shift towards a more formal regulation of society through the universal application of national codified laws as the most practical remedy against chaos.⁵ Legal visionaries, such as Lord Brougham, believed that the fundamental framework of the law and its potential prescription for defining national standards of societal behaviour could deliver the concept of an idealised future or social utopia. They believed that the invocation, at increased levels, of legislation to prevent, curb and punish anti-social activities would provide an effective remedy to this perceived threat. Providing the substance for the realisation of their vision of an absolute and comprehensive codification of the existing body of criminal law required unwavering self-belief and determination beyond the human will of many of their contemporaries. The visionary masterplans of such thinkers provided the material for one of the most ambitious projects in legal and social engineering ever undertaken in England, though it can be argued there was precedent for such in Napoleonic France. As already emphasised, such visionary undertakings deserve to be interpreted not just as a reformulation of the law, but as an exercise in social forecasting in direct reaction to contemporary crises. The idea was that the law, properly enacted, has the capacity to provide a social utopia by attempting to create a better and more stable society, safeguarding it against lawlessness by means of an easily accessible and wide-ranging legislative code.

As early as 1623, Sir Francis Bacon had proposed that obsolete laws be repealed to avoid stifling the living laws "in the embraces of the dead".⁶ Hale also advocated a *Corpus Juris Communis*, though failed, formally, to develop his ideas. The nineteenth

⁴ Professor Richard Evans, "Does Social History Have a Future?", unpublished paper, Social History Society Conference, Cambridge, January 2000.

⁵ See, for example, D. Eastwood, *Governing Rural England: Tradition and Transformation in Local Government 1780-1840* (Clarendon Press, 1994).

⁶ De Augm. Scient., Bk. viii. Aph.57 as cited in "Codification of English Law: A Retrospect and a Prospect" (1884) *Edinburgh Review* at p. 478.

century English equivalents of visionaries like Bacon and Hale were fascinated by the 1811 French *Code d'Instruction Criminelle* and *Code Penal* which incorporated, and defined, universally accepted societal norms, envisioning the future health and security of the French nation. In the context of an on-going debate over levels of criminality and the effectiveness of the legal system, the need for a re-organisation of the existing substantive criminal law was widely agreed: "The rough general rules (which left much scope to individual judges and juries) and a maze of statutory detail (which sought to delimit the range of the death penalty) was coming to seem seriously inadequate to the reform-minded".⁷ Apart from anything else, there was a practical incentive to reform provided by the increasing difficulties experienced by non-summary courts in achieving convictions, even in apparently clear-cut cases. Juries were notoriously reluctant to convict, especially because of the huge range of offences which carried the death penalty. This is the context in which, in 1824, the ambitious enterprise of codifying and consolidating the whole of the criminal law was first mooted: it undermined the so-called "economy of deterrence" which governed thinking on crime and punishment in the interests of social stability.⁸

At this period, a mixture of religio-moral (Evangelical) and philosophical (Utilitarian) idealisms shaped the thinking of many influential figures in British society, creating a climate in which a reform agenda became central to political strategies, regardless of governmental party complexion. It is, here, worth pointing out that (unlike many current reforms) the major nineteenth century legal reforms were, with the possible exception of the franchise campaigns, never central to *party* politics. Support for, or opposition to, such reforms operated largely independently of party loyalties. This was important, for it ensured the continuation of debates, in Select Committees and Royal Commissions, through changes of government.

For those interested in legal reform, Bentham's *Principles of Penal Law*, seeking rationale and clarity in the law through the application of scientific principles, was a central text. Benthamites (including figures like Lord Brougham) believed law should be enacted in the interests of the greater good, where definable harm could be shown to result from a particular practice or conduct.⁹ In 1824, the then Home Secretary, Sir Robert Peel, responded to the widespread consciousness of a compelling need for action, setting up a Select Committee which reported in 1825. The recommendation was for the consolidation and simplification of the criminal law, and on that basis, Peel introduced legislation in March 1826. The primary objective was beginning the not insignificant task of harmonising and consolidating the immense array of existing legal rules and common law doctrines into formal legislation. It was estimated that there were 20,000 existing Acts of Parliament contained in some 36 volumes, which necessitated identification, cataloguing and condensation. Parliamentary support for the reforms mirrored wider support amongst respectable society. Peel and the succeeding Whig ministry successfully piloted through the first Criminal Law Amendment Acts 1826-32, comprising eleven consolidated statutes. For example, in 1828, law relating to offences against the person was targeted. The Act repealed some 60 existing statutory provisions (dating back to the reign of Henry III), and consolidated 38 new sections.¹⁰ Many of these formed the basis of the subsequent all-encompassing Offences Against the Person Act 1861. Manchester comments that in securing the co-operation

⁷ W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (Sweet and Maxwell, 1989) at p. 598.

⁸ Eastwood, *op.cit.*

⁹ See, "Bentham's Papers on Codification" (1817) *Edinburgh Review*; A. Manchester, *A Modern Legal History of England and Wales 1750-1950* (Butterworths, 1980) at pp. 39-40.

¹⁰ An Act for consolidating and amending the Statutes in England relative to the Offences against the Person 9 Geo.IV, c.31.

of the judges Peel surpassed the efforts of all other subsequent reformers during the nineteenth century.¹¹ However, his success must be assessed against the background of lawlessness then current. It must also be added that it was a very limited first step in consolidation, and that its real significance, certainly in the broader social context, lay elsewhere.

As historians emphasise, the major contemporary resonance was that Peel was successful through his reforms in reducing the list of offences carrying a mandatory death penalty.¹² In promoting a renewed effectiveness in the legal system, he initially was held simply to have reinvigorated the economy of deterrence. However, he undoubtedly promoted impulses for further legal reform as a remedy for societal ills. In the climate of continuing unrest (including the development of the Chartist movement) after passage of the Great Reform Act in 1832, the example of the successful management by the French authorities of the 1830 'revolution' encouraged the supporters of what constituted a hugely ambitious enterprise - the codification of the entire criminal law. In July 1833 Brougham, the Lord Chancellor, appointed a Royal Commission to digest the enacted, and unenacted, criminal law into two new statutes entitled Crimes and Punishments, and Criminal Procedure. Brougham regarded the inquisitorial system used by French justice as more effective in controlling the unruly urban masses, having little time for the flexibilities of the English common law or for powers of judicial interpretation.¹³ In this, he was in line with utilitarian thought. The Criminal Law Commission, acknowledged as Benthamite in its membership, comprised some formidable names, including the highly respected Professors of Law, John Austin, Thomas Starkie, and Andrew Amos as well as the lawyer Henry Bellenden Ker; something which underlines the potential for support for the project within the legal profession.

It is, also, a mark of the widespread cross-party political support for this exercise in legal reform that, despite changes in government, a Criminal Law Commission remained active into the 1850s, though with various modifications to the membership and the precise shape of its remit for reform. The members laboured assiduously, producing 13 reports in as many years. The Fourth Report, for example, was critical of the unsystematic and contradictory accumulation of laws, lacking any firm rationale or principle, especially in relation to offences against the person and property. Brougham consistently ensured that their comments were brought before Parliament. In May 1844, he tabled a Draft Act of Crimes and Punishments, asking "How much longer will Parliament be content to let the Criminal Law lie scattered over so many books - locked up in so many statutes - floating, as it were, in the air of Westminster Hall".¹⁴ Ignorance of the law is, of course, no defence - but as Brougham pointed out, how could the people possibly know what constituted the law if it was so vague and uncertain?

Brougham also deprecated the creative role of the judiciary in developing and augmenting the criminal law through judicial dictat rather than Parliamentary debate: "I want . . . to leave as little as possible to the judge's discretion. . . I would have the law speak through the judge who delivers it, and not the judge make the law he delivers".¹⁵ The judicial stranglehold on the control of the law prompted Brougham to

¹¹ *Op.cit.*, at p. 41.

¹² Vic Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford University Press, 1994).

¹³ E. Foss, *A Biographical Dictionary of the Judges of England 1066-1870* (John Murray, 1870) at p. 130.

¹⁴ Henry P. Brougham, *Speech of Lord Brougham upon the Criminal Code in the House of Lords* (James Ridgeway, 1844) at p. 4.

¹⁵ *Ibid.* at pp. 14-15.

comment that this was “a great and incurable defect”, only to be mitigated through the promulgation of a more prescriptive Code. Adopting the French model of the *Code Civile* would, he advocated, “rescue the judges from the chaos of the Ancient law”, giving them a “code purged of such shameful impurities”.¹⁶ In 1849, the Commissioners issued their last report on criminal procedure, but apart from a handful of short Acts (covering specific subjects such as burglary, robbery, and arson) little, immediately, seemed to have resulted from these endeavours. It was, according to Cross, the “largest and most abortive enterprise yet seen in this country”.¹⁷ Yet this is an unjust criticism. It undoubtedly advanced the project of codification by helping to provide the framework for the subsidiary project of consolidation. This in turn was seen as a vital preliminary to the passage of the further parliamentary reform which, during the 1850s, was identified as a necessary societal development.

Thomas has argued that tidying up the criminal law and making it more accessible was possibly of less importance to the Commissioners, and presumably to would-be reformers in Parliament, than the opportunity “to reduce the scope for arbitrary decision-making by prosecutors, judge and juries alike”.¹⁸ However, this is to ignore the pressures placed on the legal system and politicians by societal developments. Particularly after 1848, and despite increasing individual and national prosperity, there were growing fears over the threats to communal and national security posed by the ‘dangerous’ classes, those identified as most likely to need the attentions of the courts.¹⁹ If Chartism was seen as a spent force, the masses to whom it had appealed were still believed to be a constant menace in the social climate of the 1850s.²⁰ The same commentators, such as Brougham, Viscount Ingestre, or John Parker, who promoted codification were also vocal on these issues in a wide range of periodicals and newspapers throughout the 1850s.²¹ They recognised that a further extension of the franchise was inevitable, and sought to promote prior legislative reform to ensure that this expansion of democracy did not destabilise the nation. This is underlined by Brougham’s comments to the Lords in March 1855. He argued that codification “would not only separate the disreputable classes from the bettermost folks, and thus restrain the former, but it would render riotous proceedings and other like outrages impossible”.²² A highly refined and well-elaborated criminal law, with an effective means of execution, was crucial if society was to move forward from the legal relics and barbarism of the previous unenlightened age to a more enterprising, bright and democratic future.

The filibustering and protracted debate that surrounded codification proposals underlines the gap between vision and reality: the Commission had identified its desirability, but not put forward any schedule for its establishment that Parliament could consider acceptable. In 1852 Lord St. Leonards ensured the enactment of a digest of criminal offences. Charles Sprengel Greaves, (editor of *Russell on Crimes*), and James John Lonsdale were directed to reconsider and amend the Bills produced by the

¹⁶ *Ibid.* at p. 31.

¹⁷ R. Cross, “The Reports of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853” in P. R. Glazebrook (ed.) *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens, 1978) at p. 5.

¹⁸ D. A. Thomas, “Form and Function in Criminal Law” in Glazebrook, *op.cit.*, at p. 22.

¹⁹ See, for example, *Report of the Rural Constabulary Commissioners* (1839) Parliamentary Papers xix, at p. 169.

²⁰ Gertrude Himmelfarb, *The Idea of Poverty. England in the Early Industrial Age* (Faber & Faber, 1984), at pp. 371-400.

²¹ Viscount Ingestre (ed.), *Meliora or Better Times to Come. Being the Contribution of Many Men Touching the Present State and Prospects of Society* (J. W. Parker & Son, 1853); Lord Brougham, *Addresses on Popular Literature and the State of Society* (Edward Law, 1858).

²² *Lord Brougham’s Speech on Criminal Law Procedure* (James Ridgeway, 1855) at pp. 9-10.

Commissioners, incorporating both statute and common law. They were advised to start with the one area widely acknowledged to be the most important, and problematic, that concerning offences against the person.

CONSOLIDATING THE POSITION

Consolidation was not, as examination of the parliamentary debates indicates, without its controversies. It was not until 1861 that the resultant act passed onto the statute books. But its lengthy and stormy passage emphasises the point that, where there are wider societal factors driving on reform, opposition related to legal detail succumbs to the wider imperatives. In 1853, Lord Cranworth, succeeding St. Leonards, solicited the views of the judiciary and asked for their comments on the draft bills relating to offences against the person and larceny, but received a none too favourable response. His judicial colleagues were opposed to the idea of codification; fearing (rightly) that politicians and visionaries such as Brougham would see consolidation as a first step along the path to codification.²³ Vociferous criticisms were made to the effect that the Bill was totally wrong in principle with considerable inaccuracies, blunders and mistakes.²⁴ But despite this, the will to achieve consolidation as a measure of social as well as legal reform continued throughout the 1850s, punctuated by reminders from Brougham of the ultimate dream of criminal codification. The consolidation brief was to simplify “the statute laws of the realm, . . . [or parts thereof] combining with that process, if they should think it advisable, the incorporation of any parts of the common law or unwritten law”, in the interests of a more orderly society.²⁵

The Statute Law Commission appointed in 1854 initially resolved to consolidate the whole of the statutory criminal law and employed an army of barristers to assist them. It was a huge task. Over 14,000 statutes needed to be reduced to approximately 300 new enactments.²⁶ But some of those involved, notably Greaves, were concerned about the long-term impact of restricting the reforms to consolidation. Even if all the obstacles could be surmounted and “all the statutes consolidated, without alteration or amendment, what would be effected by it?”²⁷ As the law would not be changed or altered in any substantive manner the end result would simply be a *collection* of statutory provisions including those that ought to be repealed. Greaves made his reservations known to Cranworth. The consequence was the preparation of nine consolidating Bills which were later reduced to the seven Consolidating Acts of 1861. The Commission also threw up a number of problems associated with consolidation: problems which undoubtedly in the longer term highlighted the need to consider the greater possibilities contained in codification, with its opportunities for amendments to existing legislation.²⁸ In the Commons, for example, Mr Bowyer criticised the whole consolidation process on the grounds there was much “repetition and unnecessary matter” which might have been reduced “had there been proper scientific definitions of what constituted certain offences”.²⁹

²³ “The Judges on Codification, Observations on the Answers of the Judges” (1854) *Edinburgh Review* vol. xcix, pp. 573-581 at p. 575.

²⁴ *Ibid.* at p. 577.

²⁵ C. S. Greaves, *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict. with Notes and Observations* (Stevens & Sons, 1861) at p. xvi.

²⁶ HC 1856 1R [140] 719 *et seq.*

²⁷ *Op.cit.*, at p. xxiii.

²⁸ *Op.cit.*, at p. 43; and see Lord Campbell’s comments in *The Times* 24 February 1860 3d.

²⁹ HL 2R 1857 [146] at p. 1354.

Subsequent perspectives have downplayed the 1861 Offences Against the Person Act, arguing that it was spectacularly flawed, lacking cohesion and rationale. Yet its importance was enormous: it was arguably the most significant piece of positivist legislation to be enacted during the nineteenth century. Its effects have been lingering. Even today it is responsible for some 80,000 offences a year (though its repeal is now impending). Yet despite defects in its draftsmanship, the Act was fundamental in fusing both existing statutory provisions and some common law rulings to prescribe a national centralised standard of behaviour. It certainly made the dream of codification more substantial, even if contemporaries did not immediately comprehend this. Greaves, for example, concluded that “I have shown that codification is out of the question and that mere consolidation is impracticable” and advised that reform should be approached by taking a specific subject, collecting all the clauses on that subject and confining all amendments to those that are absolutely and practically necessary.³⁰

As early as 1863, discussion of codification reappeared, as part of the wider dialogue focusing on further (and better) attempts at consolidation. Westbury raised the issue in the Lords, and *The Times* gave it a considerable airing, showing a growing degree of public endorsement. Another Royal Commission was appointed in 1866, but its efforts became lost in the debates surrounding the Reform Act of 1867. It was hoped that this further extension of the franchise would provide an alternative remedy against the threats to individual and national happiness provided by the dangerous classes. It did not. In the eyes of contemporaries, fears over the level and type of offending continued.³¹ The focus returned to legal reform, but this time with added urgency. The increased levels of democracy resulting from the 1867 Reform Act, and the relative failure of the 1861 Act to control the excesses of the dangerous classes, made concerns over the threats posed by an enfranchised but unenlightened mass electorate more acute. During the 1870s even the trades union movement saw its cause, that of the skilled worker, as being advanced by better control over a range of societal menaces from individuals and groups alienated from respectable society by economic and social, as well as political, factors. With consolidation making codification seem more viable, discussion of the project reached its peak.

PROFESSIONAL RIVALRIES AND POLITICAL AGENDAS

The abortive 1866 Commission did achieve one consequence of note in interesting a number of legal commentators in the concept of codification of the criminal law. Amongst them was the figure most concentrated on by subsequent scholarship (partly because of his well-established skills of self-publicity): the eminent jurist and commentator, Sir James Fitzjames Stephen. Already a self-proclaimed Benthamite and an admirer of Macauley the framer of the 1835 Indian Penal Code, Stephen readily embraced the arguments for codification. He has proved to be its most enduringly high-profile advocate, though not necessarily amongst the best qualified of the legal reformers of the period. However, one of the reasons why he does form an important resource for scholars interested in assessing Victorian efforts at codification is that Stephen was a prolific journalist as well as an active lawyer. As part of his support for codification, Stephen discussed not just the details of his proposed draft and criticisms thereof, but also put his legal proposals firmly in the context of the social imperatives requiring such change, though this aspect has been less focused on. Deeply interested

³⁰ *Notes and Observations op.cit.*, at pp. li-ii.

³¹ F.M.L. Thompson, *The Rise of Respectable Society* (Penguin, 1988).

in the criminal law and the ethical problems it posed, Stephen had previously compared the differences between the adversarial approach of the English legal system and the inquisitorial one of the French, in terms of their social impact far more than their discrete, legal coherence.³² In his articles and books, Stephen had anticipated his coming role in his suggestion that the 1861 Consolidating Acts be re-enacted in a simpler and less technical form because of the social need therefor. He had also previously proposed the creation of a Ministry of Justice “to direct the administration of the law and superintend criminal legislation” for similarly societal reasons.³³ Yet in the late 1860s, Stephen was unconvinced of either the practicality or the desirability of codification of the criminal law in the purely legal dimension. Other figures took the lead in working on potential schemes, including Serjeant Woolrych, who produced a draft code in 1869.

However, in that year Stephen began to qualify himself as the leading public advocate for codification, thanks to his appointment as the legal member of the Governor-General’s Council in India. There, codification of the criminal law was already well-advanced as a result of the identified need to safeguard against any future uprisings or major unrest by promoting ‘civilisation’ in India. A practical criminal code, which was also accessible to Victoria’s Indian subjects, was seen as an essential in this civilising exercise. Stephen praised Macauley’s 1835 efforts at an Indian Penal Code thus, “[it] Seems to me to be the most remarkable . . . [it has] triumphantly stood the ordeal of 21 years experience . . . and has been more successful than any other statute of comparable dimensions”.³⁴ In a remarkable effort, Stephen formulated what became known as the Indian Criminal Code by expurgating all extraneous sections of English criminal law, simplifying the remainder, and amalgamating that with Macauley’s work.³⁵ Flushed with self-confidence as a result, Stephen became convinced that codification of the English criminal law was both desirable and practical as a tool in the campaign to civilise the English counterparts of the Indian dangerous classes, though he still doubted the willingness of Parliament to enact such a measure.

Finding, on return from India in 1872, that codification was once more under discussion by both legal and social reformers, Stephen took the opportunity to develop a central role in the debates. The narrative of his involvement during this period is rehearsed at length in a number of recent volumes, and it is not proposed to repeat this here.³⁶ However, it is important to comment on the reasons why Stephen, rather than any of the other would-be codifiers, achieved contemporary prominence, particularly in the political arena. Stephen’s journalism undoubtedly ensured that his intervention would attract a high public profile, but would not necessarily convince hard-headed politicians that he was a good choice to spearhead a serious attempt to enact a criminal code. First and foremost, Stephen was the one extant English legal figure who had developed a code and seen it put into practice, with contemporary Indian comment praising its accessibility.³⁷ Moreover, though it attracted criticism, there was, as Sir John Holker stressed, also substantial praise. It was seen as a successful enterprise.³⁸

³² See J. F. Stephen, “The Criminal Law and the Detection of Crime” (1860) *The Cornhill Magazine* vol. ii, pp. 697-708; “English Jurisprudence” (1861) *Edinburgh Review* vol. cxiv, pp. 456-486; *A General View of the Criminal Law of England* (Macmillan & Co., 1863).

³³ L. Stephen, *The Life of Sir James Fitzjames Stephen* (Smith, Elder & Co., 1895) at p. 210.

³⁴ *Ibid.* at p. 247 and see Stephen’s commentary in “Codification in India and England” (1872) *Fortnightly Review* vol. xii, pp. 644-672.

³⁵ See Radzinowicz *op.cit.*, at p. 14.

³⁶ See Colaiaco, *op.cit.*, at pp. 200-206; Hostettler, *op.cit.*, at pp. 170-198.

³⁷ Letter of the High Court of Bengal on the Indian Criminal Procedure Bill (Smith, Elder & Co., 1883).

³⁸ HC 1878 [239] 1936. Interestingly enough, Sir Courtenay Ilbert at the time thought more highly of the code produced by another figure, R.S. Wright, for the Colonial Office, though he was later to accord great praise to Stephen’s work as

Stephen also emphasised the debt he owed to English criminal law in drawing up his Code (produced in a remarkably short period of time), making his claims for successful codification seem credible.

This all amounted to substantial credentials in the eyes of administrators like Holker whose support depended on its realisation within a measurable period of time, and on its presentation in a form which would make it an asset to government. Stephen stressed that his proposals took account of these factors.³⁹ He reviewed the 1861 Acts as a preliminary, asserting that while “They have been of great practical convenience in the administration of justice. . . Their arrangement is so obscure, their language so lengthy and cumbrous . . . [that] they present a strange assemblage of incongruities”.⁴⁰ Stephen estimated his codification of these Acts could reduce them to less than a quarter of their existing length. He was also willing to tackle the problem that had defeated the Commission in 1857, that of defining the crime of murder. Sections 11-15 of the Offences Against the Person Act 1861 which provided eight different methods of attempting to commit murder could, he insisted, be condensed into the single line “Whosoever attempts to commit murder shall . . .”. Stephen compared the parts of the 1861 Acts which required reform “to stakes in the bed of a stream which have become the centres of masses of weed and obstructions of every description. If the stakes were pulled out the water would run clear”.⁴¹

Offering to undertake this labour in 1877, Stephen promised that a draft could be completed by the end of the year.⁴² It was, and in a form which made it clear he remained fully conscious of the societal pressures driving governmental interest in the project:

I do not believe that any offence known to the common law is unintentionally omitted from the Code. If any such offence exists, it must be one which, after the most careful search and inquiry, was unknown to every member of the Criminal Code Commission, and . . . if it exists, can scarcely be of any real danger to society.⁴³

Though not the first attempt at such a draft, it was the first to be taken seriously, being referred to the Statute Law Consideration Committee for their confidential observations.⁴⁴ These were not uncritical, but (particularly in the climate of the time) were sufficiently encouraging to convince the government to consider them further.

Much has been made by recent scholarship of the resistance that Stephen’s code encountered, from the judiciary and above all, from the Lord Chief Justice, Sir Alexander Cockburn.⁴⁵ It is explained as the reason why the project failed to come to fruition in 1879-80, and (along with other “pressing” business including Irish troubles) why there was no sustained attempt to represent codification to Parliament. This is misleading. That there was significant opposition is undoubted, and some of it was based on genuine concerns relating to the legal dimensions of the draft code. But much opprobrium, such as that emanating from R.S. Wright, related to professional rivalry. Wright was another who had drafted a colonial criminal code (for Jamaica), which was

it had operated in practice. See M.L. Friedland, “R.S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law” (1981) *Oxford Journal of Legal Studies* vol. 1, at p. 308; Courtenay Ilbert, *Methods of Legislation* (University of London Press, 1912).

³⁹ J.F. Stephen, *A History of the Criminal Law of England* (Macmillan, 1882) at p. 366.

⁴⁰ PRO/LCO1/42.

⁴¹ *Ibid.*

⁴² *Ibid.* Letter dated 1 June 1877.

⁴³ *A History of the Criminal Law, op.cit.*, at p. 360.

⁴⁴ PRO/LCO1/42 Letter dated 2 January 1878.

⁴⁵ For example, see S.White, “Lord Chief Justice Cockburn’s Letters on the Criminal Code Bill of 1879” [1990] *Criminal Law Review* pp. 315-17.

actually intended to provide the model for other colonial codes.⁴⁶ However, by the time he produced his code in 1878, Wright must have suspected that the greater publicity accorded to Stephen's Indian Code would incline colonial administrations to look to the India Office model and not his own.

It could not, of course, be denied that Cockburn's hostility was profoundly damaging, but only in the short term. Cockburn, who had a far higher opinion of himself and his abilities than was shared by most of his contemporaries, had expected to be asked to chair the Royal Commission considering the draft code. Vexation at his 'exclusion' reached such a level that, as Home Office records show, Lord Cairns was forced to take a hand in the ensuing bitter clash of personalities to try to soothe Cockburn's injured feelings.⁴⁷ The Commission presented their completed report on 12 June 1879, the same day that Cockburn sent a long letter to the Attorney General outlining his dissatisfaction with the Bill. Cockburn claimed he strongly opposed the Bill's passage into law because of its defects. While this may be true to some extent, the timing and the record of his earlier resentments suggests very strongly the addition of a more personal motivation. Though in terms of daily practical politics, Cockburn's opposition was damning, leading Holker to withdraw the code (despite his own rejection of Cockburn's criticisms) it was not, at the time, seen as the end of the project. Indeed, it reappeared in early 1880, but again failed to pass onto the statute books.

The usual conclusion is that the change of administration in April 1880, and the consequent shifting positions of key personnel interested in codification, such as Holker, ensured that there would be no further immediate attempt at introducing legislation to Parliament.⁴⁸ This seems a reasonable conclusion. However, it is less reasonable to argue that, despite some further efforts by Stephen, the codification dream evaporated because of lack of popular support and parliamentary interest.⁴⁹ Such emphasis over-inflates Stephen's importance. After all, when the codification project was taken up again in February 1880, a different draft code produced by Edward Dillon Lewis was invoked.⁵⁰ Too elegiac a tone over Stephen's lost dream and elevation to the Bench ignores the continuing public interest in legal reform. The Trades Union Congress had a sustained interest in the codification project. In 1877, Stephen and Wright, along with other prominent figures such as Lord Coleridge, had addressed its members.⁵¹ The TUC Parliamentary Committee subsequently sent a petition to the Lord Chancellor expressing support and requesting involvement in the refining of the code, because the magnitude of such law reform involved not only questions of law and procedure but also "subjects of vital interest to the social and political freedom of the people".⁵² This perspective did not change, as the powerful resolution passed in favour of codification in 1881 underlines. It indicates the extent to which this increasingly powerful national institution saw the need to link respectable skilled working class interests to this type of legal reform, albeit in a more radical direction than the Royal Commission proposal. Almost certainly, an amalgamation of Stephen's code with Wright's code would have suited them best, since the latter was far more radical in certain areas, such as free speech.⁵³

⁴⁶ Friedland, *op.cit.*, at pp. 307-8.

⁴⁷ PRO 30/51/22 Letter dated 15 July 1878.

⁴⁸ Colaiaco, *op.cit.*, at pp. 204-5; Hostettler, *op.cit.*, at pp. 193-5.

⁴⁹ Colaiaco, *op.cit.*, at p. 25; Radzinowicz, *op.cit.*, at pp. 20-21.

⁵⁰ HC, 1880 1R [244] col. 433.

⁵¹ Stephen, "A Penal Code" (1877) *Fortnightly Review* vol. xxi, pp. 362-376.

⁵² PRO/LCO1/42 Letter dated 9 July 1878.

⁵³ See, for example, Hostettler, *op.cit.*, at pp. 191-2.

Codification was also widely discussed in the printed media, not just in specialist publications such as the *Law Times* but also in national organs. In widely-respected and read periodicals including the *Edinburgh Review*, *Nineteenth Century*, and *Fortnightly Review*, articles on legal reform continued to stress the issue of codification, either as a main or a subsidiary focus. Even *Punch* expressed an interest in the topic.⁵⁴ In particular, *The Times* demonstrated an enduring commitment to the project in a number of leading articles into the 1880s, demonstrating the extent to which codification remained on the political agenda.⁵⁵ To argue it was not a major issue because it was not flagged in electioneering as a central policy plank for either main party, or to point to Irish hostility, is to misunderstand Victorian perceptions of the politics of legal reform.

The general desirability of such measures was not then identified as a party-specific issue. The intimate details of proposals were debated not along party lines, but across them, as the passages of the 1861 Act and the 1885 Criminal Law Amendment Act illustrate.⁵⁶ There was, as a result of the efforts of the 1878-9 Royal Commission and Stephen's own work, to say nothing of the input of figures like Wright, a broad political consensus that codification was necessary. The distinctly shaky Disraeli government would not otherwise have dreamed of introducing the measure with a general election looming. As commentators like Hostettler and Colaiaco point out, it was expected that the 1879 Bill would have little difficulty in passing through Parliament. Its reintroduction in 1880 indicates that the furore over Cockburn's intervention had already died down, and that Stephen's response thereto had been widely accepted. True, some criticisms had surfaced, such as those identified by Hostettler in the *Law Times*, but it would have been surprising indeed had reservations not been voiced, and overall, the political mood in 1880 was still positive.⁵⁷ The issue of legal reform was far from dead.

It was not to be expected that an incoming administration would see codification as a matter of immediate urgency, but it did reappear on the government agenda in the 1881-2 Queen's Speech, as a result of the efforts of Liberal supporters, including Henry Broadhurst. A Grand Committee on Law, a clear descendant of earlier bodies examining codification was created in 1882, though it was not, in the end, to issue a report of any substance. The intervention of crises in Ireland and the Transvaal do help to explain the temporary eclipse of codification in the parliamentary debates, but not entirely. More significant was the further exercise in ameliorating the dangerous tendencies of the masses by invoking the civilising effects of an extension of the franchise, as had been tried in 1867. This time, as a result of Acts in 1884 and 1885 the majority of male heads of households were enfranchised, and the boundaries of parliamentary constituencies amended, better to reflect actual demographic concentrations. There was also an attempt to improve the operation of the legal system and remedy the defects of the 1861 Offences Against the Person Act by further efforts at consolidation. Consequently, the debates on legal reform in the first half of this decade were dominated by arguments over the precise details of what emerged as the Criminal Law Amendment Act 1885.

Disappointments over the soothing effects of such measures, and in particular over the practical problems remaining unresolved by the 1885 Act, resulted in a willingness

⁵⁴ "The Essence of Parliament" (20 July 1878) *Punch* vol. 15.

⁵⁵ *The Times*, 12 June 1880, 25 March 1886.

⁵⁶ See, for example, HL 1883 3R [280] pp. 397-407.

⁵⁷ Hostettler, *op.cit.*, at pp. 193-4; Colaiaco, *op.cit.*, at pp. 204-5; Stephen, "The Criminal Code" (1880) *Nineteenth Century* vol. vii, at pp. 140-143.

to revisit codification in 1886.⁵⁸ Time was set aside in the parliamentary session by the new Conservative administration, with a fair expectation of support for such a measure from the Liberal opposition. Stephen himself certainly expected such a development would involve a revival of his draft code. However, it must be remembered that there were now a variety of alternatives, including Wright's draft code, and any committee considering a codification Bill could very probably have sought to amalgamate these alternatives. But in fact, despite promises in 1886 that a "short well-considered Bill amending the criminal law" would be introduced in the next session, which could be expected to "be passed without any great difficulty, notwithstanding the opposition of the Irish members", the codification project was allowed to remain dormant.⁵⁹

The responsibility for this state of suspension, at a time when moves to codify aspects of civil law were proceeding smoothly and successfully towards fruition from the late 1880s into the 1890s, lies not with the Lord Chancellor, recalcitrant Irish members, or a hostile judiciary, but with a now little known legal figure who rejoiced in the soubriquet of 'the real Sleuth Hound of the Treasury'. Henry Bodkin Poland, Senior Counsel to the Treasury at the Central Criminal Court was the man entrusted by Lord Herschell with preparing a codification Bill in 1886, for introduction in 1887. Though he made positive noises to Herschell in Home Office papers, he was, as his subsequent biography based on extended conversations illustrates, profoundly opposed to criminal codification: "Something may be said for codification in general, but nothing for the codification of the Criminal Law. . . It is impossible to codify the Criminal Law of this country. . . the practical difficulties. . . are insuperable".⁶⁰ He did, however, find a number of positive things to say about Stephen's code, including the issue of the locking up of juries. The basis for his opposition to codification was far broader than a simple hostility to some of the aspects of Stephen's code. It was not so much legal, or strictly societal, though he did say to his biographer Bowen-Rowlands that "You cannot stabilise an essentially fluctuating thing like our Criminal Law", because "Any Code would *pro tanto* hamper the Judges in interpreting the Criminal Law in accordance with the requirements of the age".⁶¹ Rather, it was the economic dimension that occupied Poland. As he informed Lord Herschell, he had advised the Chancellor of the Exchequer that he feared such a code, particularly one that would promote the efficiency of the legal system and encourage more cases to be brought before the higher courts, would be too expensive.⁶²

It was still possible that the legal merits of codification could have seen its revival by subsequent governments. The matter remained before Parliament as colonies from Canada to Mauritius adopted criminal codification based on Stephen's Indian Code during the 1880s and 1890s. It remained a matter of interest to the print media too, as states such as Japan toyed with versions of British-style criminal codification. Stephen certainly turned his efforts to advocating the spread of *civilisation* (by which he effectively meant the spread of British values) via the export of criminal codification to nations as diverse as Russia and the USA. But with Bodkin Poland remaining as the economic Cassandra for the project into the early twentieth century, placing codification back on the parliamentary agenda would always have faced considerable obstacles from the Treasury. Also of subsequent significance in explaining the suspension of the codification project was the redirection of the focus of efforts at

⁵⁸ PRO30/51/22 Note, Lord Herschell, 6 October 1886.

⁵⁹ PRO/LCO1/42 Lord Chancellor's papers 1886.

⁶⁰ Ernest Bowen-Rowlands, *Seventy-Two Years at the Bar. A Memoir* (Macmillan & Co, 1924) at p. 305.

⁶¹ *Ibid.* at pp. 305-6.

⁶² PRO/LCO1/42, Letter, Henry Bodkin Poland to Lord Herschell, 6 October 1886.

societally-driven legal reform from the mid-1890s. Neither women's issues nor Irish issues in their *fin de siècle* or Edwardian manifestations were susceptible to solutions via criminal codification. Thus, a Code Victoria was not to be.

FUTURE VISIONS

Such visionary desires to regulate the social order might be interpreted as simply providing the concept of an achievable *legal utopia* for those engaged in the practical operation of the law. However, as we enter the third millennium, many would argue that the visions of legal reform examined by our nineteenth century forebears warrant renewed consideration for much the same set of essentially societal reasons. The major difference is that now, legal reform is very much a matter of party politics. Carnwath J., recently appointed Chair of the Law Commission, has emphasised that he and his predecessors have been searching for the "Holy Grail" of codification for the last twenty years. The Commission has produced some twenty detailed reports awaiting implementation but these have been hampered by the lack of any systematic procedure or concerted political will to streamline the criminal law. Carnwath advocates that immediate action is necessary unless the Government is content "to leave the courts fighting twenty-first century crime with nineteenth century weapons".⁶³ Further impetus is provided by the recent enactment of the Human Rights Act 1998 which, as the previous chair of the Law Commission, Arden J. argues, has created an even more urgent and pressing need for reform as "many aspects of the criminal law may undergo change" once the Act comes into force.⁶⁴ If the modernisation of the criminal law is, to use Carnwath J.'s words, to be more than "simply a pipe dream" then the Government must take a more forward thinking and proactive approach. As Carnwath hopes, "A political commitment to codification of the criminal law with a programme to achieve it over this and the next Parliament, would be the ultimate prize of my term of office".⁶⁵

To figures such as Brougham, Stephen, and Holker, the codification of the criminal law was much more than a pipe-dream. It is so now, being identified as the key to achievement of a more stable and civilised society. Clearly it is a utopian ideal, but such are generally necessary for the achievement of any socially-driven legislative reforms. Now, however, there is an extra dimension, carrying with it overtones of *patriotism*. Present reformers must accept that unless Britain seizes the initiative, its sovereign power to determine both the substance and procedural aspects of the criminal law will be severely curtailed. Some elements of the executive of the European Union are already pressing for a common pan-European criminal justice system or *corpus juris*. The Eurojust Project demands not only a pan-European prosecutor but also a uniform, *i.e.* codified, body of criminal law, applicable in all member states. Currently Jack Straw, the Home Secretary, has rejected the notion of a uniform legal system on the grounds that legal systems are embedded in national and political cultures - an interesting reaffirmation of the socio-cultural dimensions to such legislation. He asserts that despite the fact that the Scottish legal system has much in common with the Continental system this does not prevent co-operation with the criminal justice systems

⁶³ *The Times* 15 June 1999. Also see H. Brooke, "The Law Commission and Criminal Law Reform" [1995] *Criminal Law Review* pp. 911-19.

⁶⁴ Mrs J. Arden DBE, "Criminal Law and the Crossroads: the Impact of Human Rights from the The Law Commission's Perspective and The Need for a Code" [1999] *Criminal Law Review* pp. 439-459 at p. 453.

⁶⁵ *Op.cit.*

of the rest of the United Kingdom.⁶⁶ Ben Hall, research director for the Centre for European Reform has said that “A single legal code for Europe is fantasy”.⁶⁷ However, the reality is that the nineteenth century vision of a Code Victoria, which attempted, but failed to bring the English criminal law more in line with the continental approach, has never been closer. The difference is that the nature of the ideal society encapsulated in such legal visions for the future may no longer be under English/British control.

⁶⁶ D. Rudnick, Is Eurocop our real legal future? *The Times* 26 October 1999.

⁶⁷ *Ibid.*

THE PROPER LAW OF THE CRIME IN INTERNATIONAL LAW REVISITED

PAUL ARNELL*

INTRODUCTION

THE CONCEPT OF THE PROPER LAW OF THE CRIME in public international law entered the realm of academic debate some time ago.¹ In the intervening years developments in municipal law have given further impetus to its realisation in international law with judicial decisions by national courts increasingly employing various proper law approaches. Two recent high-profile cases illustrate the growing strength of the arguments in its favour. The decisions of the House of Lords in the *Pinochet*² case and the ongoing proceedings in the International Court of Justice (ICJ) in regard to the *Lockerbie* incident³ *inter alia* relate to the issue of where and/or whether criminal jurisdiction should be exercised. These are the questions the proper law of the crime approach addresses. In essence it provides a normative framework for the allocation of jurisdiction between and amongst states. It is to be desired that the concept of the proper law of the crime gains further strength within international law because rules governing and limiting the allocation of criminal jurisdiction are integral to the development of the international rule of law. Human rights, for example that protecting persons from the non-retrospective application of criminal law, depend upon a system governing the assumption of criminal jurisdiction.⁴ From this perspective it is regrettable that the *Pinochet* proceedings, as we shall see, did not positively contribute to the position of the concept in international law. There is a likelihood that the ICJ in the *Lockerbie* cases may do so. Even if the *Lockerbie* cases do not contribute to the development of the concept, both the *Pinochet* and *Lockerbie* proceedings have highlighted the growing need for a normative framework governing the allocation of criminal jurisdiction in international law. This note firstly describes the nature of jurisdiction in international law. It then highlights the continuing development of the proper law of the crime approach, employing both judicial and academic support. It concludes by analysing the *Pinochet* and *Lockerbie* proceedings in light of this developing system.

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¹ L. Sarkar, "The Proper Law of Crime in International Law" (1962) 11 I.C.L.Q. 446.

² The case was first heard on 28 October 1998 in the Divisional Court, *The Times*, 3 Nov. 1998. The original appeal to the House of Lords was decided on 25 November 1998, [1998] 3 W.L.R. 1456. It was set aside in that the Committee was not properly constituted, [1999] 2 W.L.R. 272. The second substantive decision of the House was reported on 24 March 1999 *sub nom Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* [1999] 2 All E.R. 97, hereinafter the 24 March decision.

³ Libya instituted proceedings against the United Kingdom and the United States in the International Court of Justice on 3 March 1992. Interlocutory decisions relating to the jurisdiction and admissibility of the case were rendered on 27 February 1998, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United Kingdom, (Preliminary Objections)*, cited at <<http://www.icj-cij.org/icjwww/idocket/iluk/ilukjudgment>>, and *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States, (Preliminary Objections)*, <<http://www.icj-cij.org/idocket/ilus/ilusjudgment>>; (1998) 37 I.L.M. 587.

⁴ Article 15 of the International Covenant on Civil and Political Rights 1966, (1977) 6 UKTS, Cmnd. 6702, for example, *inter alia* provides "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed".

JURISDICTION IN INTERNATIONAL LAW

Criminal jurisdiction internationally is based upon the assumption, almost universally accepted today, that international law limits the circumstances where states can lawfully take cognisance of an alleged criminal act. In the Privy Council over sixty years ago it was stated that: “*according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or on its own ships, and to crime by its own nationals wherever committed*”.⁵ In the Supreme Court of Canada it was recently stated “. . . the principle of sovereign equality of states generally prohibits extraterritorial application of domestic law since, in most instances, the exercise of jurisdiction beyond a state’s territorial limits would constitute an interference under international law with the exclusive territorial jurisdiction of another state”.⁶ As a result of this position states most often refer to legal justification in the limited circumstances in which they assume extraterritorial jurisdiction. In this regard Jennings has stated:

[t]he fact is that States do not give themselves unlimited discretion in the matter [of extraterritorial jurisdiction]. Their municipal laws - even those of States which make extensive claims to extraterritorial jurisdiction - contain principles of jurisdiction... It seems reasonable to infer from the existence of these principles of extraterritorial jurisdiction, firmly entrenched as they are in the practice of States, that some justifying principle is thought to be necessary to found extraterritorial jurisdiction; that it is not a matter for sovereign discretion.⁷

International law, then, in spite of the apparent *ratio decidendi* of the *Lotus Case*,⁸ limits the criminal jurisdiction of States to defined circumstances. Following on from this conclusion the question arising is what are the circumstances in which states can lawfully assume jurisdiction?

In order for a state lawfully to assume criminal jurisdiction it must possess the right to do so. This right flows from international law. It establishes a state’s lawful competence to become seized of an alleged criminal act. The right is commonly stated by commentators to be present if a category of jurisdiction applies as between the state assuming jurisdiction and the crime and/or alleged criminal.⁹ The categories are commonly said to be the territorial, active personality or nationality, universal, protective and passive personality.¹⁰ They in essence pertain to all the circumstances in which states can have an interest in the prosecution of a crime within a system built of territorially delimited states. In particular a crime can be committed wholly within a State or it can partially be committed within a state. In both of these cases the territorial category applies as between the crime and the state assuming jurisdiction. A crime can also be committed wholly outwith a state. Here the categories justifying the assumption of extraterritorial jurisdiction apply. The active personality and passive personality categories relate to nationality or allegiance, with the active personality category generally pertaining to the assumption of jurisdiction over persons where the

⁵ *In re Piracy Jure Gentium*, [1934] A.C. 586 at 589, per Viscount Sankey L.C. emphasis added.

⁶ *R v. Cook* (1999) 32 I.L.M. 271 at 281 per Cory and Iacobucci JJ.

⁷ R. Y. Jennings, “Extraterritorial Jurisdiction and U.S. Antitrust Laws” (1957) 33 B.Y.I.L. 146, at p. 150.

⁸ *The Case of the SS Lotus (France v. Turkey)* (1927) PCIJ Rep Series A No 10. The much discussed case *prima facie* holds that there are no restrictions upon a state’s lawful competence to assume extraterritorial jurisdiction. For a critique see P. Arnell, *International Jurisdiction and Crime: A Substantive and Contextual Examination of Jurisdiction in International Law*, pp. 13-15, August 1998, unpublished PhD thesis on file at the University of Hull.

⁹ Also used as germane terms are “base”, “principle” and “theory”. It is submitted that “category” is the correct appellation because the “categories” are not facilitative in themselves as “base” or “principle” connote, rather they are evidential in nature. “Theory” is inappropriate in that it implies that they do not exist in fact. See further Arnell, *ibid.* at pp. 20-21.

¹⁰ See for example I. Brownlie, *Principles of Public International Law*, 4th ed., (Clarendon Press, 1991), at pp. 303-308.

accused holds the nationality of the assuming state and the passive personality over persons where the victim(s) were of the nationality of the assuming state. The protective and universal categories relate not to territory or nationality but to the particular interests the crime did or attempted to affect. The protective category justifies the assumption of jurisdiction where certain core interests of the state *per se*, such as the protection of its currency from counterfeiting, are affected or threatened. The universal category in contrast justifies the assumption of jurisdiction where certain interests common to all states are affected or threatened, such as the freedom of navigation on the high seas by the crime of piracy. The application of these broad categories results in international law being very generous in the allocation of competencies, with concurrent jurisdiction being far from uncommon. What is lacking in international law is a widely accepted and entrenched normative system to govern this broad allocation of competencies. The concept of the proper law of the crime does precisely this, both where only one state claims jurisdiction and in the face of competing claims.

WHAT IS “PROPER LAW”?

“Proper law” is a concept that has its roots in various areas of private international law, the most notable being contract and tort.¹¹ It is said to “simply denote the appropriate legal system”.¹² It was defined by John Morris as “the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation before us”.¹³ He further said that the doctrine of proper law would “enable the problems to be broken down into smaller groups and thus facilitate a more adequate analysis of the social factors involved”.¹⁴ These factors, in the case of the proper law of the contract, include the place or places of business of the parties, the place or places where the contract was negotiated and concluded, and the place or places of performance and payment. In the proper law of the crime the relevant factors relate to the place, places, nationality, nationalities, interest or interests corresponding to those defining the five categories of jurisdiction. As noted these are a territorial connection of some sort, a nationality connection of the accused or victim, and a connection present where certain core interests of States or of the international community as such are or are intended to be threatened. The “breaking down” of the situation to enable a “more adequate analysis” in the allocation of the most suitable *corpus* of law to govern a certain situation is the essence of the proper law approach. It can be used not only for the allocation of jurisdiction to the most suitable *corpus* of law but also as a framework for solving disputes where competing claims to criminal jurisdiction are made. The proper law approach can operate to provide an objective methodology for the allocation of jurisdiction to the state most closely and genuinely connected with the alleged crime. Being predicated upon a restrictive jurisdictional regime, it is designed to permit the assumption of jurisdiction in limited circumstances only and thus serves to protect individuals from egregious claims to jurisdiction. As we will see below the approach is finding more and more support, and is beginning to find a place in customary international law.

¹¹ See F. A. Mann, “The Proper Law in the Conflict of Laws” (1987) 36 I.C.L.Q. 437.

¹² *Ibid.* at p. 438.

¹³ J. Morris, “The Proper Law of the Tort” (1951) 64 H.L.R. 881 at p. 888.

¹⁴ *Ibid.*

PROPER LAW OF THE CRIME IN INTERNATIONAL LAW

The traditional position of international law is lucidly encapsulated by Sarkar:

The essence of current practice is its mechanical approach to jurisdiction. A court will ask where the crime was committed, or what was the nationality of the criminal or the victim, or whether the security of the State was threatened. These simple questions will be used as mechanical jurisdiction tests; the answer to them will be accepted uncritically. As a result, jurisdiction may be too narrow to protect society from crimes containing complex foreign elements or too broad for the interests which it claims to protect. Another consequence is that several States may compete for jurisdiction over a single crime, regardless of their real contacts with the crime and the possession of the body of the accused, without more, settle the problem of priority of claim.¹⁵

A system of the proper law of the crime would mitigate the excesses of this “mechanical approach”. An approach that weighs the various linkages reflected by the categories appertaining to one state in isolation, or as against those of another state, would admit flexibility in the assumption, and deferral, of jurisdiction. It must be noted however that a proper law of the crime approach differs in one fundamental respect from that in private international law. In the conflict of laws a distinction is drawn between the applicable law and the jurisdiction (state or territory) in which it is to be applied. In criminal law this cannot be done. States generally do not apply the criminal law of other states.¹⁶ In regard to the criminal law, jurisdiction and the applicable law are inseparable. The proper law approach here would govern the allocation of jurisdiction, that is, both the law to be applied and the state or territory which applies it.

More precisely, a developed system of the proper law of the crime would address such issues as the precise nature of the connections, for example what is a “territorial” connection, the relative importance of the categories, such as the territorial as against the protective, and the burden of proof in disputes over the existence or propriety of the exercise of jurisdiction. As will be seen below, certain of these questions are beginning to be addressed by states and academic commentators. The essence of this embryonic system is that jurisdiction is lawfully assumed in the presence of a close and genuine connection between the state and crime and/or criminal. This connection is most assuredly established *via* the presence of one or more of the accepted connecting factors existing between them. In the establishment and defence of the lawful assumption of jurisdiction the proper law of the crime approach requires that a holistic view is taken, with the various applicable categories each lending weight to one or more state’s claim.¹⁷

JUDICIAL SUPPORT FOR PROPER LAW TODAY

Support for the proper law of the crime approach is found in a wide variety of municipal judgements. One form of this support is by way of multiple and cumulative reference to the jurisdictional categories. This type of reference occurs where states attempt to bolster their claim that they are entitled by international law to assume

¹⁵ Sarkar, *op. cit.*, at p. 466.

¹⁶ It is well settled that United Kingdom courts will not enforce, either directly or indirectly, a foreign penal law, *Attorney General for Canada v. William Schulze and Co.* (1901) 9 SLT 4 at 4. See also *Attorney General of New Zealand v. Ortiz* [1984] A.C. 1.

¹⁷ It is suggested that the categories most widely and historically accepted, the territorial and active personality, would lend greater weight than those less accepted. This is implicit in the discussion below.

jurisdiction. In the American case of *United States v. Felix-Gutierrez*¹⁸ a defendant appealed against conviction of being an accessory after the fact in regard to the murder of a United States Drug Enforcement Agent in Mexico. In answer to a challenge to its jurisdiction the court held “Here, three of the international law principles permitting extraterritorial jurisdiction have application: (i) territorial, (ii) protective, and (iii) passive personality”.¹⁹ Significantly the court held later:

We need not decide whether any one of these facts or principles, standing alone, would be sufficient. Rather we hold that cumulatively applied they require the conclusion that giving extraterritorial effect ... to the statute in Felix’s case does not violate international law principles.²⁰

The House of Lords in *DPP v. Doot*²¹ has also implicitly taken a proper law of the crime approach. The court was seized of the question whether an agreement “made outside the jurisdiction of the English courts to import a dangerous drug into England and carried out by importing it into England is a conspiracy that can be tried in England”. Lord Wilberforce, in a then rare English judicial reference to international jurisdiction, stated:

The present case involves international elements - the accused are aliens and the conspiracy was initiated abroad - but there can be no question here of any breach of the rules of international law if they are prosecuted in this country. Under the objective territorial principle ... or the principle of universality ... or both, the courts of this country have a clear right, if not a duty, to prosecute in accordance with our municipal law.²²

The Israeli judgments following the prosecution of *Adolf Eichmann*²³ lend strong support to the proper law approach. The District Court of Jerusalem *inter alia*, held in regard to Israel’s jurisdiction that “the power of the State of Israel to enact the law in question or Israel’s “right to punish” is based ... on a dual foundation: the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people”.²⁴ This is a reference to more than one connecting factor between Israel and Eichmann and his crime. The Supreme Court explicitly agreed with the District Court on this point:

In regard to the crimes directed against the Jews the District Court found additional support for its jurisdiction in the connecting link between the State of Israel and the Jewish people ... It therefore upheld its criminal and penal jurisdiction by virtue also of the “protective” principle and the principle of “passive personality”. It should be made clear that we fully agree with every word said by the Court on this subject.²⁵

¹⁸ (1991) 940 F 2d 1200.

¹⁹ *Ibid.* at 1205.

²⁰ *Ibid.* at 1206. See also *US v. Layton* (1981) 509 F Supp 212, and *US v. Yunis* (1988) 681 F Supp 896.

²¹ [1973] A.C. 807.

²² *Ibid.* at 817. It is submitted that the trade in proscribed substances does not come within the ambit of universal category.

²³ *Attorney-General of the Government of Israel v. Adolf Eichmann* (1962) 36 I.L.R. 5.

²⁴ Eichmann was charged under s 1(a) of the Nazis and Nazi Collaborators (Punishment) Law, 5710/1950, it *inter alia* states: “A person who has committed one of the following offences:

(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the Nazi regime, in an enemy country, an act constituting a war crime; is liable to the death penalty”.

Eichmann was convicted under each of the three groups of offences.

²⁵ *Ibid.* at 304. The Supreme Court agreed *in toto* with the District Court’s judgment, at 279.

Taking the law a step further are the more recent cases of *Liangsiriprasert v. United States Government and another*,²⁶ *Libman v. The Queen*,²⁷ and *R. v. Cook*.²⁸ In the first case, Lord Griffiths (in the House of Lords) stated, in regard to criminal jurisdiction, that:

Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly, a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.²⁹

This case supports a holistic and less technical and rigid approach to jurisdiction. It supports the proper law of the crime approach in that an interest of the state in the form of its protection from the traffic in drugs is weighed against the lack of a territorial or other connection. This case also reduces the significance of result/ conduct crime distinctions and the initiatory and terminatory theories of English jurisdiction.³⁰ In the Canadian case of *Libman v. The Queen*, concerning international telephone fraud, La Forest J. stated:

As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting the offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial" link between an offence and this country, a test well-known in public and private international law.³¹

Lending support to the development of the proper law of the crime approach was the court assuming jurisdiction on the basis of a significant portion of the activities constituting that offence taking place in Canada, and that this satisfied the requirement that there be a real and substantial link between the offence and Canada. La Forest J. stated:

Just what may constitute a real and substantial link in a particular case, I need not explore. There were ample links here. The outer limits of the test may, however, well be coterminous with the requirements of international comity.³²

Of particular interest for the purposes of the development of the proper law approach is the recent Supreme Court of Canada case of *R. v. Cook*.³³ Here it was held by Bastarache J. that:

²⁶ [1990] 2 All E.R. 866.

²⁷ (1985) 21 D.L.R. (4th) 174.

²⁸ *Supra*, n. 6.

²⁹ *Supra*, n. 26 at 878. This position has been explicitly incorporated into English law by the Court of Appeal in *R v. Sansom et al.* [1991] 2 W.L.R. 366. In *HMA v. Megrahi and Fhimah*, 8 December 1999, cited at <<http://www.scotscourts.gov.uk>>, the High Court of Justiciary applied the *ratio decidendi* of *Liangsiriprasert* in response to a challenge to the jurisdiction of the Scottish courts over the charges of conspiracy in relation to the Lockerbie bombing. For the ICJ *Lockerbie* Cases see below.

³⁰ In regard to which see M. Hirst, "Jurisdiction over Cross Frontier Offences" (1981) 97 L.Q.R. 80, and J. D. M. Lew, "The Extraterritorial Criminal Jurisdiction of the English Courts" (1978) 27 I.C.L.Q. 168 respectively.

³¹ *Supra*, n. 27 at 212-213.

³² *Ibid.* at 200. There appears to have been in Canada a diminution of the criteria requisite to found jurisdiction. In 1984 what was needed in such cases was that "a material element has occurred within the territory of the forum state" (Law Reform Commission of Canada, *Extraterritorial Jurisdiction, Working Paper 37*, Ministry of Supply and Services Canada, 1984), at p. 8.

³³ *Supra*, n. 6.

While the objective principle is unimpeachable as a matter of principle, it is recognized that when the interest of the forum state is less significant than the interests of the state in which the events take place, the objective principle no longer authorizes asserting jurisdiction. When this is the case, the forum state engages in an impermissible extraterritorial application of its laws.³⁴

This passage evinces the “weighing-up” central to the proper law approach, and states that where such analysis leads to the conclusion that another state has a more significant interest in the prosecution of the crime the assumption of jurisdiction is impermissible. Further he stated:

Thus, whether there is an extraterritorial application of law depends to a large extent on whether there is a conflict between the two legal systems engaged. If there is a conflict, then a state with a reasonable connection to the events, *or, where two states have a reasonable connection to the events, the state which is most clearly connected to the events*, may properly assume jurisdiction under international law principles.³⁵

The definitional characteristics of these “principles” are precisely the criteria upon which a decision as to the nature of the connection between the state and crime and/or criminal is based under a proper law approach. Under it, for example, a state would measure a nationality of the victim connection and come to a conclusion whether this is in itself sufficient to justify its assumption of jurisdiction in light of other factors such as the interests of the *lex loci delicti* and perhaps the principle of the non-retroactivity of penal legislation. While *R. v. Cook* is a directly relevant recent judicial authority supporting the proper law of the crime approach, all of the cases referred to above are framed in terms of a proper law of the crime approach to a greater or lesser degree. In the earlier cases the assumption of jurisdiction by states is defended by the aggregation of relevant connecting factors between the state and crime and/or criminal. This can be seen to have led to the adoption of a holistic approach with the overall connection between the state and crime and/or criminal being considered in support for the establishment of a close and genuine connection. Finally, implicit or explicit consideration was given to the interests of foreign states. The weighing-up of connections between the state and crime and/or criminal here addressed this methodology being applied not only in relation to a single state but in the face of competing claims.

ACADEMIC SUPPORT FOR A PROPER LAW APPROACH

Academic commentary has augmented and buttressed the support for the proper law of crime approach found in state practice. Providing direct support is Brownlie who avers that whilst the law is unsettled, it is developing in the light of “a principle of substantial and genuine connection between the subject-matter of jurisdiction, and the territorial base and reasonable interests of the jurisdiction sought to be exercised”.³⁶ The latest edition of *Oppenheim's International Law* states in this regard that there is a tendency to regard the categories of jurisdiction as:

³⁴ *Ibid.* at p. 303.

³⁵ *Ibid.*, emphasis added.

³⁶ Brownlie, *op. cit.*, at p. 298.

[p]arts of a single broad principle according to which the right to exercise jurisdiction depends on there being between the subject matter and the state exercising jurisdiction a sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states.³⁷

Direct support of a more practical nature is found in this statement by Bassiouni:

[t]he passive personality theory cannot be solely relied upon as the exclusive basis of jurisdiction to prescribe or enforce the penal laws of one state over a person whose conduct was performed outside the territory of that state. However, when there is an additional jurisdictional basis the passive personality theory serves to reinforce the jurisdictional claim of the given state. Furthermore, in cases of conflict between two states, the one claiming passive personality as an additional basis is to receive priority in extradition.³⁸

This statement supports a proper law approach in that aspects of the connection between a state and crime and/or criminal, here termed “theories”, are treated in a cumulative sense and employed to reinforce an existing claim to jurisdiction.³⁹ This academic approach focuses upon the overall connection between a state and crime and/or criminal and identifies the various factors that can comprise it. In this instance, the factor of a state’s national being the victim of a crime is referred to as being able to contribute to the establishment of a close and genuine connection.

A further academic approach provides indirect support for the proper law approach by concentrating upon the similarity among the various categories. Supported here, as above, is an approach which centres upon the overall connection between a state and crime and/or criminal, one that is evidenced by one or more of the five possible connections defining the five categories of jurisdiction. It is the common denominator of the categories that is emphasised, namely that they are all products of states acting to protect various interests. In regard to the passive personality and the protective categories it has been written that the former “is derived from the idea of ‘protection’ by the state of its nationals wherever they may be. In a sense it is a corollary of the principle of security and endows jurisdiction upon the state whose national is the victim of the offence committed abroad”.⁴⁰ This statement highlights the applicability of the interest of “protection” in both these categories. In the following comments by Jennings not only are the passive personality and protective categories said to be related but all of the categories are stated to be a manifestation of states protecting a legitimate interest:

States claim extraterritorial jurisdiction in cases where they believe their legitimate interests to be concerned; whether that assumption be rationalized and expressed by means of the nationality claim, the objective territorial claim, the security claim, the passive personality claim or the universality claim. It is reasonable to say, therefore, that international law will permit a State to exercise extraterritorial jurisdiction provided that State’s legitimate interests (legitimate that is to say by tests accepted in the common practice of States) are involved ... [A] State has a right to extraterritorial jurisdiction where its legitimate interests are concerned.⁴¹

³⁷ R. Y. Jennings, and A. D. Watts, *Oppenheim’s International Law*, 9th ed., (Longham, 1992), at p. 457-8.

³⁸ M. C. Bassiouni, *International Extradition and World Public Order*, (Sijthoff, 1974), at p. 256.

³⁹ The passive personality category today can in itself support a claim to jurisdiction. The frequent reference to the nationality of the victim in modern and widely subscribed to international conventions has defeated the traditional antagonism to passive personality jurisdiction. See G.R. Watson, “The Passive Personality Principle” (1993) 28 *Texas Int. L.J.* 1.

⁴⁰ C. Shachor-Landau, “Extra-territorial Penal Jurisdiction and Extradition” (1980) 29 *I.C.L.Q.* 274 at p. 283.

⁴¹ Jennings, *op. cit.*, at pp. 152-53.

Academic support from a different justificatory position⁴² comes from Mann who stated in both 1964 and 1984 that:

[a] State has legislative jurisdiction if its contact with a given set of facts is so close, so substantial, so direct, so weighty that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not itself constitute a sufficient connection.⁴³

The academic support outlined above, as with the judicial authority, strongly militate in favour of the developing proper law of the crime approach in international law. Commentators have deemed central the overall connection between the state and crime and/or criminal. This connection must be sufficiently close and genuine in order for the assumption of criminal jurisdiction to be lawful. A connection of this nature is present if one or more of five factors are present. These factors are found and reflected in the five orthodox categories of jurisdiction. As we will see, this proper law of the crime approach applies not only in regard to claims to jurisdiction in isolation but is also well-suited to govern jurisdictional disputes, as occurred in the Pinochet affair.

THE PINOCHET CASE

The UK proceedings surrounding Spain's extradition request are one of the two recent opportunities where a proper law of the crime approach could have received significant support. Indeed the facts formed a particularly suitable situation where a dispute over jurisdiction could have been resolved through the proper law approach. Both Spain and Chile, and indeed other states, desired to assume jurisdiction.⁴⁴ Pinochet was *inter alia* alleged to have committed crimes of torture and murder in Chile which amounted to international crimes and/or gave rise to universal jurisdiction⁴⁵ and were in part committed against Spanish nationals. He was also alleged to have conspired in Spain to have committed murder in Spain and to have committed torture. Arising from these facts was the opportunity to employ the proper law of the crime approach and come to a conclusion regarding a close and genuine connection through reference to the five factors. Chile was the predominate territorial state, the state of the nationality of the accused and the majority of alleged victims, and, arguably, the state with a linkage *via* the protective category. This was positioned against the Spanish connection, it also had a territorial linkage as well as one of a passive personality. If the universal category was applicable it would provide an additional factor to both Chile and Spain as indeed all states.

⁴² It can generally be said that Mann argues from what can be termed a historically synergetic position where international law, public and private, are closely related. Jennings on the other hand comes to his conclusions through orthodox public international law analysis.

⁴³ F. A. Mann, "The Doctrine of Jurisdiction in International Law" (1964-I) RdC I at p. 49, and F. A. Mann, "The Doctrine of International Jurisdiction Revisited After Twenty Years" [1984-III] RdC 19 at p. 28.

⁴⁴ Spain's desire was, of course, manifested in its extradition request. Chile sought Pinochet's return to "have these matters dealt with in Chile" (cited in Lord Hutton's 24 March decision, *supra* note 2, at 165). This request, importantly, did not take the form of a formal request for extradition. In regard to other states, both Switzerland and France made formal extradition requests to the Secretary of State (see *The Times*, 10 December 1998).

⁴⁵ In the unusual argot (for the House of Lords) of international law, Lord Browne-Wilkinson stated that the "jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed" (the 24 March decision, *supra* note 2, at 109). Lord Phillips, in contrast, later stated: "I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crimes – that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur" (*ibid.* at 188-189).

It is unfortunate but understandable that neither the Divisional Court or the House of Lords on either occasion it was seized of the case took an explicit proper law approach. Instead the courts in the case focused upon the nature and effect of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984⁴⁶ within English law as it affected extradition and sovereign immunity. Further, the failure of Chile to make a formal extradition request prevented the emergence of competing claims from the two states with the closest and most genuine connections with the alleged crimes and criminal. Finally, the forum itself, being a national court and one traditionally reluctant to fully embrace international law, was ill-suited to engage in the progressive development of the proper law of the crime concept. The final judgement hinged upon two issues, whether the alleged crimes were “extradition crimes” and whether an immunity attached to Pinochet. The 24 March decision held, by a majority, that the charges applicable were only those of torture and conspiracy to torture committed after 8 December 1988, the date the United Kingdom ratified the Torture Convention.⁴⁷ After this date the double criminality rule contained in the Extradition Act 1989 was satisfied: torture was then a crime in both England and Spain. The court held that the double criminality rule requires that the relevant conduct to be criminal in both states at the date of commission, rather than the date of the extradition request. In regard to immunity, the court held that Pinochet as a former head of state was not immune for acts which could not have been officially committed at any time, such as acts contrary to international law.

The failure of the courts to adopt the proper law approach in *Pinochet* opens the door for speculation as to the result had it been employed. The states with close and genuine connections, Chile and Spain, had varying territorial connections to the alleged crimes. Chile could point to the nationality of Pinochet. Both Chilean and Spanish nationals were alleged victims of the crimes. If applicable, both could point to the universal interest in assuming jurisdiction, as well as the jurisdiction arising under the Torture Convention itself. Finally, the alleged crimes could be argued to have affected certain central interests of Chilean governance, giving it a protective linkage to the crime. In light of these facts, a “weighing-up” of Chilean and Spanish connections to the alleged crimes and Pinochet almost certainly leads to the conclusion that Chile had the strongest claim to exercise jurisdiction. In other words, the crimes and criminal had the closest and most genuine connection with Chile.

In regard to all the separate factors supporting a close and genuine connection between the state and crime and/or criminal, Chile’s linkage was more tangible. The extent of acts taking place upon Chilean soil as opposed to outside Chile, the nationality of the accused, the nationality of the greatest number of victims, and the affectation of interests central to governance all weigh in Chile’s favour. This is not to conclude that Spain, and indeed other States, did not have jurisdiction under the proper law approach, just that in the face of competing claims between Chile and Spain, Chile’s claim was stronger. Here a desirable caveat in the application of the proper law approach must be noted. This exception would apply in cases where the state with the closest and most genuine connection is governed by those complicit in international crimes and/or unwilling to prosecute. In such instances the proper law

⁴⁶ (1985) Cmd. 9503, Misc. 12, (1984) 23 I.L.M. 1027. Hereinafter the Torture Convention.

⁴⁷ Lord Hutton held that the applicable date was 29 September 1988, the date that s. 134 of the Criminal Justice Act 1988 prescribing torture entered into force.

approach should be exercised with extreme caution and even excepted.⁴⁸ What would be reasonable is that the approach be conditioned with the result that the state with the second-most close and genuine connection be preferred to assume jurisdiction. In Pinochet's case this state is most likely Spain. It must be conceded however this can only be stated *de lege ferenda*, the concept is as yet not developed or accepted to govern this type of situation. What can be concluded is that as a result of law and circumstance the House of Lords failed to adopt or consider the proper law of the crime approach. The case did, however, highlight the growing need for its development, refinement and acceptance in international law.

THE LOCKERBIE INCIDENT

The ongoing cases before the International Court of Justice brought by Libya on 3 March 1992 against the United Kingdom and the United States present themselves as further opportunities where the proper law of the crime approach can be positively affected.⁴⁹ Libya has instituted proceedings against both the United States and the United Kingdom in respect of a "dispute... concerning the interpretation or application of" the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971⁵⁰, commonly known as the Montreal Convention. In its case against the United Kingdom Libya is seeking the Court to adjudge and declare:

- (a) that Libya has fully complied with all of its obligations under the Montreal Convention;
- (b) that that United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under articles 5(2), 5(3), 7, 8(2) and 11 of the Montreal Convention, and
- (c) that the United Kingdom is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya and from all violations of the sovereignty, territorial integrity, and political independence of Libya.

In its Memorial, Libya has also requested the court to declare that the Montreal Convention was applicable to the dispute, that it had fully complied with it, and that it was justified in exercising criminal jurisdiction as provided for by that Convention. In a decision dated 27 February 1998, the ICJ rejected United Kingdom and United States objections to both the admissibility of the Libyan claims as well as its own jurisdiction to hear the case. The dispute centres upon the propriety of the exercise of criminal jurisdiction by Libya.⁵¹ The case is presently proceeding to be considered on its merits before the ICJ. It is, therefore, poised to become the first time an

⁴⁸ The problem here is the necessity of calling into question the culpability of the rulers of that state. Situations as in South Africa where Truth and Reconciliation Commissions take the place of criminal proceedings pose a particular difficulty. In Pinochet's case the problem was in part compounded in that Chile did not make an official request for the Senator's extradition.

⁴⁹ The genesis of the case was the destruction of Pan Am Flight 103 over Lockerbie on 21 December 1988. The most recent development in the case is the decision of 29 June 1999 by the Court to set the deadline of 29 June 2000 for Libya to submit a Reply to the Counter-Memorials submitted by the US and UK (see Press Communiqué 99/36, 1 July 1999).

⁵⁰ (1974) 10 UKTS, Cmnd 5524; (1971) 10 I.L.M. 1151.

⁵¹ The transfer of the two Libyan nationals accused of placing the bomb on the flight to a Scottish Court in the Netherlands has affected the issue of criminal jurisdiction in fact, although not in the abstract. The High Court of Justiciary itself has upheld its jurisdiction in *HMA v. Megrahi and Fhimah*, *supra*, n. 29.

international court is to be seized of a question of criminal jurisdiction since the *Lotus Case* in 1927.⁵² In anticipation of the judgement it is useful to outline the basis of the dispute before the ICJ.

The cornerstone law is the Montreal Convention, a treaty that aims to “provide appropriate measures for the punishment” of those engaged in “unlawful acts against the safety of civil aviation”.⁵³ The provisions directly most germane are articles 5, 7, 8 and 11. Article 5 requires that contracting states establish jurisdiction over the offences defined in article 1 with reference to the territory where the crime was committed, the state of registration of the aircraft, the territory where the aircraft landed after an offence was committed, the state of the principal place of business, which failing, residence of a lessee where the aircraft is leased, and finally where the accused is within a state and it does not extradite him in pursuance of article 8 of the Convention. Article 7 is the *aut dedere aut punire* provision today commonly found in international criminal conventions:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 8 concerns extradition. It provides, *inter alia*, that extradition “shall be subject to the . . . conditions provided by the law of the requested State”. Article 11 provides for mutual criminal assistance between parties to the Convention.

According to article 5 the United States, the United Kingdom and Libya are all competent to exercise jurisdiction. The United States is competent in that the aircraft was registered within it, the United Kingdom because that is where the crime was committed and/or the territory where the aircraft “landed” after an offence was committed, and Libya in that the accused were found within it and it did not extradite them in pursuance of article 8 of the Convention. Further, and relevant to all three states, article 5(3) provides that the Convention does not exclude any criminal jurisdiction exercised in accordance with national law. This provision opens the door for the assumption of jurisdiction on the basis of active and/or passive personality, the former of which is relevant to Libya and the latter, *inter alia*, to the United States and the United Kingdom. The central question arising is what is the relative position of the various jurisdictional claims? This is to be answered by firstly resolving the position of article 7. Is it, as it appears, that custody is determinative of the question of jurisdiction, or is it possible that, for example, the territorial claim of the United Kingdom outweighs the nationality claim of Libya with custody being of secondary importance? Further, are these linking factors to be considered distinct or are they cumulative with each serving to strengthen the various jurisdictional claims? Finally, the question of the effect of factors extraneous to the crime and alleged criminals themselves such as Security Council Resolutions and Libyan constitutional law must be considered.⁵⁴ These issues go to the heart of international criminal jurisdiction in that

⁵² The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic* (1996) 35 I.L.M. 32, dealt with the questions of its own jurisdiction and establishment but not with international criminal jurisdiction generally.

⁵³ As in the preamble.

⁵⁴ In their preliminary objections the United States and United Kingdom *inter alia* argued that the resolutions passed by the Security Council (731, 748, and 883) in effect pre-empted the Montreal Convention. It is to be hoped that this issue does not take precedence over the issues of criminal jurisdiction, with the Court focusing on the questions of pre-emption and judicial review of Security Council action. The pleadings of the parties, however, suggest this is likely.

questions centre upon the restriction and allocation of competencies. The concept of a proper law of the crime is particularly relevant as the facts are such to allow the “weighing-up” of the various linking factors to the crime and criminals held by the United Kingdom, the United States and Libya.

The ICJ is presented with an opportunity to adopt the proper law of the crime approach in the *Lockerbie* cases. It is to be hoped that the court does indeed apply a rational and objective test in the ascription of jurisdiction to one party or other in the dispute and in the process make a much-needed contribution to this area of international law. If the court were to adopt a proper law approach it would firstly have to deal with the question of custody as the terms of the Convention appear to be determinative of jurisdiction in favour of the custodial state. Article 7 provides that states satisfy their obligations by submitting an alleged offender to its competent authorities for the purpose of prosecution. The question is what, if anything, overrides this position? The Convention appears to answer this question quite simply. Libya as custodial state is entitled, and indeed obliged if it does not extradite the accused, to submit them for the purpose of prosecution to its own competent authorities. On a literal interpretation of the Convention nothing overrides the effect of custody and this appears to obstruct the adoption of a proper law of the crime approach by the ICJ in these proceedings.⁵⁵ It is perhaps not unreasonable to suggest that the court might take a liberal and teleological approach to interpretation of the Convention with the result that article 7 is deemed to raise only a presumption in favour of the custodial state rather than be determinative of jurisdiction.

If the court is not deflected from undertaking a proper law analysis by the issue of custody or another stumbling block such as the effect of Security Council Resolutions, a weighing-up process would have to occur.⁵⁶ The ICJ would have to examine the overall connection with the crime and/or alleged criminals the various states have by comparing the relative nature of the applicable linking factors. Libya is connected to the crime and criminals in that the accused are Libyan nationals and were at the material time in Libyan custody. The United Kingdom has territorial and passive personality connections to the crime, and the United States has connections *via* it being the state of registration of the aircraft as well as having passive personality connections. Unlike the Pinochet case, here the three “competing” states all have roughly similar claims to jurisdiction in that any one state does not have a preponderance of the connecting factors in its favour. In such a case, approaching the question holistically, it is suggested that Libya’s active personality and custodial claim is the weakest of the three as the crime cannot be said to have had a direct and manifestly inimical effect upon it. The vast majority of the victims were United States nationals and the crime “occurred” upon United Kingdom territory. Between the United States and the United Kingdom it appears that the United Kingdom has the greater claim in that it has both a territorial and passive personality connection, although one may argue that state of registration of the aircraft is in a position akin to that of the territorial state.

Of course in employing this approach the ICJ would have to engage in a more detailed analysis of the relative nature of the connections between the crime and/or

⁵⁵ An optimal situation overcoming this problem would be an accused present in a third state with no interest or connection to the crime and no desire to submit the accused for prosecution with two or more other states seeking to exercise jurisdiction.

⁵⁶ A further stumbling block is Libya’s constitutional prohibition on extradition of its own nationals. This position is not uncommon. German law for example provides similarly (see C.L. Blakesley, and O. Lagodny, “Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law” (1991) 24 Van. J. Tran. L. 1 at p. 25). The Court here would most likely refer to the long standing rule that a state cannot plea its own domestic law as a defence within international law (see Brownlie, *op. cit.*, at p. 34 *et seq.*).

criminals and the three states than this, although it is hoped that it would be along these lines.⁵⁷ In spite of the factual and legal hurdles outlined above the *Lockerbie* Cases contain issues of criminal jurisdiction that will be put to the ICJ for the first time. Not since the Permanent Court of International Justice was seized of the *Lotus* Case in 1927 has an international court been asked to consider questions surrounding the nature of criminal jurisdiction in international law. The *Lockerbie* Cases are an opportunity for the ICJ to build upon the contributions to the proper law of the crime concept made by municipal jurisprudence and juristic writings.

CONCLUSION

The concept of the proper law of the crime in international law is at a crucial stage in its development. It has been in the realm of international legal discourse for some time and has recently come to find a greater place in municipal case law and academic writings. Judgements from superior courts in Canada and the United States in particular are making significant contributions to the concept's development within customary international law. As was seen, the approach provides an objective methodology to govern the assumption of jurisdiction in isolation and in the face of competing claims. It does so by identifying the various factors that give rise to a close and genuine connection between a state and crime and/or criminal. This allows for a particular analysis of the situation, which is in turn necessary for judgment upon the overall connection, and in cases of contested jurisdiction, a weighing-up of the relative linking factors. It is regrettable that the *Pinochet* cases failed to employ the proper law analysis, especially in light of the facts of the case being especially amenable to it. Instead, jurisdictionally, the 24 March decision mainly turned upon the particularities of English extradition law. For proponents of the proper law approach the *Lockerbie* cases will hopefully contribute to the concept constructively. However, as noted above, the particular law and facts may well lead to a failure by the ICJ to further its development. Both the *Pinochet* and *Lockerbie* cases, it can be noted, highlight an important underlying argument in favour of the approach, notably its ability to mitigate political overtones surrounding the assumption of jurisdiction in isolation, and in decisions where jurisdiction is contested. Opportunities for criticism may be lessened if an objective weighing-up of the various linking factors is made. Similarly, for individuals subjected to extraterritorial jurisdiction a normative system governing its application is important in that it provides legality and objectivity. This of course also applies to states, in their dealings with each other and in the protection of their nationals. For these and the reasons mentioned throughout this paper it is hoped that the proper law of the crime approach continues to develop and find a firm place in the body of international law.

⁵⁷ Further factors in the analysis could include the relative harm done in the form of numbers of victims (a relative passive personality connection) and political and economic damage resultant from the crime (a relative protective connection).

INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION: THE CHALLENGE OF THE 21ST CENTURY

MARTIN HUNTER*

WHEN I REVEAL MY THEME for this lecture you may well think that, as an arbitrator, I am a bit like the proverbial turkey extolling the virtues of Christmas. That is because, looking into my crystal ball, I predict that over the next few years we shall experience a proportionate decline in the engagement of third parties for assistance in resolving mature international trade disputes. If I am right about this the current level of expansion of work for arbitrators and mediators will decline, and there will be an increasing demand for dispute *management* specialists rather than dispute *resolution* experts. I propose to try to explain my views as to how the dispute resolution community might react to this challenge.

From my perspective, as the 21st Century gets under way, we are already seeing a movement away from the three classical forms of third party intervention in dispute resolution – the judge in his court; the arbitrator in his hotel conference room; and the mediator shuttling between the parties trying to get the parties to reach some form of acceptable compromise settlement.

In Europe and the USA we now hear the phrase “dispute management” used almost as often as the traditional term “dispute resolution”. “Dispute management” is a relatively new term and I am not sure that we could all agree on what it means. For me it means two things. First, and most important, it means *dispute avoidance*; secondly, it means that where the parties cannot avoid falling into dispute, they enter into a structured *direct negotiation* process designed to limit the occasions on which they will need to involve a third party to the barest possible minimum.

My main purpose today, after explaining *why* I think this is going to happen, is to take a look at the likely consequences for all of us who are from time to time involved as practitioners or teachers in the field of dispute resolution in international trade. If my prediction turns out to be right, what will it mean for lawyers, law firms and law schools? And, of course, how can we position ourselves to make a useful contribution to society at the same time as continuing to earn a modest living?

HISTORICAL FACTORS

To develop my theme I must first take a look at *where* we are today and *how* we got here. People from all cultures and in all civilisations have needed some means of settling disputes. It is not hard to think of examples. We are all familiar with the biblical story of Solomon’s proposal to cut the baby in half. Many ancient societies referred disputes to village councils or tribal elders - Maori Tribes in New Zealand, for instance, used a combination of both.¹ Similar processes can be seen in China,²

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¹ Disputes could be resolved on a *Marae* by a process under *te tikanga o te marae*. Decisions were usually reached by consensus. Alternatively, disputes could be referred to a *kaumatua* as a type of third party mediator: (see Hudson, *Tikanga Maori & The Mediation Process* (unpublished LL.M. Research Paper, Victoria University of Wellington, 1996).

² Rulers after King Wu administered civil justice in China through committees during the Western Chou Dynasty (c 1100): Choen, Edwards and Chen (eds.), *Essays on China’s Legal Tradition* (Princeton University Press, 1980).

Mongolia³ and Japan,⁴ and India;⁵ traders from the Roman colonies could refer their disputes to the *Praetor Peregrinus*.⁶ Subjects in Medieval England could seek the sovereign's ruling at his court;⁷ and so on throughout recorded history.

All of these procedures shared a common model; that is, resolution of disputes between citizens by third party intervention *after* the dispute had become a significant bone of contention between the parties.

I suggest that these two main features of the dispute resolution mechanisms used by our ancestors – the *process* (third party intervention); and the *timing* (that is, after the dispute has matured) – are still very much a part of today's landscape, and that the arrival of a new century presents us with an opportunity to take a fresh look at the validity of these features in the light of present conditions.

MODERN THIRD PARTY ASSISTED DISPUTE RESOLUTION

Most of today's commercial lawyers are trained to participate in three quite different types of dispute resolution techniques:⁸

- (i) Litigation in national courts;⁹
- (ii) Arbitration, designed to achieve a *final and enforceable outcome*;
- (iii) ADR mechanisms such as mediation, conciliation,¹⁰ “mini-trial”, “rent-a-judge”, “med-arb” and other “touchy-feely” ways of engaging the intervention of a third party to achieve *agreed settlements* between the disputing parties.

Before I proceed with my main theme I need to say a few brief words about each of these tools; their respective places in the overall spectrum of dispute resolution mechanisms; and the uses to which they are best suited in the context of international trade.

NATIONAL COURTS

Most of us would now accept that the days are gone when national courts are chosen *expressly* by the parties as their forum for resolving disputes arising out of international

³ Village committees usually resolved Mongolian disputes after the turn of the 1st Century AD. Following the rule of Genghis Khan, these disputes could be resolved according to national law, the *Great Yassa*: see Butler, *The Mongolian Legal System* (Martiinus Nijhoff, 1982).

⁴ By the mid 1st Century AD Japan had a fully-fledged legal system under which officials applied the *Taihoitsuro*: see Seiichi Inao, *Biographical Dictionary of Japanese History* (Kondansha International Ltd, 1978).

⁵ India has a rich legal history. In the *Smriti* period (c. 300 BC) various courts of justice, from regal councils to informal corporations of traders were set up under the authority of the king: see Indra Deva Shirama, *Growth of Legal System in Indian Society* (Allied Publishing, 1980), in particular p. 14.

⁶ Not, as is sometimes assumed, a “travelling magistrate” but a commercial judge based in Rome who decided case between travelling traders: Boardman, Griffin and Murray (eds.), *Oxford History of the Classical World* (OUP, 1993).

⁷ The Norman Conquest brought with it the feudal system of tenure. One of the chief consequences of this was the King's right and duty, as supreme Lord, to hold a court for his tenants: see Holdsworth, *History of English Law Vol 1* (3rd ed., Methuen & Co Ltd., 1922), in particular pp. 24-25.

⁸ Several highly respected institutions offer courses on negotiation, notably Harvard and Stamford universities

⁹ There is as yet no international court for commercial disputes, as the International Court of Justice deals only with disputes between states.

¹⁰ Some commentators consider that the difference between mediation and conciliation is that in conciliation the third party makes a recommendation for a possible settlement, whereas in mediation he does not. However, this is not universally accepted: see Mackie, Miles and Marsh, *Commercial Dispute Resolution* (Butterworths, 1995). A plausible explanation is that mediation is an Anglo-Saxon word, whereas conciliation derives from civil law origins. The term mediation is used generically to cover both for present purposes.

trade. Their role in resolving international trade disputes usually now arises where the parties have failed to make an express choice of forum in their contract.¹¹ National courts are therefore a *default* forum in the context I am addressing today.

Nonetheless, national courts generally do a good job when they are brought into play, particularly where the jurisdiction concerned has a specialised commercial court comprised of judges who have been promoted on merit from the local commercial bar. This is so in many common law countries, but not so often the case in civil law countries. There are some regions, and some countries, where the local courts cannot be relied upon to handle commercial disputes to the high standard that is required by the international trading community. A prime example is found in the Central and Eastern European nations of the former Soviet bloc which were parties to the now almost defunct Moscow Convention.

The judiciaries in those countries were not trained in commercial law. Their role was to administer criminal justice and, to adjudicate on matrimonial disputes and other rights and obligations of citizens. Trade, both external and internal, was conducted by governmental organisations. Commercial disputes were directed to the so-called “arbitration courts” of the national chambers of commerce. This was not consensual arbitration as we know it in the capitalist world.

ARBITRATION

The general preference for arbitration in *international* transactions has nothing to do with the advantages of speed and cost saving, which are often emphasised at arbitration conferences. In practice, these advantages apply only in the context of domestic arbitration before a sole arbitrator and even then only in specialised fields such as maritime, commodities, rent reviews, documents-only consumer arbitrations and a few others.

The main reason why we see arbitration clauses in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party’s “home” court. This is not just because of any perceived chauvinistic bias on the part of national judges. There are other much more practical reasons for not playing an “away game” unless it is absolutely essential. For example, all the documents and witness testimony must be translated into the language used by the court in question. It may also be necessary to engage lawyers with local rights of audience, which means that at least one of the disputing parties will not be able to have its own trusted lawyers in the driver’s seat.

The other positive feature of arbitration in the international context lies in the treaty obligation for enforcing arbitration awards across national boundaries. By contrast, it may be difficult to enforce a favourable judgement of a national court in another country, as there are no multilateral treaties covering the reciprocal enforcement of court judgements. As of June 2000, 121 countries had ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;¹² and about 30 jurisdictions had enacted legislation based on the 1985 UNCITRAL Model Law on International Commercial Arbitration, which provides a harmonised standard for national legislation to regulate private arbitration processes.

¹¹ National courts do, however, have important supportive and supervisory roles in relation to arbitrations held within their territories.

¹² See UNCITRAL’s website (<http://www.un.org.at/uncitral/english/status/index/htm>).

Arbitration will thus always be needed where for one reason or another a final and enforceable outcome is necessary. In my own career I have on a number of occasions seen situations where the client needed an *award* – a final and binding solution imposed by a third party – rather than an agreed compromise settlement or even a “consent award”. Often not just money is at stake. Sometimes one party may be bankrupted if it does not achieve a complete victory. Matters of principle, or the positioning of a party in a long-term relationship, may be in issue. Sometimes a minister, or a senior governmental official, particularly in the less-developed countries, cannot afford to take the political responsibility of being a party to a compromise settlement. To illustrate the point I will describe a fairly typical example from my experiences in the mid-1960’s in the Arab states in the Gulf region. On several occasions, on advising that I believed I could negotiate a more favourable outcome than the likely result if the case was fought through to an arbitration award, the minister or official concerned would reply to the effect:

... But, Martin, the public view is that this project was disastrously bungled by my ministry. If I approve a settlement the newspapers and hostile deputies in the National Assembly will attack me. I will even be accused of being bribed to pay the contractor’s claims. It’s not my money. If the arbitrators make a big award against us it doesn’t matter. I will simply send it down to the Ministry of Finance with a request for a cheque. In public I will say that the arbitrators were incompetent.

MEDIATION

However, international arbitration is usually a lengthy and costly experience for the parties, and the outcome will generally be “rights-based” rather than “interest-based”. I shall mention these two concepts again later. During the 1990’s mediation and its associated ADR offshoots, developed in the USA primarily for use in disputes without any international element, have made a significant impact in the international arena and have proved that they can work just as well there, at least in certain types of cases that are susceptible to compromise solutions.

The reasons for using mediation as one of the preferred dispute resolution processes are, first, the commercial clientele’s disenchantment with the cost and time involved in litigating in national courts and in arbitration; and, secondly, a growing feeling amongst international traders that “interest-based” solutions may produce better outcomes in the medium to long term than “rights based” solutions.

The result is that the major international arbitration institutions have been developing their ADR facilities and capabilities with understandable urgency, because these things are market-driven. The AAA, the ICC, ICSID, the LCIA and WIPO all promote their own sets of conciliation or mediation rules; and there are now also many domestic organisations around the world offering mediation services, particularly in the USA and other parts of the common law world. Most of these organisations offer training for budding mediators, and some of them offer diplomas or other opportunities for mediators to put letters after their names.

Mediators bring many useful skills to the bargaining table. In particular, they bring *neutrality* and a sense of *structured informality* to the proceedings. They may also receive information that neither side is willing to impart to the other, and then use this information as an element in their strategy to help nudge the parties towards agreement.

As part of the master's degree program run at Nottingham Law School for litigation practitioners there has traditionally been a "mediation weekend". We have a rather complicated case study that contains a number of different settlement possibilities, and some dead-ends that cannot work out for one reason or another. There is no satisfactory "rights-based" solution – one of the parties will be bankrupted if that route is taken.

We divide the class into about eight hypothetical "law firms". Four of the law firms represent the claimant, and four represent the respondent. Thus we have four groups working separately and simultaneously on the same case study. Faculty members and invited guests play the roles of the four mediators, eight clients and so forth, and the scenario is played out over one and a half days.

We have experimented over the last four or five years with various different types of mediators – judges, Q.C.s, senior litigation solicitors, professionally trained mediators (many of them not lawyers), professors and some other guests from overseas, particularly the USA.

On average, around three of the four groups achieve a settlement before the time runs out. Where the process fails, most groups think that the process was positively harmful in that hostile positions hardened. In some of the successful groups, one of the parties often thought it had been "bullied" into an unfavourable settlement by an over-aggressive mediator.

Some of the clients have felt that their lawyers were too focused on scoring points over the other side and lost sight of the client's interests. Very often the clients and their lawyers started to distrust the mediator in the sense that they suspected that he was not conveying their position accurately to the other party, and that the other party did not appear to move at all. This atmosphere of suspicion tends to be fuelled by the seemingly long periods the parties are left waiting while the mediator is with the other side. On a few occasions the parties terminated their mediation at an early stage and proceeded by direct negotiation. On one occasion the clients fired their lawyers and sat down together with the mediator – and reached a settlement almost immediately.

All the participants – students, mediators, clients and tutors – invariably leave on the Sunday (a) exhausted and (b) with a lot of food for thought. It's not easy to formulate any definitive results, but here are some tentative conclusions:

- (i) Judges don't necessarily make good mediators – their approach tends to be "rights-based", and their failure rate (in the sense of not achieving a settlement) is rather high
- (ii) Professionally trained mediators – with some notable exceptions - do no better than the average
- (iii) Litigation lawyers are often out of their depth when representing clients in mediations
- (iv) Mediation is far from the universal cure for all ills that its evangelical exponents would have us believe

Nonetheless, I happily accept that, like arbitration, mediation has a genuine and valuable place in the spectrum of available dispute resolution mechanisms. There are occasions where a properly trained mediator can produce a result that adds value for the parties at a fraction of the cost of an adversarial process designed to achieve a "rights-based" solution. I will refer further to "rights-based" and "interest-based" solutions later.

THE INVALIDITY OF ENTRENCHED ASSUMPTIONS

It seems clear to me that these three dispute resolution tools - litigation, arbitration and mediation - are all descendants of the ancient practice of resolving *mature* disputes through the intervention of a third party who has substantial formal or informal authority over the parties. Of course the role of the third party varies as between each of the three different mechanisms, and the nature and progression of the dispute resolution processes are different. However, the historic fundamental has remained the same; and in my view we seem to have been brainwashed by our background into assuming that the way our forefathers have always done it is the appropriate way in today's circumstances.

The result is that for hundreds if not thousands of years lawmakers, judges and litigation-orientated lawyers have steadfastly focused their attention – and earned their livings – by developing and refining increasingly sophisticated rules of substance and procedure. In the second half of the last century the problem was compounded by the proliferation of electronic devices that enable huge quantities of words to be set on paper and reproduced over and over again. These factors have had the cumulative effect of making speedy, inexpensive and fair resolution of dispute largely inaccessible to the small players engaged in international trade – and the pips are squeaking even for the big players.

In the USA the low esteem in which the public holds “contingency fee plaintiff attorneys” has driven businessmen into the arms of the of the thriving ADR industry. But in turn that industry has itself generated a whole new and highly competitive and self-interested ball game. The sun never sets on the daily progression around the world of conferences promoting the causes and products of various ADR organisations and the people who make their livings on their coat tails with messianic zeal.

Nonetheless, although there are no statistics, I believe most of us would accept an educated guess that - even taken together - the cases that involve the participation of a third party are only the visible tip of a an enormous iceberg. Under the water-line more than perhaps four-fifths of the ice mass represents the invisible bulk of disputes that never get anywhere near lawyers. They are either “nipped in the bud” before they can burst into flower; or they are resolved promptly by the parties reaching an agreement on an “interest” basis rather than a “rights” basis. The parties assess it to be advantageous to implement a solution reflecting elements (such as fairness, maintenance of long term relationships and which of them will feel less pain in “taking a hit”). These elements have little to do with contractual rights and obligations; and the parties know, of course, that in at least the first two of the classical “third party intervention” mechanisms referred to above the outcome will necessarily be based on a third party's assessment of their legal rights and obligations.

I am not suggesting that our existing third party dispute resolution mechanisms are about to be consigned to a *Jurassic Park*, eventually to become as extinct as the dinosaur. Far from it. All three will continue to have an essential role, albeit perhaps in a diminishing proportion of the whole of the iceberg as it grows larger.¹³ It is inevitable that the iceberg will expand, because as international trade

¹³ So long as there is no truly international court of arbitration, national courts will always play an essential role in enforcing arbitration agreements and awards, and supporting the arbitral process by appointing arbitrators and compelling evidence where necessary: see Holtzmann, “Creating a New International Court for Resolving Disputes on

expands – as it must at least until we enter some form of new dark, perhaps post-nuclear war, age – the number of disputes will expand. This follows as night follows day.

THE INEVITABILITY OF CHANGE

I believe it is inevitable that international business will turn away from allowing disputes to fester until they mature into a state in which third party intervention becomes the only available option. We can already see examples. In 1998 I ran across one where a senior in-house litigation counsel at General Electric – a very large multinational corporation – explained at a conference that the company had developed a mechanism for “early dispute evaluation”. Essentially this involved an internal review of all situations where disputes seem to be on the horizon, including objective assessments of the facts and legal position by a special section of the legal department. This assessment would then itself be reviewed by an internal panel which decides how to go forward – with a predisposition to settle the problem by negotiation unless there are clear indicators that a third party intervention mechanism should be brought into play. To me it seems clear that this kind of change is inevitable. It will happen whether we like it or not, and the competition between the existing approaches by the different branches of the international dispute resolution industry is merely a battle for market share in the proportionately diminishing cake of the visible ‘above the waterline’ sector of the iceberg.

My proposition is therefore that the resources and effort lavished on arbitration and mediation are essentially directed towards creating a series of refinements and variations on a well-worn concept. That they are useful variations with genuine application to certain situations is not in doubt, but nonetheless they are nothing more than refinements or variations, and they do not face up to the inevitable changes that lie ahead.

THE CHALLENGE

I now turn to discuss my suggested response to the challenge presented by these inevitable changes under three headings:

- (i) Attitude
- (ii) Skills
- (iii) Structures

ATTITUDE

When an international businessman consults his lawyer about a commercial dispute, his main concern is what he should do next. Certainly he needs to have the best assessment that can be given as to his rights and obligations; but he also wants to develop a commercially orientated strategy for solving his problem.

the Enforceability of Arbitral Awards” in *The Internationalisation of International Arbitration* (Kluwer, 1995) pp. 109 *et seq.*; and Schwebel, *The Creation and Operation of an International Court of Arbitral Awards* in *ibid.*, pp. 115 *et seq.* As mentioned earlier, national courts will also be needed in default of a agreed choice of forum by the parties.

Most techniques adopted in legal education do not prepare the young lawyer to meet this situation. It is apparent to me that we teach law as the study of litigation. In the common law countries much of our law is created by celebrated appellate court cases, and the system actually rewards students for focusing narrowly on the legal issues. In general, litigation lawyers are taught to focus on *rights*, not interests; on victories over enemies, not continuing relationships. However, the world of international commerce does not operate that way. To “add value” in the modern world, lawyers need to develop an attitude that is consistent with the real interests of their clients. It follows that law students should be taught that the strict legal position is only one of the elements, albeit a significant one, in making business decisions.

Current training courses on negotiation sometimes teach students and practitioners to distinguish between the *apparent problem* and the *underlying problem*. For instance, a dispute about a late payment can really be caused by tension over slow or shoddy service. But they are still mostly taught to focus on *rights* and *obligations*, and these are often not the best pointer to an interest-based outcome to a dispute between real people.

One of the classic examples, albeit an over-simplified one, was expounded by Fisher and Ury in their Harvard study *Getting to Yes*.¹⁴ The authors describe a dispute between two children about possession of an orange. Both children were adamant they wanted the orange, and argue about their *right* to have it. It so happened that the two children did not want the orange for the same reason. One wanted to eat the flesh, and the other wanted the peel to take to school in order to bake a cake. Neither a complete victory for one child nor a fifty-fifty (or any other) split would have maximised the children’s joint interests. Of course this is an idealised example, but it makes an important point. Lawyers should learn from an early stage of their careers that they are employed to protect their client’s interests, not merely to defend their legal rights.

This is what I mean by *attitude*. In my view the law schools have significant role to play in changing the way that their graduates approach solving clients’ problems; and the law firms need to capitalise on a new breed of entrants by encouraging them to develop this approach in their relationships with clients.

SKILLS

An appropriate *attitude* can make a significant difference to a lawyer’s usefulness to his client, but on its own it is not enough. If the legal profession is to retain its market share in the dispute resolution field it needs to ensure that the next generation of practitioners acquires dispute management skills. I referred earlier to two elements in this context: *dispute avoidance* and *direct negotiation*. Although separate disciplines, they both require broadly similar abilities. Insight into the needs and motivation of the other party are crucial. In international trade disputes this requires a highly developed understanding of cultural factors; this is, of course, much more profound than the superficial advice that we should, for example, “never do business over breakfast with an Englishman”; “never over dinner with a Mexican”.

Cross-cultural awareness requires an understanding that we inevitably see the world around us through spectacles fashioned by our own experience. This involves a web of predispositions, assumptions, and behavioural patterns. An example is that we trust

¹⁴ Robert Fisher and William Ury, *Getting to Yes* (2nd ed., Penguin, 1991)

people we like; and we like people whose thought-processes we believe to be similar to our own. How often do you hear the expression “he¹⁵ is on my wavelength”? If you can “feed back” to the person you are communicating with his own body language, tonality, words and phrases, you will have a good chance of having that person say to themselves “I can do business with this guy, he talks my language”. Some may remember that this is what British prime minister Margaret Thatcher said publicly of the Soviet leader Mikhail Gorbachev.

As a digression I should mention that all this is a far cry from my own experience as a young litigator at Freshfields in the mid-1960's. I can vividly recall being taught that any case that went to trial was a failure, and that the objective in all litigation was to get the most favourable outcome that could be achieved without going to trial. This seems alright so far. But the key phrase was “winning without trial”; and in each case we would work out strategies for harassing the opposition with interlocutory applications, such as trying to freeze assets, at the same time as imposing on them the greatest possible burden with regard to discovery and so forth. The motto ran . . . “If you have them by the balls and squeeze hard enough, their hearts and minds will follow.”

Returning to cross-cultural matters, the negotiator dealing with a person from a different culture must realise that the comfort zone in which he operates is not likely to be the same zone in which the other party operates. The range of differences is of course a study in itself, and I mention briefly just a few. In Western cultures the contract tends to constitute a complete definition of the relationship between the parties. Most of us are familiar with the so-called “entire agreement” clauses that are inserted in commercial contracts, particularly by North Americans. However in some other countries, such as Japan, a contract only represents one part of a wider business understanding.¹⁶ Similarly, people from different cultural backgrounds approach to problem solving from entirely opposite directions. In Western cultures universal rules or principles that are to be applied equally in quite different situations.¹⁷ In other cultures, notably in the former Soviet Bloc countries, more attention is given to the unique circumstances of the relationship.¹⁸ Thus a Romanian might view a British approach as inflexible and disrespectful to the personal ties involved; whereas the Briton might view the Romanian approach as creating an unjustified exception in favour of a friend. In the Arab Middle East emotional and family ties play an important part in problem solving. Recognising and responding appropriately to these cultural differences is an important element in negotiations.

There are also some more specific negotiation skills. The Fisher and Ury study made a distinction between “positional” and “principled” negotiation. In the former, negotiators barter competitively - asking for far more than they expect to get and then giving way little by little until a position acceptable to the other side is discovered. In the latter, the negotiator assesses what the other side really wants (or needs) and then offers it in exchange for what he really wants himself.

Fisher and Ury also identified a number of “pathological” negotiation techniques. A negotiator sometimes cannot resist the temptation to become involved in a battle of egos, and is determined to gain the upper hand over his opposite number. In particular, litigators called on to act as negotiators often get caught up in the adversarial process,

¹⁵ The masculine description of course includes the feminine throughout.

¹⁶ Trompenaars and Hampden-Turner, *Riding the Waves of Culture: Understanding Cultural Diversity in Business* (2nd ed., Nicholas Brealey Publishing, 1997), pp. 39-40.

¹⁷ *Ibid.* pp. 33-39.

¹⁸ *Ibid.* pp. 33-39.

developing an adrenaline high from the “smell” of battle. They can sometimes become so absorbed in the process itself that they lose sight of the client’s objectives.

I used to play an occasional golf game with the chairman of one of the UK’s largest commercial property development companies. He told me that they fell into dispute with their joint venturer in connection with one of a number of ongoing property developments. Each side retained equally large and blue chip London law firms, where the opposing litigants were represented by young litigation partners who were sparring with each other on various unrelated cases and didn’t get on well personally. The result was that the dispute escalated to an extraordinary level, notwithstanding several reminders from the clients on both sides that they were good friends doing much continuing business with each other. The matter was only resolved after the chairmen of the two client companies met at an industry social function and agreed to seek a joint meeting with the senior partners of the illustrious firms concerned, with a view to “calling off the dogs”.

I accept that the provision of skills training is not a primary objective for law schools at undergraduate level. This is when the basic knowledge must be taught. At the level of continuing legal education for practitioners, which is now compulsory for those not grandfathered out, there is however strong case for the law schools to get together with the profession to offer training in dispute management for young - or even senior - litigators. The law schools would provide the physical and logistical infrastructure in an academic setting; and the law firms would provide much of the faculty on a part-time footing.

STRUCTURES

Finally, I turn to the structural changes that might be contemplated in connection with dispute avoidance. My thoughts on this aspect may be best explained through two recent examples.

The first, which has been rated as a substantial success, is the construction of the huge new airport in Hong Kong. Many different parties were involved, operating under a complex spider’s web of contracts collectively worth many billions of US dollars. Obviously the potential for conflicts over design, workmanship, delays, co-ordination and so forth was enormous. However, the parties did not simply cover every foreseeable eventuality in the contracts, and then leave disputes to be resolved when they matured. They created a dispute management scheme that involved an independent body called the Disputes Review Group. This Group was chaired by a former Hong Kong judge, supported by experts from various disciplines.¹⁹ They spent a good deal of time on the site as the project progressed;²⁰ and “sniffed out” potential conflicts before they developed; and then defused them. It was a massive and intensive task, undertaken with great skill and determination. The result was that the airport was completed with only one substantial dispute referred to arbitration.

The second example is found in the contracts for the construction of the famous tunnel under the channel between the UK and France. These contracts also made provision for a “pre-arbitral review process” by a “panel of experts”. Sadly the procedure did not prevent a number of very substantial disputes being referred to separate ICC arbitrations. Maybe the dispute management structure was inadequate;

¹⁹ Initially the DRG was composed of eight persons, but one dropped out early in the process and was not replaced.

²⁰ Quarterly review meetings were held over the four and a half years of the project, each lasting four days and each involving extensive site visits.

maybe the participants did not possess the necessary attitudes or skills. My old firm was involved in some of these arbitrations, and it is not for me to make value judgements. I merely comment that in one project the structure worked well; in the other it did not. Whatever the success of such fledgling efforts, it is clear that the use of dispute review boards, or similarly named bodies, is not simply another ADR device. It instead represents the emergence of a significant *structural* change aimed at the *prevention* of disputes – thus making that most modern of jargon phrases “alternative dispute *resolution*” obsolete even before it has become a commonly recognised term in the international language of professionals in the industry.²¹

What sort of structures do I have in mind? Apart from pre-arbitral disputes review boards of the type I have mentioned, I suggest as a beginning some simple and basic ideas. Contracts might require a “cooling off period” before any third party intervention is permitted. During that period the parties might commit themselves to take the negotiations out of the hands of the individuals most closely involved in the transaction and identify a trained “trouble-shooter” from each side, briefed to solve the problem without recourse to third party intervention.

Another, linked, possibility would be for each side to create a small internal (or external) team to undertake make a rigorous “risk analysis” of all the relevant elements (including but not limited to legal rights). This team could be required to make a presentation to a senior executives within the company, along the lines of the scheme adopted by General Electric that I described earlier. Of course only the largest corporations would be able to commit the necessary resources to a substantial exercise of this type; but it should not be beyond the capabilities of small companies – advised by their law firms – to develop structures that would be apt for the company concerned and the type of transactions it undertakes.

These are just a few ideas. Some detailed applied research is needed in order to evaluate these and other possible dispute avoidance structures. In my view this research could be carried out under the wings of law schools with active support and participation from law firms and representatives of international business.

CONCLUSION

Only genuine systemic change can alter the role that commercial lawyers, whether international or domestic, in independent practice or in-house, should play in dispute management. The reason that many lawyers do not negotiate well in a dispute resolution context is because historically it has not been their job. They are litigators who sometimes participate negotiation sessions, where they are often operating way outside their comfort zones largely because they are circumscribed by their background and training. Their overwhelming instincts are to “screw” the other side.

I foresee a new breed of lawyers becoming actively involved in preventing potential disputes getting “out of hand” before they mature into intractable situations. I envisage *dispute avoidance groups* being set up around the world, both as independent entities and also as teams within major law firms and in-house legal departments in large corporations. The investment required to design appropriate structures for individual

²¹ By the end of the 20th Century there was still no transatlantic acceptance of the meaning of the phrase “alternative dispute resolution”. *Alternative* to what? In Europe there was a clear consensus that the term “ADR” applied to mechanisms that are “alternative” to procedures that lead to decisions of third parties that are final, binding and enforceable against the parties (*i.e.* decisions of courts and arbitrators). In the USA the policy of the major arbitration institutions tends to be that the term “ADR” should be applied to all dispute resolution mechanisms other than the judge in his courtroom.

industries, and to create the resources to implement such schemes would surely be far exceeded by the direct and indirect costs of the litigation costs that would have been averted. The result should be that lawyers will be required to intervene in the dispute management process earlier and with greater business understanding than ever before.²²

In *Bleak House*, Charles Dickens wrote an entire novel about an impossibly convoluted Chancery suit that eventually ended in the lawyers absorbing the whole of the successful litigant's damages in costs. Of the Chancery Court, the book warns: "[s]uffer any wrong that can be done to you, rather than come here!" Have our existing methods of dispute resolution in international trade really broken out of this mould? Private arbitration and mediation systems are undoubtedly useful refinements of state-provided dispute resolution processes. They perform essential roles in appropriate circumstances, and will always be needed. Nevertheless, they are no more than refinements applied a system that has been in use for tens of thousands of years. They are not truly innovative developments that are capable of providing a real response to the rapidly changing environment in which international commerce is conducted.

It is unlikely that the current narrow focus on the third party intervention model will last very far into the new century. As international business becomes more sophisticated, so will its desire to solve problems fast and painlessly. This will require attitudes, skills and structures designed to enable commercial transactions to be supervised effectively with the aim of preventing disputes from arising; and, when disputes prove to be unavoidable, for the parties to have available to them the separate but related attitudes, skills and structures to resolve them promptly and fairly through direct negotiation.

I hope that the next generation of international trade lawyers will be in a position to be a part of this development. The challenge that confronts law firms and law schools is to participate constructively in devising the type of structures I have described and to find ways of teaching the next generation the attitudes and skills they will need in order to operate successfully within those structures.

²² For a similar conclusion see Gilson and Mnookin, *Co-operation and Competition in Litigation: Can Lawyers Dampen Conflict?* in Arrow, Mnookin, Ross, Tversky and Wilson, *Barriers to Conflict Resolution* (W W Norton, 1995), see in particular pp. 197-199.

CASE NOTES

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

THE SUBJECTIVIST BUG IS ALIVE AND WELL

B (a minor) v. Director of Public Prosecutions [2000] 1 All E.R. 833, H.L.

(Lords Irvine L.C., Mackay, Nicholls, Steyn and Hutton)

The two outstanding academic criminal lawyers of modern times, Professors Glanville Williams and Sir John Smith, have long espoused a subjectivist view of criminal liability and have been forthright critics of decisions straying from this path of doctrinal rectitude.¹ The decision in *B v. DPP*² provides a huge endorsement of the subjectivist stance, ironically in an era when younger academics have not been slow to question this prevailing academic orthodoxy.³

In *B v. DPP*, a 15 year old youth had persistently asked a 13 year old girl sitting next to him on a bus for a “shiner” which “in the language of today’s gilded youth apparently means, not a black eye, but an act of oral sex.”⁴ He was charged with inciting a child under 14 to commit an act of gross indecency contrary to section 1(1) of the Indecency with Children Act 1960. It was accepted that he honestly believed she was over 14 but it was not established at trial whether or not his belief was a reasonable one. Section 1(1) provides as follows:

Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding, or to both.

Three issues were certified for the House by the Divisional Court :

(1) Could the accused’s mistaken belief that the girl was 14 years or over negate liability?

¹ See for example their attacks on *R. v. Caldwell* [1982] A.C. 341, H.L. and *DPP v. Smith* [1961] A.C. 290, H.L. in Williams, “Recklessness Redefined” (1981) C.L.J. 252; Williams, Case Commentary on *Smith* [1960] C.L.J. 140; Smith, Case Commentary on *Caldwell* [1981] Crim. L.R. 393; and Smith, Case Commentary on *Smith* [1960] Crim. L.R. 765.

² [2000] 1 All E.R. 833, H.L.

³ See, for example, C. Wells “Swatting the Subjectivist Bug” [1982] Crim. L.R. 209; R.A. Duff “Recklessness” [1980] Crim. L.R. 282; J. Horder “Two histories and four hidden principles of *mens rea*” (1997) 113 L.Q.R. 95; J. Gardner “Rationality and the Rule of Law in Offences against the Person” [1994] C.L.J. 502.

⁴ Rougier J. in the Divisional Court decision at [1998] 4 All E.R. 265 at 266.

- (2) If so, was it necessary that the belief be based on reasonable grounds, and
 (3) in either event, does the burden of proof lie on the defence or the prosecution?

Overruling the Divisional Court decision⁵ that the offence was one of strict liability in respect of the age factor, the House held that *mens rea* in the true sense (knowledge or subjective recklessness) was required so that a genuine belief by D, whether based on reasonable grounds or not, that the victim was 14 or over would negate such *mens rea* and thus liability. As always, the burden of proving the requisite *mens rea*, including the absence of such a belief, rests with the prosecution although the defence would have an initial evidential burden of raising the possibility of such a mistaken belief.⁶ The decision's significance ranges from the micro level of age-related sexual offences to the macro level of general principle and its tentacles have the potential to spread to many corners of the criminal law.

GENERAL PRINCIPLES

The first and most fundamental issue to be settled was whether section 1(1) imposed strict liability in respect of the age factor because, in that case, a mistake as to the victim's age would be irrelevant to liability. Their Lordships were at pains to underscore the principle in *Sweet v. Parsley* that "... unless Parliament has indicated a contrary intention either expressly or by necessary implication ... the appropriate mental element is an unexpressed ingredient of every statutory offence."⁷ Even though it might be a *reasonable* implication that strict liability was intended by Parliament, that is insufficient to displace the presumption of *mens rea*.⁸ It has to be a *necessary* implication which "connotes an implication which is compellingly clear."⁹

Lord Steyn, taking a wider view than the other Lords, followed Professor Sir Rupert Cross¹⁰ in locating this admirable presumption in the principle of legality. This requires statutes to be construed strictly in the light of fundamental liberties (in this case no liability without fault), whether their wording is ambiguous or not. In the words of Professor Ashworth: "The practical implication of this approach is that the courts should exercise restraint in their interpretive role, favouring the defendant where they are left in doubt about the legislative purpose."¹¹ The advent of the provisions of the Human Rights Act 1998 can only reinforce this caution.

Mens rea is a term of variable meaning and often used loosely to embrace all fault elements, objective and subjective. The House was unanimous in endorsing a strict view confining the expression "*mens rea*" to subjective fault. Thus the presumption to be applied in this context was not simply that *some* fault was required but that *subjective* fault (*i.e.* knowledge or realisation) was essential. The fault element of negligence embraced by Lord Diplock in *Sweet v. Parsley* was specifically disapproved by all the Lords. Consequently a mistake about any fact or circumstance forming part of the

⁵ [1999] 1 Cr. App. R. 163.

⁶ Lords Steyn and Hutton at 851, 852 and 855.

⁷ [1970] A.C. 132, H.L., Lord Nicholls at 836. The "necessary implication" formulation of the test comes from *R. v. Tolson* (1889) 23 Q.B.D. 168, *Brend v. Wood* (1946) 175 L.T. 306 and *Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1985] A.C. 1, P.C. rather than *Sweet v. Parsley*.

⁸ Lord Hutton at 855.

⁹ Lord Nicholls at 839.

¹⁰ See Cross: *Statutory Interpretation* (3rd edn. 1995), p. 166.

¹¹ Ashworth: *Principles of Criminal Law* (3rd edn. 1999), p. 82.

actus reus of an offence, whether reasonable or not, would negate the *mens rea*. If the accused, however stupidly, truly believes that the complainant is 15, he neither knows nor suspects that the complainant is under 14.

In view of the strictness of the “necessary implication” test to rebut the presumption, it is questionable whether the latter should involve such a narrow construction of fault. It seems calculated to reinforce the courts’ traditional reluctance to contemplate a halfway house solution based on a fault element of negligence long embraced by the courts of Australia and Canada.¹² The all or nothing approach - full *mens rea* or strict liability – seems set to continue with an unwelcome loss of flexibility. It is true that Lord Nicholls (with whom Lord Irvine L.C. agreed) envisaged that, if the “necessary implication” displacing full *mens rea* was found, the court could choose between negligence and strict liability.¹³ However, the majority seemed to regard the choice as strict liability or full *mens rea*. It seems that the court’s agenda was to force the legislature to consider carefully and spell out the fault ingredients of any future offences and in particular any derogations from full *mens rea*, rather than to rely on the courts to supply its omission. It remains to be seen whether Parliamentary minds will be so concentrated but, in any event, it is surely unrealistic to anticipate that Parliament will find the time or inclination to review and, if necessary, amend existing offences.¹⁴

To support this stance, their Lordships relied on the mistake cases of *DPP v. Morgan*,¹⁵ *R. v. Williams*,¹⁶ *Beckford v. R.*¹⁷ and *R. v. Kimber*.¹⁸ Logically, none of these cases compels the House’s construction. They state what would now be seen as the obvious – if a mistake about the circumstances negatives the *mens rea*, it matters not whether the mistake is reasonable or unreasonable. D is not guilty. But this begs the question of what, if any, *mens rea* is required. This prior question must be answered before the effect of the mistake can be judged. The House tended to conflate and confuse the two questions. Although *DPP v. Morgan* and the other cases lay down no general principle governing the ascertainment of *mens rea*, the House appears to have regarded them as authority for the presumption that full *mens rea* in respect of all aspects of the *actus reus* is a standard requirement of all offences.¹⁹ By implication the House gives its stamp of approval to the view in *Kimber* and *Williams* that the concept of the unlawfulness of force in offences of violence is a definitional element of the offence so that *mens rea* is needed in relation to the absence of consent and self-defence etc.²⁰

THE PARTICULAR OFFENCE

In the light of the general principles enunciated by the House, it was clear that under section 1(1) the presumption of full *mens rea* in relation to age applied unless it was excluded by ‘necessary implication.’ What factors could give rise to such an

¹² *Proudman v. Dayman* (1941) 67 C.L.R. 536; *City of Sault Ste* (1978) 40 C.C.C. (2d) 353.

¹³ At 837.

¹⁴ Cf. Lord Nicholls at 841 and Lord Hutton at 856.

¹⁵ [1976] A.C. 182, H.L.

¹⁶ [1987] 3 All E.R. 411, C.A.

¹⁷ [1988] A.C. 130, P.C.

¹⁸ [1983] 3 All E.R. 316, C.A.

¹⁹ Lord Nicholls at 837 and 838 and Lord Steyn at 851.

²⁰ This is particularly important on the issue of consent where the majority’s reasoning in *R. v. Brown* [1994] 1 A.C. 212, H.L. threw doubt on *R. v. Kimber* in seeming to regard consent as a matter of defence rather than a definitional element in the crime of battery.

implication? “Such an implication may be found in the language used, the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.”²¹ For those looking for predictive certainty, such vague generalisations are of little use and mark no advance on previous case law. However an examination of the application of these criteria to the specifics of the case proves more instructive.

The Nature of the Offence

It seems reasonably clear that the classification of the offence into either criminal or quasi-criminal will remain of immense importance.²² Whilst it would be going too far to suggest that the House’s strictures are applicable only to “truly criminal” offences, previous experience suggests that a markedly different approach can be expected for quasi-criminal offences.²³ This offence is truly criminal in character, originally attracting a punishment of up to two years’ imprisonment and now up to ten years.

The more serious the offence, the greater is the weight to be attached to the presumption, because the more severe is the punishment and the graver the stigma which accompany a conviction.”²⁴ Another factor heavily influencing both Lord Nicholls and Lord Steyn in favour of *mens rea* was the breadth of the formulation of the *actus reus* which embraced a wide range of conduct from serious paedophilic activities to relatively innocuous “consensual sexual experimentation between precocious teenagers.”²⁵

The Mischief Sought to be Prevented

It was accepted that a major purpose of the legislation on sexual offences including the offence in question was to protect young children from sexual exploitation, “unquestionably a great social evil”.²⁶ However, for Lords Nicholls and Steyn, such a legislative purpose by no means predicated an intention to impose strict liability and Lord Nicholls, citing the lack of general agreement that strict liability is necessary for the enforcement of the law protecting children,²⁷ was not convinced that strict liability would in fact aid the legislative purpose. Nor was he impressed by the potential evidential difficulties posed for the prosecution in having to negate a possible mistaken belief preferring to adopt the views of Sir Owen Dixon in a famous dictum from *Thomas v. R.* Mistrust of the jury’s ability to differentiate true from false assertions of mistaken belief is never a “sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code”.²⁸

Lord Hutton was more sympathetic to the contention that the legislative purpose ruled out the presumption of *mens rea* “by necessary implication” and considered the “arguments for the appellant and the Crown to be almost evenly balanced”. He saw the danger in focusing exclusively on the rights of the accused and omitting due

²¹ Lord Nicholls at 839.

²² Cf. Lord Steyn at 847. For example it is not thought that the recent decision in *Harrow London Borough Council v. Shah* [1999] 3 All ER 302 DC that the offence of selling a lottery ticket to a person under 16 is strict liability as to age would be affected by *B v. DPP*.

²³ Cf. *Alphacell v. Woodward* [1972] A.C. 824, H.L. decided soon after *Sweet v. Parsley*.

²⁴ Lord Nicholls at 839.

²⁵ At 839f and 846.

²⁶ Lord Steyn at 849.

²⁷ Lord Nicholls pointed to the mistaken belief defence provided to the gross indecency offences in the Law Commission’s Draft Criminal Code 1989 (Law Com. No. 177).

²⁸ (1937) 59 C.L.R. 279 at 309.

consideration of the “social and moral imperative” to protect the interests of children from sexual abuse.²⁹ But ultimately he was not persuaded that the presumption was rebutted.

It is suggested that there is quite a strong policy argument for displacing the presumption though only by reducing the fault element to negligence. If the victim is in fact under the statutory age, the accused’s conduct will involve an actual or incited attack on the sexual integrity of the victim. It therefore seems appropriate to require the accused to have reasonable grounds for believing that the victim is not below that age so that the actual or incited attack does not interfere with their sexual integrity. This is especially so given that the victim’s youthfulness (and therefore potential to be under age) will almost inevitably be obvious from their appearance.³⁰ The onus should be on the defendant who interferes with the sexual integrity of a young person (whether consenting or not) to take reasonable care to ensure that that person is not under the age.

Statutory Context

The main thrust of the prosecution’s argument was that the 1960 Act had to be viewed as part of an overall statutory scheme based around the Sexual Offences Act 1956 and had to be interpreted not in isolation but in the context of that general scheme. The reason for this was compelling. The 1960 offence had been specifically enacted to cover a lacuna in the indecent assault provisions of the 1956 Act whereby, due to the absence of any “assault”, no offence was committed if a passive adult invited a child to touch them indecently, whether or not there was an actual indecent touching.³¹ Lord Steyn accepted that “the two Acts should be read as one always speaking statute to be interpreted in the world of today”.³²

The 1956 Act makes express provision for defences of mistaken belief in several of its offences necessarily implying, so the prosecution’s argument ran, that in the remainder, including the 1960 “appendix” to the 1956 Act, mistaken belief is no excuse. In particular, section 6(3) provides a defence to the section 6 offence of unlawful sexual intercourse with a girl under 16 for men under 24 who reasonably believe the girl to be 16 or over. Since there is no such provision in section 5 for the corresponding offence of unlawful sexual intercourse with a girl under 13, that was meant to be an offence of strict liability. Similarly various offences for the protection of mental defectives expressly provide for a reasonable mistake defence in respect of the victim’s mental capacity.³³ This argument which had proved persuasive in the Divisional Court was unanimously rejected by the Lords on the ground that the 1956 Act was “a motley collection of offences, of diverse origins” displaying “no satisfactorily clear or coherent pattern”.³⁴ Like the Offences Against the Person Act 1861, its precursor, the 1956 Act contained “a rag-bag of offences brought together from a variety of sources with no attempt ... to introduce consistency as to substance or as to form”.³⁵ For this reason the 1956 Act failed to give the necessary “compelling guidance” to displace the

²⁹ See Rougier J. in the Divisional Court’s decision at [1998] 4 All E.R. 265 at 269 and Ashworth “Interpreting Criminal Statutes : A Crisis of Legality” (1991) 107 L.Q.R. 419 at 446-7.

³⁰ Analogous to the ‘Thin Ice’ principle - see Ashworth *op. cit.* 75-6.

³¹ *Fairclough v. Whipp* [1951] 2 All E.R. 834. See Criminal Law Revision Committee: First Report (Indecency with Children) 1959 (Cmnd. 835) - Amazingly the CLRC did not discuss whether the offence was to be strict liability or not.

³² At 847. See *R. v. Ireland* [1997] 4 All E.R. 225, H.L. at 233 for the newly minted concept of “always speaking” statutes.

³³ Sections 7(2) (as amended), 9(2), 14(4), 15(3) and 27(2).

³⁴ Lord Nicholls at 840.

³⁵ Lord Steyn at 848 quoting from *R. v. Savage, R. v. Parmenter* [1992] 1 A.C. 699 at 752.

presumption when interpreting a different statute.³⁶ Furthermore, as Lord Reid had pointed out in *Sweet v. Parsley*,³⁷ the fact that some offences in an Act expressly prescribe *mens rea* is not in itself sufficient to imply that offences which are silent as to *mens rea* are meant to be strict liability.³⁸

However, as well as the express words of the 1956 statute, there were case law interpretations of some of its other offences supporting the prosecution's argument. As indicated previously, the 1960 statute was designed to block a loophole left by the definition of indecent assault (contained in sections 14 and 15). Under section 14(2) a girl under 16 cannot give a valid consent to negate an assault and under section 15(2) neither can a boy under 16. The cases of *R. v. Forde*³⁹ and *R. v. Maughan*⁴⁰ had long ago held that even a reasonable belief that the girl was 16 or over could never be a defence to a section 14 charge. Their Lordships declined to express a final view on the correctness of these decisions in respect of sections 14 and 15 but concluded that they were insufficient to displace the presumption for section 1 of the 1960 Act. Similarly the prosecution's attempt to argue that the well-known case of *R. v. Prince*⁴¹ laid down a general rule that all age related sexual offences were to be strict liability in respect of the age factor unless otherwise expressed by the statutory wording, was unanimously rejected as inconsistent with the *Sweet v. Parsley* presumption. Again *R. v. Prince* was not overruled in respect of the abduction offence under section 20 with which it dealt but it is clear that it cannot be relied on for the interpretation of other offences. Indeed the general tenor of their Lordships' remarks suggest that none of these cases is likely to survive a judicial reconsideration of sections 14, 15 and 20.⁴²

CONCLUSION

The decision certainly advances the tide of subjectivism and is notable for its adherence to principle when the difficult subject-matter might have been expected to yield to the expediency evident in not a few House of Lords' decisions. The House clearly cannot be labelled "predictable".⁴³ However, there is quite a strong case for negligence liability in respect of age in offences involving violation of sexual integrity and it is submitted that the House gave inadequate consideration to this compromise between strict liability and full *mens rea*. Furthermore the formulation of the presumption in terms of *mens rea* in the purist sense as opposed to fault generally is likely to continue the polarisation evident hitherto though it does not *preclude* a court from finding that negligence liability is a 'necessary implication' of the statute. On the face of it, the decision is a massive strike against strict liability but it is doubted whether it will dissuade the courts from strict liability in the field of regulatory offences. One final gripe: the decision continues the tradition of three judgments all reasoning similarly but slightly differently with one judge agreeing with all three. The result is that it is often

³⁶ Lord Nicholls at 841, Lord Steyn at 848 and Lord Hutton at 855.

³⁷ [1970] A.C. 132 at 149.

³⁸ Lord Steyn at 848 and Lord Hutton at 855.

³⁹ [1923] 2 K.B. 400.

⁴⁰ (1934) 24 Cr. App. R. 130, C.C.A.

⁴¹ (1875) L.R. 2 C.C.R. 154.

⁴² See especially Lord Steyn at 850. Also Lord Nicholls at 841. There is a problem in relation to s.20 in that s.19 (abduction of a girl under 18) expressly provides in subsection (2) for a defence of reasonable belief that the girl is 18 or over. It would be odd if s.19 were strict liability (subject to the s.19(2) reasonable belief defence) whilst the more serious s.20 abduction offence required *mens rea* as to age thus allowing an unreasonable belief to negate liability. *Prince* may yet survive.

⁴³ For example, compare *R. v. Gomez* [1993] A.C. 442 with *R. v. Preddy* [1996] A.C. 815.

difficult to determine whether a majority can be said to be in favour of a particular proposition. It seems unnecessary and unproductive to have lengthy separate judgments where there is unanimity on all fundamental matters.

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NO RESPITE FROM THE “STORM”

Edge v. Pensions Ombudsman [1999] P.L.R. 215; 4 All E.R. 546 (C.A.)

(Peter Gibson, Ward and Chadwick L.JJ.)

INTRODUCTION

The background and facts to this case and a commentary on the decision in the Chancery Division are set out in the last issue of this journal¹ and the appeal results from the Pension Ombudsman's objection to certain aspects of the Vice-Chancellor's decision. In particular, the Ombudsman contended that the latter had been wrong to hold that:

- (i) the statutory jurisdiction of the Ombudsman under the Pension Schemes Act 1993, section 146(1) was limited to determining disputes involving rights of the claimant against the trustees or managers of the scheme, and the Ombudsman had no power to determine disputes which involved the rights of others or to direct steps to be taken which could adversely affect those rights;
- (ii) in the exercise of a power to amend scheme rules, the trustees were not subject to a duty of impartiality between the individual or classes of beneficiaries; and
- (iii) on the facts of the case the exercise of the power did not amount to a breach of trust.²

THE TRUSTEES' DUTY

Chadwick L.J. (who delivered the judgment of the court) recognised that the role of the trustees in a scheme where the fund is dynamic is one of maintaining a balance between the assets and liabilities so as to provide pensions and other benefits to the members. If this could be done with perfect foresight there would be no surplus or deficit in a fund, but this does not happen in reality. Thus the trustees in *Edge* were provided with three tools to enable them to “balance” the fund. The first (and principal) tool provided that the employer would contribute an amount required by an actuary in addition to any “ordinary” contributions it was making; the second obliged the members to contribute an amount prescribed by the trustees; and the third was a power of alteration. The trustees had to consider which of the tools was suitable to balance the fund and decided that the benefits under the scheme should be increased by exercising a power of alteration.

Chadwick L.J. reiterated the well-accepted principle that the beneficiaries had no right to insist on an increase of benefits,³ *i.e.* they had no right in the surplus, but they had rights in relation to it, one of which was the right to have the matter properly considered. This, he believed, gave rise to the requirement that, if there is an actuarial surplus after providing for estimated liabilities, the trustees must, in deciding whether

¹ (1999) 8(1) Nott. L.J., at pages 60-68.

² The contention that the Vice-Chancellor was wrong to reverse the Ombudsman's conclusion that the trustees, who were also members of the scheme, were accountable for benefits accruing to them as a result of the amendments was thankfully abandoned, and Chadwick L.J. decided that the issue was laid to rest by the Pensions Act 1995.

³ Knox J. in *LRT Pension Fund Trustee Co. Ltd. v. Hatt* [1993] P.L.R. 227.

or not to increase benefits, act in a way which appears to them to be “fair and equitable”, and this in turn leads to a reasonable expectation among the beneficiaries that this will be done.⁴

There appears however to be a degree of uncertainty displayed by the courts as to whether the concepts of reasonable expectation and legitimate expectation are synonymous. The latter concept originates in public law and, as employed in an abuse of discretion case in public law, requires a reliance on a representation and a resulting detriment to the claimant in a manner which is similar to estoppel in property law.⁵ Robert Walker J. in *Scott v. National Trust*⁶ indicated that the concept of legitimate expectation in the public law sense was relevant in the law of trusts and proceeded to give an example of the trustees of a scheme paying £1,000 *per* quarter to an elderly, impoverished beneficiary and discontinuing the payment without any warning or without giving the beneficiary the opportunity to persuade the trustees otherwise. In such a situation, he opined, the beneficiary had a legitimate expectation to the continued payment.

This approach would undoubtedly give the members greater rights than would be bestowed upon them by traditional trusts law, but would seriously erode and fundamentally affect the discretionary nature of a power. A power rarely if ever gives a trustee unfettered control and disposal of the property, although the degree of control imposed on the trustee, and as a corollary the rights of the beneficiaries, are greater in some powers than others.⁷ To extend the rights of the beneficiaries to the extent that Walker J. suggested in *Scott* seems excessive and furthermore does not appear to be supported by the tenor of Chadwick L.J.’s judgment.⁸ Reasonable expectation, it seems to the authors, is different from legitimate expectation and, as employed in a pension context, gives the beneficiaries a right to have the matter of disposal of a surplus properly considered. Proper consideration, Chadwick L.J. believed, would impose an obligation on the trustees to consider whether to increase benefits, and would involve them in considering several factors,⁹ some of which are particular to pension schemes.¹⁰

The Court of Appeal approved *Scott V.-C.*’s interpretation of the so called “duty of impartiality”, which the Ombudsman had attempted to argue amounted to a duty to act impartially between various beneficiaries or classes of beneficiaries, and re-affirmed

⁴ *Thrells v. Lomas* [1993] 1 W.L.R. 456, at 468. This echoes the approach taken by Brooke L.J. in the Court of Appeal in *National Grid v. Laws* [1999] P.L.R. 37.

⁵ *Oloniluyi v. Home Secretary* [1989] Imm. A.R. 135, at 146. See Dowrick and Thomas [2000] J.B.L.

⁶ [1998] 2 All E.R. 705. Here Walker J. seemed to base the beneficiary’s legitimate expectation on a representation.

⁷ For example, there are greater controls on the exercise of a fiduciary power than a bare power, and hence the objects have greater “rights”.

⁸ What is somewhat disconcerting is the support without due consideration given to Walker J.’s decision by Sir Richard Scott V.-C. in the decision of *The Equitable Life Assurance Soc. v. Alan David Hyman* [1999] P.L.R. 297.

⁹ His Lordship helpfully listed some of the factors in a manner which has not been done by other judges, although he conceded that the list is not exhaustive or prescriptive: the trustees must always bear in mind the main purpose of the scheme, *i.e.* the provision of retirement benefits; they must consider the effect any course which they are minded to take may have on the financial ability of the employers to make the contributions which that course will entail; they must be careful not to impose burdens which imperil the continuity and proper development of the employer’s business or the employment of the members who work in that business and remember that the main purpose of the scheme is not served by putting the employer out of business; they must also consider the level of benefits under their scheme relative to benefits under comparable schemes or the pensions market generally; the benefits must be seen by the members to be good value in relation to the contributions; the main purpose of the scheme is not served by setting contributions and benefits at levels which deter employees from joining or which cause resentment; the benefits must have kept up with increases in the cost of living so that the expectations of those members during their service are not defeated by inflation.

¹⁰ Another factor Chadwick L.J. deemed relevant to determine the ultimate destination of a surplus was an identification of the effective source of the surplus. In a pure balance of cost scheme, for example, he believed the actuarial surplus may arise through past overfunding by the employer, through prospective overfunding from excessive contributions of the members in the future or may arise from members’ past contributions. The courts, however, have at times found this approach problematic due to actuarial difficulties in ascertaining the specific sources of the surplus. In *Thrells v. Lomas* [1993] 2 All E.R. 546, for example, the actuary was unable to identify the source of £83,000 of the surplus of £238,000, although he was able to attribute the remainder to several identifiable sources.

that the duty represented no more than the ordinary duty imposed on a donee of a power to give proper consideration to the relevant matters and factors and exclude all those which are irrelevant. If this is done and the trustees prefer one beneficiary (or set of beneficiaries) to another, then such a preference does not take place as a result of an improper exercise of a discretion, and cannot be challenged.¹¹ The court remarked that this test was similar to that propounded in *Associated Provincial Picture Houses v. Wednesbury Corp.*,¹² which dealt with the exercise of a discretion entrusted by Parliament to, *inter alia*, a local authority. It does appear that the courts in pension trust cases in particular, and to a lesser extent in traditional trusts cases, are moving towards the adoption of such a test for the exercise of a discretion over surplus entrusted to a trustee.¹³

The introduction of public law concepts, in the guise of the *Wednesbury* principle, into pension schemes may be less remarkable than at first appears. For, it is suggested, the rationale underpinning the *Wednesbury* rule in public law is the fortification of good administration in the decision making powers of a local authority; a similar objective is being sought in pension scheme trusts in relation to the decision making powers of a trustee. Furthermore, Lord Greene in *Wednesbury* said, "It is clear that the local authority are entrusted by Parliament with the decision on a matter which *the knowledge and experience of that authority can best be trusted to deal with*"¹⁴ (emphasis added). These days the trustee in an occupational pension scheme is unlikely to be the devout clergyman appointed a century ago to a family trust,¹⁵ who may well have been chosen for his personal qualities. Rather he, like the local authority, may well be chosen for the professional qualities he possesses, such as his commercial skill, knowledge or experience in pensions matters. Thus the use of the *Wednesbury* test in pension trust matters may not be inappropriate.

A CONFLICT OF INTERESTS

The Ombudsman adopted a new approach to challenging the trustees' decision in the Court of Appeal, which was based on the argument that the trustees found themselves in a conflict of interests position and this imposed a burden on them to show that the decision they reached was fair. He relied on the observations of Knox J. in *Hillsdown Holdings plc v. Pensions Ombudsman*,¹⁶ where, after concluding that there was no breach of the self dealing rule where trustees and employers and directors enjoy multiple capacities, his Lordship proceeded to say:

I am not satisfied that the self dealing rule is as hard and fast as to require a negotiation between pension fund trustees and the employer to be set aside automatically and without investigation if one or more of the trustees are directors of the employer. I accept that, unless there is an express provision in the relevant trust deed permitting a trustee to act

¹¹ *Re Londonderry's Settlement* [1965] Ch. 918; see also *Harris v. Lord Shuttleworth* [1995] O.P.L.R. 79.

¹² [1948] 1 K.B. 223.

¹³ It seems that Chadwick L.J., impliedly at least, underlined the two aspects to the *Wednesbury* test discussed at (1999) 8 (1) Nott. L.J., at pp. 64-65, and rejected the ability of the court to intervene in the second. He said the trustees were obliged to take into account the actuary's recommendation and whether to increase benefits, but if after looking at the relevant factors they decide not to increase the benefits (but to achieve a reduction of the surplus in some other way) they cannot be criticised and their decision cannot be challenged.

¹⁴ *Ibid.*, at 230.

¹⁵ See, for example, *Re Beloved Wilkes Charity* (1851) 3 Mac. & G. 440.

¹⁶ [1996] P.L.R. 427. Here counsel for the defendant argued that the self dealing rule applied to an agreement that had been concluded between Hillsdown (the purchasing company), FMC (the vendor company), FMC trustees and HF trustees, since there was at least one person who was either a trustee or director on both sides of the agreement.

in negotiations with the employer under the scheme notwithstanding that the trustee is a director or employee of the company, the fact that negotiations have been conducted by persons one of whom had a conflict of duties puts upon those who say *the transaction in question should be upheld the onus of proving that it was indeed reasonable and proper* (emphasis added).¹⁷

This represents a departure from the orthodox approach where the self dealing and fair dealing rules reflect different aspects of the no conflicts rule, although their legal basis is different. The former has generally been applied more stringently,¹⁸ without enquiry into the fairness of the transaction, where it cannot be carried out without the concurrence of the interested party who owes a fiduciary duty to another in relation to the same transaction, *i.e.* there is in effect only one party to the transaction. In such a case the transaction is set aside automatically.¹⁹ It has generally been thought that it is only in cases where the fair dealing rule applies that the fairness of the transaction may be investigated.²⁰

The conflict in the *Edge* case was said to arise from the fact that the body of trustees comprised the board's trustees, member trustees and trustees appointed to represent the interest of the closed fund, but there were no trustees from the class who were excluded from the increase in benefits arising from the award of additional years' pensionable service. This appears to be a different factual situation from that which arose in *Hillsdown* and other cases in this area where the conflict was obvious and tended to be based on dual capacity. In *Edge* it is difficult to ascertain the nature of the conflict. The rules of the scheme specified the composition of the body of trustees, and it must have been evident at the time the scheme was established that the trustees would from time to time have to take decisions which required them to balance the interests of the employers, the members in service and the pensioners. Inevitably such decisions will be perceived by some to favour one interest at the expense of another.

As Chadwick L.J. pointed out, it could not have been intended that if and when the validity of any particular decision was challenged the question "on whom does the onus of proving that the decision was reached on a proper basis fall" would depend on whether the decision favoured the employers, the members in service or the pensioners. A decision to increase all benefits might be challenged by a pensioner on the grounds that the increase was insufficient and by a member in service on the grounds that it was over-generous. In the first case does the onus of showing that the decision was fair fall on the trustees, but in the latter case on the member, or does it fall on the trustees in both cases? The only sensible and pragmatic conclusion to reach is that the provisions regulating the trustees were intended to provide a body of trustees who could be relied upon to consider all interests fairly and properly. Those who challenge a decision made by the trustees should bear the ordinary burden of establishing that the decision has been properly reached.

THE OMBUDSMAN'S JURISDICTION

It was no surprise that the Ombudsman sought to oppose, on appeal, the determinations that Sir Richard Scott V.-C. had made relating to the exercise of his jurisdiction.

¹⁷ *Ibid.*, at 453.

¹⁸ Although in the case of *Holder v. Holder* [1968] Ch. 353 some doubt was cast on this. In that case the Court of Appeal refused to set aside a purchase by an executor of estate property after a purported renunciation. It may be argued, however, that the circumstances of the case are peculiar.

¹⁹ See *Ex p. Lacey* (1802) 6 Ves. 625, at 626a, and *Re Thompson Settlement Trusts* [1986] Ch. 99.

²⁰ *Megarry V.-C. in Tito v. Waddell (No. 2)* [1977] Ch. 106.

It was contended in our previous note that the decision severely circumscribed the Ombudsman's jurisdiction under the Pension Schemes Act 1993.²¹ It was also pointed out that there was little or no consideration of pertinent authority. The sad feature of the Court of Appeal's view, affirming the stance of Scott V.-C., is that again, no authority was considered which had a bearing upon whether the Ombudsman was correct in (a) not consulting those who would be adversely affected by his determination,²² and (b) approaching his statutory functions here without the necessary fairness in respect of the same parties. Accordingly the determination could not be supported where that determination is adverse to the rights of those who cannot be bound.²³ The Court of Appeal concluded that, rather than acting in excess of jurisdiction by accepting the complaint, the Ombudsman should have exercised his discretion *not* to accept it for these very reasons.²⁴

The Court of Appeal's decision – like that of Scott V.-C. – is remarkable for its literal approach to the interpretation of the legislation. Moreover, according to the Court, the requirement that a complainant should seek recourse to the Ombudsman in respect of complaints or disputes was because it allowed determination of these issues in a relatively quick, informal and inexpensive fashion. This view is somewhat reinforced by the Court's impatience with the Ombudsman in acting as an appellant.²⁵ It is our contention that the net effect of these decisions on the jurisdictional point will be potentially damaging to this underlying philosophy. For reasons that will be developed, it appears unlikely that a court exercising appropriate jurisdiction on an ordinary action brought by a complainant, say, alleging the same impropriety of action by the trustees of a scheme,²⁶ would consider itself similarly disabled from acting and, where the complaint against the trustees is upheld, providing the necessary remedy. It may be that due to the "neutering" of the Ombudsman's jurisdiction in this way, complainants in such circumstances will be advised that it is more appropriate to seek redress through the court. This does not encourage the "relatively quick, informal and inexpensive" dispute resolution that the Court of Appeal seemed to embrace.

In its consideration of dispute resolution within the pension setting, the Goode Committee²⁷ had envisaged that disputes brought by a scheme member, which have "implications for the scheme as a whole or for other members of the class to which the complainant belongs",²⁸ were more suited to resolution by the court. It envisaged disputes that were suited to the Pensions Ombudsman to be those that it characterised as "individual" disputes.²⁹ However, the distinction between these and "collective" disputes is not always easy to maintain. Moreover, the Committee's view of the Ombudsman's role was (understandably) influenced by a common assumption about the role and function of an ombudsman.

²¹ The legislation applicable at the time and not altered (on this issue) by the Pensions Act 1995.

²² And the remedial steps thereunder.

²³ The term employed in the legislation: we sought to indicate in our earlier note a distinction between being "bound by" and "affected by" the determination.

²⁴ Moreover, Parliament could not have intended that the Ombudsman "should expend what are, no doubt, limited resources from public funds pursuing an investigation which may lead to that result" (*op. cit.*, at 240). This is not entirely accurate, as the 1993 Act contained a power to levy schemes for the purposes of funding, *inter alia*, the Ombudsman's office. A new s. 173 has been inserted by the Pensions Act 1995: see also the regulations thereunder (Occupational Personal Pension Schemes (Levy) Regulations, S.I. 1997 No. 666).

²⁵ See *post*.

²⁶ Though not in the form of maladministration, as it is commonly understood.

²⁷ The Report of the Pension Law Review Committee, Cmnd 2342.

²⁸ Which the Committee characterised as a "collective dispute"; *ibid.*, see generally chapter 4.13.

²⁹ Which the Committee regarded as one in which "a particular scheme member complains that he or she has not been properly or fairly treated by the trustees or the employer" – note here the "classic" language of maladministration.

In the parliamentary proceedings pertaining to the Social Security Act 1990³⁰ a number of amendments were tabled which would have had the effect of broadening the jurisdiction of the Ombudsman and of increasing the base of those who were to be an “authorised complainant” so as to include collective or class complaints.³¹ These were rejected by the Government. In rejecting an amendment to include an investigation of the exercise of any discretionary power by the trustees, Gillian Shephard responded by stating: “We believe that the proposals for the ombudsman give greater protection to members, but the Opposition amendments would widen his functions and powers in a way that was not intended by the Bill and beyond the role of *classic ombudsmen*” (emphasis added).³² This was notwithstanding that the Government had bestowed the Office with jurisdiction in certain circumstances over any disputes of fact or law.

The point here though is that this common perception of the role and function of an ombudsman as one whose *raison d'être* is that of dealing with an individual's complaint seems to have consciously or unconsciously influenced the courts. Moreover, the view that an “individual” dispute is one involving unfair treatment (or conceivably “maladministration”), takes little or no cognisance of his jurisdiction to entertain and determine “any complaint” or “any dispute of fact or law”. In truth, the difficulty that both the court and the Ombudsman have in relation to his jurisdiction, is a legacy of the Government's view on setting up the office, that an expanded ombudsman's jurisdiction was the appropriate method of dealing with (individual) disputes in a pensions setting.³³ The Government clearly had, like many similar private initiatives, been struck by a form of “ombudsmania” in being convinced that an ombudsman's office could provide the necessary investigatory and dispute resolution facility and at the same time ensure the confidence of the relevant industry. The situation, we hesitate to suggest in light of the litigious activity in recent years, is in need of clarification. If the Ombudsman – and no doubt other interested parties – had some doubts about the exercise of certain aspects of his jurisdiction before this case, they are certainly felt now.

In essence, the Court of Appeal in *Edge* relied on two arguments to uphold the first instance decision, the first inexorably linked to the second:

- (i) The statutory framework does not provide for either the interested (but non-complainant) parties to be bound by the determination, nor the representation of those interests by parties to the complaint (and accordingly the latter could not be “bound”); and
- (ii) there was a remedial deficiency in that the remedy required by the Ombudsman in his directions to the trustees could not have been implemented. This could not be done either by the trustees, or under the statutory mechanism for enforcing the directions as if it were an order of the court, because a court could not enforce such a direction as against the trustees.

³⁰ See schedule 3, establishing the office of Ombudsman by inserting provisions into the Social Security Pensions Act 1975, now the Pension Schemes Act 1993, Part X, as amended.

³¹ The class of complainants was subsequently broadened by the Pensions Act 1995, s. 157 but not to this extent.

³² Standing Committee G, col. 274, February 27, 1990. See also the view of Mr Newton, the Secretary of State for Social Security, expressed to the Society of Pensions Consultants on the 7th November 1989, extracted in the commentary to schedule 3 of the Social Security Act 1990, in *Current Law Statutes* 1990, vol. 2, 27-55. This view clearly did not accord with Dr. Farrand's approach, who eschewed the self-imposed restriction of his predecessor on investigating complaints involving the exercise of trustees' discretions.

³³ The recommendation of the Occupational Pensions Board was for a specialist tribunal- see *Protecting Pensions: Safeguarding Benefits in a Changing Environment*, Cmnd 573.

“BOUND OR AFFECTED?” – THAT IS THE QUESTION

We have addressed the first point at some length in our earlier note. As an additional point, however, the court was singularly unimpressed with the argument that the trustees could be said to be implicitly representing the interests of the non-complainant members. No authority was considered on this point but the court was content to base its rejection of this on two grounds. First, that such an argument is unsustainable in relation to a member's obligation to pay contributions.³⁴ Secondly, that a person in the same position as the complainant could hardly be said to be bound by a decision of the ombudsman adverse to the complainant by virtue of being a person “claiming under” him.

The first point is a difficult one to follow and, even if it is correct, can hardly be said to be conclusive of the issue. The second point is disingenuous in that such a person would hardly be able to sustain the same, or a similar, complaint to one that had been properly rejected on grounds of there having been no injustice as a consequence of maladministration or no wrongdoing in relation to a determination of fact or law. Moreover, if it is correct that, where beneficiaries of a trust bring a derivative action, they are asserting rights and interests of the trust as a whole, the same point can be made about the trustees' actions themselves.³⁵ The court's point that the relevant legislation makes no provision for the representation of class interests, however, is difficult to resist and is consistent with the legislature's intent when the office was first established.³⁶

REMEDIAL DEFICIENCY

This point relates to the inability of the Ombudsman to enforce his determination as against the trustees. The court made the point that any claim against the trustees by a member who was not bound by the decision could hardly be resisted by the trustees by way of their own breach of trust being put forward as a putative defence. In some respects the position is analogous to a case in which a public body puts forward its own *ultra vires* action as a defence,³⁷ and whilst there is no general rule that would permit or deny of a claim against such a body before the validity of the action had been determined by a court, there are circumstances where a claim for, say, repayment of a sum alleged to have been collected improperly, will be denied before the determination.³⁸ Whilst it may not be possible to take this approach as far, in relation to a determination by the Ombudsman that the trustees had been flawed in the process of an exercise of discretion or been in breach of trust, it seems unlikely that, in the scenario envisaged by the court, a member's claim against the trustees of a scheme for a benefit apparently validly given (albeit held to be in breach of trust by the Ombudsman) would be enforced in such a general fashion.

³⁴ Therefore the member could not be said to be ‘claiming under’ the trustees; see s.153.

³⁵ See McCormack, ‘Suing external fund managers: redress for disgruntled trust beneficiaries’, (1997) 11 *Trust Law International* 60.

³⁶ See *ante*.

³⁷ See for example, *R v. Lambeth BC ex p. Clayhope Properties* [1988] Q.B. 563.

³⁸ See generally Wade & Forsyth, *Administrative Law* 7th Ed., (OUP, 1994) pp. 337-339.

CONCLUSION

In many respects this decision will be disappointing for the Ombudsman. Significantly the Court of Appeal did not enjoy a *consensus ad idem* with the Ombudsman in relation to his attempt to elevate the “duty of impartiality” beyond its proper bounds. The view of the court, and that of the court below, that such a duty is one of proper process and is analogous to the correct process approach so fundamental to the *Wednesbury* principle, is unremarkable. This propensity to elevate, beyond their proper bounds, trust law principles and/or *obiter* judicial comments is also evident in the Ombudsman’s view of the conflict of interests point. Most significant will of course be the court’s view of his jurisdiction because, as the Ombudsman contended, it opens to question the way he has exercised it in a vast number of cases previously. However, there is, as it were, some comfort to be taken here. The Court of Appeal was in general unanimity with Scott V.-C.’s decision and it is important to note that, in relation to the position of non-complainant members, the latter seemed to accept that, once those whose proprietary interests would be adversely affected by his determination were “given a fair opportunity to make representations”, they would be bound by the same. It may be that the Ombudsman will have to revise his approach and adopt a procedure where, in appropriate circumstances, such persons are invited to comment before final determination.

One final point to be made is in relation to the Ombudsman as appellant. This is one of a number of occasions that his role in this respect has been doubted.³⁹ The court’s statement that, aside from situations where, for example, conflicting first instance decisions make it difficult for him to carry out his functions without proper assistance from the Court of Appeal, he should accept and act upon the decision of the High Court, is important. Whilst it may reinforce the view that an ombudsman’s function is properly construed within rather more narrow statutory confines than the office holder may have believed, and though the authorities do not bear the weight placed upon them, the general sentiment seems irrefutable.

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³⁹ See also *Miller v. Stapleton* (1996) (C.A.) (unreported, Lexis Transcript, 30th July 1996) and *Westminster City Council v. Haywood* [1988] Ch. 377.

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A “GOOD FAITH” REQUIREMENT FOR ENGLISH CONTRACT LAW?

Director-General of Fair Trading v. First National Bank plc [2000]

2 W.L.R. 1353, (C.A.) (Peter Gibson, Waller and Buxton L.J.J.)

INTRODUCTION

The Unfair Terms in Consumer Contracts Regulations 1994¹ (“the 1994 Regulations”) were adopted to implement Directive 93/13/EEC.² These Regulations (which have since been replaced with the Unfair Terms in Consumer Contracts Regulations 1999³ (“the 1999 Regulations”)) provide, *inter alia*, for the challenge of terms perceived as unfair by a public body with an interest in consumer protection. This has been done successfully over the past five years by a special unit within the Office of Fair Trading (OFT). The 1999 Regulations enable other bodies with an interest in consumer protection to challenge unfair terms.⁴ One element of this power is that the Director-General of Fair Trading (DGFT) may apply to the courts for an injunction to prevent the continued use of an unfair term where the business using the particular term fails to agree to remove this after receiving the OFT’s objections.

The decision in *Director-General of Fair Trading v. First National Bank plc* is of interest for a number of reasons: first, the case is the result of the first application by the DGFT for an injunction to prevent the continued use of a term which is regarded unfair in consumer contracts. Secondly, the decision offers important guidance on the interpretation of two concepts, that of the “core term” and the meaning of “good faith”, for the purposes of the Regulations.

THE FACTS

The case arose over the disputed fairness of a condition in a standard form for regulated consumer credit agreements used by First National Bank plc (“the bank”). Under the agreement, a consumer who had taken out a loan with the bank had to repay this by monthly instalments. Clause 8 of the agreement permitted the bank to demand payment of any instalments which were more than 7 days late, and to demand repayment of the full loan amount should the consumer fail to meet the bank’s initial demand for the unpaid instalment. The final sentence of this condition stated that “Interest on the amount which becomes payable shall be charged . . . until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment).” This sentence was objected to by the DGFT. The effect of this condition was that when the bank obtained judgment against a consumer, the consumer would have to pay interest on the total amount still outstanding as well as any interest accrued which was unpaid at the date of judgment. This goes against the objective of the Consumer Credit Act 1974, which provides that once judgment is given

¹ S.I. 1994/3159.

² (1993) O.L.J. 95/29.

³ S.I. 1999/2083.

⁴ See C. Twigg-Flesner, “The Unfair Terms in Consumer Contracts Regulations 1999 – New Powers for the Regulators and the Consumers’ Association” (2000) 11(2) *Utilities Law Review*.

in consumer credit claims, no further interest may be charged by the lender. It is, however, possible to ask the court to order that interest will continue to be chargeable after judgment.

The DGFT believed this term to be unfair, because it deprived the consumer of the protection under the Consumer Credit Act 1974 that no further interest may be charged after judgment when the court has extended the time allowed for repayment. Whether or not this provision is economically sound, the thinking behind this was to limit the financial difficulties of consumers who were already in serious debt.⁵

At first instance, Evan-Lombe J. refused to grant the injunction sought by the DGFT.⁶ He held that the term was not unfair for the purposes of the 1994 Regulations, and that the DGFT's application should be refused. The DGFT appealed. The Court of Appeal disagreed with the judge at first instance and allowed the appeal. Peter Gibson L.J., who delivered the only judgment in this case, held that the term in question was not a core term and could be assessed for its fairness, and, furthermore, that the term in question was, in fact, unfair.

Both at first instance and in the Court of Appeal, two issues had to be considered: the first was whether the term in question was to be regarded as a core term, in which case it would not be open to challenge under the 1994 Regulations. Secondly, if it was not a core term, then the question was whether it was unfair within the meaning of the Regulations. These issues will now be examined more closely.

CORE TERMS

Regulation 3 (2) of the 1994 Regulations⁷ states that:

In so far as it is in plain and intelligible language, no assessment shall be made of the fairness of any term which (a) defines the main subject matter of the contract, or (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied.

Thus, a term which merely describes the reason for the contract (e.g., "A Regulated Consumer Credit Agreement between Bank X and Consumer Y"), as well as the "price" for this (e.g. "19.5% a.p.r.") would not be assessed for its fairness.

The Bank had claimed that Clause 8 was a core term. Its argument was as follows. If the bank obtained a judgment against a consumer following a default in repaying the loan, this clause provided the new rate of interest which the consumer would have to pay. Therefore, this was a term which defined the price to be paid for the service (*i.e.* the loan) supplied. At first instance, Evans-Lombe J. rejected this. He suggested that a consumer seeking to obtain a loan from a bank would not regard the default provisions in the loan agreement as important terms of the contract in the sense that these provisions would influence the consumer in deciding whether or not go ahead with the loan agreement. The important term for the consumer would be the clause which set the

⁵ R. Colbey, "Cleaning up the small print" *The Guardian Money*, 19 February 2000, p.9.

⁶ [2000] 1 W.L.R. 98; [2000] 1 All E.R. 240.

⁷ This is Regulation 6(2) in the 1999 Regulations, which reads differently: "In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate (a) to the definition of the main subject matter of the contract or (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange." This, it is submitted, is a different rule altogether. Whereas Regulation 3(2) of the 1994 Regulations excludes the price and subject matter (e.g., an MP-3 player for £450) from the assessment of fairness, under the 1999 Regulations, the fairness of *any* term (including those defining the subject matter) can be assessed, but regard must be had to the price paid and the subject matter of the contract. The outcome in the instant case would not have been affected by this, as under the 1999 Regulations, *all* terms appear to be capable of assessment as to their fairness.

rate of interest he would have to pay if he repaid the loan in instalments by the due date each month. This term would indicate to him the overall cost of the loan facility. Therefore, Clause 8 was not a core term, and could be assessed for its fairness.

The Bank raised this issue again when the DGFT's appeal was heard by the Court of Appeal. It argued that any term in a consumer credit agreement which set the amount of interest and the period over which this was payable (both before and after a judgment) constituted a core term because it contained the price payable for the loan facility. It also referred to the Scottish case of *Bank of Scotland v. Davis*⁸ as authority that any contractual term which deals with the payment of interest was a core term of that contract.

The DGFT counter-argued that Clause 8 was not a core term for two reasons: first, the clause only took effect when there had been a breach of contract, *i.e.*, a failure by the consumer to repay the loan in accordance with the terms of the loan agreement. Core terms, however, only define the rights and obligations of the parties in the due performance of the contract. Secondly, the clause did not specify the rate of interest payable, but rather set out the circumstances in which interest is to be paid.

The Court of Appeal agreed with the DGFT. It held that the issue was not whether the term would be regarded as core term under the ordinary rules of contract, but whether the term fell within the definition of Regulation 3(2). As the clause neither defined the main subject matter of the contract, nor the adequacy of the remuneration, it did not fall within that definition and could therefore be assessed as to its fairness.

GOOD FAITH

Having thus decided that Clause 8 could be assessed as to its fairness, the Court then had to decide whether the clause was fair or not. Under Regulation 4(1), a term is unfair if, "contrary to the requirements of good faith, [it] causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer".

It was, first of all, necessary to consider the meaning of "good faith". In interpreting the "good faith" principle under the Regulations, both the judge at first instance and the Court of Appeal, referred to academic commentary, and notably an essay by Professor Hugh Beale.⁹

At first instance, Evans-Lombe J. decided to apply common sense before considering the legislative framework. He suggested that a consumer would expect to have to pay the normal rate of interest on the loan amount, whether or not a judgment had been obtained against him by the bank. Furthermore, the judge suggested that a consumer would be surprised to discover that his financial situation would improve after a judgment if the bank were not allowed to charge interest:

Equally, it seems to me, that if he was informed that . . . if he defaulted in making the payments required by the agreement, and judgment was obtained against him, he would . . . not have to pay interest at all . . . he would have been surprised that his financial obligations would become less onerous as the result of a judgment.¹⁰

In other words, the term complained of by the DGFT would not change the consumer's position.

⁸ [1982] S.L.T. 20.

⁹ H. Beale, "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts", in J. Beatson and D. Friedman (eds.) *Good Faith and Fault in Contract* (Oxford, Clarendon Press, 1997).

¹⁰ [2000] 1 All E.R. 240, at 250 (Ch.D.). The quotation is abridged; the judge referred to loan agreements below £5,000, where no interest would be payable after a judgment, and those above £5,000, where a reduced statutory rate would be payable.

Evans-Lombe J. then referred to Bingham L.J. in *Interfoto Library Ltd. v. Stiletto Ltd.*,¹¹ who observed that good faith at least required a business to deal openly and fairly with its customers. He then went on to draw on “several academic commentators on this area of law” and suggested that a breach of the requirement of good faith could take two forms, “substantive” and “procedural” unfairness. The former involved the imposition of “an onerous term out of proportion to a reasonable assessment of the obligations of the parties under the contract by the supplier on the consumer”,¹² The latter referred to instances where a consumer becomes subject to an onerous term, although not necessarily substantively unfair, affects the balance of obligations under the contract to the consumer’s detriment. This is what has also been referred to as “unfair surprise”. Based on this interpretation, the judge concluded that there was no infringement of the requirement of good faith. He held that the only substantive advantage of which consumers may have been deprived by Clause 8 was the fact that no interest would normally be imposed after a judgment. The procedural disadvantage could only have been that consumers would have been unaware of the clause, but the judge found that on the evidence before him, no such disadvantage had been made out. Therefore, the clause did not infringe the requirement of good faith.

The Court of Appeal took a similar approach to applying the “good faith” requirement. Peter Gibson L.J. first similarly referred to Bingham L.J. in *Interfoto*, and then to Professor Beale’s essay,¹³ which discusses the procedural and substantive elements of the “good faith” concept. He then observed that the element of “significant imbalance” in Regulation 4(1) appeared to overlap substantially with that of the absence of good faith.

The Court of Appeal disagreed with the judge’s application of the “good faith” requirement. It held that the assessment of unfairness was to be done purely by reference to the legislative scheme. With reference to Evans-Lombe J.’s “common sense” approach, Peter Gibson L.J. observed:

[W]e are far from convinced that a borrower would think it fair that when he is taken to court and an order for payment by instalments has been tailored to meet what he could afford and he complied with that order, he should then be told that he has to pay further sums by way of interest.¹⁴

The term was, therefore, unfair and the appeal was allowed. The DGFT sought an injunction that would have operated to prevent the use of the term in dispute not just in the agreement in question, but generally, with the effect that agreements offered by other lenders which contained this term would automatically be regarded as unfair and could no longer be used. The Court of Appeal was only willing to grant a limited injunction, but it encouraged the parties to come to an arrangement by which the term in question would be amended. Following the handing-down of the judgment, an undertaking was agreed and no injunction was ultimately granted.

COMMENT

The judgment of the Court of Appeal is particularly welcome for its clarification of the scope of the “good faith” principle. It is now clear that “good faith” in the context of

¹¹ [1989] Q.B. 433, [1988] 1 All E.R. 348.

¹² *Op. cit.* n. 10, at 251.

¹³ *Op. cit.* n. 9, at p. 245.

¹⁴ [2000] 2 W.L.R. 1353, at 1366.

the 1994 Regulations is to be equated with open and fair dealing, and has a procedural and substantive element. But is this an acceptable interpretation of the “good faith” principle? The literature on “good faith” in English law has grown rapidly in the last five years or so, undoubtedly motivated, at least in part, by the adoption of the EC Directive on unfair contract terms.¹⁵ Thus, Roger Brownsword has similarly suggested that one possible interpretation of “good faith” could be by reference to the standards of fair dealings of the society of which the contracting parties are members – in his words, a “good faith requirement”.¹⁶ However, Brownsword favours an objective standard of good faith, which would be based on the standards of fair dealing and co-operation as prescribed by the most defensible moral theory. He prefers an objective criterion – a “good faith regime”. Yet, he concedes that English law at present seems to be developing a “good faith requirement”, and this decision of the Court of Appeal confirms this. This interpretation of the concept and its most likely prevalence over a normative interpretation was also suggested by John Wightman.¹⁷ His concept of “contextual good faith” is based on what the parties to the contract would reasonably expect, particularly reasonable standards of fair dealing. Whereas Wightman also finds merit in an objective “good faith” concept, he too concedes that English contract law would develop the concept more in line with an interpretation as open and fair dealing. Thus, the Court of Appeal’s judgment confirms academic opinion on how the “good faith” concept would develop in English contract law.

CONCLUSION

As has been noted above, the case was decided under the 1994 Regulations, which were replaced with the 1999 Regulations on 1st October 1999. The court’s comments on “core terms” are therefore unlikely to be of future relevance.¹⁸ However, it is clear that the interpretation of “good faith” will continue to be relevant under the new regulations.

Although, the court’s decision is to be welcomed, it is unfortunate that neither at first instance, nor in the Court of Appeal, more thought was given to the various alternative interpretations put forward by academic commentators of the “good faith” concept. An application for leave to appeal to the House of Lords was refused by the Court of Appeal, and at the time of writing, no application for leave had been dealt with by the House of Lords. Although unlikely, a more detailed examination of the concept of “good faith” by the House of Lords would be welcome.

CHRISTIAN TWIGG-FLESNER*

¹⁵ See e.g., C. Willett (ed.), *Aspects of Fairness in Contract* (London, Blackstone Press, 1996); J. Beatson and D. Friedman (eds.), *Good Faith and Fault in Contract* (Oxford, Clarendon Press, 1997) R. Brownsword, N. J. Hird and G. Howells (eds.), *Good Faith in Contract – Concept and Context* (Aldershot, Ashgate, 1999), and a range of papers published in the *Journal of Contract Law* in Volumes 7 (1994) and 8 (1995).

¹⁶ R. Brownsword, “Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law” in Brownsword, Hird and Howells (eds.), *op. cit.* n. 15.

¹⁷ J. Wightman, “Good Faith and Pluralism in the Law of Contract” in Brownsword, Hird and Howells (eds.), *op. cit.* n. 15.

¹⁸ See n. 7 above.

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LEASES, LICENCES AND CONTRACTUAL TENANCIES

Bruton v. London & Quadrant Housing Trust [1999] 3 All E.R. 481 (H.L.)

(Lords Slynn, Jauncey, Hoffmann, Hope and Hobhouse)

INTRODUCTION

The last fifteen years since the landmark House of Lords' ruling in *Street v. Mountford*¹ have seen a continuing growth of case law on the lease/licence dichotomy both in the residential and commercial context. It is now clear, for example, that the *Street* test applies to commercial property albeit that, in relation to a business occupancy, the restriction of the inquiry to whether the occupier is a tenant or lodger will not always be appropriate.² In the residential field, it now also seems clear that separate licence agreements may constitute a joint tenancy conferring on multiple flat-sharers joint exclusive possession of their accommodation. The crucial issue here is whether the separate agreements operate independently of each other, so as not to confer a right to exclusive possession on any one occupant but merely a right to share the flat with the other occupants. In the absence of joint exclusive possession, the agreements will be construed as a genuine licence arrangement. On the other hand, if the agreements are construed as operating interdependently, so as to make it unreal to regard them as separate and independent licences, the result will be a joint tenancy (assuming the four unities are present) conferring on the occupiers joint exclusive possession.³

There has also been considerable litigation in recent years concerning the grant of licence agreements by various charitable public bodies charged with the responsibility of providing temporary housing accommodation for the needy and homeless. The point arose in *Family Housing Association v. Jones*,⁴ where the Court of Appeal concluded that an arrangement under which a person is granted exclusive possession of premises does not escape being a tenancy merely because the arrangement is intended to provide temporary accommodation for the homeless. In other words, it was not to be classified as falling within the exceptional categories of case enunciated by Lord Templeman in *Street* where an occupier might not be a tenant even though his possession of the premises was exclusive. In *Jones*, however, the Court did not consider the effect of the grantor's lack of title on the occupier's legal status; the housing association in that case merely had a licence to use certain local authority properties as temporary accommodation for homeless families referred by the local authority. It was arguable, therefore, that, in the absence of legal title, the association had no power to grant a legal right to exclusive possession and, hence, the grant to Mr Jones could not take effect as a tenancy.

The point has now been addressed both by the Court of Appeal⁵ and House of Lords⁶ in the recent case of *Bruton v. London and Quadrant Housing Trust*. In the

¹ [1985] 2 All E.R. 289, H.L.

² See *Dellneed Ltd v. Chin* (1987) 53 P. & C.R. 172; *London & Associated Investment Trust plc v. Calow* (1986) 280 E.G. 1252; *Eso Petroleum Co Ltd v. Fumegrange Ltd* [1994] 2 EGLR 90, C.A.; *Venus Investments Ltd v. Stocktop Ltd* [1996] EGCS 173; *Hunts Refuse Disposals Ltd v. Norfolk Environmental Waste Services Ltd* [1997] 03 E.G. 139, C.A.

³ See, *Nicolau v. Pitt* [1989] 21 E.G. 71; *Stribling v. Wickam* [1989] 27 E.G. 81, C.A.; *Mikeover Ltd v. Brady* [1989] 3 All E.R. 618, C.A.; *A.G. Securities v. Vaughan/Antoniades v. Villiers* [1990] 1 A.C. 417, H.L.; *Aslan v. Murphy/Duke v. Wynne* [1990] 1 W.L.R. 766, C.A.

⁴ [1990] 1 All E.R. 385, C.A.

⁵ [1998] Q.B. 834, C.A.

⁶ [1999] 3 All E.R. 481, H.L.

Court of Appeal, the majority⁷ accepted the argument that the grant of exclusive possession did not create a tenancy where the grantor had no estate or interest in the land out of which to grant a tenancy provided it made it clear that it was only granting a licence. (If it purported to grant a tenancy, the grant could take effect as a tenancy by estoppel.) This view, however, has now been firmly rejected by the House of Lords in favour of a novel (and, in many ways, remarkable) proposition that a purely contractual lease can arise between two parties having no proprietary interest in the land and irrespective of any factors giving rise to an estoppel.

THE FACTS

On 27 March 1986, the London Borough of Lambeth (the Council) entered into an agreement with a charitable housing organisation, the London and Quadrant Housing Trust (the Housing Trust) by which the Council permitted the Housing Trust to use a block of council-owned flats in Brixton to further its charitable housing objects. This agreement was called a licence and both parties agreed that the Council granted no estate or proprietary interest to the Housing Trust. Indeed, under section 32(3) of the Housing Act 1985, the Council had no power to grant the Housing Trust a tenancy.

On 31 January 1989, the Housing Trust executed an agreement with Mr Bruton to permit him to occupy a flat in the block on a short-term basis. This agreement was also called a licence and included a clause by which Mr Bruton was to allow access at all times during normal working hours to the staff of the Housing Trust and related personnel. There was also a provision under which Mr Bruton agreed to permit the Housing Trust (or its agents) to enter the property for the purposes of inspecting its state of repair and cleanliness. Mr Bruton paid £18 per week to occupy the flat.

Mr Bruton's claim against the Housing Trust alleged that he was a tenant of the flat and that the Housing Trust was in breach of its implied covenant to repair under section 11 of the Landlord and Tenant Act 1985. He sought damages and other relief including an order for specific performance of the implied covenant. The Housing Trust's defence was that Mr Bruton was not a tenant but a mere licensee of the premises and, accordingly, the covenant under section 11 of the 1985 Act could not be implied into his agreement. The question whether Mr Bruton was a tenant or licensee was ordered to be tried as a preliminary issue. The Court of Appeal (by a majority) upheld H.H. Judge James' decision that Mr Bruton had at all material times occupied the flat as a licensee and not a tenant. On appeal, the House of Lords, following the earlier decision in *Jones*, concluded that Mr Bruton was a tenant.

LICENCE OR TENANCY?

The House of Lords has confirmed the principle that an agreement will confer on the occupier the status of a tenant if it gives a right to exclusive possession for a term notwithstanding that the agreement was intended by the parties to create only a licence. The importance of examining the actual substance of an agreement rather than relying on the apparent form given to it by the contracting parties was emphasised by Lord Templeman in *Street*⁸ and this approach has been reiterated by their Lordships in

⁷ Millett and Kennedy, L.J.J., Sir Brian Neill dissenting.

⁸ [1985] 2 All E.R. 289, at 294.

Bruton. In the words of Lord Jauncey,⁹ “it is the legal consequences of the agreement which is determinative rather than the label which the parties have chosen to attach to it”. Lord Hoffmann¹⁰ also reaffirms the importance of the characteristics of the agreement over the underlying intention of the parties but, in addition, stresses the importance of examining the meaning of the agreement against the factual background:

The meaning of the agreement, for example, as to the extent of the possession which it grants, depend upon the intention of the parties, objectively ascertained by reference to the language and relevant background . . . But the classification of the agreement as a lease does not depend upon any intention additional to that expressed in the choice of terms. It is simply a question of characterising the terms which the parties have agreed. This is a question of law.

His Lordship cites the earlier House of Lords decision in *Westminster City Council v. Clarke*¹¹ as a good example of the importance of “relevant background” in determining the extent of possession granted. In that case, the licence agreement entitled the Council to change the subject accommodation without notice or to require the occupant to share it with any other person. Moreover, the Council’s representative was given the right to enter the accommodation at any time pursuant to the terms of the agreement. These facts undoubtedly warranted the conclusion that the occupier was to share possession with the Council and that, accordingly, he was as a licensee and not a tenant. By contrast, according to Lord Hoffman, these features were lacking in Mr Bruton’s agreement and consequently the *Clarke* case fell to be distinguished on its facts. Interestingly, however, Lord Hoffmann, when referring to *Clarke*, makes no reference to the powers and duties of the Council, which (as we shall see later) were considered highly relevant in determining the issue of exclusive possession in that case in favour of the landlord.

An investigation of the parties’ intention when entering into the agreement, reflected in their use of language and choice of terms, will not, of course, preclude the agreement being characterised as a genuine licence if that is the true meaning of the language and terms used. In *Antoniades v. Villiers*,¹² Bingham L.J. in the Court of Appeal emphasised that the decision in *Street* had not precluded the acceptance of terms in a written document as giving rise to a genuine licence if that represented the true meaning of the agreement:

[*Street*] has held that the true legal nature of a transaction is not to be altered by the description that the parties choose to give it. A cat does not become a dog because the parties have agreed to call it a dog. But in deciding whether an animal is a cat or dog the parties’ agreement that it is a dog may not be entirely irrelevant.¹³

There can be little doubt that in *Bruton*, the language and terms of the agreement, with one possible exception discussed below, consistently evidenced the intention of both parties to create a licence. This is clearly recognised in Lord Jauncey’s speech,¹⁴ who expresses “no doubt that both parties . . . were under the impression and indeed intended that the legal consequences of the agreement should be those of a licence”. In his view, this was “not [an] unreasonable intention” given the Housing Trust’s limited interest of a licensee. Kennedy L.J. in the Court of Appeal also recognises the

⁹ [1999] 3 All E.R. 481, at 483.

¹⁰ [1999] 3 All ER 481, at 486.

¹¹ [1992] A.C. 288, H.L.

¹² [1988] 2 All E.R. 309, C.A.

¹³ *Ibid.*, 315.

¹⁴ [1999] 3 All E.R. 481, at 483.

significance of accepting the genuine intention of the parties as evidenced in the wording of the agreement: “this is not a case in which their actions must be said to have been at variance with reality. Here what they described as a spade was in fact, a spade.”¹⁵ As Millett L.J. points out: “the document was carefully drawn by the trust and accepted by the plaintiff as a licence. There is no inconsistency between the terms of the document and the trust’s assertion that it has not granted a tenancy”.¹⁶

This same approach is also to be found in the earlier case of *Camden London Borough Council v. Shortlife Community Housing*,¹⁷ where Millett J. (as he then was) concluded that the language used by the parties in the licence agreement before him “plainly demonstrated” the grantor’s intention not to part with exclusive possession of the premises; this was conclusive and could only be discounted if the parties’ professed intentions differed from their true intentions (the *Street* scenario) or failed in some way to reflect “the true substance of the real transaction”.¹⁸ An important determining factor, in his Lordship’s view, was the grantor’s need to retain rights of access to the premises in view of the perceived imminence of their demolition and reconstruction. Significantly, this factor was also present in *Bruton* in so far as the premises were the subject of a redevelopment scheme and the Council’s motive in granting the licence in favour of the Housing Trust was to make use of the property before the redevelopment could take place.

It is submitted, therefore, that starting point for any analysis of the true nature of the agreement is the genuine intention of the parties as manifested by the terms of their agreement. If the grantor genuinely wishes to offer a licence agreement in good faith to an occupier, how can this be achieved? It will obviously not avail the parties to call the agreement a licence. Neither (it appears) will it suffice to include a clause expressly denying the grant of exclusive possession. In *Bruton*, the Housing Trust reserved a right of entry designed to offer the occupier a degree of privacy whilst, at the same time, it is submitted, emphasising its unwillingness to confer exclusive possession:

[The property] is offered to you on the condition that you will vacate upon receiving reasonable notice from the Trust . . . You understand and agree that while you are living in the property, you will allow access at all times during normal working hours to the staff of the Trust, the owners and agents for all purposes connected with the work of the Trust.

There was also a reservation of a right to enter the premises “at all reasonable hours of the day” for the purpose of inspecting the state of repair and cleanliness of the property. This express reservation was characterised by the House of Lords as being far too limited to negative the grant of exclusive possession; on the contrary, according to their Lordships, such a reservation of limited rights served only to *reinforce* the conclusion that Mr Bruton was a tenant. Although, of course, there was nothing in Mr Bruton’s agreement to suggest that he was to share possession of the flat with another occupant or the Housing Trust (or, indeed, anyone else), it is submitted that this is not conclusive. In the *Shortlife* case, referred to earlier, which involved a licence agreement made between a local housing authority and a charitable housing organisation, Millett J. drew attention to the absence of any reservation of rights in the agreement in favour of the housing authority, but nevertheless concluded (it is submitted rightly) that, in the surrounding circumstances, it would have been inconceivable for the authority to have

¹⁵ [1998] Q.B. 834, at 847.

¹⁶ *Ibid.*, at 845.

¹⁷ (1992) 25 H.L.R. 330.

¹⁸ *Ibid.*, at 345.

divested itself of such rights given the nature of its future plans for the property.¹⁹ It is apparent from Millett J.'s judgment that the authority did, in fact, enjoy rights of access to the property from time to time, "no doubt by prior arrangement". This apparent reservation of access rights did not, however, dissuade his Lordship from concluding that "what the Council was attempting to do was to make property available to [the licensee] to enable it to provide accommodation to persons in housing need while retaining possession in itself".²⁰ A similar argument was raised (but rejected) by the House of Lords in *Bruton*, namely, that the rights of access reserved to the Housing Trust by the terms of the licence were consistent with the parties' intention not to grant exclusive possession when judged against the fact that the property was going to be redeveloped in the near future. Unfortunately, the decision in *Shortliffe* is not referred to in *Bruton* and, hence, it is difficult to assess to what extent the former still represents good law.

The upshot, of course, of the House of Lords' ruling is that it will become increasingly difficult for organisations such as the Housing Trust to operate in a manner which excludes them from unwarranted landlord responsibilities whilst, at the same time, offering those in need of housing a degree of privacy in their homes. One of the inherent difficulties with the *Bruton* decision is that it fails to consider whether the assertion of a tenancy is compatible with the "totality, immediacy and objectives"²¹ of the powers exercisable by such organisations. This was the approach taken by a differently constituted House of Lords in *Westminster City Council v. Clarke*²² and it has, it is submitted, much to recommend it in preference to the views adopted by the House in *Bruton*. In this case, the Council entered into a licence agreement with a young homeless man, Mr Clarke. The agreement was headed "Licence to Occupy" and specifically stated that exclusive possession was not granted to Mr Clarke. The Council reserved the right to move him or require him to occupy a shared room within the hostel if the need arose. Lord Templeman, who gave the leading opinion, concluded that the agreement constituted a licence because Mr Clarke fell to be characterised as a lodger. Under the terms of his agreement, he could be moved to different accommodation if and when required. Significantly, his Lordship considered that the grant of exclusive possession would have been inconsistent with the purposes for which the Council had provided the accommodation and also contrary to the interests of all the occupants of the hostel.²³ In reaching his decision, Lord Templeman (who also, of course, gave the leading speech in *Street*) expressly took into account:²⁴

the object of the Council, "namely the provision of temporary accommodation for vulnerable homeless persons";

the "necessity for the Council to retain possession of all the rooms" in order to carry out its function in arranging suitable accommodation for the homeless population it served; and

the need for the Council to retain possession of the rooms to facilitate assistance to the occupants.

¹⁹ *Ibid.*, at 345.

²⁰ *Ibid.*, at 346.

²¹ See *Westminster City Council v. Clarke* [1992] 1 All E.R. 695, at 703, H.L., *per* Lord Templeman.

²² [1992] 1 All E.R. 695, H.L.

²³ See further, P.J. Clarke, All E.R. Rev. 1992, at p. 226, who acknowledges that "the most interesting point is that the purpose of providing accommodation – at any rate when the provision is by a public sector landlord – is now material".

²⁴ *Ibid.*, at 703.

Although in *Bruton* the element of providing psychological support for the occupants was not present, it is submitted that the other considerations (referred to above) were of considerable relevance. The Housing Trust had broadly the same housing objectives as the Council in *Clarke*. They would similarly be best served by entering into a licence agreement with each occupier rather than a tenancy; one which could be revoked or rearranged, at short notice if necessary, to meet the fluctuating needs of a growing population of homeless people. Whilst Lord Templeman in *Clarke* emphasises that his decision turned on the very particular characteristics of the case,²⁵ it is clear that similar (if not identical) background features were also present in *Bruton*. None of these, however, were considered pertinent to their Lordships' decision, presumably because this would attach too much weight to the intention²⁶ of the parties (*i.e.* the approach emphatically rejected by Lord Templeman in *Street* in the context of private landlords). What, unfortunately, *Bruton* fails to address is whether a more flexible approach (exemplified by the *Shortlife* and *Clarke* cases) is more apposite in determining the rights of the parties in the quite different context of public sector housing for the homeless.

WANT OF TITLE

In *Street*, it was made clear that the test for distinguishing between the grant of a tenancy and the grant of a licence is the presence or absence of a legal right to exclusive possession. The right to exclude the landlord is what distinguishes the right of exclusive possession from that of exclusive occupation. The vital difference is that in acquiring exclusive possession, the occupier is deemed to have a "stake in the land", an authority to "exercise the rights of an owner of the land" which is consistent with an acquisition of a legal estate conferred only by the granting of a tenancy. Unlike an occupier with only the rights of exclusive occupation, an occupier with exclusive possession can "keep out strangers and keep out the landlord",²⁷ should he be so minded. In the words of Lord Templeman in *Street*:²⁸

The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land.

In *Bruton*, despite the reservation of limited rights of entry, it is evident that the Housing Trust, being itself only a licensee of the property, could never have had the power to exclude the Council from possession and, consequently, was not in a position to confer such a right on Mr Bruton. This, it is submitted, is a compelling argument and one that should have been decisive of the appeal in *Bruton*. Millet L.J. addresses the issue head on in his leading judgment in the Court of Appeal:²⁹

²⁵ Lord Templeman refers to "this very special case": *ibid.*, 703. Yet, as is pointed out by one commentator, "this factual matrix must be replicated countrywide": D. Cowan, "A Public Dimension to a Private Problem", [1992] Conv. 285, at p. 290.

²⁶ See further, D. Cowan, "Lease/Licence Distinction: Changing Enphases?", [1993] Conv. 157, at p. 163, who seeks to clarify the relevance of intention in this context: "Intention . . . is relevant in two particular circumstances on the application of *Street* principles: the intention evidenced on a construction of the agreement and, secondly, on the question of pretence, the real intention of the parties as to whether exclusive possession has, in fact, been granted. Its third sense takes into consideration the position of the parties outside the negotiating process and is irrelevant."

²⁷ *Street v. Mountford* [1985] 2 All E.R. 289, 292, H.L., *per* Lord Templeman.

²⁸ *Ibid.*, at 292.

²⁹ [1998] Q.B. 834, at 845. See also, *Camden London Borough Council v. Shortlife Community Housing Ltd* (1992) 25 H.L.R. 330, where Millet J. (as he then was) held that, in the absence of a legal power to grant a tenancy, the occupants could not have a better right than their grantor and, consequently, they could only be licensees, applying the maxim *nemo dat quod non habet*.

The hallmark of a tenancy is the grant of exclusive possession. In this context, therefore, exclusive possession means possession to the exclusion of the whole world, not merely of the grantor and those claiming through him. If the grantor has no power to exclude the true owner from possession, he has no power to grant a legal right to exclusive possession and his grant cannot take effect as a tenancy.

In *Bruton*, the Housing Trust was itself merely a licensee of the block of flats.³⁰ As such, it could not lawfully exclude the Council from entering any of the flats which it occupied under the terms of its licence. Equally, it could not confer such a right of exclusion on any individual occupier of a flat within the block simply because, as licensee, it did not have such a right itself. As legal owners, the Council could have demanded unrestricted access to the property at any time from the Housing Trust; here, of course, lies the inherent difficulty with the *Bruton* ruling – if the individual occupiers fail to be classified as tenants, then presumably the Housing Trust would be unable to facilitate such access because each occupier would have been granted possession to the exclusion of the Council and its agents. The only way of avoiding this difficulty is to suggest that each occupier holds only a “personal tenancy” in the sense that it binds only his immediate landlord (the Housing Trust) and not persons with a superior title. The notion that a tenancy creates purely personal rights between the contracting parties and does not confer exclusive possession against the rest of the world is, to say the least, novel. If such a hybrid tenancy does exist, what is to distinguish it from a licence which also confers purely personal rights as between the parties? We shall revert to this aspect of the *Bruton* decision later.

SPECIAL CIRCUMSTANCES

In *Street*, Lord Templeman also recognised that “an occupier who enjoys exclusive possession is not necessarily a tenant”.³¹ There may be “special circumstances” which can negative the creation of a tenancy. His Lordship instances, in particular, the situation where the owner, a requisitioning authority, has no power to grant a tenancy.³² The majority of the Court of Appeal in *Bruton* invoke this exception so as to include a grantor who has no power to grant a tenancy because he does not possess any legal estate in the land. According to the majority, Lord Templeman’s exception was not limited to the case where the grantor had no *capacity* to grant a tenancy but extended to situations where he had no *estate or interest* in the land which enabled it to do so. In the words of Kennedy L.J.:³³

Why then can it not be said that the present case is also an example of exceptional circumstances which negative the prima facie intention to create a tenancy? Both parties knew that the housing association did not have and had no chance of acquiring any legal estate. They expressly proceeded on that basis, and there would seem to me no obvious reason why in law they should not be assumed to have meant what they said.

³⁰ It is assumed, for present purposes, that the licence granted by the Council to the Housing Trust was a genuine licence and not a tenancy. See further, T. Bullimore, “Lease or Licence? An Old Chestnut on a New String”, *Solicitors Journal*, 3 October 1997, p. 921, who suggests that the Court of Appeal decision in *Bruton* may have been inconclusive in so far as the crucial question was not asked: “Might the lead-licence not have been a tenancy and the plaintiff thus (potentially) a sub-tenant rather than a sub-licensee?”: *ibid.*, at p. 921.

³¹ [1985] 2 All E.R. 289, at 294, *per* Lord Templeman.

³² [1985] 2 All E.R. 289, at 295-296.

³³ [1988] Q.B. 834, at 847.

Strictly speaking, as Millet L.J. points out,³⁴ a lack of power to grant a tenancy is not a true exception to the general rule because “the relationship of landlord and tenant is a legal relationship” and “it cannot be brought into existence by an arrangement which is not intended to create legal relations at all or by a body which has no power to create it”.³⁵ Here again, the crucial point is that the creation of a tenancy requires the grant of a legal right to exclusive possession. A licensee cannot grant a tenancy because he cannot give what he does not have, namely, exclusive possession of the property. The point is addressed by Gray,³⁶ in the context of the creation of equitable leases, who states that “if the grantor of a lease holds only an equitable title (for example, an equitable fee simple estate), any term of years granted can itself have only equitable quality”.³⁷ To take another example, it is apparent that a tenant who purports to grant a sublease of the premises for a term equal to or greater than his own will be treated as having effected an assignment of his lease by operation of law.³⁸ The crucial point is that the person who grants the tenancy must have some greater interest in the land so that there is something which will revert back to him at the end of the tenancy.

Another central issue in the *Bruton* case was whether the fact that the Housing Trust was a charitable organisation charged with the function of providing short-term accommodation for the homeless was sufficient to constitute “special circumstances” so as to displace the presumption of a tenancy. In this connection, Lord Templeman in *Street* also instances the situation where the occupier is an “object of charity” as negating the intention to create a tenancy. The point arose in *Gray v. Taylor*,³⁹ where the defendant occupied a flat in an almshouse administered by the trustees of a charity. Although the defendant enjoyed exclusive possession for a term paying a weekly sum towards the cost of maintaining the property and for essential services, the Court of Appeal concluded that she was not a tenant because the circumstances showed that all that was intended was that she should be granted a personal privilege to occupy as a beneficiary under the trusts of the charity. Her right to exclusive possession was referable to a legal relationship other than a tenancy (*i.e.* that of trustee and beneficiary).

The importance of the *Gray* decision lies in the Court of Appeal’s express recognition that an occupier who is an “object of charity” may not qualify as a tenant simply because the circumstances negate the relationship of landlord and tenant. Significantly, the point has also been judicially addressed (albeit only at county court level) in the specific context of an organisation offering accommodation to the homeless. In *Brent People’s Housing Association Ltd v. Winsmore*,⁴⁰ the defendant was granted the occupancy of a bed-sitting room by a registered housing association. The agreement between the parties was termed a licence and a clause therein reserved the housing association’s right to move the occupant (against his will if necessary) to another part of the house. Two full-time social workers were employed at the house to provide support, advice and assistance to the occupants. When the defendant failed to comply with the rules of the house, the Association terminated his licence. The county court judge held that there was a sharing of the flat between the various residents so that there was no exclusive possession necessary to create a tenancy. Alternatively, the judge held that, given the charitable aspect of the scheme and its temporary nature, the

³⁴ *Ibid.*, 843, referring to his earlier decision in *Camden London Borough Council v. Shortlife Community Housing* (1992) 25 H.L.R. 330.

³⁵ *Ibid.*, at 843.

³⁶ See, Gray, K., *Elements of Land Law*, (Butterworths, 2nd ed., 1993), at p. 739.

³⁷ The decision in *Marks v. Attallah* (1966) 198 E.G. 685 is cited as authority for this proposition.

³⁸ See, *Milmo v. Carreras* [1946] K.B. 306, C.A.

³⁹ [1998] 4 All E.R. 17, C.A.

⁴⁰ Unreported, County Court, 20 November 1985, noted [1988] 36 E.G. 20, at p. 22, (D. Williams).

agreement fell within the exceptional circumstances envisaged by Lord Templeman in *Street*. Although, of course, this is only a county court decision, it does illustrate the court's willingness to widen the scope of "special circumstances" in the context of social housing policies. By contrast, however, Millet J. in *Shortlife* (referred to earlier), emphatically rejected the notion that special circumstances could negative the legal consequences of a transaction concluding (as we have already seen) that facts relevant to exceptional circumstances were more pertinent to the initial question of whether or not exclusive possession had been granted.⁴¹ This approach is also discernible, of course, in *Clarke* where the House of Lords held that the status of the Council in providing temporary accommodation to the homeless was relevant only to the question of intention to grant exclusive possession.

Unfortunately, in *Bruton*, the House of Lords also reject the notion that the performance of socially-valuable functions can amount to circumstances capable of negating the general rule in favour of a tenancy. Lord Hoffman simply refers to Slade L.J.'s judgment in *Jones* for authority that a charitable housing body providing temporary housing accommodation for the homeless does not fall into the "object of charity" category of special circumstances or, indeed, any new category of special circumstances. Lords Slynn and Jauncey also conclude, referring to *Jones*, that there are no special circumstances to displace the general rule, but both express their "anxiety"⁴² and "misgivings"⁴³ about the impact of such a result on the Housing Trust. Lord Hope simply concurs in Lord Hoffman's opinion, and Lord Hobhouse does not refer to the point. Significantly, the earlier decision in *Gray* (mentioned above) is not referred to in any of their Lordships' speeches, which is surprising given that it provides recent Court of Appeal approval to the object of charity exclusion in the related context of a charitable trust providing accommodation to poor persons of good character over the age of 60.

Their Lordships' reluctance to embark upon any substantive analysis of this issue is even more surprising given that Slade L.J.'s reasoning in *Jones* is far from clear, being based simply on a rejection of the broader principle, expressed by Purchas L.J. in that *Ogwr Borough Council v. Dykes*,⁴⁴ the court may look at "the context in which the right to exclusive occupation is granted" in order to determine whether the intention to create a tenancy has been "specifically and definitely" displaced. Despite having identified several "special features" which marked the case out as worthy of special consideration, Slade L.J. simply concludes, without further elucidation and with some regret, that they are insufficient to constitute a new exceptional category falling outside the *Street* principle.⁴⁵

The result, it is submitted, is unfortunate given that the decisions in *Ogwr*⁴⁶ and *Gray* would have provided a "neat solution"⁴⁷ to the problem of admitting evidence of

⁴¹ See further D. Cowan, "Lease/Licence Distinction: Changing Emphases?", [1993] Conv. 157, at pp. 160-161, who argues that Millet J.'s approach in *Shortlife* "attempts to strip these categories [of exceptional circumstances] of all their efficacy".

⁴² [1999] 3 All E.R. 481, 483.

⁴³ *Ibid.*, at 484.

⁴⁴ [1989] 2 All E.R. 880, 886.

⁴⁵ See further, D. Cowan, "A Public Dimension to a Private Problem", [1992] Conv. 285, at pp. 288-289, who argues that the relevance of the council's powers and duties "should be as to whether the situation should fall within the exceptional circumstances.

⁴⁶ In this case, the Court of Appeal held that a council fulfilling its duties to homeless persons by housing them could not give rise to a secure tenancy if that was not their intention. The case is based on the premise that, in exceptional circumstances, the parties can contract for a licence by manifesting an intention not to create a tenancy.

⁴⁷ See, D. Cowan, "A Public Dimension to a Private Problem", [1992] Conv. 285, at p. 289.

background features (characterised as a category of exceptional circumstances relying on the intention of the parties not wishing to enter into legal relationships) in determining the issue of exclusive possession.⁴⁸

TENANCY BY ESTOPPEL

One of the main arguments submitted on behalf of Mr Bruton before the Court of Appeal was that the Housing Trust was estopped from denying the existence of a tenancy despite the absence of any legal title to the property. This argument did not find favour in the Court of Appeal and was considered largely irrelevant in the House of Lords. According to Millett L.J. in the Court of Appeal, any tenancy by estoppel depended upon the grantor having purported to grant a tenancy and, in the present case, the Housing Trust had not done so. On the contrary, according to his Lordship, it had made it obvious that it was only purporting to create a licence.

The House of Lords, on this issue, disagreed with Court of Appeal's analysis in at least three important respects. First, it was the fact that the agreement was a tenancy which created the proprietary interest. It was not correct to say that, if the grantor had no legal estate, the agreement could not create a legal estate and hence did not qualify as a tenancy. In the words of Lord Hoffmann:

... it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest.⁴⁹

Secondly, according to their Lordships, the question of a tenancy by estoppel did not strictly arise for consideration because the issue was simply whether the agreement constituted a tenancy. It was the fact that the agreement between the parties constituted a tenancy which gave rise to an estoppel and not the other way round. In the instant case, therefore, the issue was not whether either party was entitled to deny some obligation or incident of the tenancy on the ground that the Housing Trust had no title. The only issue was whether the agreement conferred a tenancy or merely a licence and Mr Bruton needed to do no more than simply rely on the agreement he had with the Housing Trust and its legal effect. Thirdly, according to the House of Lords, the Housing Trust, as a matter of law, had granted a tenancy (as opposed to a licence) by entering into an agreement with Mr Bruton on terms which constituted a tenancy. Accordingly, contrary to Millett L.J.'s view, there was an inconsistency between what the Housing Trust *purported* to do (*i.e.* grant a licence) and its denial of the existence of a tenancy. In this connection, Lord Hoffmann dismisses as irrelevant the fact that both parties plainly agreed that it was not a tenancy and insists that "such devices" cannot be "used by a landlord to avoid being estopped from entering into the agreement he actually made".⁵⁰

The obvious difficulty with this approach is that it risks producing the very injustice which the estoppel doctrine seeks to prevent. If the grantor genuinely and in good faith, with knowledge of its want of title, offers a licence to a grantee, it seems unduly harsh

⁴⁸ See further, D. Cowan, "Lease/Licence Distinction: Changing Emphases?", [1993] Conv. 157, at p. 160, who emphasises the importance of intention when considering the *Street* exceptions.

⁴⁹ [1999] 3 All ER 481, 487.

⁵⁰ *Ibid.*, 489.

to then compel the grantor to accept a tenancy by refusing him the right to plead his lack of title.

CONCLUSION

The upshot of the House of Lords' ruling is that a grantor may create a tenancy despite having no proprietary interest in the land and irrespective of any factors giving rise to an estoppel. This, it is submitted, is a startling proposition not least because it assumes that the existence of a lease which does not have any proprietary characteristics. If Mr Bruton's tenancy does not give rise to a proprietary interest in land, the question must be, what is it?

Lord Hoffman, in his speech, suggests that not all leases give rise to a leasehold estate "or, technically, a term of years absolute". Lord Hobhouse is more explicit in so far as he expressly concedes that Mr Bruton's case was not dependent on the establishment of a proprietary title good against all the world or against the Council. In his view, the relationship between the parties was "contractual" and, hence, there was no necessity for Mr Bruton "to show that the Council had conveyed a legal estate to the Housing Trust".⁵¹ But if Mr Bruton's tenancy is not "good against all the world" and is purely contractual in nature, then surely the very essence of a tenancy, namely, exclusive possession, is lacking unless, of course, exclusive possession, in this context, may now mean exclusive possession as between grantor and grantee only!

The conclusion must be that the House of Lords has unwittingly created an entirely new species of tenancy which is purely contractual in nature, personal to the contracting parties, and which cannot be assigned to or bind third parties. This raises some intriguing questions. If there are now two categories of lease, one proprietary and one non-proprietary, does existing landlord and tenant legislation,⁵² drafted under the assumption that leases are proprietary in nature, extend to the non-proprietary category? And if it does, will not the current distinction between leases and licences become even more muddy? How will the courts seek to distinguish between a contractual tenancy and a licence? Both operate *in personam* and create no proprietary interest in the land. Neither bind third parties. The former gives the "tenant" exclusive possession but only as against the grantor. The latter confers no exclusive possession but merely a permission to occupy. But surely the whole point of the lease/licence distinction is to draw a clear dividing line between personal and proprietary rights. Leases are proprietary; licences are personal. At least, that is the orthodox view! Can, for example, a non-proprietary tenant validly create a sub-tenancy out of his personal "estate"? Does the Landlord and Tenant (Covenants) Act 1995 (or the Landlord and Tenant Act 1988) apply to a non-proprietary lease? Since both Acts are based on the assumption that leases are potentially assignable and bind third parties, the answer is probably not. On the other hand, it is implicit from the decision in *Bruton* that section 11 of the Landlord and Tenant Act 1985 will apply. Presumably also, Mr Bruton's weekly tenancy is valid on the basis that it falls within the concession regarding formality of leases contained in section 54(2) of the Law of Property Act 1925. But because of its non-proprietary nature, it would presumably not qualify as an overriding interest under section 70(1)(g) of the Land Registration Act 1925. Is this new species

⁵¹ *Ibid.*, 490.

⁵² It seems reasonably clear that Mr Bruton would enjoy statutory security of tenure: see, further: J. Driscoll, "Distinguishing Tenancies from Licences", *Solicitors Journal*, 20 August 1999, at pp. 816-817.

of contractual tenancy capable of forfeiture by the landlord? The general consensus is that forfeiture involves the loss, destruction or termination of a proprietary interest in land. It does not extend to the termination of purely contractual rights.

It is a pity that none of these fundamental questions are addressed in their Lordships' speeches.

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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.

PROFESSIONAL PRACTICE

Managing the Professional Partnership

by BRIAN D. ALLINGHAM and DOUGLAS R. MILL

Edinburgh, T & T Clark, 2000

150pp., Paperback £25.00

ISBN 0 567 00542 9.

This book assesses the problems of managing a business, with particular reference to professional partnerships, and considers the potential solutions to these problems. Although it is expressly not intended to be a book on partnership law and is not aimed at a particular profession, it does attempt to tailor current thinking on management strategies to the particular situation of a professional partnership. The problems discussed will therefore be instantly recognisable to lawyers. For the basic management elements, it relies heavily on three texts: C.B. Handy's general text, *Understanding Organisations*,¹ D. H. Maister's more professionally-oriented *Managing the Professional Service Firm*² and the more legal practice-oriented *Making Sense of Law Firms* by S. Mayson.³ These texts are referred to throughout, although the book is based on the assumption that partnerships raise different management problems than other forms of business organisation.

The book is divided into six sections covering broad areas. These are entitled "Introduction", "People", "Financial Matters", "Running the Partnership", "Momentous Events in the Life of the Partnership" and "The Future for Partnerships". Each section is subdivided into chapters. This is in the main a logical and helpful structure, although more cross references between the various sections and chapters would have been helpful. For example, neither the chapter on "Setting Up" nor that on "Taking on a New Partner" refer to the possibility of entering into restrictive covenants, which are instead dealt with solely in the chapter on "Termination". Similarly, there is no reference in the section on "The Future for Partnerships" to limited liability partnerships (LLPs) or multi-disciplinary partnerships (MDPs), which are instead dealt with under "Financial Matters".

The style is informal and remarkably readable. Management jargon is explained clearly with practical examples. The chapters on "Mergers", "New Partners" and "Termination" are particularly clear and well written. The overall impression is that

¹ C.B. Handy, *Understanding Organisations*, 4th ed., (Penguin, 1993).

² D.H. Maister, *Managing the Professional Service Firm*, (The Free Press, 1993).

³ S. Mayson, *Making Sense of Law Firms*, (Blackstone Press, 1997).

the authors, especially Brian Allingham who wrote all except the chapter on “Multi-Disciplinary Partnerships and All That”, enjoyed writing the book and were enthusiastic about the ideas they put forward. As mentioned above, considerable reference is made to management texts. In places, this produces a slightly disjointed result but this is a small price to pay for a relatively painless introduction to many of the key concepts of management theory.

In the “Introduction” section, there is a thoughtful discussion of the ethos of partnership. This is an essential issue for partners and would-be partners to consider, since it should affect their choice of business medium and will influence the functioning of the business throughout its life. This section sets out some of the potential advantages of the partnership form, including the sharing of knowledge and skills, reduced costs and the provision of better services. It also sets out some of the disadvantages, including the possibility of adverse behaviour on the part of other partners (graphically described as “shirking, grabbing and leaving”).

The section on “People” includes a chapter on “Communications in the Partnership”, which discusses appropriate methods of communicating different types of information, for example good or bad news. These methods, as with much in this book, would be obvious to most competent managers who addressed their minds to the matter. However, the reality is that managerial minds are too often not addressed to such matters in the first place. The book is therefore a useful prompt. This section also contains a very useful chapter on the necessary task of “Appraising Partners”, a difficult and sensitive issue. It anticipates problems and suggests practical solutions. At Appendix Three, there is a draft partner appraisal form.

One problem for this book is that it covers a wide variety of difficult issues in a slim volume and, as a result, some of the more interesting and thought provoking ideas are not always fully developed. For example, in the “People” section, the chapter on “The Culture of a Partnership” discusses the theoretical models of the firm but does not develop their significance and application to partnerships.

The section on “Financial Matters” includes a chapter on that most desirable of features, “Profitability”. This is especially useful for partners who are not financial experts. It summarises the key issues affecting profitability and, as part of the author’s Campaign for Real Accounts, provides a list of items which should be taken into consideration as a matter of common sense. More detail on the accounting rules applicable to partnerships (for example, the significance of the introduction of the current year basis and the “true and fair view” computation) would have assisted in places but, in fairness, this is no more intended to be a book on accountancy than a book on partnership law. With the increasing size and diversity of many professional firms, the question of how profits should be shared is constantly under review and the chapter on “Profit Sharing” discusses the main possibilities. These include lockstep, performance related and fixed shares, and the merits and weaknesses of each are evaluated.

The explanation of the advantages of MDPs and their likely prospects, in the chapter on “Multi-Disciplinary Partnerships, Limited Liability Partnerships and All That”, is particularly timely and the inclusion of material on multi-national practices (MNPs) and incorporated practices is a useful reminder. However, given the imminent introduction of LLPs, the subsection dealing with them is rather brief.

In the “Running the Partnership” section, the chapter on “Meetings” largely provides a useful review and summary of the issues; for example the fact that the more partners are present at a meeting the more expensive (and often longer) that meeting is. The chapter on “Devising Strategies” provides practical advice, including a plan for establishing and assessing the firm’s objectives.

The brief chapter on “Leadership” contains little of real value, but this reflects the emphasis elsewhere on delegation and sharing responsibility. In addition, the more useful information and ideas which might otherwise have been included under “Leadership” are to be found in the chapter on “The Managing Partner”. This chapter defines what the role of managing partner should and should not be and stresses the importance of delegation and monitoring. The chapter on “Partnership Roles” makes some useful points but these could have been developed further. For example, it argues that all partners should be involved in entrepreneurial roles and acknowledges that many partners lack the essential skills to do this but not does suggest strategies for reconciling the aspiration with the facts.

It is perhaps appropriate that the chapter on “The One-Partner Firm” (i.e. the sole practitioner) is both brief and rather gloomy, given that this is a book largely devoted to an alternative form of practice.

The section on “Momentous Events in the Life of a Partnership” includes a chapter on “Setting Up” (which, as a result of this categorisation, appears more than halfway through the book). This provides an excellent adaptation of the basis rules for business start-up to partnerships. There is also a sample partnership agreement at Appendix Two. This sets out clearly and simply the clauses which should be included, with a commentary and suggested alternatives. This section also includes a chapter on “Mergers”, now an important topic in many professions. It identifies advantages and disadvantages and discusses the strategies which can be used to maximise the former and minimise the latter. The chapter on “Termination” deals with the effect on the firm of termination though a variety of different events and also covers insolvency. Appendix Four contains a sample minute of dissolution.

All chapters in this book begin with an apposite quotation, but that which introduces the section on the “Future for Partnerships”, “I have seen the future; and it works”,⁴ is particularly interesting. The authors point out that this statement was made in relation to the U.S.S.R. However, their view of the future of partnerships is ultimately more optimistic than the reference to that state might suggest. This section considers such issues as the possibilities of increasing size of partnerships, specialisations, the advantages of limited liability, women partners, portfolio workers and the route to partnership. It concludes that “[p]artnerships, as a means of doing business, will succeed and prosper, even though some partnerships may not”. It is, however, curious that no mention of LLPs, MDPs or the Law Commission’s review of partnership law (which has, admittedly, been ongoing for several years), appears in this section.

The chief criticism of the book is that it is too brief on the law. As already mentioned, the authors expressly disclaim any intention to deal with partnership law (although there is a summary of the law of partnership at Appendix One). However, where the law is relevant to the issues under discussion, an omission, or too brief a mention, can mislead. For example, the chapter on “Communications in the Partnership” does not refer to the obligation under section 28 of the Partnership Act 1890 to disclose to fellow partners all information affecting the firm. Similarly, the chapter on “Termination” does not refer to the importance of a retiring partner giving notice under section 36 of the Partnership Act 1890 in order to ensure that he is not liable for partnerships debts incurred after his departure. Examples of points inadequately explained include the assertion in the “Introduction” that an unspoken and unwritten contract is unenforceable (whereas in fact a course of dealing may give

⁴ Lincoln Steffens, *The Letters of Lincoln Steffens*, ed. E. Winter and G. Hicks, Volume One, (Harcourt, Brace, 1938), at p. 463.

rise to an agreement) and the statement in Appendix One that partners have no right to expel a partner (which is correct but subject to the necessary qualification that partners may agree on a right of expulsion).

However, despite these criticisms, this is a useful book for partners in professional firms. It serves as a reminder of things once known, but forgotten or ignored, and as an introduction to new ideas. Although much of the content is common sense, it is the sort of common sense that can easily be overlooked when other pressures exist. It is thus a useful book to refer to from time to time.

ELSPETH DEARDS*

JURISPRUDENCE

Philosophy of Law

by MARK TEBBIT

London, Routledge, 2000

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The study of jurisprudence, or philosophy of law, is not greatly enjoyed by those law students enamoured of black letter law. However, they should be aware that the very difficult problems that arise in other legal subjects ultimately come down to some form of jurisprudential issue, for example, the limits of responsibility for criminal actions, the extent to which judges make “policy” decisions, lawyers’ ethical obligations, the principles that arise in cases of discrimination and human rights, and so on. This book covers a wide range of jurisprudential topics and includes reference to the work of a large number of theorists.

The book is divided into three parts respectively entitled: “What is law?”; “The reach of the law” and “Criminal responsibility and punishment”. The first part surveys the principal theories of law, taking as its starting point the perennial dichotomy of law versus morality. Tebbit points out that this is a superficial demarcation. The demands of the law can sometimes be more extensive than morality (*e.g.* minor road traffic offences may well not be morally culpable) and sometimes less extensive (*e.g.* no legal obligation of beneficence). The tension between natural law and positivism is then briefly examined before Tebbit goes on to chart the rise of positivism in its various forms. He places this development well in its historical context, rightly pointing out that, in the move away from natural law, the empiricist philosopher David Hume was a key influence. The remainder of Part I deals with the development of positivism, and other theories of law, such as legal realism and pragmatism,¹ Kelsen and legal normativity, Fuller’s “procedural” version of natural law, and, of course, the rights-based theory of Ronald Dworkin.

Part II, “The reach of the law”, deals with the authority of law, the problem of civil disobedience and the extent to which the law should intervene in matters of personal morality. Tebbit points out that there is no simple correlation between the principal theories of law and the justifications as to why we should obey the law. He illustrates

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¹ In the context of pragmatism, William James, who is important in an examination of this concept, is not mentioned in the bibliography (although there is a brief reference to him in the text at p. 25). It might be useful to remedy this in the second edition.

this by referring to Hart's distinction between law as (justified) obligation and law as something we can, simply as a matter of fact, be obliged to comply with. He delineates three types of obligation theory: conceptual, consequentialist and social contract. The first two are disposed of fairly quickly. The conceptual is no more than "form" and the consequentialist no more than a rough calculation of what produces the best results overall. Tebbit, however, deals in some detail with social contract theory, taking Plato's account of Socrates's death sentence in the dialogue *Crito* as the theory's starting point. Socrates accepted his death sentence, not because it was just, but because it was lawful. The political instability of the seventeenth century, when it was necessary to justify overthrowing tyrannical regimes, is seen as the catalyst for the development of social contract theories (for example, those of Hobbes and Locke). Finally, Tebbit deals in some detail with the contemporary contract theory of John Rawls, whose two principles of justice (equal basic liberties for all and the distribution of benefits to favour the least advantaged) are based on rational self-interest.

Using Rawls as his main theorist, Tebbit then looks at the nature of civil disobedience, justifiably concluding that "any serious examination of the link between a valid authorised law and the duty of obedience leads into a conceptual quagmire".²

The section on legal and moral rights highlights the nebulous nature of "rights talk", which lends appeal to Bentham's no-nonsense view of the notion of rights and duties floating in the ether as nothing more than a legal fiction. The language of rights in the twentieth century, says Tebbit, has focussed very much on legal rights. Indeed, it is arguable that there are no non-legal rights. Essential to the concept is that they should be, at least in principle, enforceable. A moral right is an unenforceable appeal to conscience. Tebbit looks in detail at the difficulties of defining rights in any meaningful way, via the work of Bentham and J.S. Mill (various versions of utilitarianism) and Dworkin (rights as "trumps").

The final section of Part II is concerned with liberty, privacy and tolerance. It considers the 1957 Wolfenden Report on homosexuality and J. S. Mill before concentrating on the Hart - Devlin debate. Although now almost quaintly dated, this debate is still a good starting point for discussion of the relationship between law and social and moral norms.

On a general note, as the subject matter is much more easily related to real life issues, and perhaps because it does not have to pack so much theory into a relatively small space, Part II might have been a better starting point for the book than Part I.

Part III is concerned with criminal responsibility and punishment. The first section is about criminal responsibility and guilt and is the best part of the book. In the context of free agency and responsibility, Tebbit lucidly examines the difference between excuse and justification. As he points out, the defence of necessity frequently appeals to these concepts, and it is important to be clear as to the difference, even though, at times, regardless of which argument is employed, the end result might be the same. If an act is justified then it is lawful and the accused will escape criminal liability. In the case of excuse, the act is unlawful but, because of the law's "empathy" with the accused's predicament, again he will escape. In this regard Tebbit uses the illustration of the defence of self-defence (justification) and provocation (excuse). As he says, the person who justifies his actions will always be able to say that, with hindsight, he would do exactly the same thing again. By looking at cases such as *R. v. Dudley and Stephens*³, Tebbit examines the problems that arise in cases of duress, and states that

² M. Tebbit, *Philosophy of Law*, (Routledge, 2000) at p. 94.

³ (1884) 14 Q.B.D. 273.

the equivocation between justification and excuse in cases of necessity does not apply in cases of duress: "By its very nature, a crime committed under duress cannot be represented as the right thing to do".⁴

Similarly, he draws the distinction between motive and intention. The motive behind a crime might be, for example, revenge or hatred of the victim; the intention might be to frighten or destroy. "Given that a criminal act has been committed, the presence of a motive is neither necessary nor a sufficient condition of guilt, while intention is normally necessary and sometimes sufficient to establish guilt. A crime without any apparent motive is no less a crime, but a crime which is not intended is in normal circumstances not a crime at all."⁵

Tebbit also gives an excellent account of intention and foresight and the intractable problems thrown up by the subjective/objective debate. Illustrating the problem by way of *DPP v. Smith*⁶ and *Hyam v. DPP*⁷, he shows how the subjective approach is an essential part of *mens rea* in murder.⁸ Although outside the scope of the author's remit, it would have been interesting to extend this analysis to situations in which the concept of foreseeability is used by judges as though it was a precision instrument rather than the blunt tool that it clearly is.

Tebbit goes on to explore the M'Naghten Rules and the justified criticism of their operation. For example, the requirement that the defendant must "know" that the nature and quality of the act he was committing can be subjective or normative. The Rules take an exclusively cognitive view of the defendant's state of mind, so that emotional reactions are excluded, in particular the "irresistible impulse" cases which are at present excluded from the ambit of the rules.

The final chapter deals with theories of punishment. This is introduced by a discussion of the classic dichotomy between retributive theories, where the crime itself is enough to justify punishment, and those based upon justification in the wider interests of society (deterrence, rehabilitation, incapacitation). The arguments for and against each of those views are thoroughly and critically explored, with Tebbit, finally, and inevitably, rejecting the crude polarisation of the traditional theories in favour of a more unified approach to punishment.

The preface describes the book as "an introduction" for philosophy and law students "who are setting out on a course on the philosophy of law or jurisprudence for the first time". Whilst it is an admirable book in many ways, this it is not, at least not in the first third of the book, and at least not for law students. For a second or final year philosophy student it might serve as an introduction, as by then the student will almost certainly have received some grounding in ethics or political philosophy, both of which are relevant to the study of jurisprudence. However, generally speaking, law students will not have received any introduction to philosophical concepts. On the other hand, philosophy students will have some familiarity with the law (albeit most likely in an anecdotal sort of way) as almost every day the media will cover legal issues, whether it be an account of a gruesome murder trial, outrage at allegedly "lenient" sentencing or concern about human rights abuses. Alain de Botton notwithstanding, the pages of the daily newspapers tend not to contain much philosophy. Tebbit tends to introduce big and complicated issues almost in passing, with little in the way of explanation. An

⁴ M. Tebbit, *Philosophy of Law*, (Routledge, 2000) at p. 134.

⁵ *Ibid.* at p. 140.

⁶ [1961] A.C. 290.

⁷ [1974] 2 All E.R. 41.

⁸ For an illustration of the subjective approach to some statutory offences, see the case of *B (a minor) v. DPP* [2000] 1 All E.R. 833, H.L., the subject of a casenote in this edition of this journal.

illustration of this is his reference to Aristotle's division of "justice" into that which is "corrective" and that which is "distributive".⁹ A careful reading of the next few pages of the text will give the student some idea of roughly what Aristotle was driving at but that is not the point. Whilst it is by no means easy to say precisely what is meant by each of these concepts, a stab at some workable definitions would have helped. An introduction to the subject should spell things out in more detail.

It is not that the book lacks clarity; it is simply that the early chapters assume too much of someone with no previous knowledge of philosophy. It would, perhaps, have benefited from a general introduction to some key philosophical concepts such as consequentialism and deontology. Further, it might have been useful to include more examples of actual law to consider how they might fit into the theoretical frameworks. For example, Aristotle is referred to as introducing the concept of equity,¹⁰ and a useful discussion might have ensued by relating the general concept to the tempering of the harshness of the English common law by the "introduction" of equitable principles.

At the end of each chapter the reader is invited to tackle a number of "study questions". Tebbit can be forgiven (indeed, it may have been the publisher's requirement) for including this kind of self-assessment stuff as it is very much in vogue amongst the "teaching and learning" brigade. However, some of the questions require a student to do little more than regurgitate the theories about which they have just read (this is also often the case in many self-assessment exercises in other student texts). If these sorts of appendages are to be included then, arguably, there should be some element that requires the student to use the reading in a more demanding and creative way. Again, an invitation to the student to consider examples of law to illustrate some of the conceptual matters under discussion might have been included alongside the study questions.

This book is cogently argued, stimulating and well written. It can confidently be recommended to law students with the proviso that they might need to tackle a truly introductory text beforehand.

KAY WHEAT*

⁹ M. Tebbit, *Philosophy of Law*, (Routledge, 2000) at p. 7.

¹⁰ *Ibid.* at p. 9.

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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.

A RESPONSE TO THE EUROPEAN COMMISSION GREEN PAPER ON LIABILITY FOR DEFECTIVE PRODUCTS

MARK MILDRED ¹

INTRODUCTION

Council Directive 85/374/EEC of 25 July 1995 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products ("the Directive") obliges² the Commission to report every five years to the Community institutions on the general state of application of the Directive and every ten years on the effect of the development risks defence³ and of the financial ceiling on liability⁴ on consumer protection and the functioning of the common market.

The first report of the Commission on 13 December 1995⁵ was very brief and simply reported that there was insufficient experience of the Directive (which had only recently been implemented in most jurisdictions) to justify any reform.

Partly, no doubt, in reaction to the United Kingdom "Beef Scandal" the Parliament on 1 October 1997 requested the Commission to change the Directive so as to remove the option to exclude primary agricultural products and game from the definition of "product".⁶ This set in train a sequence of legislative debates⁷ culminating in a wide range of amendments proposed to⁸ and partly accepted by the Parliament.⁹ In the face of opposition from the Council of Ministers the Parliament resolved at the second

¹ Sweet and Maxwell Professor of Litigation at Nottingham Law School, Nottingham Trent University and a consultant to several UK law firms in product liability matters; co-agent (in 1996/7) for the EC Commission in the Infringement Proceedings brought against the United Kingdom in respect of transposition of the Directive, Case C-300/95 *Commission v. United Kingdom* [1997] E.C.R. I-2649.

² Article 21.

³ Article 7(e) implemented by section 4(1)(e) of the Consumer Protection Act, 1987 ("the Act").

⁴ Article 16. 2. This optional provision limiting overall liability for damage resulting from death or personal injury caused by identical products with the same defect was not implemented in the UK.

⁵ COM (95) 617 based on a study carried out in 1994.

⁶ Article 15. 1(a).

⁷ For a full account of the process, see C.J.S. Hodges "Reform of the Product Liability Directive 1998-1999" (1999) *Consum. L.J.* 35.

⁸ By the Committee on the Environment, Public Health and Consumer Protection.

⁹ At the first reading on 5 November 1998.

reading on 23 March 1999 to reject all reforms except the removal of the exemption of agricultural products and game and to undertake a full consultation process and debate. This process was put in motion by the Green Paper on Liability for Defective Products¹⁰ open for responses for four months.

This article summarises the issues raised by the Green Paper and sets out the author's response to them.

CONSULTATION QUESTIONS, SECTION 1 – THE FUNCTIONING OF THE DIRECTIVE

Question: According to your experience, does the directive function properly in practice?

No comprehensive statistics exist (as far as the author knows) in relation to the frequency of use or the efficacy of the Directive compared to alternative remedies and there is no obvious means available for the collection of such information. To this extent any response is necessarily approximate; data collected by a court or trade association will be more reliable (even if partial) than that collected by a consumers' association or an individual or law firm interested in the area.

The main distinguishing factor relating to the Directive is the lack of reported cases. Following on from this there is no certain understanding of the true meaning of certain provisions of the Directive. Most importantly, there is no clear understanding of the correct approach to the concept of defectiveness in article 6. Whilst the words "a person is entitled to expect" introduce an objective criterion, the context of the expectation and the identification of the characteristics which the person is to be presumed to have are not developed. In the result the criterion of safety restates the question "what is defective?" rather than answering it.

There are no English or Scottish reported cases on the correct interpretation of article 6. A survey of the Consumer Law Journal for 1998 and the first two volumes for 1999 reveals only five relevant decisions.¹¹

In a decision of the Supreme Court of Spain, 3 December 1997¹² the report suggests that "defective" has a similar meaning to "dangerous". On the other hand, in a decision of the Austrian Supreme Court of 28 April 1998¹³ the defendant cycle manufacturer was condemned for not succeeding in developing *a perfect product suitable for any use*. In spite of this it gave no installation instructions or any warning that loads on the cycle handlebars common in cycle races had not been adequately tested.

The same court decided¹⁴ that a manufacturer must warn customers "about the risks involved in handling mineral water bottles". The report in the Consumer Law Journal¹⁵ does not make clear to what extent the defect was characterised as an information, as opposed to a manufacturing, defect.¹⁶ The court's description of the defect as a "freak defect" under article 5 of the Product Liability Act¹⁷ does not help in the analysis.

¹⁰ COM (1999) 396 final, 28 July 1999.

¹¹ A fuller survey is included in the article by Jose J Izquierdo Peris (1999) *Consum. L.J.* 331. In a striking Italian case from the *Corte di Cassazione* of 29 September 1995 the court decided that the concept of defect did not cover a method of use that was not reasonably foreseeable. This is pre-eminently the language of negligence.

¹² (1998) *Consum. L.J.* 397.

¹³ 10 Ob 399/97t., (1998) *Consum. L.J.* 518.

¹⁴ OGH – April 8, 1997, 4 Ob 87/97s.

¹⁵ (1998) *Consum. L.J.* 83.

¹⁶ The significance of this distinction is that in the similar German case (Green Paper n. 43) the court decided that the development risks defence had no application to manufacturing defects.

¹⁷ Abs 1 Z 2 PHG.

In decision OGH – April 16, 1997, 7OB 2414/96t the same court decided that consumers were not entitled to expect danger-free electricity.

The Court of Appeal of Ghent decided on 29 May 1998¹⁸ that a defect must be an *abnormal* characteristic likely to cause injury. “The fact that a door has an automatic opening system does not mean that a consumer can blindly expect that a door will open in all circumstances”.

Thus it is clear that there is little understanding of the standards to be applied in judging defectiveness and that there is a wide divergence of judicial opinion.

There are two further difficulties routinely occurring in product claims on which no guidance is available. Any prescription medicine is supplied through a learned intermediary and not directly by the producer to the consumer. How does this affect the expectation to which the consumer is entitled? How far can the producer avoid liability by leaving the detail of instruction and warning to the intermediary? The provisions of article 8 of the Directive require a causal defect on the part of the producer but not a “defective” or tortious act or omission on the part of the intermediary. Defendants, however, are quick to argue that the only expectation that the consumer is entitled to form (the so-called “entitled expectation”) is that adequate product information is given to the intermediary.

The second uncertainty concerns the ambit of relevant evidence as to the existence of a defect. Suppose information supplied with a drug fails to give details of five different suspected adverse effects. The claimant who suffers only one of these adverse effects seeks to prove that the product information was defective in failing fairly to represent the five risks and that, if they had been drawn to her attention, she would not have accepted the product and would thus have avoided injury. She submits that evidence of all five risks goes to the existence of the defect and thence to causation. The Defendant argues, however, that the only admissible evidence for the existence of a defect is that which concerns the one risk which has resulted in the actual injury sustained. Guidance is required on this question.

An impressionistic response is that manufacturing defects are quickly and advantageously dealt with by agreement and it is likely that the Directive has played a part (along with other consumer legislation, increasing awareness by consumers of their rights and the pressures of competition in trade) in procuring the rapid settlement of these disputes.

Question: Do you think that the Directive should be revised to become the common and sole system of liability for defective products (deletion of article 13 of the Directive)?

For the above reasons to make the Directive an exclusive remedy would be premature. Nor has familiarity with the Directive become so widespread or interpretation of its terms so accepted that reform would undermine a stable and effective regime.

Question: Has the disparity in legislation on producer liability – even potentially – discouraged the marketing in one Member State of Products from another Member State?

It is impossible to say with certainty whether disparity in legislation on producer liability has inhibited cross-border marketing. In my submission legal factors which are much more likely to inhibit or promote such marketing are heads and levels of damages, delays in obtaining and enforcing judgments, availability of state or other

¹⁸ (1999) Consum. L.J. 235.

funding and the level and recoverability of legal costs and disbursements. Even more important than these is the “litigation culture” of the individual member states. In the United Kingdom product liability claims run at a small fraction of equivalent per capita rates for the United States but almost certainly far exceed the rates for the civil law jurisdictions.¹⁹

Question: Where ordinary law has been applied rather than the Directive, what do you consider to be the reasons for this?

Pre-existing law may still be relied upon either because it is perceived by claimants’ advisers to be more favourable than the Directive or because of ignorance or conservatism on the part of those advisers. The latter is to be deplored and will no doubt decrease with the passage of time. At least until the jurisprudence of the Directive has grown, national remedies (including those stricter than the Directive) should be available.

Question: Do you think that each Member State should be able to adopt stricter liability rules (introduction of a “minimum” clause in the Directive)?

Again, at least until key concepts in the Directive become clearly understood, a Member State should be entitled to opt for stricter measures, if minded to give greater weight to consumer protection than fear of deterrence of trade.

CONSULTATION QUESTIONS, SECTION 2 – THE IMPACT OF THE DIRECTIVE ON BUSINESS

Question: Do you think that the Directive weakens the position of European businesses vis-à-vis their foreign competitors because if the conditions governing liability for defective products?

Even after the Restatement (Third) of the American Law Institute the law in some US States remains stricter than that imposed by the Directive. In any event the availability of juries, levels of compensatory damages, the ready award of punitive damages and the contingency fee funding system result in US companies being ready to subject themselves to the Directive regime on equal terms with EU companies.

The provision for importer liability ensures that all claimants have an available defendant to whom standard liability provisions apply. Consumer protection is served by the imposition of liability on importers and importers have the opportunity to protect themselves against extra-Community exporters by appropriate terms of trade. Community businesses are protected against unfair competition from unregulated foreign companies.

The Directive should be clarified by explaining who is to be characterised as the importer. It may be the carrier, the handling agent, the distributor, wholesaler or retailer of the finished product or the assembler of a component. In its decision of 26 January 1995²⁰ the Austrian Supreme Court held liable as an importer a company which had not taken physical possession of the product but had authorised the transmission of the product to another company.

¹⁹ It was estimated by P.S. Atiyah in “Tort law and Its Alternatives: Some Anglo-American Comparisons” *Duke Law Journal* (1987) 1002-44 that 350 times as many product liability actions were issued in the US as in the UK. Even allowing for the difference in population and a rise in the frequency of actions in the UK as the legislation becomes more familiar, this is a striking difference.

²⁰ 6 ob. 636/94, *Juristische Blätter* 456, (1996) *Consum. L.J.* CS 16.

It is not apparent how the Directive can place exporters under a competitive disadvantage in respect of goods manufactured solely for export. In any event the Community would surely not wish to encourage the export of less safe products than it was prepared to accept within the Community itself.

CONSULTATION QUESTIONS, SECTION 3 – THE DIRECTIVE AND DOMESTIC LIABILITY REGIMES

Question: What percentage of victims has been compensated either on the basis of ordinary liability law or on the basis of application of the principles of the Directive?

It is impossible to say for certain what proportion of those suffering accidents obtain compensation. Received wisdom is that in the United Kingdom a small minority of victims seek, let alone obtain compensation.²¹

Reasons for this include lack of consumer awareness, fear of involvement in court process, ignorance of fault of the producer or defectiveness of the product, the expense of litigation, unavailability until recently of “no win, no fee” funding, stringent financial limits on legal aid and a general desire to carry on with life.

The Civil Procedure Rules 1998 explicitly provide that resources devoted to litigation should be proportional to the amounts at stake. Given the expense of the process this is a potent inhibitor of the issue of court proceedings for recovery of any but substantial damages. The court has power under the Rules to strike out claims which do not satisfy the test and has an explicit duty to make cost/benefit judgements when deciding how cases are to be managed. The philosophy of the Rules is that litigation should be a last resort and courts are encouraged to stay or strike out proceedings which are deemed unworthy of publicly funded court resources.

Question: In the case of application of the Directive, was it easy to obtain compensation awarded in terms of speed and efficiency?

It appears likely that UK lawyers are becoming familiar with the remedy under the Directive and it is probably increasingly rare that a claim under the Directive is not made, at least as an alternative claim, when the grounds arise. As argued above²² the Directive appears to expedite the resolution of straightforward cases. For example two batches (in the UK) of the blood product Gammagard administered to patients with genetic hypogammaglobulinaemia in December 1993 and January 1994 were infected with the Hepatitis C virus. Twenty-four patients made claims. These claims have all been settled by the manufacturers, Baxter Healthcare, notwithstanding an argument that the presence of the virus did not of itself make the product defective. An appropriate sum to provide against the risk that the virus may return to cause damage in the future was incorporated in the settlement figures where the prognosis was uncertain. It was arguable that the product had become contaminated with virus as a result of a process insisted upon by the US Food and Drug Administration. Whilst this might have provided a defence to claims brought in the US, it did not of course satisfy the requirements of section 4(1)(a) of the Consumer Protection Act 1987.²³

²¹ This was the conclusion of the Civil Justice Review, 1988, Cmnd. 398, HMSO.

²² Page 2 para 5.

²³ Implementing article 7(d) of the Directive.

CONSULTATION QUESTIONS, SECTION 4 – THE DIRECTIVE AND THE VICTIM'S INTERESTS

Questions: How has the Directive impacted on the victim's interests because of the balance established in the Directive? Should the Directive be amended to give greater protection of (sic) victims' interests, even if this involves changing the present balance?

The balance between producer and consumer and the potential superiority for the consumer of the Directive regime over a frank fault-based liability system is based on the requirement for the producer to prove a defence once the consumer has established the existence of a defect in the product. The advantage to the consumer is diminished by the burden of proving the existence of a defect. Save that the test under the Directive focuses on the quality of the product and that in a negligence-based system on the conduct of the producer, there is nothing to choose between the two. There is no *a priori* reason to suppose one test will be easier than the other to satisfy. Moreover, the question of "entitled expectation" imports normative questions based on a value judgment of what society is prepared to accept or condemn hardly dissimilar to the exercise of approving or condemning the conduct of the producer according to objective criteria²⁴ as required in a fault-based system.

Thus the regime imposed by the Directive is not truly a "no-fault" or "strict" liability system. Such a system might connote liability on proof of damage caused by a product (*i.e.* not by a defect in that product). Use in a manner not inconsistent with any instructions given by the producer might provide a defence or go to reduce the damages recoverable. The advantages of such a system would include simplification of the process of proof with consequent savings of transaction costs and a higher apparent concern for product safety; the disadvantages would include requirement of a greater insurance cover and a potential price increase to be borne by consumers at large. The arguments on either side are well rehearsed and the Commission should, in my submission, conduct empirical research to discover what capacity the insurance market does in fact have and the precise relationship between rises in insurance premia with any consequential price rises and a reform of the liability system along these lines.

The first report of the Commission²⁵ found no increase in price or insurance premia and no shortfall in insurance capacity attributable to the introduction of the Directive. An assertion that reducing the burden on the consumer would affect disproportionately price, insurance capacity or business incentive should therefore be rigorously tested rather than accepted at face value.

CONSULTATION QUESTIONS, SECTION 5 – THE DIRECTIVE AND SOCIAL SECURITY

Questions: In your experience, how do you assess the relationship between the possibilities to (sic) award damages to the victim by Directive 85/374 and those of the social security schemes? Can you indicate any cases in which the social security schemes took proceedings against the producer on the basis of the rights conferred upon the victim under Directive 85/374, after having covered his expenses?

In the UK there is no free-standing right for the Department of Social Security to institute proceedings against a producer under the regime created by the Directive. A

²⁴ "Objective" is used here in the sense of "characteristic of the reasonable person" as developed in the doctrine of negligence following *Donoghue v. Stevenson* [1932] A.C. 564. For an expansion of this argument, see M. Mildred "The Decline and Fall of Strict Liability" (1998) Nott. L.J. 1.

²⁵ COM (95) 617 based on an impact study carried out in 1994.

defendant to a claim for personal injury or fatal accident damages is obliged²⁶ when making compensation to repay to the Department certain social security payments available to the claimant.

Question: Can you indicate any cases in which the producer liability scheme set up by Directive 85/374 was insufficient to fulfil its compensatory role, so that it was then necessary to fall back on the solidarity of society as a whole to compensate the victims?

There are no instances in the UK in which society as a whole makes up for the inadequacy of remedies under the Directive. There is little doubt that, before implementation of the Directive, public opinion played a part in the decisions of the manufacturer defendants to compensate those injured by thalidomide and of the Department of Health to compensate those haemophilia patients infected with HIV virus in the course of treatment under the National Health Service.

CONSULTATION QUESTIONS, SECTION 6 – PRACTICAL APPLICATION OF THE DIRECTIVE

Question: Are you aware of any cases of defective products in which the Directive was actually applied and how this affected your activities?

Although this section is addressed primarily to producers it is worth mentioning that the Directive has been relied upon by claimants in group actions relating to medicinal products including Norplant (a sub-dermal contraceptive implant), Lariam (an anti-malarial drug), Minocin and Roaccutane (anti-acne drugs), the Measles Mumps and Rubella vaccine, the third generation oral contraceptives, various breast implants and the 3M Capital hip prostheses.

The Directive is now relied upon routinely (and generally successfully) in food poisoning cases. The National Consumer Council and the Association of Personal Injury Lawyers (APIL) will no doubt have details of singleton claims where the Directive has been relied upon.

CONSULTATION QUESTIONS, SECTION 7 – INSURANCE CLAIMS

Question: Have you any data – if possible with figures and broken down by year – on the number of claims which the insurance sector has dealt with after accidents caused by defective products since 1990?

I am unable to make any useful comment.

CONSULTATION QUESTIONS, SECTION 8 – THE PRINCIPLES UNDERLYING THE DIRECTIVE

Question: Do you agree that the six principles [listed in the Green Paper] constitute the basis that needs to be maintained in order not to upset the internal balance of Directive 85/374? [The six principles are that: (i) the producer's civil liability is "objective" (i.e. there is no need to prove fault); (ii) it is "relative" (i.e. that the producer is exempt

²⁶ Social Security (Recovery of Benefits) Act, 1997.

from liability when he proves certain facts, e.g. the development risks defence); and (iii) it is "limited in time" (i.e. the producer is not liable for an indefinite period). Furthermore, (iv) "liability cannot be waived at the wish of the parties"; (v) the burden is on the victim to prove that damage has occurred, that the product was defective and that there is a causal relationship between the defect and the damage suffered; and (vi) if several producers are liable, their liability is joint and several.

I accept that these principles underlie the present balance of the Directive but subject in theory and in practice to the comments made in response to section 4 above in relation to proof of defect; in response to section 11 below in relation to development risk; and in response to section 13 relating to the extinction of liability.

CONSULTATION QUESTIONS, SECTION 9 — THE BURDEN OF PROOF

Question: Do you think that the experience of implementing the Directive justifies its being amended in order to make [it] easier to determine the burden of proof? How? [The Green Paper set out four options for amendment as follows: (1) "to infer a causal relationship when the victim proves the damage or defect, or the defect when the victim proves the existence of damage resulting from a product"; (2) "to establish the degree or standard of necessary proof of the three elements required by article 4 of [the] Directive . . . (damage, defect, causal relationship)"; (3) to "impose on the producer the obligation to provide all useful documentation and information so that the victim can avail himself of concrete facts to prove his case"; and (4) "[w]ith a view to facilitating the victim's burden of proof, to make the producer bear the costs of expert opinion under certain circumstances..."]

The options set out in the Green Paper require separate comment:

(1) There is no justification for inference of causation from the existence of damage. This would go even further than an absolute liability system since there is no known damage or injury which has no other cause than a particular product. For the same reason proof of a defect alone cannot logically found an inference of causation. In the light of the failure of the recent attempt to permit a presumption of liability in the case of "a typical course of events"²⁷ it may be preferable to rely on defendants or their insurers being unwilling to defend subsequent cases after establishment of a pattern of defect and causation of injury.

The same arguments apply in relation to the inference of a defect after proof of causation of damage. To hold otherwise would negate consideration of the risk/benefit ratio of any product. Although this is not explicitly the test for defect under the Directive, it is inconceivable that an exercise of this kind will not be considered by the court.²⁸

(2) In the UK the simple balance of probabilities test is applied to issues of damage, defect and causation and should remain so.

(3) This obligation is in some measure imposed on the producer by the Pre-Action Protocol sanctioned by the Civil Procedure Rules 1998 under which disclosure of

²⁷ See Green Paper n. 39.

²⁸ Revealingly the English House of Lords judge Lord Griffiths who wrote that although English judges may not overtly adopt the cost/benefit test when considering whether a defect exists for the purpose of article 6 of the Directive "they would as an educated response to the facts of a particular case undertake a balancing exercise of an analogous kind": Lord Griffiths, P. de Val and R. Dormer, "Developments in English Product Liability Law" 62 Tulane L.R. 353, 381.

certain categories of documents relied on by the producer or otherwise relevant to the issues in the case is triggered by a reasoned letter by the claimant's adviser setting out the details and the basis of the claim.

(4) The obligation on the court pursuant to the Civil Procedure Rules 1998 Part 1, r. 1.1(2)(a) to ensure that the parties are as far as practicable put on an equal footing and the power under Part 35, r. 35.8(3)(a) to give directions about the payment of a jointly instructed expert's fees and expenses go some way to achieving this option.

CONSULTATION QUESTIONS, SECTION 10 – MARKET SHARE LIABILITY

Question: Would “market share liability” be feasible in Europe for this type of case?

The inability of a consumer, for example, to identify the manufacturer of a generic drug would cause unfairness only if the supplier to the consumer (in this example presumably the dispensing chemist) was unable to identify the next link in the supply chain under article 3(3) of the Directive or if the person ultimately so identified was unable through liquidation or lack of means or insurance to satisfy a judgment.

The requirement for a market share doctrine might thus be limited to cases where there was no intermediary between producer and consumer. In those circumstances the application of a market share liability would equitably reflect the likelihood that each producer had in fact produced the actual product in question. The requirement for good record keeping (itself to be encouraged) would be no more onerous than that required for protection against article 3(3) liability in the case of the non-manufacturer and that required of the manufacturer to protect against contractual claims by its distributors, wholesalers etc. in the normal course of business.

It would be open to a market sharer to escape imposition of liability by showing that it could not have been the producer of the actual product in question. In case this seems an exorbitant extension of liability it is worth recalling that the Netherlands Supreme Court in the *DES*²⁹ litigation rejected market share liability in favour of outright joint liability on all producers on the ground that the consumer would be unfairly disadvantaged, if a producer was unable to meet its share of the damages and thus the consumer made an incomplete recovery. This principle is also enshrined in the Civil Code article 6:99.

CONSULTATION QUESTIONS, SECTION 11 – THE “DEVELOPMENT RISKS” DEFENCE

Questions: Do you have information about the actual application of the exemption clause in cases of “development risks” (article 7(e) of the Directive)? Have you any information on specific extra costs incurred by industry in countries where producers are liable for development risks? Do you think that producers should be liable for “development risks”? Should damages caused by development risks be borne by society as a whole. . .and/or by the manufacturing sector in question...?

An exemption from liability for development risks is inconsistent with a true strict liability system and accordingly owes its legitimacy to the agreed aim of a fair apportionment of risks.

²⁹ *Hoge Raad*, 30.6.89, no. 13564, NJ 1990/652.

In my submission the burden of proving the existence of a defect is so onerous that the application of the development risks defence should be confined as narrowly as possible. In this context the approach of the Court of Justice in *Commission v. United Kingdom*³⁰ is worryingly permissive.³¹

The Court decided that the producer was to be fixed with a state of knowledge which is not what the actual producer “actually or subjectively was or could have been apprised, but the objective state of scientific and technical knowledge of which the producer is presumed to have been informed”. But the only qualification which the Court offered in respect of such a presumption was that the relevant knowledge must have been accessible at the time when the product was put into circulation and no elucidation was offered as to what was and was not accessible to the producer.

Thus the present position appears to be the worst of all worlds for the consumer who must first prove the defect and then see the producer lead evidence not that the defect was undiscoverable *per se* but that it was undiscoverable in the light of the knowledge accessible to that producer. Any notion that the defence is to apply only in cases where the defect was literally undiscoverable thus has no application.

There is now no disincentive to plead a development risk defence in any case³² where the defect was not entirely apparent at the time the product was put into circulation.

It is likely that the political will to remove the defence does not exist and even more likely that there is no hard information about the consequences for insurance coverage and levels of premia, if it were to be removed. In these circumstances a fair apportionment of risks would be better brought about by making the producer prove (once the consumer had established the existence of the defect) that the defect was simply undiscoverable. This would confine the application of the defence to cases where the state of knowledge of the producer, the knowledge accessible to it and good or best practice in the industry in question had no place and the defect was literally undiscoverable.

If exemption from liability for defects was limited in this way, cases of genuine undiscoverability would be rare and it would be equitable for claimants barred from recovery for this reason to be compensated from a fund established either by government or the relevant industrial sector. The generally low levels of damages (which could in any event be capped by statute³³) and the rarity of qualifying cases would result in the benefit to the consumer greatly outweighing the costs to the public.

CONSULTATION QUESTIONS, SECTION 12 – VALUE THRESHOLDS

[Article 9 of the Directive excludes producer liability for damage less than ECU 500. Article 16, on the other hand, permits Member States to set “a maximum ceiling” of ECU 140 million “for product liability for damage to persons caused by identical items with the same defect”.]

Question: Do you have any information on the percentage of cases involving material damage of less than ECU 500? Would you modify the Directive as regards the ECU 500 threshold and/or the optional upper limit of ECU 70 million? If you have opted for product liability with regard to development risks, do you think that there is justification for keeping the optional upper limit for this kind of risk?

The Commission should make it clear whether a deduction (as in recital 9) or a jurisdictional threshold (as in article 9(b)) is intended. There appears no justification for

³⁰ See n. 1 above.

³¹ This point is developed in detail in M. Mildred *op. cit.*

³² This occurred in the Norplant and Lariam litigation and is very likely to occur in the MMR vaccine litigation.

³³ As in the Vaccine Damage Payments Act, 1979.

the former. Removal of the threshold should be considered for two reasons: the economics of litigation make it highly unlikely that there will be a flood of small claims against any producers. There is no reason to suppose any such claims would be primarily targeted against SME's. Further, those who choose to make those small claims are likely to be the worst affected by the injury or damage in question.

The upper limit of ECU 70m should be abolished. The fact that only three Member States have implemented it suggests that it is not necessary for the protection of producers. If it is not abolished, it should be raised to the equivalent of ECU 140m in the light of inflation and the globalisation of markets. It should be made plain how the "ceiling" would operate in practice. Would payments be made on a "first come, first served" basis or would all claims be collected together and paid *pro rata*? The administrative complications and delays inherent in the latter approach would be very great whereas the former might seem unfair.

At present there is no correlation between imposition of a financial ceiling and liability for development risks except in Spain. But here the liability for development risks is limited to food and medicinal products whilst the financial ceiling is of general application to all claims. Thus there appears to be no cogent argument in favour of limiting damages once liability for development risks exists.

CONSULTATION QUESTIONS, SECTION 13 – LIMITATION PERIODS

Under articles 10 and 11 of the Directive: the producer's liability ceases ten years from the date on which the product was put into circulation, unless there are any claims or proceedings pending (i.e. the term of extinction of liability); and even within the ten year period a claimant must bring his claim within three years from the date on which he became aware, or should reasonably have become aware, of the damage, defect and identity of the producer (i.e. prescription period).

Question: Does the time limit of ten years need to change, either generally or specifically for certain products or sectors?

The ten year limit should not apply to cases where the damage has not manifested itself by the end of that time. Prime examples are products with carcinogenic or mutagenic effects where the latent period may well be in excess of ten years. It is perverse that in such cases consumers should be obliged to employ fault-based causes of action (where there is no cut-off date) instead of the simpler, quicker, cheaper and fairer system which the Directive was introduced to put in its place.

Unless producers can show cogent evidence that insurance would not be available at reasonable cost the extinction of the claim should be replaced by an obligation to commence proceedings within three years of the manifestation of damage (with no discretion to over-ride the time limit). In that event the period should be extended to twenty years.

In any event the commencement of the ten year period on the date on which the product was put into circulation by the producer leads to unfairness. Unless (as will almost never be the case) the product is supplied direct from the producer to the consumer, the consumer will have no knowledge of the date on which the ten year period begins. The uncertainty and expense of investigation could be saved by beginning the period on the date on which the product was first supplied to the consumer. This extension of time is likely to be short and the benefit in terms of certainty and cost-saving will far outweigh the costs to industry.

CONSULTATION QUESTIONS, SECTION 14 – AVAILABILITY OF INSURANCE

Question: Are you aware of any cases whereby (sic) lack of insurance made it impossible for victims to obtain reimbursement for damages?

I know of no case in the UK where a claimant went uncompensated for lack of insurance available to the defendant. Insurance arrangements should be encouraged. If research shows a significant level of uninsured production, legislation can be considered.

CONSULTATION QUESTIONS, SECTION 15 – TRANSPARENCY

Question: Do you think that the Directive needs to be revised in order to include means of increasing the transparency of the way in which operators apply the rules, especially by identifying the cases involving defective products that are still on the market?

Greater transparency should be an aim. The absence of court judgments owing to the high rate of settlement of viable claims makes the obligation to notify a central claims commission the preferable alternative. The obligation to notify should be placed on claimant as well as producer. The notification should specify the product, the injury, the date of supply, the place of claim, the outcome (judgment or settlement) but only in the case of a judgment the amount of damages recovered. Thus commercial confidentiality could be preserved. Product recalls should also be registrable.

An EU wide registry would be a potent aid to product safety at minimal cost. A form of registration could be simply designed and electronic reporting and search would keep running expenses to a minimum.

The impression gained is that the present data collection system is of little value in the assessment of both safety and claims activity.

CONSULTATION QUESTIONS, SECTION 16 – TIME LIMITS FOR PROVIDING INFORMATION ABOUT THE CHAIN OF SUPPLY

Question: Should the victim prove that he provided the supplier with the opportunity to inform him of the identity of the producer, at the risk of having his claim declared inadmissible, and, on the other hand, should the supplier inform him of the identity of the producer within a maximum time limit (e.g. three months)?

In a claim against a supplier the consumer should be obliged to prove that an opportunity has been given to furnish the identity of the producer or other prior link in the supply chain. Three months is excessive: a fair balance between the demands on the supplier, the need to progress claims as quickly as possible and the desirability of encouraging good record keeping suggests a time limit of one month. In an age of increasing computerised storage and search of records this should be ample.

Question: Should the Directive be applicable to any professional in the product supply chain when his activities have affected the safety properties of a product placed on the market?

It is desirable that the regimes created by the Directive and by Directive 92/59 on General Product Safety (the latter of which does include in its definition of a “producer” other professionals in the supply chain) should, as far as practicable, be

common. For that reason a professional in the supply chain should be subject to the Directive *provided that he or she has in fact caused or contributed to the existence of the defect*. It would be possible to enumerate activities *e.g.* repackaging, provision of product information, storage or transport which would commonly be considered in determining whether the person in question had been responsible for such cause or contribution.

CONSULTATION QUESTIONS, SECTION 17 – REAL ESTATE

Question: Do you think that the Directive needs to be extended to cover real estate property?

In view of the complexities of introducing liability for real property and the impetus to consider the operation of this Directive, the Commission should consider its position on contractor and real property liability in a separate initiative.

CONSULTATION QUESTIONS, SECTION 18 – NON-MATERIAL DAMAGE

Question: Should the Directive cover other damage caused by defective products, such as non-material damage, moral damage, mental suffering and/or damage to property intended for professional use, which would allow firms, especially SMEs, to invoke the Directive against producers of defective goods?

In the UK psychiatric injury is now regarded by the courts as tantamount to physical injury for the purpose of compensation³⁴ and the concept of moral damages is unknown. There is no evidence of any difficulty in recovering appropriate damages under the Directive. In principle there appears no reason why remedies under the Directive should not be the same as those under other causes of action in each Member State.

In the absence of compelling evidence of difficulty on the part of businesses recovering losses caused by defective products this review of the operation of the Directive should not be impeded by consideration of such an extension to its scope. Any problems in practice will no doubt emerge from the responses from each Member State. The author knows of no evidence that the narrow scope of the Directive is causing problems in the UK.

CONSULTATION QUESTIONS, SECTION 19 – DISPUTE RESOLUTION

Should Community legislation provide for court proceedings or out-of-court dispute resolution means, specially set (sic) for the implementation of the Directive?

A rule of court covering group or multi-party actions will be introduced in the UK in 2000 as part of the Civil Procedure Rules. This will cater adequately for the enforcement of collective rights to damages under this Directive.

³⁴ *Page v. Smith* [1996] A.C. 155, *per* Lord Browne-Wilkinson at 182B and Lord Lloyd at 187G and 188F.

It may be more appropriate to consider adding Directive 92/59³⁵ to the scope of Directive 98/27³⁶ since the latter has more of a “public” quality than the former in relation to the enforcement of interests. The implementation of Directive 98/27 is under active consideration by the Lord Chancellor’s Department in the UK and a recommendation by the Commission to this effect would no doubt be seriously considered.

There is no reason why special procedural remedies should be required under this Directive with the possible exception of small claims. It would be preferable to conclude consideration of this Directive before embarking upon a contentious process of procedural reform where there would be a far greater diversity of starting points than exist under a common substantive law.

³⁵ Council Directive 92/59/EEC of 29 June 1992 on general product safety.

³⁶ Directive 98/27/EC of The European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests (as amended by 99/44/EC).

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EDITORIAL

THE LEGAL PROFESSION: FUSION OR DIFFUSION?

THE SOMEWHAT WHIMSICAL PROPOSAL by the past President of the Law Society, at the Law Society conference in 1999, that the two branches of the profession fuse, with the Law Society regulating the whole, seems to have missed the real point of the debate. The debate about fusion has traditionally focused on advocacy services, the sub-text being that there is no rationale for these types of legal services being confined to one branch of the profession. This restrictive practice has now diminished, with the new Higher Rights test for solicitors wishing to act as advocates in the High Court being significantly simpler than the original version. The question of fusion has now re-emerged in a different guise. Fusion is no longer canvassed in order to give solicitors rights of audience, but as recognition that solicitors and barristers are, in effect, delivering the same kind of service. Now that it is intended that all qualified barristers and solicitors have the right to appear in any court, is there any real difference between the two branches of the profession? If there is little practical difference between the two branches of the legal profession, what does that mean in terms of professional regulation?

The legal profession, together with other associated legal and para-legal bodies, has grown rapidly in the last two decades. The Bar's growth has been particularly rapid, but it is not clear whether this will continue. Apart from the criminal Bar – essentially state funded defenders or prosecutors – the Bar exists on its civil litigation and family work. Civil litigation has expanded rapidly, but it may not continue to do so. In the future, the bulk of civil litigation, particularly in the fast-track, will be funded through various conditional fee arrangements, backed by insurance. In general the Bar exhibits a reluctance to engage in this type of funding. If this continues, its work will increasingly be limited to the minority of complex high value cases in the High Court multi-track. Solicitor advocates may increasingly encroach upon their work, particularly if clients (institutional and commercial) make increasing use of franchising and contracting arrangements, with a global fee for a given workload. Offering work to “sub-contractors” will reduce the profitability of the business.

The Bar is responding to this by increasing specialisation, centralisation and modernisation of its practice. This will make it more attractive to solicitors. Its other mechanism for fighting back, allowing direct access to a limited class of the public (generally corporates), through Bar Direct, brings its own disadvantages. It will bring barristers into direct competition with the solicitors who refer work to them. It will also lead to an increase in overheads, and thus remove one of the rationales for the current arrangements of independent barristers.

The civil Bar may thus find that its numbers reduce dramatically over the next few years. With such a reduction, it is hard to see how it can support its own independent regulatory and educational arrangements. On the other hand, it is possible that the

solicitors branch of the profession may increase to 100,000 active members. Despite this, it would be a mistake for the Law Society to assume that fusion, in the form of a take-over, is inevitable. Talk of unification and fusion looks curiously out of place, when set in the context of the fragmentation of the solicitor's profession. It is now commonplace to note the polarisation which is characteristic of the profession, with the large city firms having little in common with the traditional high street practice. General practice is becoming an exceptional way to deliver legal services, and specialisation, although not formalised to the same extent as in medicine, is becoming the norm. Such diversification calls into question whether there is any longer one single solicitor's profession. The corollary question is whether one single professional body can meet these diverse needs.

The call for fusion thus conceals the more pressing debate – what professional structure is relevant for today's market conditions and consumer interests? The outcome of this debate may well be a unitary legal profession, but the Law Society is deluding itself if it believes it will necessarily become the regulator and representative of this large profession. Even within the present structure, there are serious questions as to whether the Law Society can control the profession's disparate groups. Some large City firms consider the Law Society as irrelevant to the way they practice. The different, indeed conflicting, aims of the various constituencies make it difficult at present for the Law Society to represent the interests of the profession as a whole.

If it is recognised that there is one, albeit diverse, legal profession, there may be some value in having a regulator to cover the whole profession, including other legal and para-legal professionals. The public seems largely sceptical about the ability of professional bodies to perform both regulatory and representative roles. Is the answer therefore to introduce a new, independent, umbrella regulatory body to take on all the regulatory functions at present performed by the professional bodies? The various sub-groups within the profession, whether they be advocates, conveyancers, litigators, or whatever, could then be free to form themselves into whatever representative bodies best suited their needs. To echo the words of the Legal Services Ombudsman, what is needed is a "willingness to rethink the working model of legal professionalism itself." This is the real point of the debate.

MARY SENEVIRATNE, EDITOR

JOHN PEYSNER

ARTICLES

The address for submission of articles is given at the beginning of this issue.

ACCESS TO COURT AS A HUMAN RIGHT ACCORDING TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS

BOSTJAN M. ZUPANCIC*

INTRODUCTION

THE FIRST COMMAND in the Roman *Leges XII Tabularum* – the primordial source of law in Judeo-Christian civilisation – reads as follows: “*Si in ius vocat, ito!*”¹ The meaning of this categorical command was simply that the party against whom legal proceedings had been commenced had to appear.

This in turn meant, firstly, that no legally articulated infringement of anyone's interests could go unanswered by the person sued or accused. But the most important implication, secondly, of the categorical requirement that anyone sued or accused had to appear before the court, something little understood even by Romanists, was that *no legally articulated dispute could be left unresolved by the legal system*. Of course, the absolute obligation to submit to legal process also means that *substantive* (material) legal rights are *procedurally* enforced. This implies that the State's legal conflict resolution service should always be available – and promptly so.

From the broader perspective of maintaining social peace and order, the prompt and consistent availability of the State's conflict resolution service is what law is all about. Ask yourself why it is that peace and the orderly division of labour in society, not to speak of individual dignity, are so closely connected with the rule of law;² or, in other words, *why is it that the rule of law is practically identical with the rule of the courts?*

This is easy to understand if we imagine the Hobbesian primordial state of anarchy, *i.e.*, the war of everybody against everybody, *bellum omnium contra omnes*. Since there

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¹ “If you are called before a court of Law, you *must* go!”.

² “Rule of law” is the Anglo-Saxon version of the Continental *Rechtsstaat* or *l'état de droit*. There is, however, a fundamental difference between the two. The emphasis in the rule of law is on procedural guarantees (due process), whereas the emphasis in *Rechtsstaat* or *l'état de droit*, a 19th-century German doctrine (von Miehle) is on substantive (material) guarantees. This is due, at least in part, to the powers of the jury in Anglo-Saxon law, *i.e.* to the fact that the jury's verdict is not reasoned (explained) so that appeal in substantive terms is not even possible.

are many palpable examples of regression to anarchy around us, Albania is perhaps the most recent one in Europe, it is not difficult to imagine the state issuing its very first command, *i.e.* that this war of everyone against everyone must stop.³

This is one reason we maintain, especially in international law, that law derives from (sometimes brutal) reality: *ex factis jus oritur*. Before it can issue the prohibition of the war of everyone against everyone, however, the Hobbesian State must first actually establish itself as a supreme *physical* power. Only once this monopoly over violence is established, *i.e.* only after all violence is absorbed into the State, does the State have the credibility to forbid its subjects to resort to physical power as a *natural*, elemental means of resolving their conflicts.⁴

But what chaos and anarchy (as an absence of law and order) really mean is that the personal *power* of individuals and groups is unhindered and that all conflicts are resolved by direct resort to *physical violence*. In such a situation there is no law, we say, and no order, because everybody must fend for himself. In such an elemental societal state it would be senseless to speak of rights, entitlements, claims, legal process *etc.* and there would be no courts to which to address these claims. It is only under the greater threat of greater State violence, however, that people are forced to forgo violence and choose to regulate their conflicts in the courts. The State, however, must maintain the credibility of its constant threat. This threat must be greater than all potential individual or group threats of violence. If the State loses its physical credibility the regression to chaos and anarchy is imminent.⁵ Peace in society prevails only under the constant threat of war.⁶

On the negative side, therefore, if a nascent state wishes to establish itself, it must absolutely *forbid* individuals' resort to physical power as a means of conflict resolution.

On the positive side, however, the State must *offer an alternative conflict resolution service*. The criteria for this (legal) conflict resolution must not be based on arbitrary violence but on logical consistency (justice). This we call the *primary* legal process. Moreover, this surrogate legal service, replacing the natural resort to violence, must be rendered objectively, fairly, and without unreasonable delay. This we call the *secondary* legal process because it is a long-term precipitate of the primary legal process.⁷

Our nascent state, in other words, must replace the arbitrary *logic of power*, as it were, with the consistent *power of logic*. The latter is clearly the logic of the law. Law as we practice it (justice) is nothing but consistent logic and common sense and experience applied to the resolution of all kinds of conflicts.⁸

³ I have tried to elaborate on this question in "From Combat to Contract: What Does the Constitution Constitute?" (1998/1999) 1 *European Journal of Law Reform* 59-95.

⁴ The resort to aggression is a *natural* human response to frustration. See Lorenz, *On Aggression* (1974). Moreover, aggression and resort to physical overpowering is, epistemologically speaking, an *experiment* which has a definite and objectively ascertained outcome. This cannot be said of legal resolution of a conflict, except insofar as the resort to legal conflict resolution is ultimately, as Kelsen well understood, backed by the "aggression" of the State. Since aggression is a *natural* response, the pressure to regress to the war of everyone against everyone, self-help, *etc.* is always there. The state of peace in society is therefore *artificially* maintained only by the continuous threat of war, *i.e.* the credibility of the rule of law depends in the last analysis on the credibility of criminal law and its ultimate sanctions.

⁵ Of course, this credibility does not depend on the fact that the power of the State is greater than the sum of all individual powers of its subjects. The credibility of the State's threat is very much a matter of an *organised* collective power facing many *individual* powers negligible in comparison. This is why conspiracy, *complot*, organized crime *etc.* are considered very serious indeed. This, on the other hand, must be balanced against the freedom of association as a human right. See art. 11(1) and (2) of the European Convention on Human Rights.

⁶ This aphorism is ascribed to the famous French social critic Michel Foucault. Some legal philosophers, among them Professor Wolcher, conclude from it that the legitimacy of such peace and of the rule of law is questionable because it ultimately rests on the threat of violence: Wolcher, *The Paradox of Legal Remedies*, Lecture delivered at the European Court of Human Rights, March 19, 1999, unpublished manuscript.

⁷ See the classic treatise on this by von Savigny, *Zur Gesetzgebung unserer Zeit*. English translation entitled *On the Legislation of Our Times*, European Sociology Series, 1975.

⁸ See Justice Oliver Wendell Holmes' famous "The Path of the Law", with his often-misunderstood adage that "law is not logic, law is experience" reprinted in 10 Harv. L.R. 457.

Access to legal process, to this *surrogate* conflict resolution service, is simply one systemic aspect of the prevention of anarchy. We may call such an established conflict resolution service “the law of the land” (*Magna Carta*, 1215), “the rule of law”, “*Rechtstaat*”, “*l’état de droit*” etc., but its essence was caught very practically and very directly in the first phrase of the Laws of the Twelve Tables: “*Si in ius vocat, ito!*” If you, as a plaintiff, have a claim deriving from your interest⁹ you must not seek to prevail over your adversary physically (*i.e.* you must not resort to self-help),¹⁰ but must go to court and seek the satisfaction of your interest *qua* “right”. The Roman law command “*Si in ius vocat, ito!*” actually refers to the corresponding *duty* on the part of the defendant, *i.e.* to appear in court and answer your charges. But the latter duty, of course, implies the former.

It follows that state-given access to court is a logical precondition for these two duties of the private parties. Because you must not and cannot resort to self-help, denial of this access to court, in other words, amounts to denial of justice.

The defendant, as we have said, is required to appear in court. He cannot say: “I do not care about the plaintiff’s claim to a right . . . since anyway I’m more powerful, influential, etc.” If he is called before the court, he *must* go, he must submit to the legal process initiated by the plaintiff, *i.e.* he must thereby admit that the *brutal reality* of power (whether physical, economic, political, or whatever) must *yield* to the *virtual reality* of the legal context. The real interests of both parties are thereafter translated into legal language. The resolution, the final outcome of the controversy, too, becomes subject to the rule of law, *i.e.* not the rule of man over man. Thus Cicero’s postulate: “Not under man, but under God and Law!”¹¹ which sums up the essence of the rule of law.

We see that the rule of law is the quintessence of culture and civilisation. The rule of law is the only alternative to chaos, anarchy, and brutality.

In modern times, however, we have considerably extended the notion of the rule of law. Previously the duty to appear in court (and by implication the standing to sue/make a claim) applied only to private individuals. This prevented anarchy and *private* brutality by another subject of the State. But such rule of law did not prevent the State’s own brutality, arbitrariness, or capricious abuse of power. The State itself was above the law precisely to the extent to which it was impossible to challenge it before the courts. The English *Magna Carta Libertatum* (1215) as a *compromissum* between the Barons and King John the Weak is probably the first example of a constitutional contract binding the executive power of the State. However, the idea of constitutional supremacy, of separation of powers and of checks and balances between the three branches of power was not known or discussed until five centuries later, with the publication of Montesquieu’s *L’ésprit des lois* (1748). Once the Enlightenment writers introduced these precepts it became possible to challenge the abuse of power by the executive branch before the judicial branch. Thereafter the State itself had “to appear in court”. This further supremacy of the Rule of Law over the executive branch of the State thus represents an extension of the original prevention of anarchy. This extended rule of law prevents dictatorship, totalitarian government, and the arbitrary use of power. The famous *Marbury v. Madison*¹² case in the United States and the

⁹ Interest, from Latin *inter esse*, to be in between, *i.e.* something that is in between two (opposing) parties. In verbal form Latin *interest* means that something is important.

¹⁰ *Self-help* is usually a little-noticed offence in most criminal codes. Even if the actor has a legitimate claim to a right, the criminal law forbids the resort to physical and other non-legal means of enforcing it.

¹¹ *Non sub hominem, sed sub Deo et Lege.*

¹² *Marbury v. Madison* (1803) 5 U.S. 137.

introduction in Europe by Hans Kelsen¹³ of the concept of constitutional courts firmly established the power of judicial review *vis-à-vis* the executive as well as *vis-à-vis* the legislative branch of power.¹⁴

The European Convention on Human Rights, on the other hand, further elevated the rule of law above and beyond an internal (national) judicial review, onto the international level. Under the Convention the whole State Party (its executive, judicial and legislative branches) can be held answerable to the European Court of Human Rights for breaches of human rights.

From the point of view of access to court doctrine, therefore, access to ordinary, constitutional and international courts is the *active* procedural aspect of the extensive spread of the rule of law. To this active aspect there corresponds a *passive* aspect, *i.e.* the duty of the individual defendant or the State itself to appear in court and answer the allegations of the plaintiff.

Clearly, all of this presupposes the existence and accessibility of the *fora* before which claims to the legal protection of the State may be made.

Let us, for a moment, return to the Hobbesian State, absorbing all the power and all the violence. When the State monopolises the use of all physical force and powers of implementation, it renders all private individuals physically helpless. The subjects of the State, however, are not helpless only *vis-à-vis* the State itself but also *vis-à-vis* other more powerful individual and group subjects of the same State. The only protection, we say, that a physically, economically, or politically helpless individual subject of the State has, derives from the rule of law. Law is the great equaliser.¹⁵ Law renders power meaningless. Law imposes the alternative *virtual* power of logic (justice) as a surrogate of the *natural* logic of power. For a specific aggrieved individual, therefore, prompt access to an impartial court applying the law of the land is tantamount to the rule of law in general.

There is one rather crucial sociological point that should be emphasised before we move to the more specific aspects of the right of access to court under the European Convention on Human Rights (hereinafter “the Convention”).

Article 6(1) of the Convention requires the States Parties to it to offer a prompt conflict-resolution service – in the areas of both private and public law.¹⁶ If resort to private and forceful conflict resolution is strictly forbidden, it is clear why justice delayed is also justice denied. One of the two, *i.e.* the law-abiding party to the controversy, is forced to suffer the continuous violation of his or her rights whereas the violator of the law profits from the delay. This is clearly the worst of all worlds, both for the legitimately aggrieved party as well as for the rule of law.

Such injustice caused by delay does, however, occur and I am personally acquainted, for example, with several truly brutal cases of physical eviction of helpless old people by those to whom real property (apartment buildings) were restituted as part of the

¹³ *Vom Wesen und Wert der Demokratie* (Tubingen: J. C. B. Mohr, 1929).

¹⁴ See, *e.g.*, the excellent presentation of this in Machacek, *Austrian Contribution to the Rule of Law* (1999), especially pp. 2-6.

¹⁵ Of course, this does not preclude the great debate over the differences between formal and material equality. This debate was initiated by the young Marx in his *Critique of the Gotha Programme* and has never been properly resolved. One might say *passim* that socialism as an ideology strived to transcend the *formal* equality guaranteed by law and to achieve *material* equality. But since the imposition of equality is in effect always a form of violence perpetrated on the more powerful, able or energetic, militant egalitarianism, so typical of the socialist societies, in the long run destroyed the socialist experiment itself.

¹⁶ Art. 6 (1): “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* . . .” (emphasis added).

denationalisation process in Slovenia. Such injustices have largely occurred because of the technicalities of the rules on recovery of possession and the prospective delay of perhaps five years before a controversy can be resolved.

We are all, I suppose, familiar with many such legal absurdities resulting in supreme injustice. But the reason why I mention this case as symptomatic lies elsewhere.

Fifty years, or even twenty years ago something like this was much less likely to happen. At such a time it would have been simply unthinkable for a judge of the circuit court to allow such an outcome. What has changed in the meanwhile is not the law of possession and property rights. What has changed are society and its prevailing values.

In Chinese law, for example, and its underlying Confucian legal philosophy, resort to formal legal protection (*fa*) is not advised and is deemed acceptable only as a last resort once the ways of politeness (*li*), i.e. an attempt at a friendly resolution of misunderstandings, have been exhausted. Sociologically speaking this means that *shared values* (human decency, moral considerations, compassion *etc.*) prevent, even today, most legal controversies either from ever arising or from degenerating into the *summum jus summa injuria*. The enormous and rising caseload of all the courts, including the European Court of Human Rights is, in other words, a consequence of the constant erosion of the values shared by people. This rising *anomie* (valuelessness, normlessness) implies that there is less and less *common moral ground* preventing indecencies such as the one described above. The rising divorce rates, crime rates, drug addiction and the other forms of social pathology dealt with by criminology testify to the same problem of *anomie* and alienation. Robert K. Merton, the leading American criminologist, maintains – in the light of Durkheim's social theory – that the cause is the growing/ increasing *discrepancy* between the *institutionalised* values (embedded in law) on the one hand and the values that would be adequate on the attained level of social and technological development. The delay in the feedback from the societal infrastructure to the suprastructure (values, social consciousness, culture, law) prevents the personal interiorisation of the institutionalised values. The logical consequence of this is not only rising cynicism, but also the exteriorisation of interpersonal conflicts. Hence the rising resort to legal means of conflict resolution and the enormous case-loads of courts all over Europe.

An additional paradox concerns the inefficiency of legal conflict resolution. Law is not an exact mathematical science. It relies on a relatively fixed semantic interpretation of words. But the meanings of words are themselves dependent on the underlying values which inform the words with their ethical and moral import. We now understand that words, even legal terms, have no intelligible essences. If there were intelligible essences, the distinction between right and wrong would be absolutely clear and there would be no need for law in the first place.¹⁷

The legal system of any country responds to the need to resolve controversies by a resort to semantically fixed meanings of words. The more values are shared in a particular society, the clearer are the meanings of legal words and the clearer the distinction between right and wrong. In a morally strong or homogenous society the legal system would rarely be resorted to, but it would be very efficient. In a morally impoverished¹⁸ or heterogeneous society, on the other hand, the legal system becomes

¹⁷ See generally Unger, *Knowledge and Politics* (1974).

¹⁸ See, e.g., an excellent editorial by Fred Hiatt entitled "This White House Race is off to a Preachy Start", *International Herald Tribune*, June 30, 1999, p. 9, citing different politicians: "Our standards of right and wrong have all but disappeared"; "As a people [i.e. Americans] we're beginning to lose faith in our institutions"; "[We are] spiritually adrift". See Zupančič, "Criminal Law and its Influence on Normative Integration", 7 *Acta Criminologica*, Montreal, Spring 1974.

the last repository of (non-internalised) values. Instead of shared values we have resort to formal logic (law). The society becomes litigious. But, and this is the paradox, the legal system is itself subject to *anomie*¹⁹ and is consequently incapable of the ethical decisiveness needed promptly and clearly to resolve the rising number of controversies.

Access to courts in such a society therefore becomes clogged for two reasons. On the one hand there is an ever-rising reliance on legal (instead of moral) conflict resolution. On the other hand, the system lacks a clear ethical meaning which would inform the value-laden words which it employs. This situation is, of course, exacerbated in the former socialist countries of Central and Eastern European, where the old values have been hastily discarded but where Western values have not yet been instilled.

ON 'ACCESS TO COURT' DOCTRINE ACCORDING TO THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Basic Cases Establishing the Doctrine

It is quite difficult to present a short survey of the relevant cases of the European Court of Human Rights. The concept of "access to court" is a very low common denominator of the procedural rights deriving from the Convention and is, consequently, something of a misnomer. In other words, "access to court" collects under its roof too many disparate legal issues (from discrimination against civil servants to the right to counsel in civil matters). Sometimes the "access to court" doctrine tends to obscure other issues which should be decided on their own merits – typically, as we shall see, questions of equal protection. Despite this misleading effect, however, access to court as the most elemental procedural right has proven to be a powerful inspiration to the Court in protecting a number of the fundamental procedural and substantive rights of aggrieved citizens. This is especially interesting since the right of access to court is a constructive right, *i.e.* one derived from a systemic construction (interpretation) of different clauses of the Convention.

The syntagma "access to court" does not appear verbatim in the Convention. The first paragraph of article 6, the *sedes materiae* for the access to court doctrine, does not directly refer to anyone's right to lodge an action in defence of his civil rights and obligations: in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a (i) fair and (ii) public hearing (iii) within a reasonable time by (iv) an independent and (v) impartial tribunal (vi) established by law.²⁰ In the French text the right to a hearing is "*le droit à ce que sa cause soit entendue*", *i.e.* the right that one's "*cause*"²¹ (complaint) be heard. *Stricto sensu* this

¹⁹ The legal system relies on words having shared meanings. But the meanings of legal words are themselves contingent on shared values. For further study of this see Barry Stroud, "Logical Compulsion", in *Wittgenstein's Philosophical Investigations (Collection of Essays)*, 1971.

²⁰ Art. 6(1) *ab initio*.

²¹ *Cause* nom féminin (latin *causa*) I. 1. Ce par quoi une chose existe ; ce qui produit qqch ; origine, principe. Connaître la cause d'un phénomène. Il n'y a pas d'effet sans cause. – Être cause de, la cause de : être responsable de, être la raison de ; causer, occasionner. 2. Ce pourquoi on fait qqch ; motif, raison. J'ignore la cause de son départ. 3. [Droit] But en vue duquel une personne s'engage envers une autre. Cause d'une obligation, d'une convention. II. 1. Affaire pour laquelle qqn comparait en justice. Plaider la cause de qqn. – La cause est entendue : l'affaire est jugée. – Être en cause : faire l'objet d'un débat, être concerné. – Mettre en cause : incriminer. – En connaissance de cause : en connaissant les faits. – En tout état de cause : de toute manière. 2. Ensemble d'intérêts, d'idées que l'on se propose de soutenir. La cause de l'humanité. – La bonne cause, celle qu'on considère comme juste (souvent ironique). – Faire cause commune avec qqn : unir ses intérêts aux siens. – Prendre fait et cause pour qqn : prendre son parti, le soutenir sans réserve. à cause de locution prépositive En raison de ; en considération de ; par la faute de. pour cause de locution prépositive En raison de: *Le Petit Larousse*, 1998.

could mean that the “civil rights and obligations” in question should be determined or one’s cause be heard, only after they have already been established as rights and obligations or a cause respectively.²²

In a formal sense (and purely in terms of timing) one could therefore maintain that the procedural rights enumerated in article 6 (fair trial, public hearing, reasonable delay, independence and impartiality of a tribunal established by law *etc.*) do *not* accrue *prior* to the actual commencement of proceedings. These procedural guarantees, in other words, would *not* become applicable unless proceedings had already been commenced. But there would be no right to commence the proceedings in the first place.

Access to Court in Civil Cases

The leading case transcending this formal obstacle was *Golder v. United Kingdom*²³ There the Court maintained that “the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law.” The Court equated the denial of this principle with the denial of justice (in terms of international law).²⁴ The ruling was limited to civil cases because Mr. Golder wanted to initiate a civil action for libel. Furthermore, the case did *not* concern standing (*legitimitio activa*, legal interest) insofar as standing is concerned with the procedural right (to commence proceedings) as an anticipation of a *material* right. There was therefore no consideration in *Golder* of any substantive (material) precondition for the procedural commencement of a civil action.

The problem in *Golder* arose even earlier and had to do with the pre-standing stage of a case. But the Court took great care to establish that a teleological interpretation and the differences between the English and French text did indeed imply that there should be a general right to submit a civil claim to a judge in the first place.

Although it was not specifically so articulated, it could simply be said that the right to have access to a court is a logical precondition, a *sine qua non*, of all other procedural guarantees. In other words, as the Court did say, were this not so, all the courts in a particular State Party to the Convention could be abolished once they had dealt with their pending cases.²⁵ This mode of interpretation is not unusual in constitutional jurisprudence. In the leading case concerning privacy, *Griswold v. Connecticut*,²⁶ Justice Douglas of the American Supreme Court developed the so-called penumbral theory of privacy. He demonstrated that the *penumbrae* (half-shadows) of various specific constitutional rights formed a full *umbra* (a shadow, the lowest common denominator) of the right which had to be respected by the government (the right to privacy). Here, too, we could say that certain rights conceptually overlap and that they presuppose one another.

²² Roman law distinguished between *legitimitio activa ad processum* and *legitimitio activa ad causam*. The denial of the former (*ad processum*) would amount to the denial of purely procedural standing, *e.g. ratione temporis*. The denial of the latter (*ad causam*) goes into the merits of the case, *e.g. ratione materiae*. But, since we are speaking only of standing to sue (legal interest) in both cases the denial of standing, denial *ad causam* should not imply that the court has gone into the merits of the case. In such cases the court nevertheless procedurally rejects the case only in terms of manifest lack of a substantive right giving one’s procedural claim a substantive basis. The distinction is, in other words, a little blurred.

²³ (1975) 1 E.H.R.R. 524 “While in prison, Mr. Golder had been accused of participating in a prison riot. To exculpate himself of this charge, he petitioned the Home Secretary for leave to consult a solicitor and start legal proceedings for libel. The Home Secretary refused. This refusal made any correspondence with a solicitor impossible. Mr. Golder claimed a violation of his rights under Article 6 para.1 (‘access to court’) and Article 8 (respect for correspondence).” Lawson and Schermers, *Leading Cases of the European Court of Human Rights* (1997), p. 18.

²⁴ *Golder*, *supra*, para. 36.

²⁵ This rather exaggerated *argumentum ad absurdum* appears in para. 36 of the judgment.

²⁶ 381 U.S. 479 (1965).

There is thus an overlap between the constructive right of access to court established in *Golder* and article 13 of the Convention (the right to an effective remedy).²⁷ The impact of the Convention's right of access to court, however, is broader than the right to an effective remedy. The right to an effective remedy applies only to rights and freedoms as set forth in the Convention. The right of access to a court, however, "applies to all determinations of civil rights and obligations, and not only to those which are related to one of the rights laid down in the Convention."²⁸

While access to a court implies that the court in question has full jurisdiction over the subject-matter (both *questiones facti* and *questiones juris*), there are some areas where this requirement can be adhered to only partly, e.g. in the application of zoning laws, urban planning *etc.*²⁹

The metaphor of the distinction between *umbra* and *penumbra* may in turn be extended to the right of access to a court itself. The full shadow (*umbra*) of this right is the right of access to a court in which the issue may be resolved and to have a hearing in this court. The half-shadows (*penumbrae*) of the right of access, however, cover at least (i) the litigant's right to present his or her case *properly and satisfactorily*; (ii) the right of access to a court that is *independent and impartial*; (iii) the right of access to a court that has *full jurisdiction* (competence) over the subject-matter; and (iv) the right to counsel in non-criminal cases.³⁰

Of course, the right to present one's case fully ("to have one's day in court") does not have to be further derived from the already derivative (penumbric) right of access to a court. The right to present one's case fully is implied in the meaning of "fair hearing" in the text of article 6 (1) of the Convention.³¹ But the right to counsel may, in many non-criminal cases, also be a precondition to effective access to court. Since the right to counsel in article 6(3)(c) (the right to defend oneself in person or through legal assistance of one's own choosing or, if one does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require) is limited to defendants in *criminal* prosecutions, the question arose whether, for example, in divorce proceedings one might also be entitled to counsel paid for by the State.

The case of *Airey v. Ireland*³² concerned a wife requesting judicial separation from her violent husband. Mrs Airey did not have the means to hire a lawyer and was, due to the insufficiency of her legal knowledge, unable to institute the required judicial proceedings herself. Consequently, she was unable to *present her case fully and properly*. She claimed that her access to court had been effectively barred because she had not been able to have counsel appointed *in forma pauperis*. The Court held by five votes to two that Mrs Airey's right of access to court had indeed been violated but refused to entertain the discrimination issue, *i.e.* the fact that as a poor person she had not been able to afford legal counsel.

²⁷ Art. 13: "Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

²⁸ Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), p. 419.

²⁹ *Bryan v. United Kingdom* (1995) 21 E.H.R.R. 342. Van Dijk and van Hoof, *op.cit.*, *supra*, n. 28, pp. 419 and 420, n. 705.

³⁰ The right to counsel in criminal cases, on the other hand, is covered *expressis verbis* in art. 6(3)(c) of the Convention: "Everyone charged with a criminal offence has [the minimal right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." The latter part of the clause refers to *ex officio* appointment of counsel *in forma pauperis*.

³¹ A fair hearing presupposes a balanced presentation of both sides of the controversy. This "equality of arms" has at least two purposes. First, the finding of truth in the interests of justice requires a full presentation of both sides. In criminal cases, second, the prevention of forced self-incrimination requires the legal protection of the defence's procedural rights. See *Saunders*, *infra*, n. 38.

³² (1979) 2 E.H.R.R. 305. See also Lawson and Schermers, *Leading Cases of the European Court of Human Rights* (1997), pp. 85-94.

Since the right to counsel *in forma pauperis* paid for by the State is in so many cases a virtual precondition of success in judicial proceedings, the question may be raised as to who ought to have the power to decide whether counsel will, or will not, be paid for by the State.³³ The issue would be problematic even if the appointment of counsel were decided by the national court in question – since the preliminary decision on whether the case merits the additional expense of appointing of counsel implies a certain pre-judgment of those merits themselves. The right of access, *i.e.* the right to counsel in non-criminal cases, is *a fortiori* endangered in cases where such a decision is made by the administrative authorities themselves.³⁴

Access to Court in Criminal Cases

Similar problems arise in the criminal context. In criminal cases the right for prisoners to have free and unhindered correspondence with their (prospective) counsel³⁵ as well as the right to oral consultation without the presence of prison officers³⁶ are further rights considered to be an integral part of the right of access to a court. *Mutatis mutandis* this should apply to suspects' right to consult in private with their lawyer, *i.e.*, without the presence of police.

The issue remains open, however, whether the presence of a lawyer is required, should the suspect so desire, *during the custodial interrogation of a suspect at a police station.*

In the famous American Supreme Court *Escobedo*³⁷ case the suspect implicated himself by admitting that he knew the identity of his co-suspect. He was interrogated *incommunicado*, *i.e.* by police officers who refused to permit Escobedo's lawyer to be present. Justice Goldberg held that the absence of counsel at the police station was decisive for the further development of the case. Most criminal cases, he said, are in fact decided at this *critical stage*. If at that critical stage the presence of counsel is not allowed, the rest of the criminal proceedings are often merely an appeal against what happened at the police station. The analogy is powerful and it implies that the effective assistance of counsel early in the pre-trial stages of criminal procedure is necessary for effective access to court.³⁸

Access to Court in Judicial Review Cases

In *Obermeier*³⁹ the question arose as to whether access to a court, as a minimum standard, was satisfied by the ability to challenge an administrative decision in a court

³³ The right to counsel *in forma pauperis* may be interesting in the context of appeal cases and, especially, concerning the constitutional complaint. In some State Parties to the Convention, for example, there is no right for poor people to have counsel appointed to lodge a constitutional complaint. Since *Airey* stands for *effective* access to court it would be only logical for the right to have counsel appointed *in forma pauperis* to apply in such cases too. Besides, this is good policy since it gives the State Party's constitutional court the chance to deal with the legal problem presented before it reaches Strasbourg.

³⁴ Cf. European Commission's view in Appl. 9649/82, *X. v. Sweden*, not yet published. See van Dijk and van Hoof, *op.cit.*, supra n. 28, pp. 420-421, n. 711

³⁵ *Silver v. United Kingdom* (1983) 5 E.H.R.R. 347; *Campbell and Fell v. United Kingdom* (1985) 7 E.H.R.R. 165; *Byrne McFadden, McCluskey and McLarnon v. United Kingdom* (1987) D.&R. 51. Cited after van Dijk and van Hoof, *op.cit.*, supra n. 28, p. 412, n. 713

³⁶ *Campbell and Fell v. United Kingdom*, *ibid.*

³⁷ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³⁸ We may add that this critical-stage-focused investigation doctrine then led to the famous *Miranda* decision. In *Miranda* 384 U.S. 436 (1966) an irrebuttable presumption was established to the effect that all self-incriminatory evidence obtained in the absence of counsel in the context of custodial interrogation was obtained in violation of the privilege against self-incrimination. Exclusion of such tainted evidence was seen as a constitutional right of the defendant. The ECtHR has yet to go thus far. But it would be logical to expect this extension of the right of access/right to counsel combination in the future. *Saunders v. United Kingdom* ((1996) 23 E.H.R.R. 313; (1994) 18 E.H.R.R.) is therefore a crucial case to be carefully studied although some of the commentators have chosen to ignore it.

³⁹ *Obermeier v. Austria* (1991) 13 E.H.R.R. 290

whose jurisdiction (competence), was, however, limited to a *formal* review of the administrative authorities' exercise of their discretionary power. Since the court in question could not itself enter fully into the merits of the administrative law issue (the court in question was limited to seeing that the discretionary power had been exercised in compliance with the object and purpose of the applicable administrative law) the Court held that this did indeed violate the right of access.

Access to Court and the Position of the Defendant

In criminal cases the right of access to court takes on entirely different characteristics. It is typical of criminal cases that the suspect should deny his passive "standing" (*legitimitio passiva*) throughout the pre-trial and trial procedures. By denying his criminal responsibility, in other words, the defendant in criminal cases is objecting to the prosecution's *legitimitio activa ad causam*, i.e. its (substantive) standing.

This, of course, is also true in many private (civil) law cases. Access to judicial protection is always in the interest of the plaintiff or the prosecution. As we pointed out in the Introduction, access to court is a surrogate of private enforcement of a claimed right (self-help), thus it was clearly in Mrs Airey's interest to institute judicial proceedings against her violent husband. But was it in the interest of the husband? Can his interest be expressed in terms of "access to a court"? *Mutatis mutandis*, can we say that it is in the interest of a criminal defendant to "have access to court"?

The answer to this question, we think, is given in the first rule of the Roman *Leges XII Tabularum*: "*Si in jus vocat, ito!*" In other words, to the right of access on the part of the plaintiff (prosecution) there corresponds a duty on the part of the (civil or criminal) defendant. The duty to appear in court is perhaps the most primordial of all legal-procedural duties of a citizen. This duty to appear is a mirror image of the plaintiff's right of access to a court.

In private law cases the sanction for a defendant's violation of this duty is for him to be declared *contumax* (stubborn) by the court, i.e. to face a judgment reached in his absence. Such a solution to the defendant's *de facto* denial of the plaintiff's right to have the case adjudicated by a judicial authority, however, will simply not do in criminal cases. In criminal cases the defendant's attendance at his trial must be assured by forcible means (arrest, pre-trial detention *etc.*).

For these reasons the right of access to a court in criminal cases makes no literal sense. Instead, the right of access in criminal cases simply means that the court which the defendant is forced to attend must fulfil the other enumerated requirements of article 6 (fair trial, impartial trial, public hearing *etc.*).

Nevertheless there are some unusual legal situations in which access to court *per se* becomes an issue even for a criminal defendant. In *Deweer*,⁴⁰ for example, the Court extended the doctrine to criminal cases in circumstances where a prosecution had been abandoned by the State. This had happened because the would-be defendant had been forced to pay his dues to the State by extra-judicial means, i.e. under the threat that, if he did not, his shop would be closed. Under these circumstances the defendant had an interest in being tried (and presumably acquitted), rather than having non-judicial authority determine his financial liability.

Somewhat similarly, there may be cases in which it is actually in the interest of a criminal defendant to obtain a continuation of the criminal trial and a judgment in his

⁴⁰ *Deweer v. Belgium* (1980) 2 E.H.R.R. 439

favour, *i.e.*, a judicial confirmation of the presumption of his innocence.⁴¹ In *Minelli*⁴² the Court held that a criminal defendant's right of access to a court in criminal proceedings will be violated if the prosecution is discontinued in circumstances such that the "odium of guilt" will continue to hang over the defendant. Thus, in *Minelli*, access to a court was functionally equated with the right to have one's innocence judicially ascertained and confirmed. The Court connected this with the presumption of innocence postulated in article 6(2) of the Convention.⁴³

Primary and Secondary Access to Court – Access to an Independent Tribunal

In *Brumarescu v. Romania*⁴⁴ the applicant was the owner of a pre-war private villa in Bucharest, nationalised in the wake of the Communist revolution in the early Fifties. The relevant nationalisation Decree had provided, however, that certain categories of owners were exempted from the nationalisation of their property, among them "professional intellectuals" such as teachers and professors. Nevertheless, despite belonging to this category, the house was *de facto* nationalised, the owner being reduced to occupying one apartment there as a tenant. After the collapse of the regime in the Nineties, Mr Brumarescu filed a civil complaint in a Romanian civil court challenging the technical legality of the 40-year old nationalisation. The civil court promptly ruled in his favour and the property was restituted *in toto*. Although the Civil Division of the Supreme Court had previously upheld similar rulings by lower courts, the Procurator-general applied to the full Supreme Court to have the decision in Mr Brumarescu's (and other analogous) cases quashed. The Romanian Supreme Court, sitting in general session,⁴⁵ overruled its Civil Division by 25 votes to 20, holding that the lower courts had acted *ultra vires* and that it was for the legislature alone to decide whether property in such cases was to be denationalised. The "final" decision in Mr Brumarescu's case was thus reversed.

The case is interesting because it has political overtones typical of the transitional legal systems in Central and Eastern Europe. The change (by a margin of five votes) in the Supreme Court's position followed a speech by the President of Romania and the background to the case was that the denationalisation decisions of first-instance civil courts were affecting the interests of former *nomenklatura* still residing in many of these nationalised properties.

From the point of view of article 6(1) access to court doctrine, however, it is interesting to note that initially there was entirely satisfactory access to the Romanian civil courts and that final and executory decisions were rendered by those courts. The Procurator-general's ability, however, to apply for judicial review in civil cases is a typical *ultimum remedium* in socialist legal systems, the function of which is ostensibly

⁴¹ It may be interesting to note here that the *rebuttable* pre-trial presumption of innocence implying that the burden of proof and the task of persuasion are on the prosecution and that all reasonable doubts have to be interpreted in favour of the defence (*in dubio pro reo*) becomes, in case of acquittal, an *irrebuttable* presumption of innocence (*ne bis in idem*, double jeopardy).

⁴² *Minelli v. Switzerland* (1983) 5 E.H.R.R. 554.

⁴³ Art. 6(2) of the Convention: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Since the right to be presumed innocent only accrues once one is charged with a criminal offence, the impact of the presumption of innocence is limited to the context of criminal proceedings: the burden of proof and the risk of non-persuasion are on the prosecution, and in doubt the court must acquit (*in dubio pro reo*). This means that there is in society no general presumption of innocence such as would, for example, imply that newspaper articles cannot be published about the alleged guilt of a criminal suspect. (But cf. arts. 8 and 10 of the Convention.) On the other hand the words "charged with a criminal offence" do not mean that a formal bill of indictment (accusation, charge) must be filed in order for the presumption of innocence to accrue as a right of a criminal suspect. A "charge" is implied, typically, by the arrest itself or any other form of *focused* investigation. Compare *Spano v. New York*, 360 U.S. 315 (1959).

⁴⁴ October 28, 1999 (unreported).

⁴⁵ The reference is to the *plenary session* of the Supreme Court which had the power to establish abstract principles to guide lower courts as well as the different Divisions of the Supreme Court.

to protect “socialist legality”. The power given to him or her is the “extraordinary remedy” of intervening to disturb *final* private law decisions if he/she deems them incompatible with this “socialist legality.” In other words, the *primary* access to court in the cases in question was retroactively denied by the *secondary* reversal of the Supreme Court’s position in blatant violation of the fundamental principles of *res judicata* and *legal certainty* and, possibly, of *the principle of acquired rights*.

In this sense *Brumarescu* was characteristic of the potential collisions between “socialist legality” and the Convention. In constitutional law and political terms the case concerned the independence of the judiciary. The retroactive denial of access to court in *Brumarescu* was a consequence of the political pressure put on the Supreme Court of Romania to which it succumbed by a margin of five votes.

One lesson here is that there can be no due process in a legal system in which the Courts are not independent. The independence of the courts is an integral part of a particular political attitude. *Constitutional* doctrines such as the independence of the judiciary, due process (access to court), the separation of powers and the rule of law describe and prescribe this political attitude. It follows logically that the European Court of Human Rights will be required to deal with cases in which these constitutional precepts are violated to the precise extent to which the domestic legal system has failed to internalise this political hierarchy of values and the corresponding constitutional doctrines.

The best way of achieving this harmonisation in former Communist countries, and, *nota bene*, in many other Contracting States,⁴⁶ is to fully empower the respective constitutional courts as the national guardians of these precepts.⁴⁷ If this legal filter is in place, in my experience, cases such as *Brumarescu* and many others will not need to reach the Strasbourg level because they will be satisfactorily resolved at the domestic constitutional level. In a very real sense, however, this presupposes that domestic legal education and political culture have worked so as to allow a greater degree of power-sharing with the judicial branch.

Access to Court and the Equal Protection of the Law

In a case decided quite recently, *Pellegrin v. France*,⁴⁸ the Court tackled an old question concerning the access to court of civil servants. Given the wording of article 6(1), and irrespective of the historical interpretation, the old Court, had, rather inconsistently, held that sometimes civil servants do have a right of access to civil judicial proceedings and sometimes they do not. The case law turned on a distinction between questions concerning civil servants’ careers (no right of access) and questions concerning their purely financial interests (right of access required). M. Pellegrin was employed under contract by the French Republic and was sent to Equatorial Guinea in order to assist in the financial management of that State. When his contract was not extended (for medical reasons) he claimed compensation. Before the Court, therefore, the issue was whether he was entitled to have access to the French civil courts or whether the protection of the administrative courts sufficed. The Court refused to adopt an extreme solution either requiring access for all (including civil servants) or denying access to civil servants as a matter of principle. It found no violation of article

⁴⁶ See generally my dissenting opinion in *Cable and Hood v. United Kingdom* (2000) 29 E.H.R.R. 365.

⁴⁷ If a legal system is to embody “the rule of law”, it is absolutely essential for its constitutional court to have the following minimum features: its judges should be appointed in a non-political process and should have life tenure; it should have jurisdiction over both theoretical questions and concrete cases (in the form of a “constitutional complaint”/ *Verfassungsbeschwerdelamparo*); and its judgments should have effect *erga omnes* (as opposed to simply being *res judicata*).

⁴⁸ December 8, 1999 (unreported).

6(1). In reality, however, the issue should have been defined as one of equal protection since it is obvious that civil servants as a class were being discriminated against in terms of their access to ordinary civil courts. The Court, however, does not use equal protection tests in the same way that they are employed by constitutional courts and thus did not define the issue in terms of article 14.⁴⁹

The crux of the matter as decided by the Court, as in other such cases, was the above-mentioned *career-pecuniary interest* distinction. The real issue, however, was discrimination against civil servants concerning their access to court. Civil servants are a separate class of employee in many States Parties. This is due to the sensitivity of their functions and the special status they enjoy as trusted agents of the State. Their responsibilities and career interests, in other words, are too closely linked to the interests of the State for them to be treated as ordinary employees. In terms of classic (constitutional) equal protection the issue was therefore whether denying this class of employee access to court represented unacceptable discrimination or not.⁵⁰ The Court, as we said, rarely deals with discrimination as such. It prefers to address this question only if another of the basic rights has been affected. An alleged violation of equal protection (discrimination) is consequently almost never entertained in its own right. It is therefore probably safe to say that the Court has so far failed to adopt a consistent equal protection doctrine.⁵¹ Many national constitutional courts, on the other hand, *do* have such doctrines, notably in Germany, whose the Constitutional Court has developed a rich jurisprudence in this respect.

The issue is really quite simple, although perhaps (as some constitutional theorists maintain) a little self-referential. Clearly, the purpose of every law is to establish differential treatment for different categories of legal subjects and the legal situations affecting them. In fact, the substance of the normative regulation of social life lies in differential treatment of different categories of legal subjects and legal situations.⁵² There is therefore, in absolute terms, no such thing as equal treatment since the purpose of every law on the statute-books is to establish the legal consequences deriving from its normative distinctions and differentiations.

To say, on the other hand, that “equal situations require equal treatment” begs the same question (*petitio principii*), i.e. the question as to what *is* an “equal situation.” In ninety percent of legal situations the differential treatment of different legal subjects

⁴⁹ Art. 14 : “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” While it is clear that it is a purpose of all laws to “discriminate” (from the Latin *discriminare*, “make differences”) *lato sensu* between different classes of legal subjects, for instance between those who have and those who have not committed criminal acts *etc.* – some of the criteria of discrimination (*stricto sensu*) are impermissible (gender, race, colour, language, religion *etc.*). These are called “suspect classifications”. If the state chooses to discriminate and for example, not accept women into the armed services it must show that (i) a *compelling state interest* exists (e.g., national security) and (ii) that the law building upon such discrimination is *suitably tailored* to achieve that compelling state interest. However, if the classification is not so suspect as gender, race *etc.*, the test of discrimination is much milder. In case of civil servants the classification is not very suspect (“status”), therefore the test ought to have been whether to discriminate against them and not permit them access to regular courts was *rationally related to a legitimate state interest*. In *Pellegrin* the interests of the French State abroad were at stake. It would consequently be conceivable to maintain that these interests were legitimate and that the question of re-employment of M. Pellegrin was not a simple matter of labour law. Discrimination it was, of course, but a justified one.

⁵⁰ Art. 14 (the prohibition of discrimination): “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

⁵¹ See my dissenting opinion in *Chassagnou v. France* (2000) 29 E.H.R.R. 615.

⁵² As for the distinction between formal and substantive equality, Karl Marx’s *The Critique of The Gotha Programme* is still the classical text used for example at Harvard Law School’s jurisprudence courses. Socialism could probably be defined as an unsuccessful attempt to introduce substantive equality. Militant egalitarianism as a mode of violence against those who were more capable, energetic *etc.* in fact probably contributed to the failure of the socialist experiment. Cf. Noam Chomsky, *Secrets, Lies and Democracy*, Odonian Press, 1994. A far better explanation is rendered in Nietzsche, *Genealogy of Morals, Second Essay*. Nietzsche maintained that too much equality “stifles life itself.”

is entirely acceptable (for example, statutory discrimination in the form of imprisonment of those who commit criminal acts). But even a law discriminating against one of the explicitly forbidden grounds (sex, race, colour *etc.*)⁵³ may be acceptable if there are *compelling reasons* of State interest. Take the most difficult example of gender (sex) discrimination: what if women complained that they were being discriminated against by not being permitted to participate fully in the combat operations traditionally reserved for men? Such discrimination would most likely be upheld due to *compelling reasons* related to the national interest in maintaining its combat-readiness.

The relevant tests are, therefore, (i) whether the legislative discrimination at issue is *proportionate* to the importance of the legitimate State interest; and (ii) whether the legislative instrument employed for that legitimate purpose is *rationally related*⁵⁴ to it.

The equal protection scrutiny may be more or less strict depending upon whether the discrimination at issue is more (sex, race, national origin *etc.*) or less (civil servants and other social and economic categories) suspect. When the issue is discrimination against civil servants, as in *Pellegrin*, therefore, the equal protection test to be employed is *less* strict. In other words, if the French State, as such, had a legitimate interest in defining the dispute over Mr Pellegrin's foreign service as a matter of the "public interest" in France's foreign relations (and thus a case for the administrative courts), rather than simply in terms of labour law, then it was acceptable to discriminate against him in denying him access to ordinary labour or civil courts.

Unfortunately, the Court was not ready to apply the pure equal protection doctrine, but it arrived at the same result by further elaborating its over-interpretation of the *career-pecuniary interest* distinction. Nevertheless, I am convinced that sooner or later many of the access to court cases will be dealt with in terms of the (un)acceptability of specific forms of discrimination. In my opinion *Pellegrin* also illustrates the fact that access to court questions may often conceal various *other issues*. Thus it may sometimes be misleading to define the issue only in terms of access to court doctrine.⁵⁵ In terms of comparative law, access to court doctrine is analogous to the *due process* doctrines of the United States courts, but space does not permit further elaboration of this extremely interesting comparison here.

A somewhat similar question, however, was raised (albeit on the international level) in *Waite and Kennedy v. Germany*⁵⁶ except that the issue there concerned not civil servants but employees of an international organisation, the European Space Agency. The Court held that it:

... recall[ed] that the right of access to the courts secured by Article 6 (1) of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation.

The applicants in *Waite and Kennedy* were employees of the European Space Agency. The issue was whether they had the right of access to German labour courts in relation

⁵³ In constitutional law doctrines these are called "suspect classifications".

⁵⁴ See my partial dissent in *Chassagnou v. France*, *supra*, in which the law in question, the French *Loi Verdeille*, was decidedly clumsy.

⁵⁵ A similar criticism, however, may be made in respect of the constitutional doctrine of equal protection (discrimination). Useful as it may be in some cases it may, if overused, reduce constitutional considerations to courts' rather unrestrained assessment/view of what is "legitimate" as a governmental aim on the one hand and what is a "rational legislative approach" for achieving that aim on the other hand. This reductionistic approach would be reproachable to the precise extent to which the constitutional courts would then be empowered to entertain what in essence are legislative (rationality, legitimacy) issues.

⁵⁶ (1998) 6 B.H.R.C. 499.

to their employment dispute. The question of discrimination was, however, directly considered by reference to the “overriding purpose” of international organisations. The Court held that

[t]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.

The implication is clearly that clauses in international organisations’ employment contracts which limit their employees’ access to court by restricting it to access to internal arbitration procedures are acceptable. Again, in terms of (non-)discrimination the question would be whether international employees as a class may or may not be discriminated against in the process due to them, in their access to court. The Court’s references to *margin of appreciation* and *proportionality* (between the means employed and the aim sought to be achieved) tend to show that here the equal protection doctrine was indeed a/the decisive factor in its findings against to the applicants.⁵⁷

Some Tentative Conclusions

In his excellent analytical essay,⁵⁸ P. van Dijk, a former judge of the Court maintains as follows:

The present Strasbourg case-law concerning ‘civil rights and obligations’ is one of lack of clarity. Lack of clarity because still no general definition of ‘civil rights and obligations’ can be inferred, while the construction of the outcome of the procedure for a right or obligation of civil right or obligation is very complex and rather undefined . . . Uncertainty because the elements actual developed in the case-law for such a definition appear still to lead within and between the Court and the Commission to different views in concrete cases, while the number of the adherents to the various views are almost equal. In our opinion this lack of clarity and this uncertainty . . . can only be eliminated when the Court breaks through its hitherto pursued casuistic approach and develops a *general and readily applicable definition in the exercise of its function to give direction to the interpretation of the Convention*.⁵⁹

This dilemma, as we saw, was tackled in the *Pellegrin* case, but it was not resolved. It is possible that the problem with the present caselaw goes even deeper than some have imagined. In terms of comparative law, the access to court doctrine seems to be similar to the constitutional due process doctrine. In constitutional law, due process is (i) limited to fair decision-making process, whereas individuals are (ii) entitled to a fair procedure (hearing) before being deprived of a life, liberty or property interest. The procedural rights are contingent upon the legitimacy of the claim of entitlement or liberty interest. Only once this has been established, does the question “what process is due?” arise. In other words, the problem of the definition of the legitimate substantive “right” is inherent in all access to court/due process legal considerations. I am afraid that no other than the criticised casuistic approach is therefore available here.

On the other hand, there is something called “substantive (as opposed to procedural) due process”, *i.e.* the requirement that the substance of the law, the restrictions it seeks to impose, affecting all people, should be valid under the constitution or, in our case,

⁵⁷ The Court cited *Osman v. United Kingdom* (2000) 29 E.H.R.R. 245, *Fayed v. United Kingdom* (1994) 18 E.H.R.R. 393 and *Waite and Kennedy v. Germany*, *ibid.*

⁵⁸ P. van Dijk, “Access to Court” in MacDonald *et al.* (eds.) *The European System for the Protection of Human Rights*, at pp. 345-379.

⁵⁹ *Ibid.* at pp. 375-376.

the Convention. In other words, van Dijk's point concerning the "definition" of the "(substantive) right" protected by access to court is really the question whether the law is arbitrary or irrational or whether it infringes fundamental rights.

These questions are questions of equal protection by the law. The denial of equal protection amounts to discrimination as defined in article 14 of the Convention. The standard objection here is that the question of discrimination can be raised only with respect to a right "set forth in this Convention", *i.e.* that it does not apply to rights which are not explicitly enumerated in the Convention. Thus, in *Pellegrin* one could not refer to discrimination against the class of civil servants denied access to ordinary courts because their right to be treated equally in terms of access to court is not specifically mentioned in the Convention.

But this kind of reasoning is clearly circuitous. If the Court is to break out of this vicious circle, in my opinion, it must do two things.

First, the Court must recognise that, irrespective of its past practice, the equal protection approach is clearly a more functional, adequate and direct way of dealing with the problem in some cases. Second, if the Court decides to adopt that approach and to see the issue, in cases such as *Pellegrin*, in terms of discrimination it must not allow itself to be inhibited by concerns over whether the specific right is expressly set out in the Convention. The right of access to court is, after all, implicitly recognised in article 6(1). The fact that this is a procedural, not a substantive, right does not mean that it is incompatible with another procedural right such as the right not to be discriminated against (in one's access to regular courts). Only the two procedural rights in combination (to have one's claim decided by the normal court) would suffice to implement the alleged substantive right of M. Pellegrin to obtain another contract from France without unreasonable delay.

Third, once this approach has been established, the Court may entertain the discrimination issue applying the appropriate scrutiny. The outcome of the case will ultimately depend on whether the discrimination in question is reasonable, *i.e.* whether (i) the classification is suspect; and (ii) if suspect, whether it merits (a) strict scrutiny, (b) heightened scrutiny, or (c) only the mild rationality test. Depending on the strictness of the discrimination test applied, the "proportionality" between the legitimate aim sought to be implemented and the legislation in question, and the rationality of the legislative instrument, must be weighed. Clearly, if discrimination on the grounds of sex, race, colour, language, or religion is in question, the test will be strict. If "other status", such as the status of "civil servants", is in question, the mild rationality test would perhaps apply.

The origin of the problem seems to lie in the far too rigid distinction between the "substantive rights" on the one hand and the procedural rights on the other hand. If the procedural rights are seen as purely ancillary, *i.e.* merely as an instrument for the implementation of the substantive rights, then article 14's prohibition on discrimination will continue to apply only in combination with another "substantive right".

The logical solution is therefore to break out of this vicious circle and recognise that discrimination is a breach of "substantive due process", *i.e.* that as a right it stands on its own feet and does not have to be complemented by a breach of a "substantive" right. The fact that article 14 refers to "rights and freedoms enumerated in this Convention" should not mean that synthetic (penumbric) derivative rights and freedoms such as access to court cannot be covered by the anti-discrimination clause.

THE GENERATION GAME – THIRD AGE WORKERS AND THE LABOUR MARKET

HELEN J. DESMOND*

INTRODUCTION

THE TREND TOWARDS early exit from the labour market, whether classified as retirement or redundancy, has been welcomed and encouraged by management and unions alike during periods of high unemployment, and became Government policy when the problem of youth unemployment was seen as a political priority. It has survived association with periods of recession and has continued apace during the 1990s, affecting all sections of the labour force and resulting in a steady increase in inactivity amongst the over 50s. However, demographic changes affecting the United Kingdom, as well as other European countries, have resulted in a change in public policy towards the over 50s and labour market participation amongst older workers.

This article looks at these demographic changes, the effect of early exit on participation rates amongst older workers and the evolving policy towards those aged 50–65, the so-called “third age” workers, in the United Kingdom and at European level. It questions the motivation for policy changes and doubts whether these represent anything other than political expediency in terms of responses to an economic imperative.

THE AGE SHIFT

As in most other industrialised countries, driven by a combination of factors, the population is ageing, and the number of old and very old people is increasing, both in absolute terms and as a proportion of the population as a whole. By contrast, as a result of a general decline in fertility rates, the proportion of younger people has been falling, and is projected to continue to do so.

The so-called “demographic time-bomb” caused by these two factors, failed to go off when women provided an additional source of labour by returning to or joining the labour market, and the recessions during the 1980s reduced demand for labour.¹ However, it has been pointed out that “if the explosion of the time bomb has been prevented by recession, employers need to remember that recessions, however long drawn out, are temporary – whereas the demographic factors are permanent and inevitable”.²

Improved health care, diet and housing have led to a progressive increase in life expectancy at all ages. In the early years of the twentieth century life expectancy at birth was a mere 45.5 years for a male and 49 years for a female, and people did not live long enough to enjoy retirement, literally working until they dropped. However, for those born in 2001 life expectancy is expected to be 75.4 years for a male and 80.6 years for a female, having increased by an average of some six-and-a-half years over the last 40 years. More significantly, over the period 1961 to 2001 life expectancy at age 60 is

* University of Leicester. I would like to thank Professor Alan Neal for his comments on an earlier draft of this article.

¹ Worsley, R., *Age and Employment: Why Employers Should Think Again About Older Workers* (AGE Concern England, 1996).

² *Ibid.*

expected to rise by in excess of four-and-a-half years for both men and women. A 60-year-old male can today therefore expect to live until 79.4 years, a female to 83.3 years, thus surviving an average of in excess of some 20 years in retirement. This means that in absolute terms whilst at the beginning of the twentieth century the number of those aged 65 and over was 1.8 million, by 1997 the number had grown to 8.2 million, and is projected to rise to some 10.5 million by 2021. At the same time the number of very old, those age 80 and over, increased consistently throughout the century and projections suggest that by 2021 there will some three million people in this age group, representing almost five *per cent* of the population. Whilst in 1961 there were fewer than 600 centenarians in England and Wales, by 1991 this had risen to around 4,400 and is projected to continue rising.³

By contrast with the growth in the elderly population, there has been a general decline in fertility rates. In a pattern that dominates the age profile of the working-age population, the birth rate, which peaked in 1964, declined to a trough in 1977, since when it has been below replacement level, at only slightly above that of 1977.⁴ As a result, the proportion of the population under the age of 16 has fallen from a third to just over a fifth.⁵ Since no developed country has experienced a sustained return to high fertility rates since the end of the post-war baby boom, this decline is expected to continue, so that by 2010, in a reversal of the traditional position, it is expected that old age dependency will replace young age dependency.⁶

Reflecting the decline in fertility rates, the number of 16–24-year-olds fell by in excess of 20 *per cent* in the ten years to 1996, and will continue to decline. This has been exacerbated by an increase in the number of school leavers entering further and higher education, which increased by nearly 30 *per cent* in the ten years to 1996. This trend is expected to continue amongst the 16–24-year-old age group, so that by 2003 only 60 *per cent* of the 6.4 million people in this category are expected to enter the labour market.⁷

As a result of the combination of the ageing of the post-war baby boom generation and declining fertility, the working age population has been ageing, and will increasingly shift and be concentrated in the middle age groups. This shift to a middle age bulge means that whilst traditionally the workforce has been concentrated around the 25–34-year-old age group, both the 35–44 and 45–54-year-old age groups will in future be larger. The significance of population ageing for the workforce is that by 2011 it is expected that some 40 *per cent* of the total workforce will be aged over 45, compared to 33 *per cent* in 1997.⁸

The increase in the number of old and very old and the decline in the number of people of working age has led to concern for the funding of social welfare systems. The support ratio, as an indicator of the capacity of the economy to provide for its ageing retired population, which stood at 3.4 in 1990, is expected to decline by some 24 *per cent* to 2.6 by 2050, reaching a low of 2.4 in 2030. This concern for the ability to maintain a growing older population was one of the factors that figured prominently in the decision to equalise the age of eligibility for state pension at 65.⁹

³ *Social Focus on Older People*, Office of National Statistics (HMSO, 1999).

⁴ B. Armstrong, and M. Scott, "British labour force projections: 1998–2011" (1998) *Labour Market Trends*, pp. 281–297.

⁵ *Social Trends 30*, 2000 Edition (HMSO, 1999).

⁶ *The Age Shift: a consultation document*, Ageing Population Panel (DTI, 2000).

⁷ R. Ellison *et al.*, "British labour force projections: 1997–2006" (1997) *Labour Market Trends*, February, pp. 51–70.

⁸ *Supra*, n. 4; Quarterly Labour Force Survey (Government Statistical Service, Spring 1998).

⁹ Eligibility for state pension will equalise at age 65 progressively from April 2010, so that women born between 6 April 1950 and 5 April 1955 will become eligible in accordance with Pensions Act 1995, Sched. 4. A woman born on or after 5 April 2020 will attain pensionable age for these purposes when she attains the age of 65, Pensions Act 1995, s. 126 and Sched. 4.

Of the various options under consideration, equalising at age 60 would have resulted in the greatest deterioration in this ratio, and as such was deemed to be too expensive.¹⁰

It is recognised that projections as to the support ratio, being built on chronological age, do not reflect either economic inactivity amongst the working age population, or economic activity amongst the population over state pension age. Although not regarded as a perfect measure of dependency, since it does not reflect financial independence, for example by receipt of an occupational pension, the economically active ratio reflects projections as to the ratio of the number of economically active to inactive adults in the population. This ratio, which stood at 1.8 in 1990 is projected to fall to 1.5 by 2050, reaching a low of 1.4 by 2030, reflecting the fact that fewer people over state pension age are economically active. More importantly, it reflects the rising inactivity amongst the post-war baby boom generation, as they move into their third age.¹¹

ECONOMIC INACTIVITY

The proportion of the working age population not participating in the economy (at some 26 *per cent*) has remained broadly constant since 1977, as has the division between unemployment and economic inactivity, that is those who are out of work but not seeking work. This, however, masks changes that have occurred within different groups: from the late 1970s labour market participation rates amongst men, and older men in particular, have progressively declined.

Whilst in 1951 the labour market participation rate for men age 55–64 was 91 *per cent*, this has declined progressively and in 1999 stood at some 72 *per cent*. A similar pattern is evident amongst men over state pension age in that the participation rate, which stood at 31 *per cent* in 1951, has declined to eight *per cent*. However, the fall in male employment has resulted, not in a rise in unemployment, but in an increase in inactivity. In a pattern that has persisted despite periods of economic recovery, inactivity rates for men have exceeded the rate of unemployment since the 1970s. This is particularly so for men age 50 plus, where the inactivity rate, which was nearly 11 *per cent* in 1977, increased to nearly 30 *per cent* in 1999.¹² This is in contrast to the pattern for women age 55 to state pension age in that over the same period the participation rate rose from 29 *per cent* to 53 *per cent*. However, in the case of women the increase in activity rates has corresponded to a decline, not in unemployment, but in inactivity, indicating that whilst older men have left the labour market and become economically inactive, women have joined the labour market from inactivity, as opposed to unemployment.¹³

The rise in male inactivity has been attributed, *inter alia*, to a decline in last-in-first-out as a redundancy selection strategy and the growth in so-called voluntary early retirement schemes that originated during the economic recessions of the 1980s and early 1990s. Initially huge job losses resulted from major changes in traditional industries, such as coal, steel shipbuilding and construction. Men were adversely affected in that, as a result of earlier labour market segregation, these jobs

¹⁰ *Options for Equality in State Pension Age*, Cm 1723 (HMSO, 1991).

¹¹ *Ibid.* Also see B. Armstrong and M. Scott, *op. cit.* n. 4 and Labour Force Survey, Quarterly Supplement, No. 8 (Government Statistical Service, February 2000).

¹² P. Gregg, and J. Wadsworth, "A short history of labour turnover, job tenure, and job security 1975-93" (1995) *Oxford Review of Economic Policy*, Vol. 11, No. 1, pp. 73-90.

¹³ *Ibid.*

were largely those traditionally carried out by men.¹⁴ However, more recently throughout commerce, industry and the public sector, layering and downsizing has involved a shake-out of labour, and the widespread introduction of outsourcing has affected a wider range of white collar employees and middle managers. Older workers have been found to bear a disproportionate share of the burden of such dismissals, the incidence of redundancy rising sharply amongst those aged over 55, and the incidence amongst 60–64-year-old men has been found to be in excess of twice that for prime-age men. Once out of work negative attitudes towards older workers and the persistence of age related stereotypical assumptions have had a detrimental effect upon the ability of older displaced workers to return to employment. The same stereotypical assumptions that have held sway in the selection of a dismissal strategy have also been found to operate in the recruitment process, where typically management prerogative is much stronger.¹⁵ As a consequence older people are over represented amongst the long-term unemployed and a long period of increasing discouragement has been found to lead to disenchantment and ultimately economic inactivity.¹⁶

EVOLVING POLICY RESPONSES

A succession of non-statutory initiatives, concentrating upon education and propaganda, extolling the virtues and attributes of older people and the benefits of age diversity, have dominated government responses to early exit and subsequent inactivity during periods of shortages in labour supply. In addition, piecemeal fiscal measures have been adopted to limit increased costs associated with population ageing and early exit. By contrast, at times when the issue has been one of high unemployment, policy responses have been directed towards reducing the size of the labour market, utilising older workers as a dispensable element in the workforce. Policy responses therefore revolved around consideration of plans for a general lowering of retirement ages and with TUC and CBI support, encouraging early retirement¹⁷ and early withdrawal from the labour market, which became official government policy with the introduction of the Job Release Scheme in 1977.¹⁸

Non-statutory campaigns emphasising the virtues of older workers date back to labour shortages experienced in the immediate post-war period. A National Advisory Committee on the Employment of Older Men and Women rejected age discrimination legislation in favour of a “vigorous publicity campaign”, which drew attention to the need to make full use of the talents of older people and to promote work opportunities for them.¹⁹ A similar campaign attempting to persuade employers to adopt what was called a more realistic approach towards the recruitment of the over-50s was launched

¹⁴ A. Walker, and P. Taylor, “Ageism vs Productive Ageing: The Challenge of Age Discrimination in the Labour Market” in Bass, S., Caro, F.G. and Chen, Y.P. (eds.), *Achieving a Productive Ageing Society* (Auburn House, 1993).

¹⁵ B. Casey, and S. Wood, “Great Britain: Firm Policy and the Employment of Older Workers”, in Naschold, F. and de Vroom, B. (eds.) *Regulating Employment and Welfare, Company and National Policies of Labour Force Participation at the End of Worklife in Industrial Countries* (Walter de Gruyter, 1994).

¹⁶ J. Westergaard, I. Noble, and A. Walker, *After Redundancy: the Experience of Economic Insecurity* (Blackwell, 1989) and A. Walker and P. Taylor, *op. cit.* n. 14.

¹⁷ Note the recommendations of the House of Commons Employment Committee, *The Management of Redundancies*, Session 1993-4, HMSO.

¹⁸ J. Jolly, S. Creigh and A. Mingay, *Age as a Factor in Employment*, Research Paper No. 11 (Department of Employment, 1980).

¹⁹ See the Committee’s Second Report (HMSO, December 1955). The campaign was supported by the publication and distribution of a booklet *Age and Employment*, see L. Hannah, *Inventing Retirement* (Cambridge University Press, 1986).

in the late 1980s. This was in response to the so-called “demographic time bomb”, a decline in the number of school leavers available to enter the labour market,²⁰ and the reluctance of companies to employ the over-50s.²¹

The deregulation philosophy of the Conservative Governments under Prime Ministers Thatcher and Major ruled out legislation on age discrimination as a response to the targeting of older workers in redundancy and downsizing exercises and declining activity levels which survived recession and continued right throughout the 1990s, opting instead for a further voluntary campaign.²² Despite criticising this voluntary approach whilst in opposition and committing itself to legislating against ageist employment practices, the Labour manifesto was distinctly lukewarm on the topic. In power, the Labour Government eschewed age discrimination legislation because following a consultation exercise there was said to be no consensus of opinion as to the merits, and because “introducing age discrimination legislation would present a range of problems, many of them complex”.²³ Instead, a piece-meal approach to the problems of ageism and age discrimination has been adopted, with the implementation of a panoply of initiatives. Most notably these include, albeit somewhat belatedly, an extension to the New Deal programme, “New Deal 50-plus”, which aims to encourage older people back into the labour market,²⁴ and a voluntary Code of Practice (*Code of Practice on Age Diversity in Employment*). This Code, which is supplemented by Guidance and Case Studies, aims to encourage employers “to tackle age discrimination” and promote age diversity in the workplace. To this end the Code and Guidance provide information on best practice in six key aspects of the employment cycle: recruitment, selection, promotion, training and development, redundancy and retirement, in order, it is claimed, to help employers improve people management and eliminate age discrimination.²⁵

The effectiveness of such campaigns has been doubted, principally because not only do they lack an enforcement mechanism,²⁶ but, as the Carnegie Enquiry into the Third Age finally concluded, they fail to send out the right message.²⁷ In addition, with the trend towards more decentralised management structures, responsibility for personnel and human resource matters has been increasingly devolved to line managers, leading to problems of penetration, implementation and enforcement.²⁸ It has been argued that such Codes, urging actions, such as barring age limits in recruitment advertisements, may help raise awareness of the issues, but that they do little more than “scratch the surface” of the problem of age discrimination.²⁹ In this respect, an evaluation of the

²⁰ On which see *Young People and the Labour Market: a Challenge for the 1990s* (National Economic Development Office and the Training Commission, 1988) and *Defusing the Demographic Time Bomb* (National Economic Development Office and the Training Agency, 1989).

²¹ The Campaign Against Age Discrimination in Employment (CAADE) chaired by Baroness Phillips.

²² *Campaign for Older Workers* was signalled in the White Paper, *People Jobs and Opportunity*, Cm 1810, para. 2.36. This involved the distribution of three publications: *Age Works*, PL991; *Too old ... who says?*, PL974; *Getting On: the benefits of an older workforce*, PL949, and a series of meetings with employers.

²³ *Action on Age: Report on the Consultation on Age Discrimination in Employment* (D/EE, 1998).

²⁴ New Deal 50-plus has no upper age limit and is open to those who have been unemployed and claiming benefit for at least six months. Unlike the New Deal for other groups, “benefit” for the 50-plus scheme includes a whole range of social security benefits, including Invalid Care Allowance, Severe Disablement Allowance and Incapacity Benefit.

²⁵ *Code of Practice on Age Diversity in Employment and Age Diversity in Employment Guidance and Case Studies* (D/EE, 1999).

²⁶ See H.J. Desmond, “Age diversity in employment – a Code of Practice”, (1999) I.L.J., Vol. 28, No. 2, pp. 186-189.

²⁷ See *A Decade of Progress and Change: a Report on Ten years' Activity and Action on the Third Age by the Carnegie UK Trust* (The Carnegie United Kingdom Trust, 2000).

²⁸ P. Taylor and A. Walker, “Age discrimination and public policy” (1997) *Personnel Review*, Vol. 26, No. 4, pp. 307-318. Also P. Taylor and A. Walker, “Combating age discrimination in employment: education versus legislation” (1995) *Policy Studies*, Vol. 16(3), pp. 52-61.

²⁹ P. Taylor, A. Walker and K. Burke, “Old gold”, *Personnel Today* (1996) 30 July, p. 26-28.

Campaign for Older Workers run by the Conservative Government revealed little awareness amongst those questioned.³⁰ Recent pilot research by the Employers Forum on Age, revealed that only 26 *per cent* of employers were aware of the current Code of Practice, and as many as 65 *per cent* of employers had no intention of changing the way they operated their business regarding ageism at work.³¹ More recent research by the Department for Education and Employment confirms this low awareness level in that only a slightly higher percentage, 29 *per cent*, were found to be aware of the Code and less than a quarter of those had actually seen a copy.³²

The profound implications of demographic changes for social and welfare costs has prompted the introduction of a number of fiscal measures to address the issue of declining support ratios. The “pay-as-you-go” nature of the state pension scheme, the increasing costs of which are projected to fall on a smaller number of economically active people, has led over time to a number of changes. Most prominently, the link with average earnings as the basis of annual up-rating for state retirement pensions was changed in the early 1980s in favour of a link with the retail price index. The effect has been to progressively devalue the state pension relative to earnings, since average earnings grow faster than prices by around 1.5 *per cent per annum*. Despite the widespread unpopularity of this change, campaigns by pensioner groups and unions for reinstatement of the link with wages have failed to elicit a change in policy from the present Government, who expressed support for such a reversal whilst in opposition, because the cost of doing so is prohibitive.³³

The age of eligibility for state pension for women is to increase from 60 to 65 on a phased basis between April 2010 and 2020.³⁴ The motivation to equalise the qualifying age was a myriad of European Court decisions on equality, and a proposed directive to extend the principal of equal treatment to state pensions. However, the decision to increase the age for women to 65, as opposed to standardising eligibility at age 60, or some other age between 60 and 65, was driven by the prohibitive costs associated with reducing the eligibility age for men. Equalising state pension age at 60 was at the time estimated to involve a cost of some £4.4 billion in 2025, the year in which the number of 60–64-year-olds is projected to peak, as compared with a saving of £3.5 billion by equalising at 65.³⁵

In addition, before finally being abolished, a number of changes were made to the State Earnings Related Scheme (SERPS) in order to limit escalating costs.³⁶ These involved changing the basis of calculating entitlement to that of the whole working life (44 years for women, 49 for men) rather than the best 20 years of earnings, and reducing entitlement from 25 to 20 *per cent* of average earnings between the upper and lower earning limit. At the same time, encouragement was given to contract out of SERPS by providing incentives in the form of rebates for joining a personal pension scheme.³⁷

³⁰ B. Hayward, *et al*, *Evaluation of the Campaign for Older Workers*, Research Studies RS36 (D/EE, 1997). This research also showed that the booklet, *Getting On*, produced as part of the campaign, lacked detailed practical advice on how to get a job as an older worker.

³¹ *Newsline*, Issue 12, p. 3 (Employers Forum on Age, 1999).

³² *Evaluation of the Code of Practice on Age Diversity in Employment: Interim Summary of Results for Wave 2* (D/EE Publications, 2000).

³³ Note most recently the campaign to have the minimum income guarantee of £78.48, made up of basic state pension and means tested top-up, consolidated and increased to £100 in the face of a recent report by the Commons Social Security Select Committee that the elderly need a minimum of £90 *per week*. See *The Daily Telegraph* 9 September 2000.

³⁴ Pensions Act 1995, s. 126 and Schedule 4.

³⁵ *Supra*, n. 10, Appendix 1.

³⁶ See *A New Contract for Welfare: Partnership in Pensions*, Cm 4179 (HMSO, 1998).

³⁷ Social Security Act 1986.

Although the link between the award of state pension and the need for formal retirement from work was severed in the late 1980s with the abolition of the “earnings rule”,³⁸ participation rates amongst those over state pension age continued to decline. This has been attributed to the fact that although there is no provision for payment of state pension before reaching the threshold age of 60/65, the financial incentives to defer taking a state pension for a maximum of five years have not been attractive. Therefore, once the “earnings rule” was abolished taking an immediate pension became more attractive, with a corresponding reduction in the need to work. Although incentives to defer receipt of state pension have been improved on a number of occasions, these have been ineffective in increasing participation amongst older people.³⁹

As with the payment of occupational pension, state pension is payable on an “all or nothing” basis, there being no provision for partial payment. It has long been argued that if some form of partial income draw down of pension were available older people would be encouraged to work part-time, maintaining income from partial withdrawal or draw down from pension sources. However, in so far as occupational pensions are concerned Inland Revenue regulations have discouraged any form of flexibility in this respect, since they have not permitted partial payment. Neither have Revenue rules permitted the option of remaining in work with the same employer on a part-time basis whilst drawing occupational pension associated with that employer.

The Inland Revenue finally responded to lobbying on these issues by proposing three changes, two of which have subsequently been implemented.⁴⁰ First, whilst a pension funded by additional voluntary contributions (AVCs) had to come into payment at the same time as the main scheme pension, trustees of occupational pension schemes now have the option to permit a pension funded by AVCs to be taken at a different time from the main scheme benefits, and at any age between 50 and 75 years, irrespective of the actual date of retirement. In addition, in the case of *inter alia*, insured money purchase arrangements, there is now an ability to defer the purchase of an annuity, which provides the pension income, bringing the regime for both occupational pensions and AVCs into line with that applicable to personal pensions. However, in connection with the proposal to permit partial retirement, that is, allow main scheme retirement benefits to be paid at any age between 50 and 75 without the need for the employee to retire from the employment attached to that pension, the Revenue rejected any change because of “problems of interaction with social security law”. By making such a change Government fears “shooting itself in the foot” in that because of the increased years of payment pension payments would be actuarially reduced to an extent that once work is given up it would become necessary to rely on state benefits to make up the shortfall. Government also fears that should it permit the option of continuing in work with the same employer on reduced hours and wages whilst drawing occupational pension to make up income shortfall, occupational pensions would be utilised to subsidise low part-time wages, and would again lead to a necessity to claim state benefits in retirement.⁴¹ These fears, the interaction with social security law and

³⁸ The “earnings rule” penalised people who worked beyond state pension age and earning more than £75 per week, see E. Whitehouse, “The abolition of the pensions ‘earnings rule’” (1990) *Fiscal Studies*, 11:3, pp. 55-70.

³⁹ See R. Disney, “Why have older men stopped working?” in P. Gregg, and J. Wadsworth (eds.), *The State of Working Britain* (Manchester University Press, 1999).

⁴⁰ *Improved Flexibility in Pension Provision*, Update No. 54 (Pension Schemes Office, 1999).

⁴¹ Alistair Darling, Secretary of State for Social Security and Cabinet Champion of Older People, Employers Forum on Age 4th Annual Conference, June 2000.

the need for primary legislation have prohibited any change on this issue, which it has long been argued would introduce flexibility into individual retirement decisions, thus encouraging older people to continue in work.

The rapidly increasing number of people claiming Incapacity Benefit and the escalating costs involved have brought about a number of amendments in the relevant statutory regime.⁴² Whilst in the early 1990s Incapacity Benefit was made subject to tax and the eligibility criteria was tightened more recent reforms reflect fears of a link between Incapacity Benefit and local unemployment rates and a claimant pattern that it was claimed indicated that Incapacity Benefit was being used as an alternative means of support in unemployment, and as a supplement to income in early retirement.⁴³ In this connection, in order to ensure those claimants do not move from long term unemployment to Incapacity Benefit⁴⁴ the Welfare Reform and Pensions Act 1999⁴⁵ links eligibility to very recent National Insurance contributions. In addition, to prevent Incapacity Benefit becoming a pension top-up, the 1999 Act provides a formula for deducting from Incapacity Benefit any occupational or personal pension or permanent health insurance payments being received.⁴⁶ Changes have also been made to the eligibility test for Incapacity Benefit in order to explore those attributes of claimants that will aid their return to work.

The Cabinet Office Performance and Innovation Unit, set up to look at a range of cross-departmental issues, recently completed an examination into the implications of the sharp decline in participation rates amongst those in their 50s and early 60s. Their report, *Winning the Generation Game*,⁴⁷ in concluding that most people leaving work early are not doing so voluntarily, reaches no less than 75 conclusions overall aimed at improving the contribution made to the economy and society by people in their later working years. These are grouped under the headings of promoting change in attitudes and practice, improving the position of older people in work, helping older people back into work, and improving opportunities and incentives to volunteer.

Although one of the ten key conclusions in *Winning the Generation Game* is that Government should set an example and send out positive messages as part of a campaign to persuade society of the value of older people, no reference is made to employment protection legislation which contains a number of provisions that discriminate against older workers. Perhaps the most contentious of these is Employment Rights Act 1996, sections 109 and 156.⁴⁸ These provisions can exclude the

⁴² Since 1979 spending on the long term sick and disabled has grown by nearly nine per cent a year. As at May 1998, the number of people in receipt of Incapacity Benefit was 1.6 million, about three times the number receiving the equivalent benefits in 1980/81, see *A New Contract for Welfare: Support for Disabled People*, Cm 4103, Summary, para.15 and Annex Two.

⁴³ *Ibid.* para. 19. Around 70 per cent of recipients are men and in excess of 70 per cent of male recipients are aged over 50, *ibid.* Appendix 2, para. 2. By 1994 about a quarter of men aged 60–64 and nearly 20 per cent of those aged 55–59 were in receipt of Incapacity Benefit, R. Disney, “Why have older men stopped working?”, *op. cit.*

⁴⁴ Nearly half those receiving Incapacity Benefit in 1998 were unemployed, rather than in work before they claimed Incapacity Benefit, *supra*, n. 43, Chapter 2, para. 22.

⁴⁵ Sections 61–63, amending the Social Security Contributions and Benefits Act 1992.

⁴⁶ The first £50 per week of any occupational or personal pension or permanent health insurance benefit will not be reduced. Thereafter Incapacity Benefit will be reduced by 50 per cent of any income received from these sources.

⁴⁷ *Winning the Generation Game: Improving Opportunities for People Aged 60–65 in Work and Community Activity*, Performance and Innovation Unit, (Cabinet Office, 2000).

⁴⁸ It should be noted that in *Nash v. Mash/Roe Group Ltd.* [1998] I.R.L.R. 168, the Employment Tribunal held that the upper age limit indirectly discriminated against men because more men than women aged 65–74 were economically active, 7.5% as compared with 3.1% in 1996. The tribunal also held, on authority of *R. v. Secretary of State for Employment ex parte EOC* [1991] I.R.L.R. 493, D.C. and *Mediguard Services Ltd v. Thame* [1994] I.R.L.R. 504, E.A.T., and *Barber v. Guardian Royal Exchange Assurance Group* Case C-262/88, [1990] I.R.L.R. 240, E.C.J. respectively, that both compensation for unfair dismissal and redundancy pay was “pay” for the purposes of art.119, which contained no such limitation. In connection with unfair dismissal compensation now see *R. v. Secretary of State for Employment ex parte Seymour-Smith* Case C-167/97, [1999] I.R.L.R. 253, E.C.J.

right to claim unfair dismissal or a redundancy payment respectively if, at the date of dismissal, the employee has reached the normal retiring age for the undertaking, whatever that age may be.⁴⁹ In the absence of a normal retiring age, or if the normal retiring age is not sexually neutral, the cut-off age is 65 (see *Nothman v. London Borough of Barnet*⁵⁰). Nor have developments in the common law proved particularly favourable.⁵¹

In the event that statutory redundancy pay does become payable, discrimination again becomes evident in that although the calculation is subject to a higher multiple for those age 41 and over,⁵² payment is limited to a multiple of 20 years service. Since older employees tend to have longer service, this cap has the ability to adversely affect quantum for older workers, whilst at the same time encouraging employers to select older workers who are eligible for a higher statutory redundancy pay. The amount of statutory redundancy pay is also adversely affected for older workers in that it is reduced by one twelfth for each month after a person's 64th birthday, so that an employee aged 65 or over is not entitled to a payment at all.⁵³ In addition, where an employee either receives or has a right to receive, a periodic pension, lump sum, or combination of these, from his employer which amounts to at least a third of the relevant annual pay at the date of termination, the employer may offset this sum against any redundancy payment.⁵⁴ With the abolition of the rebate scheme, so that the entire cost of statutory redundancy pay falls on the employer,⁵⁵ this provision is capable of acting as an incentive to take advantage of this provision, thus making it cheaper to make older workers redundant.

THE EUROPEAN PERSPECTIVE

The national demographic pattern is replicated across Member States of the Community, albeit with slightly differing degrees of intensity in different Member States, as is the trend in early exit. During the 1980s, notwithstanding that there was no firm treaty basis for developing a policy towards the elderly, the European Parliament, Council and Commission passed a variety of resolutions, recommendations and papers concerned in a general way with the position of the elderly within the Community. These have been dismissed as amounting to "little more than a collection of pious statements" about the problems and needs of the elderly.⁵⁶

However, in 1990 a *Communication from the Commission on the Elderly*⁵⁷ detailed the social and economic implications of demographic ageing of the population, and included within its definition of elderly, not just the old and very old, but "workers upwards of 50". The Commission emphasised the social welfare expenditure implications of an ageing population on efforts to contain social welfare spending. In this connection it concluded that greater solidarity between the different population

⁴⁹ For guidance as to the steps in establishing whether there is a NRA see *Waite v. Government Communications Headquarters* [1983] I.C.R. 653, H.L.

⁵⁰ [1977] I.R.L.R. 398 E.A.T.

⁵¹ *Taylor v. Secretary of State for Scotland* [2000] I.R.L.R. 502, H.L.

⁵² Employment Rights Act 1996, s. 162(2)(a).

⁵³ Employment Rights Act 1996, s. 162(4).

⁵⁴ Redundancy Payments (Pensions) Regulations 1965, S.I. 1965/1932.

⁵⁵ Rebates from the Redundancy Fund were abolished by Employment Act 1989, s. 17.

⁵⁶ See F. McDonald and M. Potton, "The nascent European policy towards older workers: can the European Union help the older worker?" (1997) *Personnel Review*, 26:4, pp. 293-306.

⁵⁷ COM (90) 80 final.

categories, as opposed to sector specific social security regimes, were vital for the future, the promotion of solidarity between generations being identified as one of the greatest challenges for the next decade. As stated in the action programme relating to the implementation of the Community Charter of the Fundamental Social Rights of Workers,⁵⁸ however, the Commission reiterated that it did not intend to propose new legislation in this area. The role of the Community was stated as being confined to “encouraging the exchange of information and experience as well as the transfer of knowledge and innovative initiatives on topics of common interest”.⁵⁹ To this end, and in response to a request by the Parliament, the Commission proposed that 1993 be designated European Year of the Elderly and Solidarity Between Generations.⁶⁰ Accordingly, the dedicated year was the culmination of a three-year programme of research and events merely concerned with promoting awareness of the challenges posed by the ageing of Europe and the problems of the integration of older people.

However, against the background of the profound social and economic consequences of an ageing European population, a series of papers drew attention to the need for adapting to the ageing challenge. In the White Paper, *European Social Policy: a Way Forward for the Union*⁶¹ the Commission acknowledged the lack of specific competence for legislation in the area of discrimination on the grounds of *inter alia* age, and observed that this was an omission that was becoming increasingly difficult to justify.⁶² As a result, it expressed the view that at the next opportunity to revise the Treaties, serious consideration must be given to the introduction of a specific reference to combating discrimination on the grounds of *inter alia*, age.

Two separate, but parallel initiatives which relate to, and impact upon the debate on demographic change, age discrimination and early exit were brought about by the Treaty of Amsterdam, described as introducing “a new dynamic to labour law thinking”.⁶³ First, in what has been described as “one of the more significant innovations of the 1999 Treaty”,⁶⁴ agreement was reached on a comprehensive anti-discrimination article, article 13. This gave power to the Council, acting unanimously on a proposal from the Commission, to take “appropriate action” to combat discrimination based on a range of grounds, including age. In accordance with the commitment made in the 1998–2000 *Social Action Programme*,⁶⁵ the Commission subsequently presented a package of measures based on article 13. This consisted, *inter alia*, of a proposal for a Council Decision establishing a Community Action Programme to combat discrimination⁶⁶ and a proposal for a General Framework Directive for Equal Treatment in Employment and Occupation.⁶⁷ This seeks to combat discrimination in seven of the eight grounds specified in article 13. Controversially, a separate proposed directive,⁶⁸ which has since been approved,⁶⁹ covering discrimination

⁵⁸ COM (89) 568 final.

⁵⁹ *Supra*, n. 47 para. 48.

⁶⁰ See Council Decision of 26 November 1990, 91/49/EEC and Council Decision of 24 June 1992, 92/440/EEC.

⁶¹ COM (94) 333 final.

⁶² Chapter VI, para. 27.

⁶³ E. Szyszczak, *EC Labour Law*, European Law Series, Chpt. 1 (Longman, 2000).

⁶⁴ M. Bell, “Equality and diversity: anti-discrimination law after Amsterdam”, in J. Shaw (ed.), *Social law and policy in an evolving European Union* (Hart Publishing, 2000).

⁶⁵ COM (1998) 259 final.

⁶⁶ COM (1999) 567, 25.11.99.

⁶⁷ COM (1999) 565, 25.11.99.

⁶⁸ COM (1999) 566, 25.11.99.

⁶⁹ Adopted by the Council of Ministers on 29 June 2000, and came into force on 19 July 2000. Member States have three years from that date in which to implement the Directive in national law.

on grounds of racial and ethnic origin only, has a stronger and wider level of legal protection than the general, or horizontal directive, which is limited to employment related grounds.⁷⁰

It has been argued that the theoretical underpinning of article 13 appears to be that of guaranteeing fundamental rights, as with the European Court of Justice's approach to existing equality provisions,⁷¹ and has to be considered against the background of the development of an EU Bill of Rights.⁷² In this connection, although the preamble of the draft directive professes that:

the right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and . . . ILO Convention no. 111 prohibits discrimination in the field of employment and occupation,

the general proposed directive diminishes protection in the event of age discrimination in six particular instances. Essentially, article 5 provides that a series of specified different treatment on grounds of age, which amount to direct discrimination shall not in fact constitute direct discrimination, if the treatment is “objectively and reasonably justified by a legitimate aim and are appropriate and necessary to the achievement of that aim”. Some of these specified grounds, such as the fixing of a maximum age for recruitment, are particularly controversial and go to the root of discriminatory behaviour on grounds of age. However, the entire validity of having legislation that makes it unlawful to discriminate on grounds of age is capable of being undermined by the catch all grounds whereby it is not to be directly discriminatory to establish age limits “which are appropriate and necessary to pursue legitimate labour market objectives”.⁷³

Age has thus been treated less favourably as compared with discrimination on grounds of racial or ethnic origin by being relegated to a general directive offering a weaker level of protection. It has also been singled out within the general directive by specifically permitting a range of discriminatory behaviour, the scope of which could prove to be very wide. It is difficult to reconcile this treatment of age with the high moral tone expressed in the preamble of the draft general directive, or with the notion of fundamental rights, since the combined effect would appear to largely extinguish, in so far as older workers are concerned, any rights established by the directive.⁷⁴ It is also difficult to see how such a directive could effectively go any way to satisfying the concerns expressed for social inclusion and the social and economic consequences for the Union of discriminatory employment practices in so far as older workers are concerned. In addition, unanimity is needed for this Directive, something which it is feared will be more difficult to achieve following the removal of race and ethnic origin from the general directive.⁷⁵

The second initiative capable of impacting upon age discrimination and early exit in particular is the European Employment Strategy, known as the “Luxembourg

⁷⁰ See M. Bell, “Article 13 EC: The European Commission's anti-discrimination proposals” (2000) I.L.J., Vol. 29, No. 1, pp. 79-84.

⁷¹ See both *Defrenne v. SABENA III* Case C-149/77, [1978] ECR 1365, paras. 26-27 and *P v. S. and Cornwall County Council* Case C-13/94, [1996] ECR I-2143, para. 19.

⁷² *Supra*, n. 64.

⁷³ See L. Waddington, “Article 13EC: Setting priorities in the proposal for a horizontal employment directive” (2000) I.L.J., Vol. 29, No. 2, pp. 176-181.

⁷⁴ All be it that the Directive contains a new definition of indirect discrimination. *Supra* n. 70.

⁷⁵ *Supra*, n. 70, p. 80.

process". Founded in the Employment Title of the Amsterdam Treaty, Title VIII of the EC Treaty, the strategy is built on four main pillars: employability, entrepreneurship, adaptability and equal opportunities. With the aim of bringing about a significant increase in the employment rate of Europe on a lasting basis,⁷⁶ the Centrepiece of the Strategy is the definition and agreement of annual Employment Guidelines and a country surveillance procedure based on National Action Plans.

In light of the impending demographic changes and the potential problems of financing systems of social protection, including pensions and health and long-term care, adapting to the ageing challenge and reversing the trend towards early retirement has been identified as one of the important issues to be addressed.⁷⁷ Accordingly, Member States were invited to develop measures aimed at maintaining workers' capacities, promoting life-long learning and flexible working arrangements, as well as reviewing tax and benefit schemes to improve incentives to take up job offers and training opportunities, with a view to keeping older workers in employment. Although this is to involve consideration of new forms of gradual retirement and making pension schemes "more sustainable and flexible",⁷⁸ more fundamentally, the Commission has posed the question of later retirement to reflect the increases in longevity.

The extent of early retirement and poor participation can be seen from the Council recommendations on the Member States' National Action Plans,⁷⁹ in which the necessity to increase poor participation levels, extend working life and promote the employment of older workers is reported upon in connection with most Member States. However, that the motivating factor and primary concern in addressing labour market policies in connection with older workers and exploring methods of both reversing the trend towards early exit and extending working lives, is economic and centred upon the ability to sustain social welfare systems is not in doubt. In this connection, it has been pointed out that as the baby-boom generation approaches the age at which it has become common to retire early, the sheer size of this group means that if the Union maintains present early retirement patterns, "it would greatly accentuate the old age dependency rate (and) social security schemes could be overburdened and labour scarcities would be likely to arise in many areas and sectors".⁸⁰

FUTURE PROSPECTS AND PROPOSED DEVELOPMENTS

In a recent consultation document, *The Age Shift*,⁸¹ the Ageing Population Panel, as one of three thematic panels of the *Foresight* programme, points out that the lack of labour market participation amongst older workers has, for both economic and social reasons, become a cause of considerable concern. With the total economic cost to the economy in lost Gross Domestic Product and taxes and extra benefits identified at between £18–21 billion, the conclusions of *Winning the Generation Game* are reached with a view to helping to reverse what is identified as a "damaging trend" in early exit

⁷⁶ The framework for the strategy is set out in the Commission's Communication, *Modernising and Improving Social Protection in the European Union* COM (97) 102.

⁷⁷ See *Social Protection in Europe 1997*, Commission of the European Communities, Directorate General for Employment, Industrial Relations and Social Affairs, April 1998.

⁷⁸ See *Towards a Europe for all Ages – Promoting Prosperity and Intergenerational Solidarity*, COM (1999) 221 final.

⁷⁹ Council Recommendation of 14 February 2000 on the implementation of Member States' employment policies, 2000/164/EC.

⁸⁰ *Ibid.* para. 3.1.

⁸¹ *The Age Shift: a Consultation Document*, URN 00/687 (Ageing Population Panel, *Foresight*, DTI, 2000).

and resulting inactivity.⁸² Since people typically do most of their savings for retirement after the age of 50, and future income from occupational and state pensions rises substantially during this period for people remaining in work, those leaving the labour market early are identified as more likely to need state support during retirement. Additionally, it is identified that unemployment and inactivity lead to poor health, with “considerable future costs to society”.⁸³

To this end *Winning the Generation Game* identifies a vision for a more positive future for older people and points of action that address what are identified as the underlying causes of low labour market participation amongst older people. Most particularly, “perverse incentives” within both private pension schemes and social security provision are identified as encouraging both early departure from the labour force and subsequent inactivity and it is concluded that a neutral framework should be created by the removal of these incentives.

In so far as occupational pensions are concerned a raft of conclusions are reached in the light of the finding that they are associated with lower employment of older people since they present a cost effective option to companies to target older workers when downsizing. In a move that it is indicated “might well have a profound effect in increasing employment among people over 50”, it is concluded that the Inland Revenue should raise the minimum age at which an immediate pension may be paid from age 50 to 55. It is pointed out that age 50 was set as the minimum around 1920 when life expectancy was ten years less than now for both men and women. In addition, referring to a change that has been under consideration for some time, it is concluded that the Revenue should “urgently review” the rules on taking a pension while staying with the same employer, thus aiding flexible retiring arrangements.

A further committee, the Inter-Ministerial Committee on Ageing, set up to co-ordinate government policy on issues relating to older people, is to be responsible for taking forward the various conclusions reached by the PIU in *Winning the Generation Game*. However, frustration has been expressed at the Government’s lack of action and commitment to deal with what has been called endemic ageism in the workplace and the proliferation of “worthy documents, initiatives and committees” on age discrimination.⁸⁴

In this connection, in pursuit of its vision the Government wants to see a “step-change in attitudes” towards and images of older people and their potential contribution. To reverse what is identified as a negative culture, *Winning the Generation Game* commends a package of measures to promote changes in attitudes and practices, Government itself taking a high profile in persuading society, employers and older people themselves that those over 50 have much to contribute. Whilst it is envisaged that cultural change could be achieved through persuasion and guidance and by launching a new campaign for older workers to run in conjunction with promotion of the Code of Practice on age Diversity, it is acknowledged that there is “a strong belief” that a voluntarist approach does not go far enough. In view of this it is concluded that careful consideration should be given to the case for age discrimination legislation, it being made clear that legislation will be introduced if an evaluation of the Code of Practice shows that it has not been effective in bringing about a “clear shift in attitudes and behaviour”.

⁸² Note that the cost is put at some £26 billion in S. Rickard, *A profits warning: macroeconomic costs of ageism* (Employers Forum on Age, 1998). This is calculated by applying average output method to all those currently classed as economically inactive who would be willing and capable of re-entering the workforce.

⁸³ *Supra*, n. 47, para. 3.4.

⁸⁴ R. Worsley, “The age of forgetfulness” (1999) *People Management*, London: Institute of Personnel and Development, 30th June, p.31.

The report recognises that Government can bring about change by setting the standard as employer and that it needs to re-examine its own employment practices to reinforce its vision of the role and value of older people in society. However, just as with private sector employers, the public sector has found adopting downsizing and redundancy strategies involving a combination of age and pensions, to be easy, convenient and generally uncontentious.⁸⁵ In this connection, local authorities, the police and the fire service have all been criticised for extensive use of pension funds to aid early exit.⁸⁶ Most recently, in an announcement that does nothing to aid the spread this new vision, generous pensions packages aimed at police officers, primarily between the age of 45 and 52, are the centrepiece of the proposals for the reorganisation of the Royal Ulster Constabulary.⁸⁷ Nevertheless, in so far as the Civil Service is concerned, steps are to be taken to reintroduce the facility for later retirement by increasing the current very small percentage of staff who remain in work after the normal retiring age of 60, and to look at introducing a degree of flexibility into the working arrangements of the over 50s. It is not, however clear why this is not just to be regarded as a general move to more flexible working under the general heading of “family-friendly” working patterns, except that it has been argued that if older people are permitted to scale down their working hours they are more likely to remain in work.⁸⁸ Of course, if the Revenue were to address the issue of permitting partial draw down of occupational pension when reducing working hours whilst remaining with the same employer, this would make partial participation a more acceptable and realistic option for older workers.

Whilst in the short term the aim is to “blur” the concept of retirement as we now understand it, in the long term one option is to increase in line with the increase in life expectancy, the age of eligibility for state pension. This is now some 10 years higher than in 1948 when State Pension Age was set at 65 years. However, a “more radical change” is mooted both by the Performance and Innovation Unit and the Ageing Population Panel – to abolish the concept of retirement altogether.⁸⁹

CONCLUSION

Current Government initiatives towards older workers, involving, *inter alia*, the voluntary Code of Practice, that seeks to persuade employers of the benefits of age diversity in the workplace, the decision to increase from age 50 to 55 the age at which an occupational pension may be paid, and restricting eligibility to incapacity benefits, do not, it is submitted, address the issue of discriminatory and ageist employment practices. Such practices have, over a protracted period, involved older workers being targeted in redundancy and downsizing exercises, and at as young as age 50 being considered too old at least for the primary, if not for the secondary, labour market. Once out of work older workers find it more difficult than any other group to return to the labour market and can drift into economic inactivity and involuntary retirement.

However, demographic changes are steadily producing an age pyramid that is narrowing at its base, and that will involve skill shortages and economically crippling

⁸⁵ See C. Itzin and C. Phillipson, “*Age Barriers at Work: Maximising the Potential of Mature and Older People*” (Metropolitan Authorities Recruitment Agency, 1993); J. Arrowsmith and A. McGoldrick, *Breaking the Barriers: a Survey of Managers’ Attitudes to Age and Employment*, para. 2.6 and table 9 (Institute of Management, 1996).

⁸⁶ See *Retiring Nature* (Audit Commission, 1997); *Fire Service Pensions Review: a Consultation Document* (Home Office, 1998); *Police Pensions Review: a Consultation Document* (Home Office, 1998).

⁸⁷ *The Times*, July 25 2000, p. 4.

⁸⁸ S. McKay, *Characteristics of Older Workers*, Research Report RR45 (Df/EE, 1998).

⁸⁹ *Supra*, n. 47, para 5.2 and n. 81, p.12.

demands in social and welfare services, and thus costs. There is therefore an imperative for older workers to continue to be retained in and to return to the labour market. Current initiatives to address early exit and ageist employment practices are, it is submitted, both at domestic and European level, being considered from the perspective of the implications of an ageing population for social, pensions and health care costs and the retention of future flexibility, not to say political expediency. In this respect they do not differ from earlier approaches and initiatives and reflect an historic and deeply ingrained ambivalence, not to say schizophrenia, towards older workers in that they fail to address fundamental concerns for the rights and dignity of older workers who have been ejected and excluded from the labour market by ageist employment policies.

What is needed is an overarching approach that is centred on rights, as opposed to economic expediency. This needs to penetrate the minutiae of cross-departmental conflicting laws and practices towards older workers and make stereotyping of, and discrimination against, older workers unlawful in much the same way as the Disability Discrimination Act 1995 aims to do for disabled people. The merits of this approach are that it makes a strong statement of the policy approach towards ageist practices, removes age from the vulnerability of being the unprotected area of discriminatory behaviour and makes it as expensive to discriminate on the basis of age as on any other ground. Retirement would and should then become a decision based on capability and genuine personal choice, as opposed to some predetermined chronological milestone.

At the European level, hopes, which were high in the wake of the inclusion of age in the grounds contained in article 13, appear to have been dashed by the removal and fast-tracking of a separate directive on racial and ethnic origin and by an ambivalent attitude towards age discrimination. *Winning the Generation Game* seems to indicate a willingness to at least consider the legislative route, even though it is less than a year since this was soundly rejected because it was said that there was neither a strong case for nor consensus in favour of legislation.

THE COMMON LAW LEGACY AND ACCESS TO JUSTICE: CONTINGENCY FEES AND THE BIRTH OF CIVIL LEGAL AID

MAUREEN SPENCER*

INTRODUCTION

ONE OF THE KEY DEVELOPMENTS in civil litigation over the last five years has been the marginalisation of civil legal aid as a publicly funded social service. Replacing legal aid in most money claims, conditional fee arrangements (CFAs), long rejected by the common law, are now sanctioned by legislation. Parliament has decided that the funding of civil litigation, whatever the litigant's means, should be left largely to private contractual arrangements between solicitors and clients. This paper examines the history of the common law aversion to conditional fee arrangements and how it influenced the approach of the post-war Labour government which introduced legal aid as part of the Welfare State. It argues that the Attlee Government adopted a piecemeal approach to the introduction of civil legal aid which avoided challenging the long-standing common law prohibition on conditional fee arrangements. The stance on this issue adopted by the post-war Labour Government in the years 1945 to 1950 stunted the theoretical basis of the legal aid scheme, making it that much more vulnerable to later attack.

The current onslaught is a comprehensive one. Legislation is now in place to replace civil legal aid in most money claims with conditional fee arrangements (CFAs).¹ Alongside this legislative sanctioning of conditional fees the courts are beginning to accept that there is no public policy rule against conditional fee agreements. In *Thai Trading Co.(A Firm) v. Taylor*, Millett L.J. held that the earlier common law hostility was based on "the ethos of an earlier age when litigation was regarded as an evil and recourse to law was discouraged". He said this "rings oddly in our ears today when access to justice is regarded as a fundamental human right which ought to be readily available to all".² Such trenchant reasoning was not echoed in *Awwad v. Geraghty & Co.* There a differently constituted Court of Appeal declined to follow the ruling in *Thai Trading* on the grounds that the Court was bound by an earlier decision of the House of Lords that the Solicitors Practice Rules, which prohibited any arrangement to receive a contingency fee, were a form of delegated legislation.³ Malcolm Mears observed that the "difference between the two approaches is that *Geraghty* is narrowly legalistic and out of tune with the legislation of the past ten years. Its arguments for striking down conditional normal fee agreements on public policy grounds might have carried conviction twenty years ago, but hardly today".⁴ However it can only be a matter of time before the House of Lords rules that the *Thai Trading* approach correctly aligns public policy with modern legislation. Thus conditional fees arrangements, whether sanctioned by legislation or the common law, will, so protagonists argue, ease the route to the courts for all irrespective of means.

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¹ See Conditional Fee Agreements Orders 1995, 1998; Access to Justice Act 1999.

² [1998] 2 W.L.R. 893, 897.

³ [2000] 1 All E.R. 608.

⁴ M. Mears, "The Mugging of *Thai Trading*" (2000) 150 N.L.J., 21 January. For further discussion on the implications of the current position on contingency fee arrangements, see P. Kunzlik "Conditional Fees: The Ethical and Organisational Impact on the Bar" (1999) 62 M.L.R. 850 and A. Walters "Contingency Fee Arrangements at Common Law" (2000) 116 L.Q.R. 371.

How has it come about that the edifice of legal aid as a publicly funded social service, one of the major innovations of the post-war Welfare State, has been so comprehensively marginalised? Why is the historic common law hostility to conditional fees now being overruled by Parliament and, albeit more hesitantly, by the courts? Or to ask the question from another angle why did the common law opposition to contingency fees survive for so long? The reasons are many and complex. Michael Zander in his recent Hamlyn Lectures saw rationing and cuts as the motor for the legislative changes and gloomily predicted that many solicitors would “not be in a financial position to advance large numbers of clients the cost of the insurance premium or of the disbursements. Clients with problems for which legal aid is no longer available who cannot get an affordable CFA will be denied access to justice”.⁵ Others such as Kerry Underwood on the other hand welcomed the new developments. Underwood observed that the “British ‘sign a blank cheque’ system of hourly rates rewarding inefficiency and delay has failed its clients and led to the proposed virtual abolition of legal aid in civil litigation”.⁶ More deeply seated reasons for the current shift away from support for public funding however are to be found in the history of civil legal aid itself. One of these is the very cautious way in which the then Labour Government introduced the state-funded scheme in the years after the Second World War. This caution is illustrated in a number of ways, for example the insistence on the private practitioner model, a reluctance to reform the civil court structure, and a failure to extend legal aid to the new administrative tribunals of the welfare state.⁷ There is also another feature which has been somewhat overlooked hitherto. The failure of the architects of the post-war scheme to confront the conservative legacy of the common law in this area had a significant effect on the shaping of the regime first established under the Legal Aid and Advice Act 1949 and in part accounts for its current vulnerability to legislative onslaught.

THE COURTS AND ACCESS TO JUSTICE

A major issue facing welfare reformists in 1945 was the part the state should play in safeguarding individual rights. In England, a long tradition of respect for individual liberty valued rights as primarily a matter of private not public law. A corollary of this was scepticism about the role of the state as a benefactor. But the experience of the Second World War and its extensive programme of war time planning demonstrated to many that the state could act as a force for the public good.⁸ For example, under pressure primarily because of the huge increase in the numbers of divorce applications, the existing charitable civil legal aid procedure reached breaking point. The war-time Coalition Government had introduced a state-sponsored Services Divorce Scheme and this became the catalyst for the eventual launching of the publicly funded scheme by the Attlee Government in 1949. The Legal Aid and Advice Act of that year ranks alongside the National Health Service and the National Insurance Act as a major reform. This increase in state intervention was accompanied at the time by an intense

⁵ *The Times*, 16 November 1999.

⁶ K. Underwood, *No Win No Fee* (C.L.T. 1999) at p. 154.

⁷ See M. Spencer, “The Attlee Government and Civil Legal Aid”. PhD thesis, Middlesex University, 1999.

⁸ There was nothing new in state intervention in itself of course, only its scale increased in the early 1940s. See M. Hill, *The State, Administration and the Individual* (Martin Robertson 1976) at pp 23-24.

debate about the relative roles of legislation and the common law in safeguarding citizens' interests and rights.⁹

In England, Dicey and his followers had accorded the common law primacy in upholding private rights. But such rights were traditionally seen as limited to protection of the individual against excessive state interference. From the end of the nineteenth century collectivists had argued for more protective legislation while individualists placed confidence in reform through the slow accretion of the common law. At issue was not so much the substance of the benefits then being awarded to citizens but the increase in the powers of administrative organs which they necessitated and the consequential marginalising of the traditional courts. The debate on the relative roles of common law and legislation continued throughout the first half of the twentieth century. In the 1940s a body of right-wing thinkers, spearheaded by the Austrian economist Friedrich von Hayek, argued that liberties would be in danger by more state intervention. They advocated a gradual extension of individual claims to welfare through the common law and opposed the post-Second World War plans of reformists.¹⁰ These arguments were never fully confronted by the proponents of state welfare. As Professor Jose Harris points out in relation to national insurance legislation, the welfarists failed to develop a coherent intellectual justification for state funding. This meant that:

The kind of welfare state policies designed in the 1940s were ill-equipped to meet the criticisms either of free marketers or of theoretical socialists or simply of moderate people who dislike paying taxes or who disliked excessive officialdom, when all these groups began gradually to resurface in the years after the war.¹¹

Harris accepts that few people took seriously Hayek's "suggestion that social welfare policies in a mass society could be effectively implemented solely through the common law". However:

The Road to Serfdom did not cause but it coincided with a general disenchantment with organic thought that was already setting in by the end of the war. Serious Welfare State theorists like Barbara Wootton who tried to meet Hayek's arguments were unable to do so: she found herself reluctantly forced back upon mere pragmatic assertions, e.g. that all freedom was relative; that all action was based on inadequate knowledge, therefore planning and public provision were no more inherently irrational than private choice; that sensitive, popular egalitarian planners were inherently different from brutish authoritarian elites.¹²

Timidity about endorsing general principles which might offend traditional thinking is evident also in the failure of the legal aid reformists in the years after the Second World War to address the restrictive legacy of the English common law on the principle of access to justice. Some other jurisdictions by contrast showed a more positive approach to the principle of access to justice. There, access to the courts was a matter for the judiciary rather than the legislature. In such an approach legal aid, for those who could not afford court fees or legal representation, was recognised as a constitutional right. One contemporary writer, for example, applauded the stand taken

⁹ See J. Harris, "Political Ideas and the Debate on State Welfare" in H. Smith (ed.) *War and Social Change in British Society in the Second World War* (Manchester University Press 1987).

¹⁰ See F. A. Hayek, *The Road to Serfdom* (1944), and G. W. Keeton, "The Twilight of the Common Law" *The Nineteenth Century and After*, Vol. CXLV January-June 1949, at pp. 230-238.

¹¹ J. Harris, "Some Aspects of Social Policy in Britain during the Second World War" in W. J. Mommsen (ed.), *The Emergence of the Welfare State in Britain and Germany* (Croom Helm, 1981), at p. 259.

¹² Harris, *op. cit.*, at p. 256.

in Switzerland where article 4 of the Constitution stated that all Swiss were equal before the law. This was made the basis of a declaration by the court that a cantonal provision requiring all persons to pay in advance the expenses of evidence to be taken by the court was unconstitutional.¹³ The author concluded his review of the Swiss approach by commending the courts for enshrining the principle of access to the courts:

The references to the Swiss practice seem sufficient to indicate that requirement of a comprehensive legal aid system by judicial interpretation is not impossible, even if the express language of the constitution offers no greater help to an understanding judiciary than a general statement of the equality of all citizens.¹⁴

By contrast the English legal establishment treated legal aid as a marginal aspect of constitutional law and concentrated on practical voluntary efforts with minimal legislative encroachments, until the flood of applicants meant that volunteers could not cope and legislation became unavoidable. The common law in England did not approach the matter of access to justice as one of abstract principle and demonstrated a narrow perception of the necessary scope of legal assistance to the poor. In fact it has recently been held that the right of access to the courts is part of the common law but this is still a very limited recognition of a right which does not appear to put positive obligations on government to enhance it. Thus in *R. v. Lord Chancellor ex p Witham* the Divisional Court held unlawful a provision in a statutory instrument which repealed the relief from payment of court fees previously given to litigants in person who were in receipt of income support. However Laws J. held, *obiter*, that providing a state subsidy in the form of legal aid was a policy issue and non-reviewable.¹⁵ Thus the proposed current restrictions on the legal aid scheme may well not be in breach of the common law right of access to the courts. The common law's slowness historically to extend the scope of this right can be illustrated firstly in its approach to the pre-existing charitable scheme and secondly to the more complex question of speculative fee arrangements.

The Courts and Poor Persons Procedure

From the late Middle Ages the royal courts had enabled those with assets of no more than £5 (changed to £25 in 1883) to be excused court fees and have assigned to them counsel who would represent them gratuitously. Throughout its existence the courts had made significant restrictions to this voluntary scheme for legal aid to the poor. The scope of both the *in forma pauperis* procedure, as it was known, and from 1914 its successor the Poor Persons Procedure, was partly determined by several judicial decisions. In a number of instances these became more limiting as the procedure itself grew in significance at the end of the nineteenth century. For example, Maguire pointed out that the courts operated "a perfectly Procrustean test of poverty". He cited instances where the means test had been applied harshly and commented: "Grotesque technical perversion of a beneficial doctrine could hardly go further".¹⁶ One important unresolved issue was whether the Poor Persons Procedure was available in the County Courts. In *Cook v. Imperial Tobacco Ltd* in 1922 the Court of Appeal held that the *in forma pauperis* procedure in the High Court was statutory and not a general principle of court practice.¹⁷

¹³ S. B. Jacoby, "Legal Aid to the Poor" (1940) 53 *Harvard Law Review* 940.

¹⁴ *Ibid.*, at p. 944.

¹⁵ [1998] 2 W.L.R. 849. See also *R v. Home Secretary ex parte Leech* (No. 2) [1994] Q.B. 198.

¹⁶ J. M. Maguire "Poverty and Civil Litigation" (1923) 36 *Harvard Law Review* 361, at p. 376.

¹⁷ [1922] 2 K.B. 158.

The procedure was therefore not to be available in the County Court. Such cases illustrate the conservative approach of the judiciary to the problem of legal assistance to pauper litigants and indicate one of the reasons why the voluntary system broke down. The limitations of the common law position, it is suggested, had a negative impact on the Attlee administration in that, although the Government clearly emphasised egalitarian reasons for introducing state funding, there was little discussion of more general principles in policy making. A coherent endorsement of statutory legal aid would have required a review of the weaknesses of the common law. In general there was little acknowledgement of a public interest which did not coincide with the interests of individual litigants or the legal profession. Admittedly there were some expositions of the general objectives on which the legislation was based. For example a Memorandum by the Lord Chancellor, Jowitt, to the Lord President's Committee in 1948 contained the following observation:

The purpose of the scheme is to provide, for the first time in the history of this country, legal assistance for a very substantial proportion of the population. Hitherto the Courts are said to have been open to the very rich or the very poor. Under this scheme no one will be prevented by lack of means from being able to prosecute or defend a just and reasonable claim.¹⁸

However, such rhetoric was very general and saw no new role for legislation on this issue other than providing for greater numbers of citizens the services already available to the better off. The failure to articulate more positively the advantages of legislation over common law made it easier for the state scheme to be truncated even before it was launched, for example by restricting its provisions initially to cases in the High Court, and also for later critics to undermine and even propose dismantling the legislation.

The Common Law and Speculation

A more significant instance of limited judicial acceptance of access to the courts is to be found in the large body of case law concerned with speculative or contingent fees. The history of the doctrine of these fee arrangements has not hitherto been studied in the context of the evolution of legal aid, but I suggest that such an examination illuminates the limited theoretical buttressing of the legal aid scheme.

There is no widely accepted definition of a contingent fee. One of the clearest descriptions given is that by an American writer, MacKinnon, who wrote:

A contingent fee can be defined as a fee for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved by the lawyer's efforts. Its distinguishing characteristic is the negative: if no recovery is obtained for his client, the lawyer is not entitled to a fee.¹⁹

The Attlee administration did not consider the possibility of some form of contingent fee arrangement as a means of increasing access to the courts. One American commentator, Hughes, has suggested that the failure to consider contingent fees as part of legal aid reform in the years 1945–1949 came from a perception of the Bar as an integral part of the welfare state:

The English view with respect to contingent fee contracts has nothing to do with morality, public or private. The simple fact is that there is no need and no place for the contingent fee contract within the complicated structure of statutes which operate to fix and assure

¹⁸ Cabinet Papers in the Public Record Office, PRO CAB132/10. Memorandum by Jowitt on "Legal Aid". July 1948.

¹⁹ A. F. MacKinnon, *Contingent Fees* (Aldine Press, New York, 1964), at p. 3.

the English lawyer's compensation for legal services . . . The high cost of English justice has often been noted in legal literature; the fees awarded are excessive by American standards, particularly when the real purchasing power of the dollar and the English pound is considered. Upon these facts, English 'rejection' of the contingent fee contract today relates to extrinsic considerations deeply involved in their concept of the Bar as an arm of the Welfare State.²⁰

Hughes exaggerates somewhat in picturing the Bar as a welfare service but his observation that the opposition to speculation was not a high moral one is underlined by the history of the common law in this area. In England the use of contingent fees until 1967 could in theory amount to a criminal or civil offence. In addition such fee arrangements were banned by the disciplinary codes of the two branches of the legal profession and also amounted to unenforceable contracts. Two related legal doctrines are involved in the history of opposition to contingent fees. The first is the doctrine of maintenance. This was described by the Law Commission, when it proposed reforming the ancient laws in 1966, as "the giving of assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference". The second doctrine is that of champerty which the Commission described as "a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give to the maintainer a share in the subject-matter or proceeds thereof, if the action succeeds".²¹

These doctrines have their origin in the peculiar state of English society in the twelfth and thirteenth centuries. In the late Middle Ages, England was in an unsettled and lawless state. One of the grievances which produced Wat Tyler's Rebellion in 1381 was oppressions perpetrated by "the outrageous multitude of embraces and maintainers" who, the Commons said, "are as Kings in the country".²² These bands had grown up as recognised retainers of the barons with their own special livery. The maintainers terrorised large parts of the country and intimidated judges, juries and witnesses. In a major study of champerty published in 1936 the American academic Max Radin reviewed the history and rationale of the law. Maintenance was, as Radin put it:

. . . the last flaring up of feudalism. It contained echoes of the system of private war and constituted the last of the attempts of feudal landowners to create within the limits and framework of the regnum, a continuance of the centrifugal tendencies inherent in the feudal theory.²³

Thus the earliest perpetrators of maintenance and champerty were not lawyers but feudal lords forming centres of opposition to the monarch. Eventually strong Tudor government gave local abuse of legal procedures a crushing blow through the channel of the Star Chamber Act 1487. Abuses did continue but now they were predominantly swindles by the growing body of lawyers including those now called "pettifoggers". Statutes reinforcing the common law which had been passed originally to tackle baronial power survived in a new era to deal with new social problems.²⁴ Radin

²⁰ K. B. Hughes, "The Contingent Fee Contract in Massachusetts" (1963) 53(1) *Boston University Law Review* 1-21, at p. 4.

²¹ Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty*, Law Commission Report No. 7, 1966, at p. 3.

²² P. Winfield, *The History of Conspiracy and Abuse of Legal Process*, (Cambridge University Press, 1921), at pp. 155-156; see also E. H. Bodkin, *The Law of Maintenance and Champerty* (Stevens & Sons, 1935).

²³ M. Radin, "Maintenance by Champerty" (1935-6) 24 *California Law Review* 48, at p. 65. Champerty, Radin explained was in origin a type of feudal tenure which consisted of a grant in which the return was a specified quota of the actual produce of the land granted. As this form of land tenure died out the word assumed the metaphorical meaning of part of the profits of a suit and was recognised as a form of maintenance.

²⁴ Radin stresses "clerical opposition to litigation in general" as a powerful factor in this history, *op. cit.* at p. 66.

suggests that the survival of the ban on champerty into the twentieth century was based on “the fundamental distrust of legal procedure and of lawyers, and it became almost specialised as a lawyer’s transgression. The champertors were nearly always lawyers. In England of course nearly all were solicitors”.²⁵

By the twentieth century public policy considerations led to some modifications of the common law position of outright opposition to maintenance. It was accepted that trade unions, trading associations and friendly societies could provide their members with financial assistance in pursuing claims or defences in certain classes of civil actions. In addition, identifiable categories of exceptions had grown up where the law against maintenance was not rigorously applied.²⁶ One of these was its application to poor litigants. Very early in the development of the common law it had been recognised that those unable to pay lawyers’ fees might need assistance. However a key problem was how to deal with the allocation of costs. In contrast to the position in the United States it was, until Lord Woolf’s reforms, the English rule that the losing party paid the costs of the winner. Costs include solicitors’ and barristers’ fees, as well as other expenses of litigation, and could amount to a substantial sum. One of the conventions of English law is that the risk of bearing this substantial expense, if he or she loses, exercises a sobering influence on the would-be litigant. Most of the reported cases on maintenance and champerty involve litigation over awards of costs. There were disputes over whether maintained parties who lost were liable for the other side’s costs and whether, if they won, solicitors could enforce payment from losers. The courts drew a distinction between a situation where the maintained litigant pays only the normal fee if he or she wins and situations where the solicitor arranges for a percentage of the award.²⁷ At an early stage then a series of exceptions to the general rule were cautiously acknowledged, one of these being for poor suitors. By the end of the nineteenth century it was clearly accepted that solicitors could act *pro bono* in cases involving poor litigants.²⁸ The courts were also prepared to go further than this and even countenance speculative actions under certain circumstances. In 1900 in *Ladd v. London Road Car Co.* Lord Russell said:

Law was an expensive luxury, and justice would not often be done if there were no professional men to take up the cases and take the chance of ultimate payment; but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed.²⁹

In another case in the same year the Court of Appeal approved this decision. In *Rich v. Cook* a solicitor acted speculatively for a plaintiff injured by a cab. The Master of the Rolls, Smith, stated that there was no impropriety at all in a solicitor merely conducting a speculative action for otherwise “many poor people would be unable to get their legal rights”.³⁰

²⁵ *Ibid.*, at p.66.

²⁶ E. H. Bodkin, *The Law of Maintenance and Champerty* (Stevens and Sons, 1935), gives a list (at pp. 23-25) of eleven acceptable categories of maintenance, including master and servant, landlord and tenant, insurer and insured and rich man and poor man.

²⁷ See J. Levin, “Solicitors Acting Speculatively and Pro Bono” (1996) 15 C.J.Q. 44. She describes (at p. 47) how the Solicitors Practice Rules 1990 “prevent a solicitor from agreeing with a client to be paid on the basis of both a speculative fee (no win, no fee, but normal fee if the case is won) and contingency fee (no win, no fee, but percentage of winnings or uplifted fee if case won)”.

²⁸ In *Ward v. Proctor* (1891) 7 T.L.R. 144, a solicitor acted without fee for his clerk but the case was lost. In considering modifying an order for costs against the solicitor the Divisional Court said it would only be misconduct for the solicitor to act *pro bono* in “frivolous and vexatious proceedings”.

²⁹ See P. Bodkin, (1955) *op. cit.*, at p. 61, quoting *Ladd v. London Road Car Co.* (1900) L.T. 80.

³⁰ (1900) 110 L.T.J. 94.

Thus speculative actions were acceptable if the solicitor simply agreed to be paid his normal fee if the case was won. He was not taking a percentage of the proceedings. It was also acceptable for a solicitor on a normal retainer simply to retain his costs before handing over the winnings to the client. In effect the ban on speculation was being selectively applied by the courts although the enunciation of general principles was muted and, as the discussion below shows, the question was complicated by the problem of the distinctive common law approach to awards of costs. Despite these limited judicial concessions, legal practitioners remained resolutely opposed to speculation.³¹ It is arguable the opposition of the Law Society to speculation in the early twentieth century was based as much on the need to maintain control over the profession as to meet the threat of undermining standards of propriety. A review of the possible explanations for the failure by government, legal profession or the courts to investigate whether further changes should be made in the light of the common law modifications on speculation requires a review of key issues in the philosophy of litigation.

IDEOLOGICAL AND POLICY OBJECTIONS TO SPECULATION

The prevailing common law position was that litigation was at best a necessary evil and at worst a vice.³² The House of Lords reviewed the law on maintenance in the early twentieth century. In *Neville v. London Express Newspapers Ltd*, Lord Finlay stated that it was “considered that it is against public policy that litigation should be promoted and supported by those who had no concern in it”.³³ But could the unlawfulness of contingent fees be justified in cases where the suit was eventually successful? In such cases presumably justice had been done. In *Neville* Lords Shaw and Phillimore dissented from the majority view of Lords Finlay, Haldane and Atkinson that the law of maintenance covered situations where the maintained action was successful. If the aim was just administration, the minority argued that if the suit succeeded there was no injustice. It is difficult to see what public policy considerations were satisfied by the majority position that successful maintained suits should not have been brought since clearly there was no injustice in the outcome.

A possible paradox developed whereby, although the application of the common law to all citizens is seen as one of the outstanding features of the English state, the courts did not see litigation as a good in itself. This approach was also illustrated in *Alabaster v. Harness* in which Lord Esher expressed doubt about the value of litigation:

The doctrine of maintenance does not appear to me to be founded so much on general principles of right or wrong or of natural justice as upon considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it when unsuccessful.³⁴

³¹ See Solicitors Act 1932, s. 63(1), which made speculation a disciplinary offence.

³² Here the reverberations of the ancient common law offence of barratry, consisting of the repeated stirring up of law suits and quarrels by one who is a stranger to them, should be noted. See Radin, *op. cit.* at p. 67.

³³ [1919] A.C. 368, at 382. The newspaper was sued for the tort of maintenance. The House of Lords held that even though the maintained action was successful an action for unlawful maintenance did lie. In the event no compensation was awarded because the plaintiffs could not prove that they had suffered special damages.

³⁴ [1895] 1 Q.B. 339, at 342.

In *Oram v. Hutt*, Lord Sumner declared: “Whether an act is an act of maintenance or not depends upon its own character, not on the character of the maintainer”.³⁵ Thus the common law position was that even though, as Lord Sumner here acknowledged, the motives of the plaintiffs were “honourable and their wrongs grievous”, they should not have redress since this offended the ban on maintenance. Upholding an ancient principle was more important than extending access to the courts.

The common law position on maintenance and champerty reflected and in turn influenced a concept in English jurisprudence that litigation was not in itself a social good. Radin suggests:

We must remember that the psychological background is the medieval and Christian one in which litigation is at best a necessary evil and litigiousness a vice. This was in direct contrast with the notion of ancient society which determined litigation by its purpose or result. If it was to secure a right it was commendable.³⁶

Judicial reticence about the importance of encouraging litigation is reflected also in departmental and government discussions in the first half of the twentieth century. Admittedly this view was somewhat modified by 1945. In 1944 the Coalition Government had appointed a Departmental Committee chaired by Lord Rushcliffe to prepare for the peacetime legislation which, it was apparent, was acutely needed to deal with the tidal wave of divorce applications. Its Report referred to “the great increase in legislation and the growing complexity of modern life [which] have created a situation in which increasing numbers of people must have recourse to professional legal assistance”.³⁷ This suggested that the potential increase in litigation was anticipated and endorsed by the Government. However there was still considerable reserve about giving official encouragement to litigation, a reserve which echoed historic common law tenets. The test for filtering suits under the Legal Aid and Advice Act 1949, for example, indicates that litigation was not seen as an unqualified public good. Eric Sachs, a member of the Bar Council, who played a large part in the deliberations leading up to the legislation, described the test. It was, he wrote, considered reasonable to grant legal aid if a “man of moderate means (sufficient to afford the costs of litigation but not in a position to waste money) would embark on litigation relying upon his own means”.³⁸ Pollock described the test in similar cautious, individualist terms:

... would the lawyers adjudicating upon the application for legal aid have advised a paying client of their own to pursue the matter? ... The philosophy underlying this test is based on the principle that the person who has to proceed with the benefit of legal aid should be placed in a position neither better nor worse than that of a paying client.

Pollock explained that the Legal Aid and Advice Act resisted test cases: “... to support the case of a person who will gain no sufficient advantage himself simply

³⁵ [1914] Ch. 98, 107. It was maintenance for a trade union to pay the costs of a suit for slander on behalf of one of its officers, even though the union had “common cause” with its officer.

³⁶ Radin, *op. cit.* at p. 68.

³⁷ *Report of the Committee on Legal Aid and Advice in England and Wales*, Cmd 6641, 1945, para.125. This position contrasted with that of the *Final Report of the Finlay Committee*, Cmd 3016, 1928 which stated, at para. 13, “It is undoubtedly desirable to encourage the giving of good legal advice to the poor; it is not desirable, speaking generally, to encourage litigation. There are many cases where, though there may be some violation of a legal right, it is neither prudent nor advisable to litigate, and we believe that any scheme which might tend to make people more litigious should be deprecated”.

³⁸ E. Sachs, *Legal Aid* (Eyre and Spottiswood, 1951), at p. 82.

because the action may achieve a benefit for a class of persons through some clarification or modification in the law is not covered by it".³⁹ This echoed the common law position on representative actions.⁴⁰

The criteria for filtering suits under the 1949 Act thus illustrate the administration's limited acceptance of the social value of litigation, which is derived in part from the common law position on maintenance and champerty. Similar reservations were made by Conservative Members of Parliament in the debates on the legislation and they were not challenged by Labour Members. For example, Quintin Hogg said: "I hope that no one will ever come to think that by the introduction of schemes of this kind litigation can ever be made a good thing. It is in its nature an evil and a concession which we make to the follies and wickedness of mankind. It can never be anything else".⁴¹

Thus one aspect of the English common law position on contingent fees echoed in the Labour Government's legislation was the concept that extensive litigation itself was undesirable, an evidence of the breakdown of social relations. By contrast, the United States academic, Galanter, has attacked the thesis that there has been an unwelcome "explosion of law". He stressed the civil function of litigation:

If litigation marks the assertion of individual will, it is also a reaching out for communal help and affirmation. If some litigation challenges accepted practice it is an instrument for testing the quality of the present consensus. It provides a forum for moving issues from the realm of unilateral power into a realm of public accountability.⁴²

Of course there are a number of explanations why a society should manifest a particular legal culture. It is not suggested that there is a simple or direct relationship between common law jurisprudence and the objectives of the legal aid scheme. However, it is undeniable that the common law tradition, with its specific view of the limited value of litigation and its emphasis on individualism, impacted on the ideology of those who prepared the legal aid legislation. This ideology in part reflected a belief in the capacity of the common law to deal in an evolutionary way with social problems. Thus the emphasis in the legal aid scheme was not on the shortcomings of the substantive law but on devising an administrative framework so that a legal aid client would not be treated significantly differently from a paying one. In a perceptive comment, Green and Green stressed this aspect of the English scheme: "The entire operation of the Scheme is administrative; its function is to determine under what circumstances legal aid funds may be granted". They continued:

The Scheme . . . also represents an attempt to realise a legal ideal – justice requires that people have access to the courts regardless of their financial means. This concept of equality of access to the courts must be distinguished, however, from the broader democratic ideal, that a community ought to afford all of its members the opportunity to accomplish their goals through the existing legal system. The Legal Aid scheme is not primarily intended to realise this broader ideal.⁴³

³⁹ S. Pollock, *Legal Aid: The First Twenty Five Years* (Oyez Press, 1975) at p. 44

⁴⁰ See *Markt. & Co. Ltd. v. Knight Steamship Company Ltd, Sale & Frazar v. Knight Steamship Company Ltd* [1910] 2 K.B. 1021 which took a narrow view of the meaning of "persons having the same interest in one cause or matter". The relevant Rule of the Supreme Court at the time of the Legal Aid and Advice Act 1949 is to be found in "The Annual Practice 1951", Order 16, r. 9.

⁴¹ HC, 1949, vol. 465, col. 1377.

⁴² M. Galanter, "Reading the Landscapes of Disputes. What We Know and Don't Know (and Think We Know) about our Allegedly Contentious and Litigious Society" (1983-4) 31 *UCLA Law Review* 4, at p. 70.

⁴³ A. J. Green and E. S. Green, "The Legal Profession and the Process of Social Change: Legal Services in England and the United States" (1970) 21 *Hastings Law Journal* 563, at pp. 578-9.

This apparent indifference to legal aid as a campaigning mechanism for social reform reflected the implicit confidence of the Attlee administration in the superiority of the common law's individualised concepts.

A second aspect of the theoretical assumptions underlying the approach to contingent fees is the argument that it is undesirable for a lawyer to have a financial stake in the outcome of the litigation. Zander noted that:

Contingent fees were not merely disliked as a way of supporting other people's litigation. They were also associated with speculation as a way of doing business beneath the dignity of professional men. The purchase of an interest in litigation was seen as near to being engaged in trade.⁴⁴

White pointed out the fallacy underlying the conception that speculation is alien to the legal profession:

No longer can it be pretended that fees are mere honoraria for a service to justice. Lawyers are in business and run their practices in the main as businesses. Furthermore the value of the subject-matter of a lawyer's work is always relevant to the fees charged, even though the normal basis of charging is for the work done.⁴⁵

MacKinnon made a penetrating comparison between the history of the professions in the United States and England to explain why contingent fees were acceptable in the former:

The difference may be based upon characteristic and nearly unique attitudes toward the work of a lawyer which arose out of the history of the American profession. Although the pattern of the profession in American colonies was, of course, based on the English system, its organisation was rudimentary and there existed considerable popular resistance to the royal courts and those associated with them. Legal historians point out that for a considerable formative period during most of the nineteenth century the legal profession was affected by the strong anti-professional attitude of the country in general. The concepts of Jacksonian democracy and the frontier spirit and the general mobility in the society brought about a condemnation of traditional professional groups as aristocratic and anti democratic.

He suggested that the decline of professional organisations in America led to the belief that practising law "was essentially a means of earning a living" and contingent fees were acceptable in a profit motivated, commercially oriented society. The rejection of the contingent fee "may reflect historic aversion to the supposed immoralities of commercial life as much as it does a belief that the contingent fee will bring harmful effects upon today's lawyers, clients and courts".⁴⁶

The English legal and political establishment in 1940s Britain was not prepared to disturb the complicated structure of fee arrangements, which might have been threatened if the law on champerty were relaxed. These arrangements primarily aided the established metropolitan lawyers. The judiciary, in upholding the ban on champerty, acted in part to protect the interests of the established solicitors against those who were thought to be less scrupulous. In short, sectional professional considerations controlled the market in law. This approach had been evident throughout the history of legal aid in the twentieth century and was not seriously disturbed by the Labour Government. The Bar showed itself just as intransigent as the

⁴⁴ M. Zander, *Lawyers and the Public Interest. A Study in Restrictive Practices* (Weidenfeld and Nicholson, 1968) at p. 117.

⁴⁵ R. White, "Contingent Fees. A Supplement to Legal Aid?" (1978) 41 M.L.R. 286 at p. 291.

⁴⁶ MacKinnon, *op. cit.*, pp. 14-15.

solicitors. This is not surprising in view of the professional rules which governed the barrister's financial arrangements with his client. These, as MacKinnon expressed it, were based on two principles:

One, that the barrister should be insulated from almost all direct dealings with the client, in order to eliminate as far as possible all danger that the barrister's professional judgement and action might be affected by the client's personal situation, and two, that the amount of the fee should be set without regard to the outcome of the litigation in order to eliminate any possible effect of this contingency on the barrister's conduct.

He commented that the whole concept of the contingent fee is foreign to the barrister's fee arrangement.⁴⁷ This is illustrated historically by the practice of the profession. For example the Bar trenchantly took up the issue of percentage fees in the discussion in the High Court about the revision of the Poor Person Rules between 1908 and 1910. These proposed changes, based partly on the system prevailing in Scotland, would have allowed some payment of expenses out of any award in the litigation. A Bar Council memorandum objecting to the new Rules notes that if they were adopted they would lead to an "immense increase in pauper litigation". Also there would be: "... a strong inducement to the bringing of doubtful and speculative actions by persons who if successful obtain payment of their full costs, if unsuccessful are under no liability to pay court fees, fees to counsel or solicitor or the costs of the successful opponent".⁴⁸

The proposed Rules would have allowed the ordering by the court of a payment to the solicitor and barrister out of the proceeds, so long as such an amount did not exceed one quarter of the amount recovered.⁴⁹ The Bar and the legal profession mounted a ferocious opposition.⁵⁰ The Executive Committee of the Bar also protested in very strong terms:

It is a primary rule – not merely of Bar Etiquette but of bar morality that no barrister shall have by agreement or otherwise a pecuniary interest in the result of his professional services; and payment by results, in whatever form it may be disguised, has always been and still is absolutely prohibited by the unwritten but often declared laws of the Profession.⁵¹

One problem, as the Bar saw it, was that the somewhat casual training of younger barristers would be affected. A note in the Bar Council archives complains that the proposed changes would be inimical to the Junior Bar.⁵² Pupils did not need such close supervision if they worked without fee. In the event the Government reached a compromise, which was to regulate the Poor Persons Procedure until 1950. Judges were given discretion to award fees in Poor Persons cases amounting to up to a quarter of any award to solicitors but not to counsel. However there was little rational substance in the argument that contingency fees encouraged commercialism. This objection to contingent fees was arguably illogical since it was clearly absurd to claim that lawyers had no pecuniary interest in their cases. For example, it was always acceptable that payment could be deferred until the end of the litigation. A solicitor could have a lien on any award until his bill was paid. Atiyah goes so far as to suggest that since this

⁴⁷ *Ibid.* pp. 10-11.

⁴⁸ Bar Council Archives. Folder, entitled "Legal Aid for the Poor". Memorandum dated 1 January 1910.

⁴⁹ See Lord Chancellor's Departmental Papers in the Public Record Office, PRO LCO2/249, 250, 252, 320, 322, 390. These files include papers on the proposed revision of the Rules.

⁵⁰ PRO LCO2/252. Channell to MacKenzie, 23 July 1910.

⁵¹ *Ibid.* Memorandum prepared by the Executive Committee of the General Council of the Bar Re Proposed New Rules dealing with Proceedings by and against Poor Persons. December 1910.

⁵² Bar Council Archives, Memorandum by Coldstream, 27 October 1906.

was allowed, in practice the ban on contingent fees had a very marginal effect. Lawyers were not prohibited under the common law from arranging to have fees in personal injury cases paid from recovery:

These differences in fee practices may appear relatively unimportant because the reality is that the accident victim with the reasonable case should be able to find a lawyer with equal ease in America and England. Nonetheless the differences do appear to be very considerable though it is not easy to explain exactly why.⁵³

He suggested that one reason may be that since contingent fees were officially frowned upon would-be litigants were not informed sufficiently about the possibility of deferred payment. Whatever the rationale the revulsion against contingent fees was associated with the view that commercialism and professional status were not good bedfellows. It was the more patrician profession, the Bar, which was the most fervent advocate of this view. In fact the Bar was sceptical about the need for reform of legal aid at all. Thus, in a letter to the Rushcliffe Committee, it was somewhat complacent about the existing procedure: “(1) The Poor Persons Procedure within the limits laid down by Order, as amended from time to time, has worked smoothly from the point of view of the Bar, and been administered so far as the Bar is concerned without breakdown”.⁵⁴ It was more concerned to condemn abuse by allegedly poor litigants, pointing out: “(7) From time to time it has appeared to counsel that the litigant alleging poverty was by no means as indigent as the information laid before the Poor Persons Committee led to suppose, and many counsel could give instance of this abuse of the procedure”.⁵⁵

The Bar clearly viewed the issue of legal aid as a peripheral one, and this was in part due to fear of encouraging commercialism. As the scheme was being prepared however the earlier indifference receded as barristers saw new financial possibilities opening up. Thus Sachs observed that the scheme might well provide the means whereby young men, in the chillier world of the Welfare State, no longer able to rely on private incomes, would be able to remain at the Bar.⁵⁶

Ambulance Chasers and Legal Aid Societies

Perhaps the most striking aspect of attitudes to contingency fees is what they revealed about perceptions of the legal professions. In recent times the opposition to such fees has stemmed from the legal profession not the general public. Of more pressing public concern has been the high cost of litigation in general rather than a specific form of fee structure.⁵⁷ Part of the explanation for the survival in 1945 of the English ban on contingency fees was the governments's acceptance of the more prosperous lawyers'

⁵³ P. Atiyah, "Tort Law and Alternatives. Some Anglo American Comparisons" (1987) *Duke Law Journal* 1002, at p. 1017.

⁵⁴ PRO LCO2/3899 Letter from E. A. Godson, Secretary General Council of the Bar to Secretary of the Legal Aid Committee, 21 June 1944.

⁵⁵ *Ibid.*

⁵⁶ Bar Council Archives Vol. XXII Correspondence, Bar Council Meeting on Legal Aid, 20 September 1950. See also Brooks, *Pettifoggers and Vipers of the Commonwealth* (Cambridge University Press 1986), for an interesting historical account of the origins of the Bar's association with the aristocracy and gentry and its avoidance of central control. He writes (at p. 268): "The reason why more effective controls over the upper branch were never instituted is that the idea of the *prudentes*, and the association of barristers with academics which had become nurseries of the aristocracy and gentry, made it appear largely unnecessary. As late as the 1930s, this notion left the barristers one of the most inadequately trained and regulated occupations in England. Nevertheless, many parts of this Renaissance ideal of a profession – payment of honoraria, autonomy, and liberal learning – are the essence of what professionalism is supposed to mean today".

⁵⁷ Radin, *op. cit.*, amusingly points out (at p. 66): "Whether mediaeval champerty was felt by people in general to be a serious menace is doubtful. Certainly it plays a minute part in the indictment constantly repeated against the lawyers by laymen. That indictment enumerates venality, treachery, falsehood, oppression and indifference to justice among its counts. The large fees of lawyers are attacked, which must be paid whether the case is lost or won, not the readiness of lawyers to speculate on whether they will get a fee or not".

condemnation of so-called ambulance chasers or touts. This condemnation was derived from a division of interest in the professions between those who wanted to maintain the preserve of the more established wealthier sections and those who were prepared to engage in lower level speculative ventures often with less salubrious clients. "Legal Aid" organisations had grown up in England and America particularly in the wake of the industrialisation of the nineteenth century, when the scope for suits arising out of accidents at work, in public transport or in leisure pursuits increased. The phenomenon has been more fully described in the United States context:

... with the advent of steam and the vast variety of machines for its application to the service of mankind came a multitude of casualties. This resulted in ... a class of litigants whose litigation theretofore had only involved controversies in small transactions ... calling for the services of inexpensive lawyers. In the new era ... the poor man found himself pitted against corporations entrenched in wealth and power ... this resulted in a great crop of litigation by the poor.⁵⁸

The legality of these societies in England presented a difficult question. A legal aid society not formed for profit but acting from charitable motives was lawful.⁵⁹ It would not be liable to an action for maintenance. Also a legal aid society formed for profit was probably not liable for a civil action for maintenance if it merely acted as an intermediary between the client and a solicitor who was willing to conduct cases for less than his ordinary costs, or on terms that he was to be paid such costs only in the event of success and the solicitor was in fact independent of the society. However the Courts often took contradictory positions on such societies. In *Grasmoor Colliery Co. v. Workmans Legal Friendly Society*, a society which consisted of one man, the secretary, undertook the pursuit of workmen's compensation claims.⁶⁰ Membership, obtained for one penny per annum, secured for the member legal advice and legal assistance in the case of injury by accident, on condition that 20 *per cent* of the money received was paid to the secretary. The practice was to hand over the case to one of eight solicitors who worked for the society with whom the secretary had an arrangement whereby if he thought the case was strong enough and the man deserving he should take it up. There was a clear understanding that the secretary would not pay costs. The Derby County Court held that the secretary was the "cause" of the proceedings and that the defendants (he and the Society) were guilty of maintenance and champerty.⁶¹ A solicitor was not allowed to act for a legal aid society upon the terms that he was to receive a percentage of the value of the property recovered or any share or interest therein, whether in lieu of or in addition to his proper costs. This was so whether the payment was made through the society or directly by the client to whom he was introduced by it. Such an arrangement was champerty and professional misconduct. Thus in *Re a Solicitor* a solicitor was party to the formation and incorporation of a trade protection and debt collecting society.⁶² He solicited business without in the first place disclosing the company's existence. He received, through the company, a commission upon the sums recovered in litigation and out of pocket expenses sanctioned by the members, in addition to any costs recovered from the other side. If the litigation failed he received out-of-pocket expenses only. The arrangement was held

⁵⁸ Proceedings of NY State Bar Association 1908, p. 99, quoted in Friedman and Ladinsky, "Social Change and the Law of Industrial Accidents" (1967) 67 *Columbia Law Review* 50.

⁵⁹ See *Harris v. Brisco* (1886) 17 Q.B.D. 504.

⁶⁰ (1912) 1 L.J. 92.

⁶¹ Bodkin, *op. cit.*, at p. 56 considers that this case was wrongly decided. Leave to appeal was granted but not exercised.

⁶² [1912] 1 K.B. 302.

to be champertous. The court of first instance did not consider what connection a solicitor may lawfully have with a bona fide society of this nature which was not purely designed for his sole advantage.

In *Danzev v. Metropolitan Bank of England and Wales* a solicitor obtained a speculative case through a workman's friendly legal aid society.⁶³ He agreed with the client to act for him in consideration of receiving in lieu of costs 25 *per cent* of the amount recovered if the proceedings succeeded. If they failed he would receive nothing. In the King's Bench Division the agreement was held illegal at common law and the solicitor was ordered to pay the defendants' costs. These cases illustrate that enhanced or percentage fees were clearly champertous. The reasoning for the latter position seems to have been much influenced by the actions of apparently unscrupulous fringe lawyers and quasi lawyers. Instead of differentiating between these and bona fide lawyers the courts made all speculative activities unlawful. Nonetheless it appears that the practice flourished. For example, the report of the Birmingham Registrar to Master Mackenzie on the operation of the new Poor Persons Rules in 1914 stated:

It appears . . . that there is practically no demand for these facilities to enable poor persons to prosecute legitimate claims in contract or in tort. This of course we were already well aware of as a large number of actions for damages are brought in the County Court on behalf of persons who are without any tangible assets whilst at the Assizes people in very humble positions are able to prosecute the most trumpety claims in libel, slander and wrongful dismissal. There appears to be no difficulty in obtaining legal gentlemen to finance such cases.⁶⁴

The hostility of the courts to such activities found echoes in the press. Thus *The Times* in 1912 published a letter from Sir John Collie, a surgeon who had a professional interest in accident cases. He complained about a "serious evil". This was the action of solicitors whose sole business was that of inducing injured employees to make speculative claims for damages. It is clear that Collie was worried that workers might be encouraged to malingering:

Although employers of labour know how to treat these parasites, the ignorant working man doesn't; he is insidiously taught to set a commercial value upon his misfortune, and to think more of what the unearned increment may be than of how soon he will return to duty.⁶⁵

Such disdain for speculative solicitors was part of defining the legal profession. Sugarman has described how the Law Society played an important role in this period in the social construction of "legal professionalism":

'Sham lawyers', arbitration, tribunals of commerce, 'ambulance chasers' and legal aid societies become counterposed against, and were rendered oppositional to, what we now understand as the norm . . . the evidence suggests that the Society reflected and reinforced notions that certain kinds of lawyers' work (such as that undertaken on behalf of the poor and working classes) was culturally and morally inferior to other forms of lawyers' work.⁶⁶

The history of legal aid has been influenced by the desire of the legal professions, particularly the solicitors, to control what were seen as disreputable elements in their ranks. There appears to have been no acknowledgement that the legal aid societies in

⁶³ (1912) 28 T.L.R. 327

⁶⁴ PRO LCO 2/322. Registrar, Birmingham, to Mackenzie 27 August 1914.

⁶⁵ *The Times*, 27 December 1912.

⁶⁶ D. Sugarman, "Bourgeois collectivism, professional power and the boundaries of the State. The private and public life of the Law Society, 1825 to 1914" (1996) 3 (1/2) *International Journal of the Legal Profession* 81, at p. 120.

some ways were serving the needs of the poor. A few legal commentators at the time had seen value in the work of speculative solicitors. Thus for example Jackson commented:

Solicitors who act for insurance companies are always concerned to stop the practices of speculative solicitors. One curious result of this is a tendency to speak as if acting for insurance companies is respectable and acting against them is reprehensible. There is a good deal of snobbery in this matter. Some speculative solicitors are a menace to their clients as well as to insurers, and a close watch should be kept on their practices. Yet it is as incontestable that many an injured man who would otherwise have gone without a remedy has been able to obtain justice because a speculative solicitor conducted his case.⁶⁷

As Abel Smith and Stevens also point out: "Whatever the Law Society may have felt about the legality of these activities, the desirability of touting and the loss of business to solicitors who conducted their practices in the more traditional way, it was clear that speculative solicitors were meeting a real social need".⁶⁸

There was no discussion in government circles on whether such suits could be in any way a supplement to legal aid. This indifference arose from an uncritical, if unstated, acceptance of the professional, economic and social values of solicitors, barristers and the Judiciary rather than from a positive preference for state funding. Auerbach has commented in detail on the American position where, although contingent fees were eventually legal, this only came about in the teeth of opposition from establishment lawyers. Such fees were subject to tighter control than fees in general. He argues that any limit upon contingent fees primarily promoted the financial interests of corporations in avoiding settlements with accident victims.⁶⁹ It could be said that by attacking the character of the lawyers who engaged in such fee agreements the legal profession drew attention away from the iniquities of a system which reduced accident compensation to a lottery. Auerbach notes that by "attributing responsibility to inferior character lawyers deflected criticism from a social system which accepted uncompensated injury and death to a substantial number of workers as a tolerable consequence of economic growth and private profit".⁷⁰ He points out that nothing was said about company claim agents who visited hospitalised workers to urge quick and inexpensive settlements. He accepted that contingent fees had some undesirable consequences but they were arguably preferable to being unable to take a suit at all.

But if the American legal establishment was eventually prepared to give support, albeit grudging, to contingent fees, official opinion in England was far less forthcoming. Thus the Finlay Committee reporting to the Lord Chancellor's Department on legal aid societies in 1928 commented: "It is most desirable that the poor should as far as possible be protected from societies such as these. The Law Society is fully alive to the gravity of the evil and is most anxious to check it".⁷¹ The pervasive influence of the fear of speculation was evident in the preparations for the 1949 legislation. For example, the Law Society objected to the Rushcliffe Committee proposals on County

⁶⁷ R. M. Jackson, *The Machinery of Justice in England* (Cambridge 1940), at p. 258.

⁶⁸ B. Abel Smith and R. Stevens, *Lawyers and the Courts* (Heinemann, 1967), at p. 139.

⁶⁹ J. S. Auerbach, *Unequal Justice. Lawyers and Social Change in Modern America* (Oxford University Press, N.Y., 1976) at p. 49. A recent study by K. Dornstein, *Accidentally on Purpose, the Making of a Personal Injury Underworld in America* (St Martin's Press, New York, 1997) powerfully argues that to great extent American establishment lawyers' opposition to contingent fees was based on antisemitism. Many of the lawyers who engaged in such arrangements were recent German Jewish immigrants.

⁷⁰ *Ibid.*, at p. 48. For an alternative view of "ambulance chasers" see A. Cockrill, "The Shyster Lawyer" (1911-1912) 21 *Yale Law Journal* 383.

⁷¹ *Final Report of Committee on Legal Aid for the Poor*, Cmd 3016, para. 11.

Court fees: "... where the claim is for a named amount the solicitor shall not be paid for costs an amount exceeding, in the case of a defendant, half the amount claimed, or in the case of a successful plaintiff, half the amount recovered ...".⁷²

The Law Society thought this would result in:

- (a) solicitors financing their clients, where the amount claimed or recovered was 'insufficient to permit reasonable costs to be paid'; (b) introducing speculation, as the solicitor would only be paid by results; and (c) anomalies between the plaintiff's and the defendants' solicitors.⁷³

Because of such objections those particular proposals were dropped.

Thus by 1949 the ideological orthodoxy prevailed that speculation was undesirable. Market alternatives or other accompaniments to state funding were not contemplated. A corollary of this was that concentration on negotiations with the Law Society tended to lead the government to marginalise the interests and activities of the wider body of solicitors. Pluralism in this context had the effect that the Society acted as mediator between the government and its membership. Arguably this meant the variety of sub groups within the profession had less contact with Government and their interests were overshadowed.⁷⁴

THE COMMON LAW AND LEGISLATIVE COMPROMISES

The Attlee administration further demonstrated some ideological confusion by engaging in a number of compromises in the 1949 statute. Some of these measures, strictly speaking, offended against principles which the ban on contingent fees was meant to uphold. One such arose out of the complex question of awards of costs as between parties. In the United States the acceptance of contingent fees was less contentious because it was not the practice of the courts to make the losing side pay the winner's costs. Indeed a key difficulty concerning contingent fees in England was that they could not be accommodated within the context of the indemnity approach to costs. In *Harold v. Smith* the Court of Exchequer established that costs as between party and party form an indemnity to the person entitled to them. The loser paid the winner's costs but only if a solicitor and client had agreed beforehand that fees would be paid.⁷⁵ The indemnity principle meant that if the maintained plaintiff won but there had been no agreement on costs the court could not award costs against the loser. Accordingly a client whose solicitor had agreed not to charge him costs was not entitled to recover any from the other side. In *Gundry v. Sainsbury* the Court of Appeal held that such a practice "would have been giving a bonus to the party receiving them. That is contrary to justice and common sense and also to the law as laid down in *Harold v. Smith*".⁷⁶ A related problem was whether the pro bono or speculative solicitor should be liable for the other side's costs if his party lost. It appeared, although the law was somewhat

⁷² Cmd 6641 para. 171 (25).

⁷³ PRO LCO2/4625 Legal Aid and Advice Bill. Notes on Part 1, p. 6, undated.

⁷⁴ See K. Reichstein, "Ambulance chasing" in 13(1) *Social Problems* 3-15, a sociological examination of the control of deviant activities in the legal profession in the United States.

⁷⁵ (1860) 5 H. & N. 381. This case established that "costs as between party and party" are given by law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.

⁷⁶ [1910] 1 K.B. 645. In *Gundry* the client was a labourer suing for injuries suffered from the bite of a dog. He stated that he could not pay costs and that he had arranged with his solicitor not to pay the costs of the action. The case illustrated the harsh application of the indemnity principle, which was primarily meant to deal with situations where a winning party attempts to recover from his opponent more than the fee he had agreed with his solicitor.

unclear, that where solicitors acted *pro bono* or speculatively for poor suitors they were held liable for the successful defendants costs only if the litigation was frivolous or without foundation. In *Warren v. London Road Car Co* in 1907, the plaintiff's solicitor was sued by the successful defendants for costs as the plaintiff was a man of straw.⁷⁷ The Court of first instance held that there was nothing wrong or illegal in taking up such a speculative action so long as the solicitor took reasonable care to assure himself that the plaintiff had a case fit to be brought. An order for costs would not be fair in this case. Thus the common law was moving towards some modifications to the position on costs for poor litigants which, if carried further, would have allowed one major objection to contingent fees to be overcome.

The failure by the Attlee Government to consider contingent fees is the more notable in that in the statutory scheme it was prepared to make adjustments to principle on the question of costs. Awards of costs posed serious difficulties for the administration. The system under the Poor Persons Procedure was that there was no awards of costs and the poor suitor paid no court fees.⁷⁸ In evidence to the Rushcliffe committee, the Law Society proposed that the amount of costs recovered from the unsuccessful assisted litigant should be limited to such amount as the Judge directed.⁷⁹ This proposal was adopted in the Report.⁸⁰ Thus an amended version of the indemnity principle was proposed and this was incorporated in the legislation. The issue of costs awards, however, stirred up some controversy. Lord Chancellor Jowitt was initially opposed to the Rushcliffe proposals on this, believing they would cause great hardship to successful defendants of cases brought by Assisted Persons.⁸¹ Alternatives were discussed, including whether to make the assisted person pay the full costs if his circumstances changed or for the state to pay full costs but, as officials of the Lord Chancellor's Department pointed out, in the latter case, "the increased cost to the Public would make this suggestion impossible to carry out".⁸²

Thus the administration was faced with resolving the conflict between two alternatives, State funding of the costs of both parties, or the convention that "costs follow the event" based on the common law. It decided that costs should be awarded against the assisted litigant at the Court's discretion.⁸³ This proposal led to the paradoxical position of the Conservatives in the House of Commons demanding increased state funding of costs for the successful unassisted litigant. Hogg pointed out: "By virtue of the Bill we are nationalising maintenance on a gigantic scale. We are making matters a great deal worse by ensuring that one party may well have to pay – and in a great many cases will have to pay – a substantial sum towards his own costs in establishing his just rights".⁸⁴ Hogg and Joynson Hicks could see no objection in principle to state funding for these costs. Joynson Hicks pointed out the illogicalities in the government's position: "Everyone in this country is entitled to a health service at the expense of the taxpayer and the proposal made by [Hogg] is entirely analogous and would enable substantially everyone to obtain, up to a certain limit, legal aid at the expense of the taxpayer".⁸⁵

⁷⁷ (1907) 52 Sol. J. 13.

⁷⁸ See Cmd 6641, p. 36.

⁷⁹ PRO LCO2/3900. Summary of Evidence.

⁸⁰ Cmd 6641 at paras. 172-3.

⁸¹ PRO LCO2/4621. Notes of meeting in Lord Chancellor's Room, dated 5 June 1947.

⁸² PRO LCO2/4621. Thesiger to Napier, 7 May 1947.

⁸³ This was finally changed in Legal Aid Act 1964.

⁸⁴ HC, 1949, vol. 465, col. 1347.

⁸⁵ *Ibid.*, col. 1350.

These contradictions on the position on costs arose from the difficulty of adapting common law practices to the new scheme. The declared aim was the fair one of putting both parties in the same position, but in practice this produced some illogicalities.⁸⁶

CONCLUSION

The Attlee Government, in instituting the civil legal aid scheme, called into question a number of ancient and cherished tenets about the financing of suits. However, although it made pragmatic adjustments to these, it did not go further and review the theoretical basis of the ban on contingent fees. It is not suggested here that the case either for or against such fees is irrefutable, simply that its failure to consider the issue at all is an example of the partial and piecemeal approach of the Labour Government to the very complex question of the financing of civil suits for citizens of limited means. Contingent fees do have undesirable consequences.⁸⁷ The English common law did not at that time endorse the overriding importance of access to the courts so as to allow an unambiguous acceptance of contingent fees for suitors who found recourse to the courts beyond their means. It did however make a number of inroads into the original position of outright opposition to champerty and maintenance but the post-war Labour Government failed to assess the implications of these and present a theoretically coherent justification for state funding in the light of such developments. Dominated as it was by the issue of divorce, the post-war administration's approach to legal aid was that the procedures, albeit expensive, then available to the private client fee paying should be transposed to all those "of moderate means". No consideration was given to alternative or parallel sources of funding other than from state revenue. But as Zuckerman has suggested in relation to the spiralling cost of legal aid: "It would be absurd to say that we are entitled to the best possible legal procedure, however expensive, when we cannot lay a credible claim to the best possible health service or to the best possible transport system".⁸⁸ He observed that: "... when the legal aid system was introduced, hardly any consideration was given to the possibility that the injection of a massive subsidy into the purchase of legal services will combine with existing inflationary factors to produce a tremendous upward pressure on costs".⁸⁹

From its very inception the legal aid scheme did not explore fully the theoretical content and implications of access to the courts. Its attitude to the common law position on contingency fees indicated both an ideological acceptance of a practice which owed more to historical legacies than present day realities or logic and a ready attachment to the professional and social power of the Bench, Bar and Law Society. The legacy of the common law encouraged the perception of litigation as a protector of private needs not as a social good. The Attlee Government tacitly endorsed the common law position on speculative fees partly because it accorded well with the

⁸⁶ It is interesting on this point to note that in relation to court fees it was accepted that these should be paid by all parties. In practice, of course, for the assisted litigant this was simply an accounting issue. The Rushcliffe Report (para. 38) stated that its aim was that assisted litigants "should be in all respects placed in the same position as those who are able fully to pay the costs involved. They should not be segregated into a separate category in the record of the courts and they should pay, or rather have paid for them, the ordinary court fees".

⁸⁷ See for example on the United States situation D. de Keiffer, "Contingent Justice", (1993) N.L.J. August 20, p. 1223. He argues that the belief that contingent fee arrangements "give access to justice for poor folk who would otherwise be denied any compensation" is "horsefeathers". He adds "attorneys who accept contingent – or conditional – fee cases do not do so for altruistic motives. They do it because they believe the cases are so strong that there is little chance that they will not be paid. And if the case is that strong, why take the case at twice the ordinary fee? Some altruism".

⁸⁸ A. Zuckerman, "Reform of Civil Procedure: Rationing Procedure rather than Access to Justice" (1995) 22 *Journal of Law and Society* 155, at p. 160.

⁸⁹ *Ibid.*, at p. 157.

interests of the more established sections of the professionals who were eager to administer the new state scheme. It is arguable that if the Labour Government had taken a more trenchant and integrated approach to issues of principle at a time when the legitimacy of state funding was widely accepted it would have provided a sounder, stabler foundation for the civil legal aid scheme. There might even have been the possibility of instituting a scheme which endorsed a limited use of contingency fees alongside Treasury funding. The somewhat shaky conceptual foundation of legal aid in the early years of the Welfare State made the scheme all the more open to the cuts it now faces at a time when the prevailing orthodoxy is antipathy to state funding.

CASE NOTES

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

STAYING CONTACT IN A NON-CONVENTION COUNTRY – THE MIRROR ORDER

Re K (Removal from Jurisdiction: Practice)

[1999] 3 F.C.R. 673 (C.A.) (Thorpe L.J. and Sir Oliver Popplewell)

INTRODUCTION

The modern phenomena of transnational and transcultural marriages, coupled with the increase in separation and divorce, has produced a variety of problems that the legislature and courts have had to address. When a marriage has broken down, the courts often have to decide issues such as which parent is to have physical custody of the child to the marriage and also the extent to which the non-custodial parent may have contact with that child. In the case of transnational marriages this is all the more difficult since each parent often wishes to live in a different country. Parental disagreement over these issues has produced an increase in international child abduction,¹ as the aggrieved parent attempts to overturn the court's decision by unilaterally removing the child to another country. The international community has responded to this increase by putting in place international conventions, the most significant of which is the Hague Convention on the Civil Aspects of International Child Abduction.² This convention attempts to stem the increase in child abduction by ensuring that decisions concerning custody of the child are taken in the country of the child's habitual residence.³ However, the safeguards of the Hague Convention cannot be invoked where the country to which the child has been taken is not a party to that Convention.⁴ The most notable group of countries who have not become contracting states to the convention are the Islamic countries.

Long after custody and contact have been decided, courts are also called upon to give leave for the child to be removed from the jurisdiction for the purposes of a holiday abroad. Applications come before the court from both the custodial parent and the non-custodial parent. This is often so the children can visit grandparents, cousins,

¹ See generally, Elisa Pérez Vera, *Explanatory Report to the Hague Convention on the Civil Aspects of International Child Abduction*.

² Given effect in English law by the Child Abduction and Custody Act 1985, which also gives effect to the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children. For a detailed account of the Hague Convention, see Beaumont & McEleavy, *The Hague Convention on International Child Abduction* (Oxford University Press, 1999).

³ Hague Convention, arts. 3 and 12.

⁴ To date there are 62 Contracting States.

etc., and also keep in touch with the other culture and traditions to which they are connected. In a lot of cases it will be the non-custodial parent applying for staying contact in the foreign country; but equally it could be the custodial parent applying for leave to take the children out of the jurisdiction where this has been prohibited under the terms of the custody order.⁵

If the parent wishes to take the children to a Contracting State to the Hague Convention, then there is a certain amount of assurance that the child will be returned, either by the parent or by the courts of that state applying the provisions of the Hague Convention. However, if the parent wishes to take the children to a non-Contracting State, the English court either must put in place whatever safeguards it can, or consider refusing the order.⁶

THE FACTS

The case of *Re K (Removal from Jurisdiction: Practice)* concerned a father with a residence order who applied to take his child to Bangladesh on holiday. The father undertook to return the child at the end of the holiday and the judge in the Family Division of the High Court granted the application. The mother appealed, and the Court of Appeal overturned the order, Thorpe L.J. insisting that the decision was not designed to prevent the child from visiting Bangladesh but to make sure certain safeguards were put in place prior to the child's departure. He stated:

[w]here the consequence of breach would be the irretrievable separation of the child from previous roots, then in my opinion it is for the court to achieve what security it can for the child by building in all practical safeguards;⁷ [and]

... to preclude the possibility of competitive litigation within two systems, reflecting different traditions and cultures, it is desirable to confine the risk of competitive litigation by putting in place, wherever possible, whatever buttresses can be devised ...⁸

One of the buttresses, or safeguards, suggested by the judge was for the father to apply for a mirror order to be issued by the courts of Bangladesh confirming that the father would return the child to England at the end of the fixed holiday period.

MIRROR ORDERS AS A SAFEGUARD

The use of mirror orders to safeguard against child abduction is not uncommon,⁹ although there is very little authority from which judicial guidance can be extracted.¹⁰ Prior to *Re K*, only two cases have been reported in which a mirror order was required before the child could be taken to a non-Convention country: *Re A (Security for Return to Jurisdiction) (Note)*¹¹ and *Re T (Staying Contact in Non-Convention Country)*.¹²

⁵ The term custody order is still used in international terminology although such an order is called a Residence Order in England and Wales.

⁶ Cf. the judgment of Singer J. in *Re P (A Child) (Mirror Orders)* [2000] 1 F.L.R. 435.

⁷ [1999] 3 F.C.R. 673, at 676.

⁸ [1999] 3 F.C.R. 673, at 676.

⁹ See Singer J. in *Re P (A Child) (Mirror Orders)* [2000] 1 F.L.R. 435, at 439.

¹⁰ Thorpe L.J. in *Re K (Removal from Jurisdiction: Practice)* [1999] 3 F.C.R. 673, at 675.

¹¹ [1999] 2 F.L.R. 1, F.D.

¹² [1999] 1 F.L.R. 262, F.D.

The earlier case, *Re A*, was decided in July 1996 but did not reach the law reports until 1999. In *Re A* the child was living with her Saudi Arabian mother in England but also had substantial contact with her father, who was opposed to the child being taken to Saudi Arabia by the mother for a holiday. Wall J. stated that he believed the mother had every intention of bringing the child back to England after the holiday, but continued: "... [h]owever much the court trusted the mother, it would proceed with caution when dealing with a society whose culture, religion and social structure were profoundly different, and which was not a signatory to the Hague Convention."¹³

He ordered that the mother swear an oath on the Quran in the presence of an Islamic official in London, and that the maternal father and brother both swear a solemn declaration on the Quran before a Sharia judge in Saudi Arabia, that the child would be returned at the end of the holiday.¹⁴ Once these declarations were in place, the mother was given permission to take the child to Saudi Arabia for a holiday; and the child was duly returned at the end of one calendar month.

Subsequently, in December 1997, an Egyptian father applied for holiday staying contact with his child in Egypt. The case of *Re T* contained a history of child abduction by the Egyptian father, the child being returned following an application by the English mother under the Hague Convention when the father and child visited the USA for a holiday. Hughes J. granted the father holiday staying contact in Egypt, subject to the father and paternal grandparents entering into a notarised agreement backed by a Cairo court mirror order to return the child to England at the end of the holiday. The father was also required to enter into a £50,000 bond to guarantee the child's return. At the end of a three week holiday, the child was brought back to England.

In light of the use of mirror orders in such cases, the mother in *Re K* appealed against the decision of the judge at first instance to allow the father to take the child to Bangladesh relying solely on his word that he would bring the child back.

COMMENT

Although the father in *Re K* was the custodial parent with a settled life in England, and although the child would have been bitterly disappointed at not going on the holiday for which his father had already bought tickets, the Court of Appeal was not prepared to allow the child to be taken to an Islamic country without the safeguards of a mirror order granted by the Bangladesh court. Had the father previously acquired such a mirror order, it is to be presumed from the tone of the judgment that the court would have had no objection to granting leave. The question we should ask, therefore, is how much difference does the mirror order make?

English courts are understandably nervous about allowing a child to travel to an Islamic jurisdiction in these circumstances. Although both western and Islamic laws decide cases concerning children based on the welfare of the child, the concept of welfare differs greatly between the two worlds. The English court will consider the merits of the case based on the paramountcy of the welfare of the child,¹⁵ using the checklist as guidance.¹⁶ On the other hand, Islamic law, although similarly based on

¹³ [1999] 2 F.L.R. 1.

¹⁴ The grandfather's declaration is reproduced: [1999] 2 F.L.R. 1, at 3.

¹⁵ Children Act 1989, s.1(1).

¹⁶ Children Act 1989, s.1(3).

the welfare of the child, is very prescriptive about which parent should have physical custody of the child, depending on the age and gender of the child amongst other factors.¹⁷

The acceptance of the mirror order by the English court appears to be saying that, if the Moslem parent agrees to return the child to England and if that agreement is ratified by the foreign court or a representative of the foreign judiciary, then the English court is content that satisfactory safeguards have been put in place to prevent the child being retained in the foreign jurisdiction. To extend judicial comity to all Islamic jurisdictions in this way is to misunderstand (a) their diversity, and (b) the overwhelming power of the teachings of the Quran. There is not room in a case note of this size to explore the issue of whether each of the Islamic bodies referred to in the above cases actually have jurisdiction to grant such a mirror order; nor is there room to examine questions of where such orders will subsequently be enforced. Suffice to say, in some Islamic jurisdictions,¹⁸ if a Moslem father agreed to return a boy of school age to the custody of the non-Moslem English mother, that agreement would not necessarily be upheld by a court of law. On application by any interested party, such as the child's grandparents, the foreign court would most likely refuse to return the child based on the fact that the father has a duty to bring up the child himself and that he had erred in agreeing the return in the first place.¹⁹

The case of *Re K* itself is not symptomatic of the underlying concern regarding the use of mirror orders. Here the father was the custodial parent with a settled lifestyle in the UK. Moreover, the author does not mean to suggest that judicial comity should not be extended to Bangladesh. This note simply voices the concern that English courts should not presume that foreign courts, or their representatives, have the judicial authority to grant such orders, nor that such orders will be subsequently enforced. Unless a thorough disposition of the appropriate laws applicable in the foreign country is entered in evidence, the author suggests that English courts should be aware that mirror orders may not provide the protection that is intended where that mirror order is being sought from a non-Convention country. In so saying, it is interesting to note the recently reported case of *Re P (A Child: Mirror Orders)*,²⁰ where it is arguable that the English court lacked jurisdiction to grant a mirror order requested from a court in the USA. If it is possible that the English High Court's jurisdiction is questionable where the child is not present in England and Wales at the time of the application,²¹ then, *a fortiori*, the English court should not assume automatic jurisdiction and enforcement by the foreign court. It is submitted that the possibility should be canvassed that the mirror order could easily be disregarded once the child is in the foreign jurisdiction and, as in the case of *Re T*, the imposition of further safeguards should be explored.

KISCH BEEVERS*

¹⁷ See, for example, Ziba Mir-Hosseini, *Marriage on Trial, A Study of Islamic Family Law* (I.B. Tauris, 1993).

¹⁸ Iran, for example: Iranian Civil Code, Articles 1168-1174.

¹⁹ Iranian Civil Code, Article 1174.

²⁰ [2000] 1 F.L.R. 435.

²¹ Family Law Act 1986, ss. 1(1)(d) and 2(3).

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THE HUMAN RIGHTS ACT 1998 AND DETERMINING PATERNITY

Re O & J (Paternity: Blood Tests)

[2000] 1 F.L.R. 418 (Fam. Div.) (Wall J.)

The case of *Re O and J (minors)* from January this year once more raises the following questions: who is a child's parent – someone with a biological tie, or an emotional role? What right does a child have to know her parent? And what right does a biological parent have to be recognised as a parent? Wall J.'s dissatisfaction with his own ruling, that the person with care and control of a child has the absolute right to refuse to a blood sample being taken from that child for the purposes of determining paternity, re-ignites the debate about whether it can be said always to be in the interests of a child to know her biological parents, placed within the context of the Human Rights Act 1998.

THE BACKGROUND

In proceedings in the county court, Mr A and Mr G obtained orders under section 20 of the Family Law Reform Act 1969 for the use of blood tests to determine the paternity of children E and J respectively. Where a child is born to an unmarried mother, there is no presumption of paternity. Section 20(1) provides that:

In any civil proceedings in which the parentage of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for the taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two, of those persons ...¹

Section 21 details the consents necessary:

(1) Subject to the provisions of subsections (3) and (4) of this section, a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from this person except with his consent ...

(3) A blood sample may be taken from a person under the age of sixteen years if the person who has care and control of him consents ...

Section 23 concerns a failure to comply with a direction for blood tests:

(1) Where a court gives a direction under section 20 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from the facts as appear proper in the circumstances ...

(3) Where any person named in a direction under section 20 of this Act fails to consent to the taking of a blood sample from himself or from any person named in the direction of whom he has the care and control, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.

¹ The amendments to s. 20(1) effected by the Family Law Reform Act 1987, with references to "scientific tests" and "bodily sample," have not been implemented.

The mothers of the children, each of whom had sole parental responsibility and care and control of her child, refused to consent to the child's blood being tested. On transferral to the High Court, Wall J. identified the following issues for consideration: (1) Does s.21 of the 1969 Act give the person with care and control of the child the absolute right to refuse to allow a blood sample to be taken from the child for the purposes of determining paternity? (2) Does the statutory scheme under Part III of the 1969 Act oust the inherent jurisdiction of the court to order that a blood sample be taken from a child? (3) Was *Re R (Blood Tests: Constraint)*² correctly decided?

Section 21 of the 1969 Act

With regard to whether the person with care and control of the child has the absolute right to prevent a blood sample being taken from a child under sixteen, Wall J. held that sub-section 21(3) must be read together with sub-section 21(1). The judge decided that the principle *expressio unis est exclusio alterius* – the expression of one specific thing is the exclusion of the other – required the “may” in sub-section 21(3) to be construed as “may only”. He accepted the argument of counsel for Ms O that where an Act of Parliament contains a specific excepting provision, it is to be presumed that this is the only exception of the kind intended. The sole exception is that a sample may be taken from a child under 16 without the child's consent, but only if the person who has care and control of the child consents on the child's behalf. This interpretation of the Act gives the person with care and control of the child under the age of 16 the unqualified right to refuse a blood sample being taken from that child for the determination of paternity.

Part III of the 1969 Act and the Inherent Jurisdiction of the Court

Counsel for Mr A submitted that in treatment cases, the court has overridden a parental refusal of necessary treatment for a child. She proposed that the duty owed by a parent to her child surpasses medical treatment and extends to an over-arching duty to act in the interests of the child, which is itself subject to the court's discretion if not exercised or exercised improperly. To refuse a blood test with the object of discovering paternity is to act against the interests of the child. Counsel for Mr G argued that a blood test to determine paternity could be considered treatment – a proposition which Wall J. declined to accept.

Even if, however, an exercise of the inherent jurisdiction would permit a court to order a blood test to determine paternity, the question remained as to whether the inherent jurisdiction of the court to order the testing of children's blood is abrogated by Part III of the 1969 Act. Counsel for Ms O argued that the plain intention of Parliament had been to codify legal rights and remedies with regard to scientific discovery of paternity. To apply the correct principles of statutory construction was to be led ineluctably to the corollary that prior, inconsistent case law had been overridden, and the inherent jurisdiction suppressed. In addition, the fact that the Act had specified the procedure in section 23 in the event of a failure to comply with a direction, resulted in the presumption that other procedures are excluded. Wall J's response to the question of whether Part III of the Act had ousted the inherent jurisdiction was also positive. An Act of Parliament may oust, regulate or fetter the exercise of the *parens patriae* jurisdiction, as he had recognised previously in *Re C (Detention: Medical Treatment)*.³

² [1998] 1 F.L.R. 745.

³ [1997] 2 F.L.R. 180.

*Was Re R (Blood Tests: Constraint)*⁴ *Correctly Decided?*

The Court considered that the direction of Hale J. (as she then was) in *Re R (A Minor) (Blood Tests: Constraint)*⁵ to order blood tests in the face of parental opposition must have arisen from one of two possible grounds: either the 1969 Act gave the court the power to facilitate the execution of the direction under section 20(1), or the court had exercised its inherent jurisdiction. The order given by Hale J. delivering the child to the “care and control” of the Official Solicitor was felt to have connotations equivalent to a section 8 residence order under the Children Act 1989. It being impossible to make a residence order in relation to a child in favour of the Official Solicitor, any temporary order into his care and control (if possible) must derive from the inherent jurisdiction. Wall J. viewed either of these options as illegitimate because of their goal of evading the plain language of section 23(1), and reluctantly felt himself bound to disagree with Hale J.

Other Bodily Samples and the Children Act 1989

The possibility of the use of the inherent jurisdiction to obtain other bodily samples such as hair roots and saliva, which could then be subjected to DNA testing, was considered, and rejected as an inappropriate subvention of the statutory scheme.

Wall J. also considered the possibility of making a direction for a report by a local authority under section 37 of the Children Act and then an interim care order pursuant to section 38(1), which would bestow on the local authority parental responsibility for the child, and enable a consent to be given on the child’s behalf. Section 38(2) clearly states that a court shall not make an interim care order unless it is satisfied that there are reasonable grounds for believing that the section 31(2) checklist is satisfied. In particular, the child must be suffering, or be likely to suffer, significant harm, attributable to the care given to the child, such care not being what it would be reasonable to expect a parent to give to him. An interim order made solely to obtain blood tests was viewed with disfavour as an abuse of process.

Wall J.’s Conclusion as to the Court’s Jurisdiction

Wall J. concluded that the court had no jurisdiction to compel either of the mothers in the instant case to give their consent to the samples being taken.⁶ His dissatisfaction with this was evident, as he quoted from his judgment in *Re CB*:⁷

I recognise the situation which results from my decision is unsatisfactory, since it permits a litigant whose conduct may be open to criticism, and who may not be acting in the best interests of the child, effectively to dictate what should or should not happen, but that, it seems to me, follows inevitably from the terms of section 21 of the Family Law Reform Act 1969, and if the matter is to be reformed, it is for Parliament to reform it.⁸

Wall J. anticipated that reform would be prompted by Part III’s non-compliance with the Human Rights Act 1998.

Re O and J raises a number of interesting points, not least in its departure from *Re R*.⁹ As Wall J.’s ruling was consistent with previous case law, excepting *Re R*,¹⁰ it is

⁴ [1998] 1 F.L.R. 745.

⁵ [1998] Fam. 66.

⁶ The possibility was not discounted of the court ordering a transfer of the care and control of the child to a “genuine alternative carer” who could consent on the child’s behalf. It is not clear what the court means by this – perhaps Wall J. had in mind a father with parental responsibility.

⁷ [1994] 2 F.L.R. 762.

⁸ *Ibid.*, at 774A.

⁹ See also the case report by C. Bridge, “Paternity: *Re O and J* (Paternity: Blood Tests)” [2000] Fam. Law 324-5.

¹⁰ See the cases discussed below, which agreed that a court may direct blood tests, but not order them.

assumed that the question of the possibility of enforcement of a direction for blood tests has been settled. The issue of whether Wall J.'s hope of a remedy in the Human Rights Act 1998 for men in the unfortunate position of Mr A and Mr G is well-founded, is one to which I will now turn.

THE HUMAN RIGHTS ACT 1998

It is anticipated that the Human Rights Act 1998 will alter signally the interpretation and application of domestic law prior to and post its implementation on the 2nd October 2000, including of course, the Family Law Reform Act 1969. Section 3 of the Human Rights Act requires that, so far as is possible, all legislation must be read and given effect in a way compatible with the European Convention on Human Rights. It is unclear to what extent interpretative gymnastics will be the order of the day, but as this requirement is mandatory, one would expect all but the most unyielding provisions to be so interpreted.¹¹ When a court or tribunal is determining a question which has arisen in connection with a Convention right, it must take into account Strasbourg jurisprudence (section 2). Section 6(1) of the Act requires courts (as public authorities) to act in compliance with the Convention unless they are prevented from doing so by statute. If an act is clearly contrary to the Convention, the Human Rights Act will not permit the Convention to override primary legislation (section 3(2)(b) and (c)). Incompatible acts must be given effect. Higher courts will have the power to issue a "declaration of incompatibility" (section 4), and Parliament can legislate on a fast-track procedure to remedy this (section 10 and schedule 2).

The Convention should be interpreted purposively to give effect to the protection of individual human rights.¹² This is a marked deviation from much UK statutory interpretation. These rights are intended to be practical and effective, not theoretical and illusory.¹³ Moreover, as a "living instrument", the Convention must be interpreted in the light of present day conditions,¹⁴ and a more recent case is likely to be more authoritative than an older case. Precedent should not be rigidly adhered to.

How likely, then, is the Human Rights Act to provide a remedy for the unproved father? Section 2 creates an obligation on the courts to protect the individual from a violation of her rights by public bodies (such as the courts) or other individuals. Do the relevant sections of the Family Law Reform Act 1969 violate an unrecognised father's rights? In particular, is the court's inability to enforce a direction for blood tests a violation of his rights?

Section 20(1) of the 1969 Act provides that: "... the court may, on an application by any party to the proceedings, give a direction for the use of blood tests ..." The subsection is permissive, rather than mandatory. If not to direct blood tests would be to violate a person's rights, then the court would be required by section 3 of the Human Rights Act to resolve their discretion in a direction for blood tests.

In the event of a failure to comply with a direction for blood tests, section 23(1) of the 1969 Act permits the court to draw such inferences (if any) from the facts as appear

¹¹ J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (Blackstone Press, 1999) at p. 28: "... the courts are under an express statutory duty to interpret legislation so as to accord with the purpose of the Convention if this is at all possible, even if this results in a strained rather than a literal meaning being selected from a range of possible interpretations, or the reading in of additional words so as to give effect to the presumed intended effect of the Convention."

¹² *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439.

¹³ *Marckx v. Belgium* (1979) 2 E.H.R.R. 330.

¹⁴ *Tyrer v. United Kingdom* (1978) 2 E.H.R.R. 1.

proper in the circumstances. If there is a breach of a person's Convention rights in the case of a blood test direction not being enforced, then section 23(1) must either be interpreted so as to enforce a direction, or the section must be declared incompatible under section 4 of the Human Rights Act, and the remedy left in the executive's hands. Men such as Mr A and Mr G might find themselves left in the cold for a little longer.

Let us assume for the moment that section 23(1) *can* be interpreted as enforceable, or if it cannot, that it has been remedied. Will article 8.1 of the European Convention on Human Rights, the right to respect for one's private and family life, be thus upheld? What of section 21, which requires that consent is necessary for a blood sample? Those of 16 or over may consent on their own behalf, but the consent of a person with care and control is required in the case of a child under 16. The right to a private life would seem to apply to protect a person from the taking of a blood sample against her (or, in the case of those under 16, the person with care and control's) will.

Situations such as in *Re O and J* are not merely a matter of the enforcement of a man's right to have his paternity proven and recognised; they are particular instantiations of the complex possibilities resulting from the interrelationships of those with competing rights. Will the unproved father's claims prevail over those of the child and the mother to a private and (emotional) family life? Will the right of a child to a (biological) family life assist her against the man who claims he is not her father, and relies on his right to a private life? Will a child, or someone on her behalf, be able to force disclosure of her biological paternity from her mother, by exercise of her right to family life?

The only possible resolution of conflicting claims is in a hierarchical structure of rights. Are any of these claims superior in the hierarchy, or do all have equal weight? There is one vital matter which must not be overlooked: in adjudication, it must be ensured that all rights of equal worth remain equal, despite contingent inequalities in the rights-holder, such as age or gender. The adjudication of competing rights is dependent on a clear understanding of the substance of the rights themselves, yet this issue is one which seems not yet to have been addressed directly by the domestic courts or the European Court of Human Rights: is the concept of parenthood biological or emotional, psychological and social?

DOMESTIC CASE LAW: THE COURTS' INTERPRETATION OF "PARENTHOOD"

The case law itself does not give a definitive response to the question of the concept of parenthood. The courts have not favoured consistently one particular conception. It could be argued, particularly since the 1996 decision in *Re H*,¹⁵ that there has been increasing emphasis on biological parenthood, but the cases need not be interpreted in this way.

With the exception of *Re H*, all of the cases that recognised the necessity of blood tests to determine whether the husband or partner was the biological father concerned unstable family units, where the relationship between the two adults had broken down. In these situations, it becomes more pressing to discover biological fact, even if there exist strong emotional ties between the father and the child he claims. In fact, the last two cases of this group, *Re R* and *Re O and J*, concerned situations where an emotional father did not exist at all.

¹⁵ [1996] 4 All E.R. 28. See the discussion at n. 21, *infra*.

In *S v. S; W v. Official Solicitor*¹⁶ the House of Lords held unanimously that the court should make a blood test direction unless it can be shown to be against the child's interests to do so (exercising the House's protective, not custodial, jurisdiction). The appeal was dismissed in S's case and allowed in W's.¹⁷ The assumption of the court (see e.g. Lord Morris, at 121) is that if the child is found to be not the biological child of the couple, then there will be no emotional relationship between husband and child. Implicit is the supposition that if a blood test is not performed, the husband's suspicion will prevent him from becoming emotionally attached. Conversely, if the husband is found to be the father, the assumption is that some emotional relationship will develop between husband and child. Whether this assumption holds good is a moot point.

In *Re G (A Minor) (Blood Test)*,¹⁸ a child was conceived during a time which was disputed by the parties as being before or after their separation. The mother's new partner, who had begun a relationship with the mother after she left the husband, believed that he was the father of the child, who was 5 months old at the date of the judgment. The mother and partner intended to marry, although present circumstances prevented their cohabitation. The husband and *his* mother believed that *he* was the child's biological father. The husband's mother and the husband applied for contact, and the husband applied for directions for a blood test, to which the mother refused to consent. The court applied the principles derived from *S v. S; W v. Official Solicitor*, noting that the interests of justice would normally require that available evidence would not be suppressed and that the truth be ascertained where and whenever possible, even though the interests of justice may conflict with the interests of the child. If nothing were done, then the husband would have parental responsibility under the presumption of legitimacy. It was not in the interests of the child to leave her paternity unresolved. The case was distinguished from *Re F*,¹⁹ where to order blood tests would be to intrude on a happy marriage. The mother and partner in this case wished to make their life together, but this should not be done on the basis of a belief which they wish to be true but is not in fact. The child's long-term interests are served by her knowing the truth. A direction for blood tests was granted.

The mother and the petitioner in *Re G (Parentage: Blood Sample)*²⁰ were cohabiting, and the child S was conceived at a time when the mother was having a brief relationship with another man. Cohabitation was resumed and the mother and petitioner married, then separated over two years later. Initially, the petitioner retained care and control of the child. The mother brought proceedings for interim custody, and at this point asserted that the petitioner was not the father. No blood tests were directed. After a divorce was obtained, the mother, who by now had care and control of the child, attempted to curtail contact between the petitioner and S. The mother obtained a direction for blood tests, but the petitioner refused, on the basis that although he was virtually certain he was the father, if blood tests showed he was not, the mother would use this to break the bond between himself and the child. The judge then declared that the petitioner was the father of the child, on the ground that he could not be satisfied that sexual intercourse had not taken place at the relevant time, that the mother had not raised the issue of paternity for two and a half years, and that

¹⁶ [1970] 3 All E.R. 107.

¹⁷ The result was that blood tests were directed in both cases where the husband claimed the child was not his own.

¹⁸ [1994] 1 F.L.R. 495.

¹⁹ [1993] Fam. 315. See the discussion at n. 26, *infra*.

²⁰ [1997] 1 F.L.R. 360.

she appeared to accept that the baby was the petitioner's by the birth certificate, divorce papers, and demand for maintenance. The mother appealed. The Court of Appeal allowed the appeal. It held that the judge had misdirected himself when he failed to draw the inference that the petitioner was not the father when the father resisted the test. Another direction for blood tests was made, and paternity should be determined, but the result of the paternity judgment would not impinge upon the issue of contact, having regard to the psychological attachment existing between the child and the petitioner.

The facts of *Re R (A Minor) (Blood Tests: Constraint)*²¹ are sparse, but it appears that the mother was a single parent. Hale J. did not merely accede to the applicant's request that blood tests be directed, but *ordered* that the child should be delivered into the care and control of the Official Solicitor in order that blood tests be taken, notwithstanding that the mother, who had had sole parental responsibility and care and control of the child since birth, had refused her consent. Hale J. asserted bluntly that it was clear that it was in the best interests of the child that her paternity be determined, if at all possible. She then considered various means of achieving her aim notwithstanding the prohibition on constraint without consent in section 21(3) of the Family Law Reform Act 1969, and thought it was possible to enforce tests either from the court's power under the 1969 Act to facilitate a sub-section 20(1) direction, or by an exercise of the inherent jurisdiction. Equally, Wall J. in *Re O and J* and *Re CB* appears to have assumed that the plausible possibility of biological parentage gives the moral right to be apprised of the fact. He was in favour of a direction for blood tests in cases of disputed paternity.

The exception to this pattern is *Re H (A Minor) (Blood Tests: Parental Rights)*.²² In this case, a woman gave birth to a son, H, whose birth was registered in her husband's name. At the time of the applications the marriage was still continuing, and the husband cared for the child. However, at the time of H's conception, the mother had been having sex with both the applicant and with her husband, who had had a vasectomy four years previously. The affair ended before H was born, and he was brought up as a child of the family. The applicant, believing himself to be the natural father, applied for contact and parental responsibility orders, and for DNA testing to establish paternity. These applications were opposed by the mother, who refused to consent to blood tests. The judge thought that if paternity were established, the chances of a contact order were remote, and the mother's hostility was a factor to be weighed. Nevertheless, he directed blood tests because the applicant would pursue the issue. The mother appealed. The Court of Appeal dismissed the appeal, holding that it was in the child's interests to establish paternity with certainty. The court was not persuaded that there was such a similarity between this case and *Re F*, discussed below, as to compel the same conclusion.

A number of factors undoubtedly influenced the outcome of the case. The vasectomy probably was successful even though the husband had not returned for a second test to confirm this. Additionally, the mother had intended to separate from her husband and live with her lover. She clearly believed, while pregnant, that her husband was not the father, because she told her 13-year-old son that the child she was expecting had a father other than her husband. The notable circumstance was the vasectomy four years prior to the child's conception. It was not a 50:50 chance of the husband

²¹ [1998] Fam. 66.

²² [1996] 4 All E.R. 28.

being the biological father: it was a mere minimal chance. The court thought that it would be wrong to ignore this very high probability that the husband was not the father.

All the cases that seemed to prefer an emotional conception of fatherhood, where blood tests were not directed, did so where the child had been brought up as a child of the family for a substantial time, and in most cases the adults' relationship continued despite the doubt over paternity. Although the courts refused to order blood tests where it was thought to be against the child's interests, there was recognition, for example in *O v. L*²³ (see below), that at some point it *would* be necessary to define the family relationships accurately according to biology.

In *Re JS (A Minor) (Declaration of Paternity)*,²⁴ the mother had had an affair, but the child had been brought up as her long-term partner's child. In the Court of Appeal, Ormrod L.J. stated:

With hindsight it is now clear that it was unnecessary to consider the biological parentage of this child in order to reach a conclusion about access, which was the only live issue. The child is securely based in a two-parent family with the mother and Mr R, who fully accepts his role as *de facto* father, with the knowledge of the doubt of his being a biological father. The plaintiff is, to all intents and purposes, a stranger to the child. To allow the paternity issue to disturb this settled relationship was, in our view, an undoubted mistake . . .²⁵

In *Re F (A Minor) (Blood Tests: Parental Rights)*,²⁶ a woman gave birth to a daughter, E, conceived at a time when she was having sex with both her husband and her lover, B. The affair ended before the child's birth. The child was brought up as a child of the family by the wife and husband, and the applicant had no contact. The applicant applied for parental responsibility and contact orders, under sections 4(1)(a) and 10 of the Children Act 1989, believing he was the natural father. The case was dismissed at first instance because the orders were unlikely to be made. Even if the application were successful, any declaration of paternity would not be more than theoretical, the potential benefit of which would be outweighed by the risk of disruption to the child's family unit. B appealed. The Court of Appeal dismissed the appeal. B submitted that it was in the child's best interest to have her natural father determined with such a degree of certainty as scientific tests can provide. He argued that her interests should not be subordinated to those of Mr and Mrs F. Balcombe L.J. stated:

This may well be true, but now and for the first few years of her life E's physical and emotional welfare are inextricably bound up with the welfare of the family unit of which she forms a part: any harm to the welfare of that unit, as might be caused by an order for the taking of blood tests, would inevitably be damaging to E.²⁷

*O v. L (Blood Tests)*²⁸ concerned a child, V, who had been born in December 1990. The mother and husband separated in 1993. Until the separation V was brought up by both mother and husband on the basis that the husband was V's father. The mother then declared that V's father was someone with whom she had been having a sexual relationship since the beginning of 1990, and with whom she had been living since

²³ [1995] 2 F.L.R. 930.

²⁴ [1981] Fam. 22.

²⁵ *Ibid.*, at 29-30.

²⁶ [1993] Fam. 315.

²⁷ *Ibid.*, at 320.

²⁸ See n. 23, *supra*.

September 1993. The husband sought contact with the child. The mother applied for a direction under sub-section 20(1) of the Family Law Reform Act 1969 for blood samples to determine V's paternity. In refusing the application, Wall J. accepted that the fact that the husband had only been told he was not V's father when V was three years old meant that blood tests which might show that the husband was *not* the child's father were of considerable moment, and not to be undertaken lightly. He found that the mother's motivation in seeking a blood test was to prevent contact between the husband and V. It was not thought necessary for the precise nature of the relationship between husband and child to be defined by blood tests in order for contact between them to be fostered. Wall J. did add that the time would come sooner rather than later when it would be in V's interests to have her paternity resolved, so that all relationships could be properly defined. He hoped that the mother would realise that continuing contact with the (now ex-) husband, irrespective of the biological fact, would be likely to be in V's interests. The Court of Appeal dismissed the mother's appeal.

*K v. M (Paternity: Contact)*²⁹ is a case with similarities to *Re JS*. The child, E, was born thirteen years into a marriage. E was conceived at the same time as the wife had been having a sexual relationship with a colleague. The ex-lover sought a direction for blood tests for the determination of paternity, and a contact order. The mother remained with the husband and opposed both applications. The ex-lover withdrew the application for a blood tests direction, because he was advised it would be unlikely to succeed, but still asserted paternity and sought contact, saying he would be important to E if the marriage broke down. Johnson J. held, dismissing the application, that notwithstanding the suggestion of future contingencies, it was unnecessary to consider the biological parentage of E in order to reach a conclusion about contact, which was the only live issue.

It could be argued that in these cases, the courts are *not* making a principled stand for any particular conception of parenthood. Rather, they make a pragmatic decision to fit the circumstances of the particular case. If the child has been brought up, for a significant period of time, on the assumption that her mother's husband is the father, and this marriage continues despite the question mark over the child's parentage, then the court has refused to disturb this unit by ordering tests, at least for the time being. The courts have favoured deep and enduring emotional ties in the above cases, refusing to direct blood tests where to do so would be detrimental to the existing family unit of mother, father and child. Families in a fragile state, or where new relationships had been forged, have been more likely to experience intervention.

On this analysis, single parent families have been pigeon-holed as "unstable" families. Whether single mothers have been viewed in a prejudicial light, or whether it has been felt that a known father (albeit one disruptive to extant relationships) is better than none at all, is unclear. Contrary to this view, it seems at least arguable – unless a child is to have concrete rights to know both biological parents, and vice versa – that a single parent with a child *is* a stable family unit, and to order blood tests in the face of a single mother's opposition is also to risk destabilising the family unit. The question must be asked whether it is illogical and inconsistent to distinguish between single- and two-parent families in the way seen in *Re R* and *Re O and J*. If it *was* right to suppress biological facts in *Re JS*, *Re F*, *O v. L* and *K v. M*, then it may well have been right to do so in *Re R* and *Re O and J*. This last point, however, is one of consistency, and the question of which conception (no pun intended) is to be preferred has not been resolved by domestic case law.

²⁹ [1996] 1 F.L.R. 312.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 8.1 of the ECHR provides that: “Everyone has the right to respect for his private and family life . . .” However, what is the “family life” referred to here? It is entirely plausible that this encompasses parenthood, but if so, the same problem arises that we have encountered before: “family life” must be interpreted, and it is possible to conceive of Article 8.1 as a right to know and have contact with one’s biological family, *or* as the right to know (and perhaps know only) one’s psychological family, *or* as a mixture of both.

The jurisprudence of the European Court of Human Rights and the Commission does not lead ineluctably to one exclusive conception of parenthood. *Keegan v. Ireland*,³⁰ emphasised that more informal relationships, such as cohabitation, are on the same footing as marriage when determining family life. As the Court noted:

... the notion of “the family” in [article 8.1] is not confined solely to marriage-based relationships and may encompass other *de facto* ‘family’ ties where the parties are living together outside of marriage. A child born out of such a relationship is *ipso iure* part of that ‘family’ from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended . . .³¹

However, it remains unclear how much importance the Court placed on the biological fact of parenthood, as opposed to the relationship between the mother and the natural father and their decision to conceive.

*Kroon v. Netherlands*³² concerned the parental status of the man of a cohabiting couple who had a child together. The woman was still married to another man, and under Dutch law, her husband was the child’s father in law unless he denied paternity. Holding that the law in question amounted to a breach of article 8, the Court stated that “‘respect’ for ‘family life’ requires that biological and social reality should prevail over legal presumption”.³³ This pronouncement is unhelpful for adjudication between rival conceptions, as the Court did not recognise the possibility of the biological and social reality being embodied in two distinct persons. It is possible that a party could employ the Court’s words as support for an enforcement of blood tests – that article 8 requires that biological reality should be established – but this argument would put the court in the position of adjudicating between competing rights.

In *G v. Netherlands*,³⁴ a sperm donor to a lesbian couple who had had some regular contact with the child since birth, alleged a breach of his article 8.1 rights when the two women denied him further contact with the child. The Commission held that “family life” implies close personal ties in addition to (biological) parenthood. Family life depends on a number of factors, of which cohabitation is only one. In the circumstances, where the donor had apparently not considered making any contribution, financial or otherwise, to the child’s upbringing, the case was found to be inadmissible.

³⁰ (1994) 18 E.H.R.R. 342.

³¹ (1994) 18 E.H.R.R. 342 at para. 44.

³² (1995) 19 E.H.R.R. 263.

³³ *Ibid.*, at para. 40.

³⁴ (1993) E.H.R.R. C.D. 38.

*X, Y and Z v. UK*³⁵ concerned an alleged violation of articles 8 and 12 of the Convention. X, a female-to-male transsexual, had a stable relationship with Y, a woman, who had given birth to Z by Donor Insemination. Their attempt to register X as Z's father following the child's birth was not permitted. The applicants submitted that they had shared a family life within the meaning of article 8.1, and that the jurisprudence of the Commission and the Court favoured social reality rather than formal legal (biological?) status in determining family life. The Court noted that, in the circumstances of the case, *de facto* family ties linked the applicants.³⁶ Article 8 was therefore applicable, even though there was held to be no breach in the circumstances.³⁷

Keegan v. Ireland and *Kroon v. Netherlands* lean towards a biological conception of parenthood, but in *G v. Netherlands* and *X, Y and Z v. UK*, a simple biological definition seems not even necessary, never mind sufficient, for an understanding of "parent."

Nor does there seem much scope for resolving the issue by recourse to other provisions of the ECHR, such as article 12. The latter, which provides that, "Men and woman of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right", has so far been interpreted narrowly. For example, in *Rees v. United Kingdom*,³⁸ the right to found a family was held to be limited to married couples. There is nothing to prevent the interpretation of "family" in article 12 taking the route of biological family or emotional family, but the European Court of Human Rights has to date been focused on procreation within the traditional family unit. It seems unlikely that our domestic courts would deviate radically from this.

It might be hoped that another rights instrument, such as the United Nations Convention on the Rights of the Child 1989, could throw more light on the matter, but article 7.1 of this Convention, which states that, "The child . . . shall have . . . from birth . . . as far as possible, the right to know and be cared for by his or her parents", is similarly unhelpful. What is a parent? Having the right to know one's parents becomes less impressive without a settled interpretation of "parent".

The two English cases (already mentioned), which touch on the UN Convention, are hardly illuminating. Balcombe L.J. in *Re F*,³⁹ felt it unnecessary to answer the question, holding that:

Whether or not B [the applicant] is included in this definition of a parent within the meaning of this article, it is not in fact possible for E to be cared for by both her parents (if B is such). No family unit exists, or has ever existed, between B and Mrs F, and if B were able to assert his claims to have a share in E's upbringing it would inevitably risk damaging her right to be cared for by her mother, Mrs F.⁴⁰

In short, Balcombe L.J. seems to have regarded the impossibility of fulfilment of the latter limb of article 7.1, the right to be cared for by one's parents, as rendering

³⁵ [1997] 2 F.L.R. 892.

³⁶ *Ibid.*, at para. 37.

³⁷ There existed no common European standard with regard to granting parental rights to transsexuals, and it was unclear whether the amendment sought would benefit children conceived by DI, or have implications in other areas of family law. A state may justifiably be cautious in changing the law. The concurring opinion of Judge Meyer is also notable at 907: "... it is self-evident that a person who is manifestly not the father of a child has no right to be recognised as her father."

³⁸ (1985) 9 E.H.R.R. 56.

³⁹ [1993] Fam. 315.

⁴⁰ *Ibid.*, at 321.

inoperative the first limb's right to know one's parents. In *Re H*,⁴¹ Ward L.J. delineated the two rights of article 7.1: the one to know, and the other to be cared for by, one's parents:

If the child has the right to know, then the sooner it is told the better. The issue of biological parentage should be divorced from psychological parentage. Acknowledging Mr B's parental responsibility should not dent Mr H's social responsibility for a child whom he is so admirably prepared to care for and love irrespective of whether or not he is the father.⁴²

Ward L.J. recognised the worth of the husband's relationship with the child, but gave emphasis to the biological role – perhaps influenced, as mentioned earlier, by the husband's vasectomy prior to the child's conception. It can be concluded that article 7.1 does not seem to demand any particular conception of parenthood, and no specific interpretation has as yet been imposed by our courts.

It is, therefore, not possible to say that there is an overwhelming consensus for the interpretation of "family life" as either biological or psychological. Even if there were, abstract rights are not of much practical use unless there is ease of enforcement. The UN Convention is not directly enforceable by individuals, and moreover, relates to the child's right to know his or her parents – not a man's right to be recognised or proven the father of his child. The best hope for men seeking to establish paternity, the one raised by Wall J., is the Human Rights Act 1998. The latter Act holds out the more readily available possibility of clarifying the concept of parenthood, and this is excellent: the issue must be resolved, and the sooner the better. Past domestic case law is no paradigm. *If* we have real concern about rights such as the right to a family life, like cases *must* be decided alike, in a consistent manner. To do so otherwise is to offend against the principle of distributive justice.

CONCLUSION

Re O and J returns to the consistent line of case law prior to *Re R* in confirming that even where a direction for blood tests is made, a blood sample can only be taken from a child when the person with care and control of her consents. Wall J. hopes for reform of the law and resolution of any incompatibility with the European Convention on Human Rights.

Neither "parenthood" in domestic law, nor "family life" in the Convention, has been defined conclusively in principle or practice to connote purely biological or psychological/emotional parenthood, or the sum of both in any defined quantities. To fail to resolve the question of the conception of parenthood will result inevitably in injustice, as inconsistent employment of conceptions will fail to treat like cases on a similar basis. If there can be said to be a correct understanding of parenthood, the consistent use of the wrong conception will work evil. An immediate, serious and principled attempt should be made to discover the best conception of parenthood, and to apply it uniformly.

With regard to the Human Rights Act and the Convention, irrespective of which conception of parenthood is used, it is not clear that a breach of a person's Article 8 rights in a *Re O and J* situation will deserve a remedy. A Convention which gives equal

⁴¹ [1996] 4 All E.R. 28.

⁴² *Ibid.*, at 44.

rights to all humans must have a mechanism for adjudication between the rights which conflict. And crucially, the adjudication mechanism must ascribe a hierarchical order to the rights, without imposing a hierarchy of right-holders.

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REVERSE PROOF BURDENS IN CRIMINAL PROCEEDINGS

R v. Director of Public Prosecutions, ex parte Kebilene and others

[2000] 1 Cr. App. R. 275 (H.L.) (Lords Steyn, Slynn, Cooke, Hope and Hobhouse)

INTRODUCTION

In criminal proceedings, as everyone knows, the burden of proving its case is on the prosecution: *Woolmington v. DPP*.¹ This covers not only the burden of proving the case overall (the overall burden) but also (if called upon to do so) the burden of proving every element in that case (the specific proof burdens). In *Woolmington*, the accused said that he had no intention to shoot his wife. Accordingly, at its narrowest, the *ratio* of the case is that it applies only to *mens rea*. However, subsequent decisions have made two things clear about *Woolmington*. First, it applies to the elements of the *actus reus* constituting the offence – such as appropriation in theft. Second, it also applies to the *actus reus* in the wider sense as decisions on self defence (at common law) and provocation (under section 3 of the Homicide Act 1957) demonstrate. In addition, the prosecution must call evidence in respect of these specific burdens thus discharging the evidential burden.

Meanwhile what is the position of the accused? The answer is that he can, in theory, be acquitted even though he does not give any evidence himself, or via his own witnesses, or cross-examine the prosecution witnesses. This is because the accused is not, as a general proposition, under any obligation to adduce any evidence other than in what Cross called the “tactical” sense.²

Yet there are dangers for an accused who does this. First, his silence at trial or failure to give pre-trial answers can become an item of evidence supporting the prosecution case.³ Second, if the accused wishes to make some issue of *mens rea* or *actus reus* in the wider sense (e.g. duress or non-insane automatism) live in the proceedings, he must adduce some evidence of it. It is probably only in that sense that it is ever appropriate to talk about the accused assuming a purely evidential burden. Third, the accused may bear the burden of proving some issue in the trial. This is known as a reverse proof burden and it may be either express or implied. *M’Naghten* insanity⁴ apart, the former arise where Parliament has used words such as “it shall be a defence to prove . . .” Section 2(2) of the Homicide Act 1957 illustrates this. Implied reverse proof burdens arise where the courts, on a “true construction” of a statutory provision⁵ deem that Parliament intended some burden to be borne by the accused.

THE DECISION IN *KEBILENE*

In *Kebilene*,⁶ the courts were concerned with express rather than implied reverse proof burdens. However, some of what was said in the case may well hold as many implications for the latter as for the former. There were four accused who were charged

¹ (1935) 25 Cr. App. R. 72.

² *Cross on Evidence*, 5th edn. (London: Sweet & Maxwell, 1979).

³ Sections 34-37 of the Criminal Justice and Public Order Act 1994.

⁴ *R v. M’Naghten* (1843) 10 C.I. & Finn. 200.

⁵ *R v. Edwards* [1974] 2 All E.R. 1085, per Lawton L.J. at 1095.

⁶ *R v. Director of Public Prosecutions, ex parte Kebilene and others* [2000] 1 Cr. App. R. 275.

with offences under either sections 16A or 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989. Those sections, so far as relevant, provided as follows:

Section 16A

“(1) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism . . .

(3) It is a defence for a person charged . . . under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in (1) above.

(4) Where a person is charged . . . under this section and it is proved that at the time of the alleged offence –

(a) he and that article were both present in any premises; or (b) the article was in premises of which he was the occupier or which he habitually used otherwise than as a member of the public, the court may accept the fact proved as sufficient evidence of his possessing that article at that time unless it is further proved that he did not at that time know of its presence in the premises in question, or, if he did know, that he had no control over it.”

Section 16B

“(1) No person shall, without lawful authority or reasonable excuse (the proof of which lies on him) –

(a) collect or record any information which is of such a nature as is likely to be useful to terrorists in planning or carrying out any act of terrorism to which this section applies; or
(b) have in his possession any record or document containing any such information as is mentioned in paragraph (a) above.”

Under section 19(1)(a) of the Act, the consent of the Director of Public Prosecutions was required for a prosecution under the sections in question and this was given. The case came on for trial in October 1998. At the end of the prosecution case, the accused submitted that section 16A (and ultimately also section 16B) were in conflict with article 6(2) of the European Convention on Human Rights,⁷ which provides:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The judge accepted the submission, whereupon the solicitor for the accused wrote to the DPP requesting him to reconsider his consent to the proceedings. Having taken advice, the Director refused to do this. The accused then were granted leave to move for judicial review and, as applicants, their case was heard in the Divisional Court. The applications were granted. There are two major issues involved.

Reviewing the Consent of the DPP

The court was concerned with the correct interpretation of section 29(3) of the Supreme Court Act 1981. The Divisional Court held that the Director's consent was subject to the jurisdiction of the Court. The House of Lords held that section 29(3) did not prevent review of the Director's decision to prosecute. However, there is a common law presumption against reviewing such a decision in the absence of dishonesty, bad faith or special circumstances. This was sufficient to deal with the application for review.

⁷ The Convention has now been incorporated into English law by the Human Rights Act 1998. The Act was not generally in force at the time of the decision.

Compatibility of Sections 16A and 16B with Article 6(2)

According to Lord Bingham C.J., the provisions of section 16A & section 16B “undermine, in a blatant and obvious way, the presumption of innocence”.⁸ Laws L.J. supported this view and Sullivan L.J. concurred with both judgments. On this issue of compatibility, which seemed pellucid to the Divisional Court, the House, in allowing the DPP’s appeal, took not so much a different view as different views.

Lords Steyn, Slynn and Cooke: the Linguistic Approach

Lord Steyn, with whom Lord Slynn and Lord Cooke concurred, said that whether there was incompatibility between the sections and article 6(2) was open for argument. His Lordship relied on the view put forward by Professor Glanville Williams in an article “The Logic of Exceptions”.⁹ Williams argued as follows. When the courts refer to an accused bearing a burden of proof, they are referring to a reduced burden (proof on a balance of probability) compared to that which the prosecution bears (beyond reasonable doubt). It follows that “proof” can be of various degrees:

Should not the courts say that burdens of proof placed on the defendant mean burdens of proof of his defence sufficient to take it the jury? They would then be what are called evidential burdens.¹⁰

Not the least problem with this line of argument is that when Professor Williams refers to ‘burdens’ he is really referring to different standards of proof. The issue is not whether the accused should bear the civil or criminal standard, but whether he should bear any obligation of proof at all. The evidential burden may or may not be a step on the way to proof. However, if “prove” is to be interpreted to mean “adduce evidence” when applied to the accused, what interpretation of “prove” would be appropriate when applied to the prosecution under *Woolmington*? There is, in any event, high judicial authority that “the discharge of an evidential burden *proves* nothing – it merely raises an issue. Accordingly the mere raising of an issue by the defence would not satisfy the obligation which Parliament has imposed”.¹¹ In the light of this authority, it is difficult to see how sections 16A or 16B could have been interpreted under the new rule of construction in section 3(1) of the Human Rights Act 1998 to comply with article 6(2) of the Convention. Indeed, it is equally difficult to understand why the Director ever thought that it might, notwithstanding the advice he received from “counsel of acknowledged authority in this field”.¹²

Lords Hope and Hobhouse: the Purposive Approach

Instead of trying to shoehorn the language of “proof” into that of “adducing evidence”, Lords Hope and Hobhouse employed authorities from the European Court of Human Rights and from the Supreme of Canada to illustrate that not all reverse proof burdens infringe the presumption of innocence under article 6(2).

Lord Hope placed considerable reliance on the European Court’s decision in *Salabiaku*.¹³ In that case, the Court said that presumptions of fact or of law operate in every legal system. Article 6(2) does not regard them with indifference, but it does require the State to confine them within reasonable limits “which take into account the importance of what is at stake and maintain the rights of the defence”. On this

⁸ Note 6, *supra*, at 289.

⁹ [1988] C.L.J. 261, at 264-265.

¹⁰ Note 6, *supra*, at 265.

¹¹ *R v. Hunt* [1987] 1 All E.R. 1, *per* Lord Ackner at 19 (original emphasis).

¹² *Per* Lord Bingham C.J. in *Kebilene* (*supra*, n. 6), at 278.

¹³ *Salabiaku v. France* (1988) 13 E.H.R.R. 379.

approach, terrorism and the need to counter it may well justify, in terms of proof burdens, what would not be justifiable in other areas. It is necessary to examine each case on its individual merits. If this view is endorsed, it will never be possible to assert *ab initio* that a reverse burden violates article 6(2).

Lord Hobhouse agreed, adding that there is “a need to look beyond the bare words of the statute to identify ‘the essential criminality’ which the prosecution must prove and the justification for requiring the defendant to prove that he comes within an exception to it”. His Lordship doubted whether Professor Williams’ approach “is the right one”.¹⁴

THE IMPLICATIONS OF *KEBILENE*

What conclusions can be reached about reverse proof burdens in the light of *Kebilene*? A central criticism of such burdens is that they may lead to the conviction of persons whose guilt has not been proved beyond reasonable doubt. A court may well feel that the accused had “no reason to believe there was any person within hearing . . .” who would be caused distress, etc.,¹⁵ but must convict unless convinced of it. Professor Williams asserts¹⁶ that the proponents of reverse burdens never answer this challenge.

Is article 6(2) more likely to be breached when the reverse burden involves negating an essential element of the offence? While this argument is *prima facie* attractive, the decision in *Salabiaku* suggests that it is only one element in the equation – albeit an important one. In that case, the European Court took account of the way in which the particular law was applied in practice by the French courts. This involves going beyond the case-by-case approach suggested by Lord Hobhouse and requires some investigation of the national jurisprudence.

In the Divisional Court, Lord Bingham C.J. relied¹⁷ on *Whyte*¹⁸ where Dickinson C.J. said that what is decisive is the final effect of the provision on the verdict rather than the characterization of the provision as part of the offence or defence.¹⁹ This approach has important consequences. It overcomes the game of chance as to whether a particular element is construed as part of the offence or defence, something which Professor Williams²⁰ considered was difficult if not impossible anyway. While this is important with regard to express reverse proof burdens, it is particularly so with regard to implied reverse proof burdens. There, under the guise of statutory construction, the courts have sought to distinguish a completed offence from some exemption, exception, proviso or excuse placing the burden of proof of the latter on the accused.²¹ Time will tell whether this essentially linguistic approach remains tenable.

A further suggestion is that if the reverse burden relates only to some ‘optional’ element on which the accused may rely, it is unlikely to breach article 6(2). This was the view taken of section 2(2) of the Homicide Act 1957 by Lord Woolf in *Ali & Jordan*.²² Section 2(2) does not seem susceptible to objection on either the linguistic or

¹⁴ Note 6, *supra*, at 343.

¹⁵ Under the Criminal Justice and Public Order Act 1994, s. 5(3).

¹⁶ See n. 9, *supra*.

¹⁷ Note 6, *supra*, at 289.

¹⁸ *R v. Whyte* [1988] 51 D.L.R. 481, at 493 (Supreme Court of Canada).

¹⁹ This was in addition to Lord Bingham’s reliance on the linguistic approach that the provisions in question undermined the presumption of innocence in a “blatant and obvious way”.

²⁰ Note 9, *supra*.

²¹ See the Magistrates Courts Act 1980, s. 101; *R v. Edwards* [1974] 2 All E.R. 1085.

²² *R v. Ali, Lambert, Jordan* (2000) *The Times*, 5 September 2000 was a consolidated appeal. *Ali & Jordan* related to s. 2(2) of the Homicide Act 1957 while *Lambert* related to ss. 5 & 28 of the Misuse of Drugs Act 1971.

purposive approaches of the House of Lords in *Kebilene*. It does, however, leave open the issue of whether an accused, who cannot prove the defence, is to be convicted of murder (instead of manslaughter) when there is a reasonable doubt as to his guilt of the former. In any event, is it not also true that self-defence is an “optional” element? What justification can there be for the anomalous position of diminished responsibility and insanity? In what way do these ‘defences’ differ from, *e.g.*, provocation or duress such as to justify the imposition of reverse burdens?

CONCLUSION

There seems to be a belated recognition by the Government of the strong possibility that provisions such as those in sections 16A or 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989 may violate article 6(2) of the ECHR. The whole of the 1989 Act has been repealed by the Terrorism Act 2000. That statute substantially re-enacts sections 16A and 16B in sections 57 & 58. However, section 118(2) of the 2000 Act provides that where a person is charged under those sections, and is under a burden of proof with regard to some matter, if he “adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.” Though welcome, such piecemeal change may be thought not to go far enough. This area is a sorry mess in need of legislative reform.

According to Lord Woolf C.J. in *Lambert, Ali, Jordan*, “[t]he common law is fiercely resistant to a burden of proof being placed on the defendant”. Anyone familiar with the research by Ashworth and Blake²³ will find this proposition hard to swallow whole. It is clear from the sheer number of reverse burdens created under legislation that there will be continued challenges under the provision of article 6(2). What benefit is there to the legal system or the taxpayer in this? The obvious remedy is the speedy passage into law of clause 8 of a draft bill from the Criminal Law Revision Committee’s 11th Report in 1972.²⁴ Under that clause, no new statutory provision would have cast more than an evidential burden on the accused. While this clause has been rejected by the Law Commission,²⁵ failure to implement it – mainly because it appeared alongside other (then) highly controversial proposals – seems to represent a wasted opportunity to bring some consistency of approach and fairness to a crucial area of criminal proceedings.

PHIL HUXLEY*

²³ “The Presumption of Innocence in English Criminal Law” [1996] Crim L. Rev. 306.

²⁴ Cmnd. 4991.

²⁵ Law Commission, Report No. 143 (1985).

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THE DEMISE OF ADVOCATES' IMMUNITY

Arthur J.S. Hall & Co. (A Firm) v. Simons [2000] 3 W.L.R. 543

(H.L.) (Lords Browne-Wilkinson, Steyn, Hoffmann, Hope of Craighead, Hutton, Hobhouse of Woodborough, and Millett)

INTRODUCTION

A second review by the House of Lords of the two hundred year-old rule granting barristers¹ immunity from suit has resulted in its abolition. This is not altogether unexpected in the light of recent changes in society and in the law, mounting criticisms of the rule and the departure from it in overseas jurisdictions. The opportunity arose in *Arthur J.S. Hall & Co. (A Firm) v. Simons*; *Woolf Seddon (A Firm) v. Barratt*; *Roberts & Hill (A Firm) v. Harris (conjoined appeals)*,² where a seven-member House of Lords embarked on a radical review of their earlier decision in *Rondel v. Worsley*,³ as further explained in *Saif Ali v. Sydney Mitchell & Co.*⁴ The reconsideration of advocates' immunity also called for a review of the rule in *Hunter v. Chief Constable of the West Midlands Police*,⁵ which bars a collateral attack on a criminal conviction in civil proceedings.

Several reasons were cited for the re-examination of the immunity rule: (1) that it was based on public policy and public policy is not immutable;⁶ (2) the compatibility of *Rondel v. Worsley* with the Human Rights Act 1998 had to be considered; (3) that it was the legitimate function of the House of Lords to declare prospectively whether the immunity was to be available in the future and if so, under what circumstances;⁷ (4) there were criticisms from many quarters that the rule is not justifiable in modern day conditions;⁸ and (5) because of great changes having been made in the law of negligence, the functioning of the legal profession, the administration of justice and in public perception.⁹

In the light of these developments, the House of Lords concluded that in the present context, public interest in the administration of justice did not justify the continued existence of the immunity in civil and criminal proceedings. This note will examine the policy reasons for and against the immunity, followed by a brief comparative survey and some concluding remarks.

ADVOCATES' IMMUNITY

Prior to *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*,¹⁰ barristers could not be sued by their clients for loss occasioned by careless misstatements because they did not have

¹ This includes barristers and solicitor advocates.

² [2000] 3 W.L.R. 543. These appeals involved firms of solicitors who were sued by their respective clients for negligence in out-of-court work involving a building dispute and family proceedings. The solicitors' claim of immunity was clearly inapplicable here.

³ [1969] 1 A.C. 191.

⁴ [1980] A.C. 198. The case centred on the scope of the immunity and its merits were not debated.

⁵ [1982] A.C. 529.

⁶ *Per* Lord Reid in *Rondel v. Worsley* [1969] 1 A.C. 191, at 227.

⁷ (2) and (3) *per* Lord Hope, *supra*, n. 2, at 580, 581.

⁸ *Supra*, n. 6.

⁹ See Lord Hoffmann, *supra*, n. 2, at 560.

¹⁰ [1964] A.C. 465.

a contract with them. This ancient common law rule could no longer be supported once *Hedley Byrne* established that a negligence action could be brought independently of contract. Subsequently, any rule of immunity had to be based, not upon technicalities, but upon what was perceived as the public interest in the administration of justice. The occasion arose in *Rondel v. Worsley* where, for the first time, the House of Lords had to consider whether or not the retention of the immunity could be justified.

In the *Rondel* case their Lordships unanimously affirmed that public interest required an advocate to be immune from negligence claims in respect of his¹¹ conduct or management of a cause in court. The issue was revisited in *Saif Ali v. Sydney Mitchell* where the House of Lords embarked on a limited extension of the advocacy rule. They held that the immunity covered not only what was done in court but also preparatory work which was so “intimately connected with the conduct of litigation that it can fairly be said to be a preliminary decision affecting the way the case is to be conducted in court.”¹²

Reasons for advocates' immunity

The following reasons may be identified in support of an advocate enjoying immunity:

*(1) The Advocate's overriding duty to the court and the administration of justice.*¹³

This was the principal ground of decision in *Rondel v. Worsley*. It was perceived that, in the absence of immunity, the fear of an unfounded action in negligence might erode the duty that a barrister owed to the court. Since legal proceedings are special, barristers should also, for reasons of public policy, be accorded a special status.

(2) Collateral challenge or re-litigation

This was a supporting reason for the immunity as re-affirmed in *Rondel v. Worsley*. Lord Diplock in *Saif Ali*¹⁴ explained the undesirability of re-litigating cases which had been settled or decided by the courts. The proper way to challenge a decision is by appeal and not by a retrial of the same issues in subsequent proceedings, which will involve a court of co-ordinate jurisdiction having to decide whether another court had reached a wrong decision. This will bring the administration of justice into disrepute and public policy therefore discourages such collateral challenges.

(3) Analogy with general immunity

General immunity from civil liabilities is accorded to all participants in court proceedings namely judges,¹⁵ court officials, witnesses, parties, counsel and solicitors. This is based on the public policy of encouraging freedom of speech

¹¹ Includes “her”.

¹² Drawn from the formulation by McCarthy P. in the New Zealand case of *Rees v. Sinclair* [1974] 1 N.Z.L.R. 180, at 187.

¹³ *Munster v. Lamb* (1883) 11 Q.B.D. 588; *Roy v. Prior* [1971] A.C. 470; *Giannarelli v. Wraith* [1988] 165 C.L.R. 543, 557 per Mason C.J. (H.C.); reinforced by s. 42 Access to Justice Act 1999.

¹⁴ *Supra*, n. 4, at 222 to 223; Lord Diplock did not find the reasons in (1) and (4) convincing, but stated that (2) and (3) were sufficient to justify a limited immunity.

¹⁵ Expressly given by the European Court of Justice. See also Fry L.J. in *Munster v. Lamb* (1883) 11 Q.B.D. 588, 607 where he stated that the rule was not to protect malicious and untruthful persons, but to protect against the vexation of defending actions.

and the speaking of truth in legal proceedings. Likewise, advocates needed a similar civil immunity from negligence suits in order to enable them to conduct litigation properly.¹⁶

(4) Ethical cab rank principle

This was given some weight in *Rondel v. Worsley*. The principle obliges the barrister, but not the solicitor, to act for any client in a matter relating to his area of practice. This is to ensure that all parties and causes have the right to legal representation, however unpopular or unfavourable they may be. However, this increases the risk of vexatious suits, particularly in relation to criminal cases, and such risk is said to justify an advocate's immunity.

(5) The assumption that a barrister may not sue for his fees

This was on the basis that the barrister had suffered pure economic loss and there was no contract with the client. However, as seen earlier, *Hedley Byrne* has undermined this reasoning.

(6) Preservation of the dignity of the Bar

This was no longer considered a reason for immunity in *Rondel v. Worsley*. It was not justifiable that the same immunity was not extended to other professionals.

ABOLITION OF CIVIL ADVOCACY IMMUNITY

In *Arthur J.S. Hall*, the House of Lords did not in terms overrule *Rondel v. Worsley*, but declared the law in its current state. Lords Hoffmann and Steyn, in particular, were careful to state that *Rondel v. Worsley* was not wrongly decided. It was a carefully reasoned and unanimous decision of the House of Lords. But it was a different world then and the decision no longer reflected current public policy. The basis of the immunity of advocates had therefore gone.

The following arguments were applied in re-evaluating where the public interest lay in present day conditions:

Divided Loyalty Argument

Lord Hoffmann observed that there were two versions of the divided loyalty argument based on: (a) the effect that it had on the behaviour of the lawyer, and (b) the fact that the conduct of litigation is a difficult art, particularly in relation to criminal proceedings, where the imposition of liability would be unfair in the sense that the performance of a public duty should be vexed by an unmeritorious action. His Lordship concluded that only the version based on (a) could have any prospect of success. However, any fear of defensive lawyering could be met by the safeguards discussed at pp. 78–79 below. By contrast, the version based on (b) was misconceived. Such an argument, if applied to other professionals besides lawyers, would mean that people doing their best in difficult jobs should not be exposed to vexatious claims.

Lord Steyn viewed the argument that immunity was needed to ensure that advocates did their duty to the court as flimsy and not supported by empirical evidence. Advocates are not the only professionals facing conflicts of duty and interest. Surgeons

¹⁶ As re-affirmed in *Rondel v. Worsley* and *Saif Ali*.

are similarly vulnerable where decisions have to be made on the spur of the moment yet are not protected by any immunity. Such a comparison, however, did not impress Lord Hobhouse. An advocate owes a duty to the court while others owe typically ethical duties or obligations not to breach the criminal law. Although the present argument was relevant, it was of limited impact and far from being a dominant factor in the assessment of the need for immunity. It was also pointed out earlier that the surgeon analogy cannot be used because the administration of justice gives rise to problems and difficulties which differ from those which arise in the practice of surgery.¹⁷

Re-litigation or Collateral Challenge Argument

The House of Lords was of the opinion that the immunity was not needed to deal with collateral attacks on criminal and civil decisions.¹⁸ The principle of *res judicata*, issue estoppel and abuse of process were thought sufficient to deal with the risk of re-litigation.

Analogy with General Immunity

Generally, it may be said that the general immunity enjoyed by participants in trials derives from considerations independent of the legal policy underlying advocates' immunity for negligent acts.¹⁹ Lord Hobhouse, however, pointed out the anomaly that would be produced if an advocate were to be treated differently from other participants in the trial. He alone could be held civilly liable, while other participants who were at fault would not be liable. Lord Hobhouse described this as correcting one anomaly by creating another anomaly.

Cab Rank Rule

Judicial opinion is not unanimous in regarding this rule as a valid justification for immunity. Lord Steyn observed that its impact on the administration of justice in England is not great. In real life, a barrister's clerk arranges the fees and it is unlikely that a barrister will be taking on a case he would not otherwise be willing to undertake. Furthermore, the rule itself was insufficient to justify an immunity because doctors are professionally and ethically obliged to accept and provide medical care without discrimination and without any immunity in return. On the contrary, solicitor advocates are not bound by the rule and such an extension to them has reduced such importance as the rule may once have had. Lord Diplock had earlier said in *Saif Ali*²⁰ that the existence of the risk of vexatious suits did not justify depriving all clients of any remedy. There are other and more specific means of disposing summarily of vexatious actions.²¹

Ending of an Anomaly

Abolishing the advocates' immunity would remove an anomalous exception. The basic principle is that there should be a remedy for a wrong.²² Hence, immunity from suit is a derogation from a fundamental right (under both Common Law and Human

¹⁷ See *Rondel v. Worsley*, per Lord Pearce, at 275.

¹⁸ Lords Hope and Hobhouse dissented on this point.

¹⁹ See generally, D. Pannick, *Advocates* (Oxford University Press, 1992).

²⁰ [1978] 3 W.L.R. 849, at 861, 862.

²¹ See also Macarthur J. in *Rees v. Sinclair* [1974] 1 N.Z.L.R. 180; and Wilson and Dawson JJ. in *Giannarelli v. Wraith* (1988) 165 C.L.R. 543.

²² Per Lord Simon of Glaisdale in *Arensen v. Arensen* [1977] A.C. 405, 419.

Rights Law) and requires to be justified.²³ It was a derogation from the right of access to the courts and could no longer be justified on grounds of public policy. Lord Hope, however, (in line with his view that criminal advocacy immunity should be maintained) suggested the retention of civil advocacy immunity in actions brought by third parties, where the role of the advocate in civil cases is analogous to that of a prosecutor. This would apply, for example, to an advocate representing a professional body in disciplinary proceedings against one of its members.

Public Perception and Expectation

Lord Steyn took the view that exposure of isolated acts of incompetence would strengthen rather than weaken the legal system. On the contrary, public confidence is not enhanced by the existence of an immunity. The world has changed since 1967. There has emerged a consumerist society with greater awareness of rights and expectation of redress. The practice of law has become more commercialised, barristers may advertise and furthermore, conduct which is covered by the immunity is beyond the remit of the Legal Services Ombudsman.²⁴

Principle of Equal Treatment

Barristers and other professionals should be treated alike.²⁵ Any departure requires a sound justification. Otherwise it would be perceived as collective self-interest. A comparison was made with salvors and surgeons called upon to make finely balanced judgments, yet they are not immune from liability for negligent conduct of the salvage or surgical operation. This lack of immunity has not disabled other professionals from giving their best services.

The Limits of the Immunity

It is difficult to distinguish between court proceedings and matters “intimately connected” with the conduct of the case in court. The difficulty in applying this distinction and fixing the boundaries of immunity with any degree of consistency is another reason for abolishing the immunity.²⁶

Protection Independent of Immunity

The House of Lords took the view that the abolition of the immunity would not result in a proliferation of negligence claims against advocates for a number of reasons. In the first place, the burden would remain with the client/claimant of proving negligence. To do one’s duty to the court to the detriment of one’s client would not be regarded as negligence; to commit an error of judgment is not negligence unless the error is such that no reasonably well-informed and competent member of that profession could have made it. Moreover, the need to show causation will remain. The claimant has to prove not only that the advocate was negligent but also that the negligence caused him the loss. To prove that a higher standard of advocacy would have resulted in a more favourable outcome to the client is a difficult task.

In the second place there have been recent developments in the civil justice system designed to reduce the incidence of vexatious claims, for example procedures for ending

²³ See Kirby J. in *Boland v. Yates* (1999) 74 A.L.J.R. 209, at 236, 238, 239.

²⁴ Section 22(7)(b) Courts and Legal Services Act 1990.

²⁵ See also the observations of Krever J. in *Demarco v. Ungaro* (1979) 95 D.R. (3d) 385, at 405 (Ontario H.C.).

²⁶ See the comments of Lords Hoffmann, Steyn, Hutton, Hope and Hobhouse, and also the remarks of Kirby J. in the High Court of Australia in *Boland v. Yates Property Corporation Pty Ltd.*, *supra*, n. 23.

unsustainable actions at an early stage of litigation.²⁷ Civil legal aid has been abolished and replaced by legal services funded by the Legal Service Commission.²⁸ It is now more difficult than previously to obtain legal help for negligent actions which have little prospect of success. This is to deter public funding of hopeless claims by disgruntled clients (as, for example, in *Rondel v. Worsley* itself). Wasted costs orders can also be made against the lawyer to pay costs wasted by any party as a result of any improper act, including negligence.²⁹ There are similar powers in criminal proceedings in respect of wasted costs. The wasted costs jurisdiction is the only empirical evidence to test the proposition that removal of the immunity would have an adverse effect on the way an advocate performs his duty to the court. Lord Hoffmann said that there was no suggestion that it had changed the standards of advocacy for the worse.

Finally, barristers would be covered by liability insurance that, as lawyers, they are professionally required to carry. There was no evidence that sufficient insurance was not available. Indeed, those aspects of legal practice that were typically the subject of the largest claims fell outside the scope of any immunity contended for.

THE REMOVAL OF THE IMMUNITY IN CRIMINAL CASES

Their Lordships were not unanimous in their views as to whether barristers should also lose their immunity in the context of criminal advocacy, recognising that the argument against abolition is stronger in these cases as opposed to in civil actions.³⁰ Although it was not necessary to decide the issue in the present appeals, their Lordships made certain comments, *obiter*, which will no doubt be persuasive in any future review.

Lords Hobhouse, Hope and Hutton gave dissenting opinions, in favour of the retention of criminal advocacy immunity, arguing that it was still required in the public interest in the administration of criminal justice. The purpose and function of the criminal process is fundamentally different in character from civil proceedings. The criminal justice system is to serve public and not private interests.

Lord Hobhouse was not prepared to end the immunity on the present appeals. He had not heard any argument upon the distinction that should be made between civil and criminal proceedings. He foresaw two factors that might change current views: first, lessons might be learnt from the abrogation of civil liability which might assist in the consideration of the immunity in criminal cases and, secondly, account would need to be taken of possible changes in role of the defending advocate under a new regime of legal representation (involving quasi-public defenders operating under strict monetary limits), which would favour unrestricted civil liabilities along the American pattern.

Lord Hope adopted a different approach related to the bearing each of the arguments had on the administration of the criminal justice system. He referred to the empirical evidence from Scotland about the likely effects that the coming into force of the Human Rights Act will have on England and Wales, namely that delays in the criminal trial have occurred because of preliminary objections about the incompatibility with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.³¹ He expected similar consequences in England and Wales. It

²⁷ The summary dismissal of actions is governed by the new Civil Procedure Rules 1999, rules 3.4(2)(a) and 24.2.

²⁸ Under the Access to Justice Act 1999.

²⁹ Pursuant to s. 51 Supreme Court Act 1981, as amended by s. 4 Courts and Legal Services Act 1990. The order can be made against barristers, as held in *Ridehalgh v. Horsefield* [1994] Ch. 205.

³⁰ See also Lord Morris of Borth-y-Gest in *Rondel v. Worsley* [1969] 1 A.C. 191, at 191; Kirby J. in *Boland v. Yates Property Corp. Pty Ltd.*, *supra*, n. 23, at 241.

³¹ (1953) Cmd. 8969.

was therefore unwise to do anything to increase the burden unless it was necessary in the public interest. Advocates' immunity pursues legitimate aims in the field of criminal justice, which is to secure the effective administration of justice in the criminal courts. In the assessment of risk, a balance must be struck between a small number of defendants in criminal trials being denied a remedy against the benefit of maintaining immunity in the public interest. The removal of the immunity would expose advocates to a significant risk of harassment of litigation. The retention of the immunity was not disproportionate to the aims of the criminal justice system. His Lordship was not aware of any Scottish case where the application of the immunity in criminal cases had given rise to the concern that immunity was pushed beyond the limits set on grounds of public policy. Lord Hope, drawing from his experience in the criminal justice system, was unable to agree that the removal of the immunity would be in the public interest. Its removal would have an impact on the criminal justice system with a strong likelihood that it would lead in some cases to defensive lawyering.

Lord Hutton had no difficulty in construing the immunity as consistent with article 6 of the European Convention. That Article clearly did not prohibit the absolute immunity granted to judges, and accordingly it did not provide a reason for denying defence counsel the same immunity. Lord Hutton was in favour of preserving the immunity in criminal proceedings notwithstanding the difficulty of drawing the line in respect of pre-trial work.

Reasons for Abolishing Criminal Immunity

However, the rest of their Lordships in *Arthur J.S. Hall* believed that advocates' immunity in respect of criminal actions should disappear along with their civil immunity. Referring to the arguments, Lord Hoffmann stated that empirical evidence to support the divided loyalty and cab rank arguments was lacking. The predictions that removal of the immunity will affect the performance of an advocate's duty to the court and increase the exposure to vexatious claims was intuitive, incapable of empirical verification and of no real substance. The witness analogy was based upon mistaken reasoning. The basis of the general immunity was to encourage witnesses to come forward and speak the truth. The only duty was to tell the truth. The judge's duty was to administer justice. The advocate was the only person in the trial process likely to be sued because he was the only person who had undertaken a duty to his client. Therefore, there was no analogy with the lawyer whose duty was to his client.

Lord Steyn concluded that the immunity was not needed in criminal cases. Relying on his experience of the criminal justice system, he did not share intuitive judgments that the public policy against re-litigation still required the immunity to be maintained in criminal cases. The public interest is satisfactorily protected by independent principles and powers of the court.

Lord Millett agreed with Lords Steyn and Hoffmann. He gave two reasons for abolishing the immunity: (1) the difficulty of drawing the line between (a) cases civil in character but commenced by information or summons and which are classified as criminal proceedings, and (b) disciplinary proceedings classified as civil but criminal or quasi-criminal in character; (2) the partial retention of immunity in criminal cases would mean compensation for negligence in civil cases but not if the criminal defendant was convicted of a crime he did not commit. This would be incomprehensible to the public and would be greeted with derision. Furthermore, Lord Millett preferred to grasp the nettle now in anticipation of the issue arising sooner or later in the light of article 6 of the European Convention on Human Rights and the coming into force of the UK Human Rights Act 1998.

Lord Browne-Wilkinson noted the conflicting results that might be produced when a criminal defendant, who was convicted, subsequently brought a successful civil action against his advocate for negligent conduct of the criminal proceedings. This would clearly be quite unacceptable. However, his Lordship pointed out that the law had provided a solution by striking out the second action as an abuse of process (provided the criminal conviction stood) under the *Hunter* principle. Only if the conviction were set aside would the civil challenge normally be maintainable. Even then, there was no need to grant immunity since the number of civil challenges brought after a conviction is quashed is likely to be small.

Safeguards in Criminal Proceedings

These are relevant to a reconsideration of the immunity in criminal proceedings. A case can be struck out as being an abuse of the process of the court.³² It has been observed that this is likely to eliminate almost all such actions where the criminal plaintiff is not successful in setting aside his conviction. This is in addition to those powers previously described relating to the withdrawal of legal aid and new powers of the court to strike out hopeless claims. Dissatisfied clients may also challenge the fees and expenses charged by the lawyer to be disallowed or reduced on taxation. Wasted costs orders may also be made in criminal actions. Furthermore, compensation for miscarriage of justice may be made under section 133 of the Criminal Justice Act 1988 (as amended). However, Lord Hobhouse took the view that summary dismissal did not give the defence counsel as effective a protection against harassment and vexation of blameless counsel as did immunity. There was greater risk of harassment from vexatious actions in criminal than in civil proceedings because of the character of the accused.

*The Hunter Principle*³³

Three reasons for the *Hunter* principle were identified in *Smith v. Linskills (A Firm)*:³⁴ (1) the affront to justice if there subsist two final but inconsistent judgments of courts of competent jurisdiction; (2) the virtual impossibility of fairly retrying the issue that was before the criminal court in a civil court at a later date; and (3) the importance of finality in litigation. The explanation for (1) is that in order to succeed in civil litigation, it must be established that the criminal conviction is wrong and this should not be allowed. That is because the criminal defendant is convicted upon proof of his guilt beyond reasonable doubt and it is necessarily inconsistent to say that on the balance of probability, the convicted person as claimant ought to succeed in the civil proceedings. As regards (2), the Court of Appeal pointed out in *Smith v. Linskills* that it would be futile to suppose that the course of the criminal court trial, as it would have been without the negligence of the advocate, could be authentically recreated. Recollections might have faded, witnesses disappeared and transcripts lost or destroyed. In relation to (3), it is important that public confidence in the administration of justice is not undermined by endless litigation.

In the *Arthur J.S. Hall* case, it was suggested in argument that the *Hunter* principle was itself a sufficient protection against unmeritorious claims, and that for this reason advocates' immunity could now be discarded as being unnecessary. The rule has always been independent of the existence or absence of immunity and it prevents attacks in civil proceedings on a final decision of a criminal court of competent jurisdiction by dismissing the attack as an abuse of the process of the court. As Lord Hobhouse

³² That is the use of civil litigation for an improper purpose, as in *Rondel v. Worsley* and in *Hunter*.

³³ *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529.

³⁴ [1996] 2 All E.R. 353, at 361, 362.

pointed out, if a criminal conviction is challenged and it is affirmed on appeal, there is no difficulty. However, if the criminal defendant is found to have been wrongly convicted because of the negligence of his advocate, a problem arises. Any re-litigation would be a trespass on the finality of judgment or conviction.

Lord Hobhouse did not accept that the *Hunter* principle provided a solution to the problems arising from the abolition of immunity in relation to criminal advocacy. It provides no argument for not continuing the existing immunity in criminal cases. Nor was Lord Hope convinced that the *Hunter* principle provided the protection needed to serve the public interest in the field of criminal justice, or that it constituted a sound basis for discarding the immunity available to advocates. Lord Hope felt that the *Hunter* protection was incomplete because a client might have been acquitted on grounds other than the advocate's negligence. Once the conviction has been set aside, the way is open to a collateral challenge which will not be struck out as an abuse of process. The client, though acquitted, might have a claim for damages, for example for the loss of wages or he might have been detained or suffered loss in other ways. Furthermore, a wide application of the *Hunter* principle would be subject to attack on the ground that it would be inconsistent with article 6 of the European Convention in denying access to a court for the determination of civil rights. However, the House of Lords were divided in their opinion as to whether the *Hunter* principle was consistent with Article 6 of the European Convention.

On the other hand, Lord Hoffmann said that re-litigation could be struck out for one of two reasons: that it is manifestly unfair to a party, or that it brings the administration of justice into disrepute. Therefore, it is difficult to use the possibility of re-litigation as a reason for giving all lawyers immunity against all actions for negligence in the conduct of litigation, whether such action is an abuse of process or not. The *Hunter* principle treats collateral challenge as an abuse of process. In Lord Hoffmann's view, the collateral attack argument deals with a real problem in a wrong way. If there is no immunity, there is nothing manifestly unfair to the advocate or to bring the administration of justice into disrepute (as in the present case) to allow re-litigation. It would ordinarily be an abuse of process for the civil court to be asked to decide that a subsisting conviction is wrong. It is this resulting conflict of judgements that is likely to bring the administration of justice into disrepute.

The proper procedure was to appeal or, if the right of appeal has been exhausted, to apply to the Criminal Cases Review Commission under section 14 of the Criminal Appeal Act 1995. Once the conviction is set aside, there will be no public policy objection to an action for negligence against the advocate. There can be no conflict of judgments and the only arguments are the cab rank, divided loyalty and vexation arguments, all of which Lord Hoffmann rejected. This is illustrated by *Acton v. Graham Pearce & Co.*,³⁵ where the question arose as to whether re-litigating a criminal trial was contrary to public policy. In this case, the claimant's conviction had been quashed on appeal and the interests of justice did require that he should have a remedy against a negligent solicitor who did not enjoy advocates' immunity. The civil court could avoid the rehearing of a criminal trial by treating the claimant's action as one for damages for the loss of a chance that he would not have been prosecuted or that, if prosecuted, he would have been acquitted. It is to be noted that the *Hunter* rule did not apply to bar the civil proceedings in the *Acton* case because the conviction had been reversed on appeal in the earlier proceeding. Therefore, the later proceedings did not involve a

³⁵ [1997] 3 All E.R. 909.

collateral attack on the final verdict of the criminal court, which was in the claimant's favour. Far from attacking the previous decision, he was relying on it.

Referring to the power to strike out an action at an early stage, which has no real prospect of success, Lord Hoffmann was of the opinion that the *Hunter* doctrine was unlikely in this context to be invoked very often. One example occurred in *Somasundram v. M. Julius Melchior & Co.*³⁶ where the claim against counsel was struck out on the ground that there was no arguable chance of success. It is significant that the Court of Appeal in that case considered that the rule against abuse of process would prevent re-litigation even where *Rondel v. Worsley* was not applicable.

Lord Hutton agreed with Lord Hoffmann that the *Hunter* rule should ordinarily prevent a convicted person from suing for negligence unless and until his conviction was quashed on appeal.

Whether it was for Parliament to End the Criminal Advocacy Immunity

Lord Hobhouse stated that the matter was within the purview of the courts as it touched on the administration of justice in the courts and that it was legitimate for the courts to declare where the public interest lay in the achievement of justice, although any decision of the courts should not be inconsistent with the policy of the legislature. Lord Steyn thought that to leave it to Parliament would be an abdication of duty if the courts were to leave advocates in a state of uncertainty over a prolonged period. That would be a disservice to the public interest. However, if the decision were made to end the immunity now, both branches of the profession would find it relatively easy to amend their rules and adjust their existing insurance arrangements. Lord Hoffmann said that since judges created the immunity, they should now say that the grounds for it no longer existed.

COMPARATIVE EXPERIENCE

The House of Lords, in reconsidering whether the immunity was currently necessary in the public interest, referred to the substantial review in other jurisdictions.

Immunity: Australia and New Zealand

The High Court of Australia³⁷ and the Court of Appeal of New Zealand³⁸ have applied *Rondel v. Worsley* on the basis that barristers' immunity was required by public interest in their respective countries.

No Immunity: other European jurisdictions, Canada and Singapore

The House of Lords noted that the fact advocates have no immunity in other countries in the European Union and that this has caused no practical difficulty is of some significance. Similarly, in the United States, lawyers have generally no immunity from negligence suits³⁹ except state prosecutors.⁴⁰ Public defenders⁴¹ are accorded immunity in a few states because of the cost and disruption flowing from defending civil claims.

³⁶ [1988] 1 W.L.R. 1394, C.A.

³⁷ In *Gianarelli v. Wraith*, *supra*, n. 13, although Deane J. stated that no reasons would justify the immunity recognised in *Rondel v. Worsley*; *Boland v. Yates Property Corporation Pty Ltd.*, *supra*, n. 24.

³⁸ In *Rees v. Sinclair*, *supra*, n. 12.

³⁹ *Ferri v. Ackermann* (1979) 444 U.S. 193, the reason being that they owe no more than a general duty to the public but are required to serve the undivided interests of their clients.

⁴⁰ *Imbler v. Pachtman* (1976) 424 U.S. 409 S.C.

⁴¹ Akin to advocates who provide services under Legal Aid.

In Canada, advocates had no immunity from negligence actions even before *Rondel v. Worsley*. Following the case, the question was reviewed extensively in *Demarco v. Ungaro*,⁴² a case from Ontario, where the *cab rank* principle does not exist in the practice of civil litigation. The Canadian court found that the advocate's duty was in no way hampered by fear of civil liability. In addition, *Rondel v. Worsley* was based on considerations that have no Canadian relevance. Furthermore, the undesirability of re-litigation did not justify recognition of a lawyer's⁴³ immunity in Ontario. This approach has been consistently followed by Canadian courts.⁴⁴

Lord Steyn regarded the empirical evidence from Canada as being the most relevant in demonstrating that the fears as to the consequences of abolition were unnecessarily pessimistic. Lord Hoffmann, too, pointed out that Canada had got on perfectly well without an immunity for over a hundred years and it was not necessary to introduce it in order to encourage lawyers to perform their duties to the court. His Lordship quoted the words of Krever J. in *Demarco*, that "... there is no empirical evidence that the risk [of counsel subjugating his duty to the court to the interest of his client] is so serious that an aggrieved client should be rendered remediless".⁴⁵ Although there are differences in the various legal systems, Lords Hoffmann and Steyn thought Canada was the best example of a legal system similar to that of England, yet differing in her approach towards advocates' immunity. It is to be noted that *Demarco* established that there is no immunity attaching to a barrister in respect of civil litigation.

Lord Hope, however, could not draw any useful lessons from comparative experience in respect of criminal justice. His Lordship doubted the extent to which any useful guidance could be gained from the United States, or countries in Europe and Canada. In respect of Canada, Lord Hope stated that there was never any rule of immunity at common law and when the matter came up for review after *Rondel v. Worsley*, the court declined to introduce such a rule. Its absence has not given rise to difficulty perhaps because it has been made clear that the Canadian courts will be slow in concluding that a lawyer in the conduct of the case was negligent rather than being in error of judgment.

Lord Hope also found it difficult to draw any useful comparisons with the continental legal system where the role and duties of the advocate is markedly different from those of their counterparts in England. On the other hand, the more recent trend in some jurisdictions in the United States has been to uphold legislation granting immunity to public defenders.⁴⁶ Lord Hope was unable to agree with Lord Steyn that the Canadian experience was the most relevant. He should have thought the Australian and New Zealand experience was the more relevant. Moreover, the distinction drawn in the United States by the Supreme Court between the position of the prosecutor and that of the defence attorney was worth noting. Whatever may be said about the defence advocate, Lord Hope thought that it was essential to the administration of justice that prosecuting advocates should continue to be given absolute immunity in the conduct of the prosecution case. The conclusion he would draw from the comparative material was that it did not suggest that their Lordships would be falling into serious error if they were to hold on grounds of public policy that the immunity against negligent claims should be available to advocates in criminal cases.

⁴² (1979) 95 D.L.R. (3rd) 385.

⁴³ Generally barristers and solicitors.

⁴⁴ *Per* Lord Steyn, *supra*, n. 2 at 553.

⁴⁵ In *Demarco v. Ungaro*, *supra*, n. 42 at 406.

⁴⁶ For example in Nevada, Delaware, Vermont and New Mexico; see *supra*, n. 2 at 592.

It is worth noting that advocates' immunity was an open question in Singapore until 1997 when the Court of Appeal, faced with the issue, declined to follow *Rondel v. Worsley*⁴⁷ in respect of civil advocacy immunity. The Court further held that negligence claims arising out of the conduct of criminal proceedings are barred not because of an immunity, but because the action is an abuse of court process. Yong Pung How C.J. reviewed the reasons for the immunity in considering whether its existence was justified in Singapore. He held that the *cab rank* principle did not apply in Singapore. Even if it did, it did not justify immunity. As for the divided loyalty argument, there was no basis for the view, as there was no reason to suppose that counsel would subordinate his duty to the court to the interests of his client.⁴⁸ In answer to the concern that, with the removal of the immunity, counsel would be overly exposed and the exercise of discretion overly scrutinised, Yong C.J. felt that the defence of error of judgment would be the solution. The answer to defensive litigation was that imposing hearing fees, case-management by the court, intervention by judges and an order of costs could control prolixity in litigation.

In addition, the general privilege reason was irrelevant in Singapore. It was not really an immunity as the privilege protected not liability in negligence but freedom of speech by those participating in legal proceedings. While there was a need to ensure that there was no abuse of process in collateral attacks on prior decisions, this need was not a sufficient reason for the immunity. Many of the difficulties highlighted in the speech of Lord Morris in *Rondel*⁴⁹ were not faced locally in the absence of a jury system. As for the complexity of evidence and the need for a finding on what an earlier court had decided, the Singapore court took the view that these were not more difficult than the issues normally posed in any commercial or arbitration matter which came before a court.

CONCLUDING COMMENT

With the "cards . . . now heavily stacked against maintaining the immunity",⁵⁰ it is unsurprising that the House of Lords should have held that it could no longer be justified in civil and criminal proceedings. Their Lordships could find no compelling reason for its maintenance. None of the arguments relied upon could justify its retention in the present context. The immunity was no longer needed with the development of safeguards preventing unmeritorious and vexatious claims against advocates which would be unfair or which would bring the administration of justice into disrepute. Moreover, in assessing what is justifiable in today's society, the balance clearly lay in favour of abrogating the immunity and granting litigants a remedy against advocates who have been negligent in the conduct of their case. Furthermore, the adoption of the European Convention and the coming into force of the Human Rights Act 1998, together with the position taken by other countries, particularly those in the European Union, calls for some uniformity of approach on the part of the United Kingdom.

On the other hand, the crucial question of whether immunity is essential for the proper administration of criminal justice has not elicited a unanimous answer. In

⁴⁷ In *Chong Yeo & Partners v. Guan Ming Hardware & Engineering Pte Ltd.* [1997] 2 S.L.R. 729, C.A.; *Rondel v. Worsley* was approved of *obiter* in *Majid v. Muthuswamy* [1968] 2 M.L.J. 89, Federal Court of Malaysia (on appeal from Singapore).

⁴⁸ Citing Wilson J. in *Giannarelli*, *supra*, n. 13, at 433, 434.

⁴⁹ [1967] 3 All E.R. 993, at 1012.

⁵⁰ *Per* Lord Steyn, *supra*, n. 2, at 555.

criminal litigation, it has been asked if immunity serves the public interest by contributing significantly to the working of the criminal justice system and not because it provides protection to lawyers as a class. The correct approach is to balance the normal right to compensation for a legal wrong against the advantages which will accrue to the public interest from such an immunity. In this regard, there is some support for the partial retention of the immunity in criminal proceedings in respect of defending counsel and public defenders, or in the case of an advocate whose role is analogous to that of a public prosecutor (e.g. a prosecutor in disciplinary proceedings).

In the case of defending counsel, only one argument seems to be capable of justifying criminal advocacy immunity, which is based on more than mere instinct or intuition. It is that to allow a negligence action would involve the risk of different conclusions being reached on issues already decided in the earlier case. The removal of immunity would produce conflicting results when the decision by judge and jury that the plaintiff is guilty beyond reasonable doubt is followed by the decision of a judge on the balance of probability that the plaintiff is not guilty. However, the majority view in *Arthur J.S. Hall* is that the formidable safeguards now in place, in particular the *Hunter* principle, would provide a satisfactory solution to any problem that might arise from the removal of the immunity. The same counter-argument would apply to what was previously said to be perhaps the strongest reason for maintaining the immunity in criminal cases, which is that advocates should not be harassed by vexatious suits. In the case of the public defender, it is a policy decision whether or not to grant immunity and it may be that the reasons for doing so in the United States may not necessarily be applicable in other jurisdictions. As for advocates playing a role akin to that of public prosecutor, more will be said below.

It must be noted that *Arthur J.S. Hall* is a case which abolishes the criminal advocacy immunity attaching to *defending* counsel. It does not affect the position of the public prosecutor who continues to enjoy the general immunity that is accorded to the other participants in a legal proceeding. Indeed this is the position in the United States where the public prosecutor is said to owe a general duty to the public as opposed to a specific duty owed to a client. Hence it would be more appropriate to draw an analogy between public prosecutor and judge than between defence counsel and judge or with the prosecutor.

It is clear that current policy considerations do not justify the retention of the criminal advocacy immunity in modern day conditions. Given the right to compensation for a legal wrong, it would be confusing and inconsistent to grant immunity to defence counsel in criminal proceedings while denying the same immunity to advocates in civil proceedings. However, given that criminal advocacy immunity was abrogated by a bare majority of the House of Lords, we may not have heard the last word. Instead, the effects of its abolition on the administration of justice may make it once again the subject of review. Public policy is not immutable but it is difficult to envisage a situation in the future that will call for the reinstatement of advocates' immunity.

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DEFINING THE BREACH OF DUTY AND THE USE OF THE *BOLAM* TEST

Adams and another v. Rhymney Valley District Council (2000) 150 N.L.J. 1231 (C.A.)

(Morritt and Sedley L.JJ., and Sir Christopher Staughton)

BACKGROUND

This tragic case arose out of a fire that broke out at the claimants' home in the autumn of 1991. Mr Adams, who discovered the fire, was downstairs at the time and managed to escape uninjured. However Mrs Adams and the couple's three small children were trapped upstairs and their escape was hampered by the fact that the bedroom windows were fitted with locks of a type that used removable keys. During the emergency the keys were not to hand because the couple, who were concerned about the risk of a child opening a window and falling out, kept them downstairs. Ultimately, Mrs Adams was able to smash one of the windows and escape, albeit suffering severe lacerations; however the three children died.

In their action against the local council, which was the landlord, the claimants alleged that the latter had been negligent in approving the use of the removable-key type of lock (in the course of refurbishing the property in 1989) as opposed to a child-proof pushbutton operated design, which had been available on the market at the same time and would have allowed the family to escape the fire. The trial judge, Thomas J., heard expert evidence as to the respective merits and demerits of the two types of lock in relation to a number of matters, in particular the need, on the one hand, to prevent small children from falling out of windows – as well as the ingress of burglars, and, on the other, to retain the window as a means of escape in case of fire. He also found that, while the defendant had not expressly adverted to these various risks, or attempted to balance them, it had, in adopting the removable-key design, chosen a design that, at the time, commended itself to a number of other local authorities. Moreover, it was one that a competent designer (who had addressed his mind to the risks) could legitimately have arrived at. The judge proceeded to apply the well-known *Bolam* test, to the effect that a professional who adopts an approach sanctioned by a responsible body of his peers is not in breach of duty, notwithstanding that another body within that profession uses a different approach.¹ Accordingly he found that the defendant's choice of the removable-key design did not amount to a breach and dismissed the claimants' action. The claimants appealed.

THE APPEAL

The claimants' main contention on appeal was that the judge had been wrong to allow the defendant the benefit of the *Bolam* test. This was because that test constituted a limited indulgence by courts of professionals who adopt a given practice following a reasoned consideration of the risks involved. Here, the defendant – by its own admission – had never given any thought to the respective risks and benefits attending the use of window locks with removable keys. Instead, it was urged, the court needed

¹ *Bolam v. Friern H.M.C.* [1957] 1 W.L.R. 582.

to ask what the Council would have done had it properly thought matters through. Insofar as those deliberations would have led to the adoption of the pushbutton design, the claimants (who would in that event have escaped injury) should win their case.

This argument produced a significant division in the Court of Appeal. Though it won the backing of Sedley L.J. it was rejected by both Sir Christopher Staughton and Morritt L.J. Accordingly the claimants lost their appeal. Nevertheless the case is of interest, not only in terms of the general comments of all three Lord Justices on the meaning and scope of the *Bolam* test – a matter of some uncertainty in recent years, but also as regards the argument sketched in the last paragraph. Exactly what is wrong with it? It is suggested that, while the majority of the Court were correct to reject it, their judgments do not entirely expose the fallacy upon which it rests. Indeed the issue is not so much the application of the *Bolam* test (which was arguably something of a “red herring”), but the proper identification of the breach of duty. Accordingly the first part of this note looks in more detail at the minority reasoning of Sedley L.J. The second part then goes on to assess the Court’s broader comments on the *Bolam* test.

THE MINORITY JUDGMENT OF SEDLEY L.J.

The starting point for Sedley L.J. was that the Council owed a duty, both at common law and statute, to design and build its housing with due regard to the safety of occupiers and visitors.² In this regard, after noting that the trial judge had asked whether the Council had exercised proper skill and care in balancing the various factors relevant to the design of the window, his Lordship commented as follows:

From the facts which I have set out, it is plain that the answer to this question is “No”. Nobody in the council ever considered whether a removable key created a risk that the window would not be able to be opened in an emergency or, therefore, balanced it against the possible drawbacks of a button release. A breach of the duty established in *Rimmer v. Liverpool City Council* had plainly occurred. The crucial remaining question was therefore causation: if due consideration had been given to the relevant factors, would it more probably than not have resulted in the choice of a button release?³

It was at this point, as Sedley L.J. saw it, that the trial judge had been distracted – and thus was prevented from asking that “crucial question” – by the phantom of the *Bolam* test. The test, though, should be regarded as irrelevant:

The reason why the *Bolam* test has no relevance to a case such as this is that its purpose is to enable the court to determine whether a person professing and purporting to exercise a particular skill has exercised it with sufficient competence to escape a charge of negligence. In the present case the problem is that nobody in the council purported to exercise the relevant design skill.⁴

It is, however, important to notice that Sedley L.J.’s approach involves more than the rejection, on the facts, of the use of the *Bolam* test. In fact the critical step in his reasoning is found in first of the two extracts above. It consists in the assertion that the Council had breached its duty under *Rimmer*. Evidently, the breach he had in mind was not the use of the design with removable keys, but rather the Council’s earlier

² *Rimmer v. Liverpool City Council* [1985] Q.B. 1; Section 4, Defective Premises Act 1972.

³ Smith Bernal Transcript, 20 July 2000, para. 12.

⁴ *Ibid.*, at para. 16.

failure to weigh up the risks in arriving at a decision in favour of that design. In short, the breach of duty has been shifted back a stage and equated with a faulty *process* of decision-making as opposed to the actual outcome of that process.

Was such a redefining of the breach of duty justified in this case? In some situations a person may indeed be under a separate and independent duty not merely to arrive at a 'correct' decision, but also to have taken care along the way in reaching that decision. This is true, for example, in many instances of Breach of Trust, where a trustee fails to have proper regard to directions in a trust instrument in making an investment. In such a case he may be found to have breached his duty notwithstanding that the investments he made were judiciously chosen and indeed profitable.⁵ By contrast, however, in the law of negligence there is no basis for judging the defendant – and whether he behaved reasonably – by anything other than his actual conduct. The law's concern here is risk-reduction and risks flow from unreasonable conduct, not the prior thought processes that give rise to it (even assuming these were accessible by a court).⁶

Additionally, it should be noted that, if accepted, the approach endorsed by Sedley L.J. would have significant implications for the causation issue. In effect, it complicates the latter by introducing an extra tier. No longer must the court decide merely the traditional issue of whether, had the defendant conducted itself properly, the claimant would have avoided loss. As a preliminary issue, it must also determine whether a more appropriate process of decision-making by the defendant would have led the latter to adopt different conduct.⁷ For example, in the case at hand, the question becomes *first* whether the Council, had it weighed up the risks, would have opted for the pushbutton design of lock and, only secondly, whether that design of lock would have enabled the claimants and their children to escape the fire. The first of these issues is by its nature very hard to determine, especially where, as here, there was something to be said for either of the designs. Indeed, while Sedley L.J. was of the view that the Council would probably have chosen the pushbutton design, he was here again in a minority.⁸

THE USE OF THE *BOLAM* TEST

On the assumption that the breach of duty, if any, by the Council consisted in its actual installation of the removable key design of window lock, the question remains as to how the *Bolam* test bears upon that issue.

The *Bolam* test originated out of a medical negligence claim brought by a patient who suffered bone fractures in the course of undergoing electric shock therapy. The risk of such fractures occurring was well known, but the evidence showed the lack of

⁵ See *Target Holdings Ltd. v. Redfern* [1995] 3 All E.R. 785, per Lord Browne-Wilkinson at 793.

⁶ As Morritt L.J. observed in his judgment (n. 3, *supra*, at para. 61), "The experienced surgeon may act in a particular way out of habit or from intuition. If his choice gives rise to damage to his patient he is sued for causing damage by that action, not for failing to sit down and think about it in advance."

⁷ It is true that, occasionally, the courts do have to engage in this type of 'preliminary causation' enquiry – notably where the defendant's breach of duty precluded it from doing anything at all in response to some contingency. Thus in *Bolitho v. City & Hackney H.A.* [1998] A.C. 232 the court needed to consider whether, if the doctor had attended the claimant when summoned (as she should have done), she would have adopted the one procedure capable of saving him from injury. There the doctor's action remained in the realm of the hypothetical. By contrast, in *Adams* the Council *had acted* in installing the removable-key design of lock.

⁸ Given that the majority judges rejected Sedley L.J.'s premise that the Council's faulty reasoning process could itself amount to a breach of duty, their comments on this point are *obiter*. However, for the record, Sir Christopher Staughton expressly dissented, pointing out (at para. 54) that "the Council's decision is likely to have been ... that which was evidently the decision taken by the majority of people in this country at the time – to have locks operated by a removable key ..." Morritt L.J. left the question open.

a consensus among doctors as to how best to minimise it. Instead the defendant hospital had adopted a practice in accordance with one of three alternative schools of thought on the subject. In directing the jury⁹ as to what was required to find a breach of duty, McNair J. stated:

A doctor is not guilty of negligence if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . . Putting it the other way round, a man is not guilty if he is acting in accordance with such a practice merely because there is a body of opinion who would take a contrary view.¹⁰

Since then the test has been applied in professional negligence cases generally.¹¹ Nevertheless, and notwithstanding recent clarification offered by the House of Lords in *Bolitho v. City and Hackney H.A.*,¹² its precise status remains contentious. The key question is whether the test operates as a *rule of law* or merely as an *evidentiary principle*. In other words, does a finding that a professional has conformed with a practice approved of by a responsible body of his peers *automatically* mean that he cannot be in breach of duty, or does it merely constitute *evidence* (albeit very strong evidence) of non-breach, which a court – at least notionally – remains free to disregard?

In *Adams* the Court of Appeal did not explicitly address this question. However, reading between the lines, it is suggested that, here too, a difference of opinion prevailed. Sedley L.J. inclined to the “rule of law” view, as shown by his concern that a defendant, who fortuitously stumbles on a practice approved by a school of experts, should not be allowed the benefit of an absolute defence. As his Lordship put it:

It would be a . . . paradox, with serious public policy implications, if those who owed a duty of care requiring professional judgment for its discharge could act more or less at random and then, if harm resulted, defend themselves by showing that – even though proper advice would almost certainly have obviated the harm – a minor school of expert opinion existed which would, if consulted, have sanctioned the course taken by them.¹³

By contrast, Sir Christopher Staughton and Morritt L.J. appear ultimately to have accepted the evidential interpretation of *Bolam*.¹⁴ The former, having given examples of occasions in ordinary life when a person could adopt either of two courses without necessarily being in breach of duty, commented: “In that sort of case the court would be well able to judge for itself whether one course or the other was negligent, or neither of them. . . . But when professional skill is involved, the judge . . . may not be qualified to decide without assistance.”¹⁵ The crucial point here is that expert evidence that a body of professionals endorses a particular course of action is regarded simply as *assisting* the court in its deliberations. Such an endorsement does not *make* the course of action non-negligent for that, ultimately, is always a matter for the court.¹⁶

⁹ The case was decided at a time when, occasionally, juries still sat in negligence cases.

¹⁰ [1957] 1 W.L.R. 582, at 587.

¹¹ See *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, *per* Lord Diplock at 220.

¹² [1998] A.C. 232.

¹³ Note 3, *supra*, at para. 18. See also his Lordship’s comments on the *Bolam* test in *Michael Hyde Associates Ltd. v. J.D. Williams & Co. Ltd.* (2000) (C.A.), *The Times*, 4 August 2000.

¹⁴ Their judgments contain, it is true, some equivocation on this important point. Thus they both refer to the ‘benefit’ conferred by the test. Moreover, Sir Christopher Staughton at one stage (para. 42) implies that a consultant obstetrician who delivers a baby in accordance with a respectable body of opinion will retain this benefit even though another course of action was shown to be safer. In fact, on the evidential approach, a court would be entitled to find a breach here.

¹⁵ Note 3, *supra*, at para. 38. See also Morritt L.J.’s comments at para. 57 (in which he, however, complicates matters by suggesting that the evidence should also show the practice endorsed by the experts to be in ‘common use’).

¹⁶ See *Joyce v. Merton, Sutton and Wandsworth H.A.* (1996) 7 Med. L.R. 1, *per* Roch L.J. at 13-14.

It is this understanding of the *Bolam* test that underlies the House of Lords' judgment in *Bolitho v. City and Hackney H.A.*¹⁷ There Lord Browne-Wilkinson commented on the proper approach to expert evidence as follows:

[T]he court is not bound to hold that a defendant escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice [T]he court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge . . . will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.¹⁸

While Lord Browne-Wilkinson went on to urge judges to be very cautious in finding a school of practice endorsed by professional experts to amount to a breach of duty (the latter, after all, not the judge, have the relevant expertise in their field and will presumably try to avoid practices that involve unreasonable risks),¹⁹ the fact remains that, in principle, such a finding is possible. Accordingly, it is suggested that, contrary to Sedley L.J.'s view, no real paradox arises out of invoking the test in a case such as *Adams*. The test does not involve giving the defendant any special defence. It amounts simply to an injunction that, in complex cases of professional negligence, the court should hear evidence on what, if any, schools of thought exist in relation to the practice adopted by the defendant. And where the practice is shown to have the support of a body of opinion within the profession, a breach of duty should not lightly be found.

Ironically, though, as Sir Christopher Staughton pointed out, *Adams* did not ultimately require the Court to give even such *prima facie* priority to the views of experts.²⁰ This was because the alleged breach of duty, going to the type of window-lock installed by the Council, did not raise complex technical questions. Instead the Court was able to assess for itself the merits and demerits of the removable-key as opposed to the pushbutton design.²¹ Clearly, the use of the former design marginally increased the fire risk (though, it may be said, the latter remained a "remote risk" – uncontrolled house fires are relatively rare events and the design would only become a critical factor in a fire where, as here, the windows were locked and the keys removed to an inaccessible location²²). By contrast, it was marginally safer than the pushbutton lock in preventing children from falling out of windows. Although the latter was designed to be childproof, the evidence was that older children were capable of operating it and, while they presumably would not fall out, a younger sibling

¹⁷ [1998] A.C. 232. See also Ward L.J.'s judgment in *Michael Hyde Associates Ltd. v. J.D. Williams & Co. Ltd.*, *The Times*, 4 August 2000.

¹⁸ *Ibid.*, at 241-242. Indeed, outside the context of medical negligence, this approach to expert evidence had already been taken for a number of years, see e.g. *Edward Wong Finance Co. Ltd. v. Johnson, Stokes & Master* [1984] A.C. 296.

¹⁹ As Sopinka J. commented in the Canadian Supreme Court in *Ter Neuzen v. Korn* (1995) 127 D.L.R. (4th) 577, 590, the professional "is assumed to have adopted procedures which . . . are not inherently negligent".

²⁰ See his Lordship's judgment (n. 3 *supra*) at paras. 44 *et seq.*

²¹ It is true that expert evidence was still relevant at a primary level, in showing the existence and magnitude of various risks (e.g. the incidence of children suffering injury through falling out of windows); however, at the secondary level, in determining what would be a reasonable response to those risks, evidence as to expert practice was not required.

²² The finding that the Council was not negligent in installing the removable-key design obviated the need to consider whether the decision by the Adams to keep the keys downstairs amounted to contributory negligence.

might.²³ With risks as finely balanced as these, it is unsurprising that the adoption of one rather than the other design was not held to be a breach of duty.

MARC STAUCH*

²³ The other main factor in favour of the removable key design – its superior resistance to burglars – was regarded as irrelevant on the facts (the window in the Adams' home where it was claimed the button design should have been fitted was at the front of the house and was extremely unlikely to be targeted by burglars).

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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.

COMPETITION LAW

The EC Law of Competition

edited by JONATHAN FAULL and ALI NIKPAY
Oxford and New York, Oxford University Press, 1999
cxviii and 961 pp., Hardback, £125.00
ISBN 0-19-876538-X

The publication of this book is both timely and welcome. It is timely for several reasons. First, the coming into force, on 1 March 2000, of the Competition Act 1998 has made an understanding of competition law essential to all commercial lawyers. The prohibition-based approach introduced by Part I of the Act and the extensive and, some would say, “draconian” powers of investigation and sanction it confers on the Director General of Fair Trading mean that businesses and their advisers can ignore it only at their peril. Furthermore, the Act effectively extends the reach of EC competition principles by applying them in the purely domestic context to transactions and practices hitherto beyond the scope of EC competition law.¹

It does this by mimicking within the purely national context the prohibitions contained in the Treaty of Rome. Thus, Chapter One prohibitions under the Act proscribe, within the national context, the same sort of anti-competitive agreements and concerted practices as are prohibited by article 81(*ex* 85) EC; and Chapter Two prohibitions extend to the same types of abuse of dominance as those prohibited by article 82 (*ex* 86) EC. This effect is reinforced, furthermore, by section 60 of the Act, the purpose of which is:

... to ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

Thus, according to section 60(2), an English court determining a question under Part I of the Act

must act (so far as is compatible with the provisions of and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –

¹ For example, to transactions which are not caught by Community competition law proper because they do not produce sufficiently appreciable inter-state effects.

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law".²

This approach is fundamental to the philosophy of the Act and even a cursory glance at the record of the relevant Parliamentary debates as they appear in *Hansard* will show that many critical issues under the Act have been left to be determined by the courts in accordance with Community Law principles.³

If the arrival of this book is therefore timely because of domestic legislative reform, it is also timely because the Community's competition regime is itself undergoing a period of reform and because of developments on the international scene. Thus, within the Community, a new regime has been introduced to deal with vertical restraints⁴ and reform of the Community's general approach to competition matters is also under way.⁵ At the international level, the 1990s saw a quantum increase in the number of countries introducing their own domestic antitrust laws⁶ and economic globalisation has led to the building up of a significant head of steam for increased cooperation between antitrust authorities and, in some quarters, for the introduction of some kind of international coordination or harmonisation of antitrust law.⁷ The immediate cause of this phenomenon has been a perception that liberalisation of trade under the WTO regime (which attempts to control *state* imposed restraints on access to national markets) may be undermined by the existence of market blocking agreements and practices on the part of *enterprises*. A lively debate is currently under way, primarily in the context of the WTO, and there is much controversy between states as to the appropriate way forward.⁸ There is also much pressure, particularly from the United

² According to s. 60 (5) and (6) of the Act, the term "court" means for these purposes "any court or tribunal" and the term "decision" "includes a decision as to—(a) the interpretation of any provision of Community law; (b) the civil liability of an undertaking for harm caused by its infringement of Community law." This approach is reinforced by the possibility that the Competition Tribunal, set up under the Act to hear appeals from determinations of the Director General of Fair Trading ("DGFT"), may refer questions of Community law arising under the Act to the Court of Justice by way of preliminary reference under art. 234 (*ex* 177) EC. The Court of Justice would have jurisdiction to accept such references as a matter of Community law in accordance with its own recent jurisprudence, notably Case C-7/97 *Oscar Bronner GmbH v. Mediaprint Zeitungs und Zeitschriftenverlag* [1999] 4 C.M.L.R. 112.

³ Not only questions of substantive law, but also procedural guarantees affecting the exercise of the DGFT's powers of investigation and sanction, may be affected by Community Law. Thus, Lord Simon of Highbury made clear when the Competition Bill was considered at Committee stage that the suspect's privilege against self-incrimination would be secure because "[i]nvestigations are always bounded by European jurisprudence" (H.L. Deb., 17th November 1997, col. 401).

⁴ Commission Regulation 2790/1999 on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Market Practices, O.J. L336, 29.12.99, p. 21.

⁵ See, for example, the Commission's *White Paper on the Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Work Programme 99/027, 28th April 1999.

⁶ According to a recent advisory report commissioned by the US Justice Department, 60 nations now have domestic antitrust regimes. See *The Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust*, 28th February 2000 ("the ICPAC Report"), Chapter One. According to the World Trade Organization, however, the total number is 80, of which 50 are developing countries. See, Notes on the Third WTO Ministerial Conference, 30th November–3rd December 1999, which can be found at <http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/16comp_e.htm>.

⁷ For a good summary of international developments, see the *ICPAC Report*, especially Chapter Five. See also, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, Report by the Group of Experts convened by the EU Commission Competition Directorate General, July 1995.

⁸ See the *ICPAC Report*. The 1996 Ministerial Conference of the WTO in Singapore set up a working party to consider the interaction between trade and competition policy. Its Reports to the WTO General Council for 1999 (WT/WGTCP/3, 11th October 1999); 1998 (WT/WGTCP/2, 8th December 1998); and 1997 (WT/WGTCP/1, 28th November 1997) indicate the issues and differences of opinion that arose during its deliberations. See also, *Trade and Competition Policies, Exploring Ways Forward*, (OECD, 1999); *Antitrust and Market Access*, (OECD, 1996); *Competition and Trade Policy – Their Interaction* (The Report of the OECD Committee of Experts on Restrictive Business Practices), (OECD, 1984) and *The Role of Competition Policy for Development in Globalizing World Markets* (UNCTAD X Seminar Papers), (UN, 1999).

States,⁹ to find antitrust solutions that will help guarantee access to domestic markets around the world. In this context, EC competition law may have a particular significance for two reasons.

First, although the guaranteeing to domestic competitors of fair and equal access to markets within the United States was undoubtedly one of the several objectives of the Sherman Act as originally conceived,¹⁰ US antitrust theory and practice (decisively influenced by the thinking of Chicago School economists and lawyers) now sees the central goal of antitrust as being to further consumer welfare by enhancing efficiency. Efficiency concerns now dominate US antitrust thinking in the domestic context. It is therefore ironic (though not surprising, given the United States' robust pursuit of its trading interests in recent years) that it is now emphasising the market access aspects of antitrust in the international field. On the other hand, as part of its insistence upon integration of the common market, Community competition law has always emphasised, as one of its primary objectives,¹¹ the assurance of market access and the need to prohibit enterprises from partitioning the common market by means of their restrictive agreements or practices. That is, after all, why Community law has taken a stricter line with various vertical agreements than would have been the case in the United States. Some vertical restraints may have efficiency enhancing justifications (and so might be regarded as benign in US domestic context) but would nonetheless not be tolerated within the EC because of their tendency to partition national markets by blocking market access. Since the international debate about the trade-antitrust interface focuses significantly on market blocking arrangements, the history and experience of the EC regime may therefore have a distinctive contribution to make.

Secondly, the EC competition law regime has matured into one of the leading models of antitrust regulation.¹² In fact, with the United States' system, it is indeed one of the two most important antitrust systems in the world. Of course, it differs in several fundamentals from the United States' approach¹³ and so represents one of two

⁹ See the *ICPAC Report*.

¹⁰ It is, of course, well known that Professor (now Judge) Robert Bork has argued that the US Congress intended the Sherman Act *solely* to enhance economic efficiency in the Chicago sense; see, for example, "Legislative Intent and the Policy of the Sherman Act", 9 J.L. & Econ. 7 (1966). Although Judge Bork's work, primarily his seminal book *The Antitrust Paradox: A Policy at War with Itself*, 2nd ed. (Basic Books, 1993), has been incredibly influential in re-shaping US antitrust law on Chicago School lines, his analysis of the legislative history has however been discredited by several distinguished scholars. See, for example, Eleanor Fox, "The Modernization of Antitrust: A New Equilibrium", 66 Cornell L. Rev. 1140, 1153-4 (1981); Thomas W. Hazlett, "The Legislative History of the Sherman Act Re-examined", (1992) Econ. Inq. 263; Herbert Hovenkamp, "The Sherman Act and the Classical Theory of Competition", (1989) Iowa L. Rev. 1019; Frederick M. Rowe, "The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics", 72 Georgetown L. J. 1511 (1984); James May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918", 50 Ohio State L.J. 257 (1989); James May, "Historical Analysis in Antitrust Law", 35 N. Y. L. Sch. L. Rev. 857 (1990); Schwartz, "Justice and Other Non-Economic Goals of Antitrust", 127 U. Pa. L. Rev. 1076 (1979); William H. Page, "Ideological Conflict and the Origins of Antitrust Policy", 66 Tulane L. Rev. 1 (1991); David Millon, "The Sherman Act and the Balance of Power", 61 Southern Cal. L. Rev. 1219 (1988).

¹¹ Community competition law is, of course, also profoundly influenced by Chicago's efficiency rationale, but not to the point of according it the same paramount position in antitrust adjudication as might be the case in the United States.

¹² Witness the comments of Barry Hawk, who states, in his Foreword to this book, that EC competition law has "become one of the most successful competition law systems in the world" (J. Faull and A. Nikpay, *The EC Law of Competition* (Oxford University Press, 1999), at p. viii).

¹³ See G. Amato, *Antitrust and the Bounds of Power*, (Hart, 1997). Although all antitrust regulation is intended to control private economic power, every system has also to find its chosen balance between the control of private power, on the one hand, and the setting of appropriate limits upon the exercise of governmental power on the other. In the US, those who drafted the Sherman Act were just as hostile to governmental "paternalism" as to private abuse. See, James May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918", *supra*, n. 10. The Sherman Act was therefore drafted so as to provide specific prohibitions to be *judicially* enforced at the suit of the Federal antitrust authorities (the Justice Department and the Federal Trade Commission), the States' attorneys general and aggrieved private parties. The executive was given no general administrative power to exempt specific arrangements or types of arrangement from the law (although statutes do, as is well known, exempt specific sectors from the antitrust laws or provide for their enforcement by sectoral regulators rather than by the Federal antitrust

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alternative models to which states are likely to have particular regard when developing new competition regimes, or discussing the possibility of global antitrust systems. For these two reasons, therefore, EC competition law now has a particular relevance to those interested in trade liberalisation and trade law.

A reflective treatment of Community competition law, such as that presented in this book, is therefore a timely addition to the shelf. It is, however, also welcome for many other reasons. It is authored by a team of twenty contributors, all of whom work, or have until recently worked, for the Commission's Competition Directorate General. Although not purporting to represent an "institutional" viewpoint, the book does clearly reflect the authors' experience and insights as competition regulators. This flavour permeates the whole work and distinguishes it from other competition law texts, some of which are excellent in their own way, written by lawyers in private practice for lawyers in private practice. It is, incidentally, a tribute to the exertions of the contributors and editors that, although the product of so many different hands, it is so well written and speaks in a single "voice" throughout.

The philosophy behind the book is also welcome. As well as providing a practical guide to EC competition law, the authors have endeavoured to "look behind the law at some of the competition policy issues in today's and tomorrow's European economy" and to "explain the rationale which underpins the law".¹⁴ It is precisely this approach, ignored by many UK published competition law texts in the past, which makes this book especially relevant to the developments already described.

Another refreshing feature of this book lies in its treatment of antitrust economics. Indeed, its opening chapter deals succinctly yet interestingly with the development of the economic thinking which underpins competition law. In the UK, so many competition law texts largely ignore the economic aspect, or nod in its direction by inclusion of a few pages describing the demand curve, barriers to entry and other isolated economic concepts. The subject is, however, much more interesting – and important – than that. It is impossible for the student, or practitioner, fully to understand competition law without understanding the evolution, and the changing forensic influence, of antitrust economics. For the student, in particular, a text's failure properly to present the fundamentals of, and the part played by, antitrust economics is especially harmful. It deprives the whole subject of its intellectual coherence, obscures its rationale (or rationales), and turns its study into a rather mind-numbing process of collecting and mechanically applying a range of highly technical and apparently arbitrary rules to a range of business practices with which the student is, in any event, unlikely to be familiar. Colleagues in other jurisdictions, particularly the United States, would be amazed at the thought that anyone, anywhere, could doubt the need properly to integrate a study of antitrust economics into the study of antitrust law. The fact remains, however, that so far as UK-published texts, and many UK-delivered competition law courses, are concerned, the economics underpinning of antitrust law has often been neglected. The approach adopted by the authors of this book is therefore particularly welcome.

The development of antitrust economics thinking, and its influence on competition law, is in any event fascinating in itself. It is traced in sufficient outline in this work, from Adam Smith to the Harvard School "structural" approach, through the consumer

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authorities). The European system, on the other hand, provides for a general prohibition of offending agreements and concerted practices, subject to the administrative power of the Commission to grant individual or block exemption, on grounds which would, in the United States at least, be seen as including industrial or social policy considerations not properly part of antitrust analysis.

¹⁴ J. Faull and A. Nikpay, *The EC Law of Competition*, (Oxford University Press, 1999), at p. ix.

welfarism and efficiency concerns of Chicago, to developments in organizational economics and to the strategic behaviour and game theory approaches emerging in the 1990s. Having done this, the text explains the relevant economic concepts and their application to competition law at a length that does justice to their importance.¹⁵ The remainder of the text then appropriately reflects the varying economic concepts in its analysis and discussion of the substantive law.

In a review of this length, it is not, of course, possible to comment in detail on the book's extensive treatment of the substantive law. Suffice it to say that it is well structured and is, as one would expect, fluent, coherent and accurate. So far as structure is concerned, the book is divided into three parts. The first deals with "The Economics of Competition" and, in addition to the antitrust economics matters already discussed, gives a good general overview of articles 81 and 82 EC, EC merger regulation, and article 86 (*ex* 90) EC (state measures in respect of public undertakings). Part II then considers specific practices in respect of horizontal agreements, vertical agreements, and intellectual property respectively. Part III closes by examining the application of competition law in four specific sectors distinguished by the particular issues they raise in the European context and/or by the relevance to them of technological change. These are the financial services sector, energy, communications (encompassing not only telecoms but also the media and the internet), and transport.

All in all, this is a fine book and will, no doubt, become established as one of the "must have" texts for practitioners and academics alike. In this reviewer's opinion, it has more than overcome the intellectual "barriers to entry" to its particular market.

PETER KUNZLIK*

YOUNG PEOPLE AND CRIMINAL JUSTICE

Defending Young People in the Criminal Justice System

by MARK ASHFORD and ALEX CHARD
 London, Legal Action Group, Second Edition, 2000
 xlix + 860 pp., Paperback, £35.00
 ISBN 0 905099 92 3

The accommodation of all issues which can arise when defending children and young people in the criminal justice system within a single text is bound to be a difficult task. The Labour government has introduced several new disposals in youth justice, has required local authorities to become more involved in crime prevention and has also placed the delivery of youth justice within the framework of the European Convention on Human Rights by enacting the Human Rights Act 1998. The authors of *Defending Young People in the Criminal Justice System* have managed to cover these changes, and more, while producing a text that is eminently readable and, more importantly, comprehensive.

The approach throughout is practical. The book is written in an unfussy manner and seems to have been designed primarily for the busy practitioner in a criminal practice – someone who probably deals with youth justice on a regular basis but is not

¹⁵ The chapter as a whole is 61 pages long.

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necessarily a specialist in an area of the law, which is often, as the authors note, “delegated to the most junior lawyers”.¹ There is useful guidance throughout; for example advice on what to watch out for in preparing personal mitigation for the child client.² However, if lawyers are the intended users of the book, it is somewhat surprising to find, albeit brief, information on such matters as the sources of law, both domestic and international. It is true that practitioners may forget some of their basic teaching from undergraduate years, but many would be surprised to find themselves confronted with information on such fundamental matters. There are also other issues discussed at a rather basic level – the main chapters on sentencing options, for example, provide straightforward definitions where they would not be expected.

Such criticisms should not, however, create the impression that the text is lacking in rigour. It certainly is not. Rather, the approach can be explained by the fact that the text aims to target not only lawyers, but also social workers and other advisors working within the youth justice system. However, it cannot really meet the needs of this wider audience – there is too little discussion and evaluation of issues, the use of acronyms may be confusing to a non-legal practitioner and the sections advising defence lawyers are not of particular relevance to social workers. In its attempt to meet the needs of different professionals within youth justice work, the text is not entirely successful. Fundamentally, it remains a text for lawyers. For this readership, the book has many useful features, such as checklists and summaries of options for sentencing disposals and of the powers of the court in breach proceedings. More of these summaries could usefully have been included elsewhere in the text; thus allowing it more easily to be “dipped into”. As it stands, it is necessary to read a whole chapter, or sometimes two, to establish the legal position in a particular situation under enquiry.

The text’s appendices make this book a more comprehensive and useful volume. No doubt due to constraints of space, some things that could have been included in these appendices have been omitted. The inclusion of the various National Standards,³ which are referred to throughout the book, would not only have made the appendices even more comprehensive, but would also have been attractive to the non legally qualified reader. The fact that none of these National Standards are within the section on further reading is, however, an important oversight.

There are other little stylistic niggles. For example, it is sometimes necessary to refer back several pages in order to establish the Act from which a particular section under discussion derives. Certain chapters are rather repetitive and there is a lack of cross-referencing to topics covered at other points. An example of this latter fault is to be found in Chapter Two’s discussion of confidentiality within the youth justice system, which contains neither a reference to the Appropriate Adult nor a link to Chapter Five where Appropriate Adults are discussed in more depth.

These are, however, only minor criticisms and a response by one individual reader to the authors’ style. Overall, it is to be hoped that interested lawyers buy and read this book. It has some shortcomings, but it is nevertheless useful, as up to date as can be expected, comprehensive and easily comprehensible.

M. E. RODGERS*

¹ *Defending Young People in the Criminal Justice System* (Legal Action Group, 2000), at p. 21.

² *Ibid.*, at p. 335.

³ For example, the National Standards for Cautioning and the National Standards for the Supervision of Offenders in the Community, both of which are referred to heavily throughout the text.

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IDEOLOGIES OF CONTRACT LAW

Understanding Contract Law

by JOHN ADAMS and ROGER BROWNSWORD

London, Sweet & Maxwell, Third Edition, 2000

258 pp., Paperback, £10.95

ISBN 0-421-71770-X

This book forms part of the *Understanding Law* series, which is primarily intended for students who are about to start their law degrees. The publishers recommend that the series should be consulted before the start of a course, or within a few weeks of commencing studies. However, these books are not simplifications because their authors focus on the underlying principles of their respective subjects. This is particularly true of *Understanding Contract Law*. From the outset, the authors make it clear that it is not their intention to cover the substance of the law of contract in any detail. Instead, selected cases are considered in order to illustrate the conflict of ideologies which Adams and Brownsword have identified as influencing the development of this area over the past two centuries or so.

The book is split into three parts. In the first, aptly headed "Groundwork", the authors observe that most contract law modules at universities focus on the contents of the "rule-book", *i.e.*, the body of decided cases which have in some way developed, or even created, contract doctrines, and relevant statutes. Adams and Brownsword comment that this is not ideal as, in practice, the rule-book is not of great significance. They then move on to consider the historical development of the law of contract, and the emergence of today's rule-book. Interestingly, until the mid-nineteenth century, there was no rule-book as such. It was only when writers of that period began to group reported cases under different headings that the formal division of contract into different categories emerged.

Following this initial part, Adams and Brownsword move on to develop their interpretative framework, which is based on the tension between "formalist" and "realist" approaches, as well as the ideologies of "consumer-welfarism" and "market-individualism". Judges who take a formalist approach will follow the rule-book, even where this may lead to harsh decisions. For the formalist, the integrity of the rule-book is to be preserved and sympathy towards any particular party is not a material consideration. Formalists are uncritical in their acceptance and almost mechanical application of the rule-book doctrines.¹

On the other hand, realist judges are the exact opposites of the formalists. For them, the rule-book is not absolute and the facts and potential outcomes are more important. In contrast to the formalists, realists have no problem with amending the rule-book where necessary in the interests of justice. Thus, new doctrines and concepts are encouraged where they promote the development of the law of contract into a fairer system. In this regard, the authors make reference to concepts such as promissory estoppel and the doctrine of the innominate term.²

¹ Cynically, one could compare the formalist with a lower-second class student, who has a good knowledge of the law, but fails to display the ability critically to evaluate its application.

² Which clearly causes many headaches for the formalist, who cannot simply say whether or not a particular term is a condition or a warranty, but needs to assess the term in question in light of all the facts. This is something which realists would do quite happily.

The distinction between the formalist and realist approach to the rule-book is used as an initial guide to interpreting and understanding the various leading cases in the law of contract. However, the authors emphasise that it would be wrong to take a black-and-white approach and to pigeon-hole judges as either formalists or realists. The objective of using these labels is simply to aid the description of how judges decide cases, rather than as a prescription as to how judges *should* decide cases.

Adams and Brownsword identify two different ideologies influencing realist judges in their decision-making: “consumer-welfarism” and “market-individualism”. Although not easy to define, consumer-welfarism represents reasonableness and fairness in contracting. The focus is firmly on consumer protection, and includes a mix of specific principles. The authors refer to principles such as good faith, unjust enrichment and abuse of bargaining position. From a paternalistic position, it is possible to release contractors who have entered into bad bargains from their obligations where justice so requires.

Market Individualism³ has two limbs – the facilitation of competitive exchanges in the market, and the individualistic ideas of “freedom” and “sanctity” of contract, which allow parties the maximum freedom to decide on the extent of their contractual relationship. Judges with such an ideological position will therefore not release parties from a bad bargain.⁴

Yet, once again, the authors issue a *caveat* – it may not always be possible to establish whether a particular decision was influenced by market-individualism or consumer-welfarism, nor whether a judge was acting as a formalist or realist. For example, if the rule book has a market-individualist orientation in a particular aspect, the strict application of the rule-book by a formalist may appear as a market-individualist approach. However, despite these potential uncertainties, the framework developed by Adams and Brownsword is very valuable in explaining and interpreting judicial decisions.

In Part Two, “The Judges and The Rule Book”, the authors consider various aspects of the law of contract, and analyse these against the framework developed in the first part. They select areas including contract formation, consideration, risk and frustration to illustrate the way in which the distinction between formalism and realism helps to explain the various cases in these areas of contract law. They also consider recent developments, such as “electronic commerce”, and their likely impact on the future development of the law.

Part Three, “The Rule-Book and The Transformation of Contract”, considers factors which have also influenced the development of contract. Issues such as changes in the relationship between the state, individual and contract and the impacts of the Europeanisation and globalisation of the law of contract are considered. The authors discuss recent E.C. Directives in the field of consumer contracts which have resulted in a modification of the rule-book. The final chapter in Part Three considers how social changes may have had an impact on the transformation of the law of contract. In doing so, Adams and Brownsword employ Marxist and Weberian analyses of social change and assess their potential application in the transformation of the law of contract. This final chapter is the most complex, and is possibly one with which law students in the early stages of their course may struggle – but then the authors conclude

³ Roger Brownsword divides this ideology into two different strands, “static” and “dynamic” market-individualism. Unfortunately, this division is not covered in much detail in this edition. It is to be hoped that the fact that a more detailed consideration of this division would require the re-writing of Part Two will not deter the authors from doing so in a fourth edition. In the meantime, the interested reader should consult Brownsword, “Static and Dynamic Market Individualism”, in Halson (ed.), *Exploring the Boundaries of Contract* (Dartmouth, 1996).

⁴ To illustrate this, the authors discuss the decision in *L. Schuler A.G. v. Wickman Machines Tools Ltd.* [1974] A.C. 235.

correctly that “understanding contract certainly is a tall order, but whoever suggested it would be easy?”⁵ Although this text cannot make that task any easier, it tries to introduce order into a complex area – and succeeds in this objective.

Understanding Contract Law should be essential reading for all students of contract law, both when they start their studies and then again when they come to study subjects which are based on the law of contract, such as commercial law. The authors make it very clear that knowing the law is but a small part of the study of contract law and that understanding contract law requires a much greater effort than is required to learn the rules in the rule-book. An easy book this is not – but it will be an invaluable help for students trying to make sense of contract law.

CHRISTIAN TWIGG-FLESNER*

FAITH IN LAW

Faith in Law: Essays in Legal Theory

edited by PETER OLIVER, SIONAIDH DOUGLAS SCOTT and

VICTOR TADROS

Oxford, Hart Publishing, 2000

153pp., Hardback, £25.00

ISBN 1 901362-95-7

This edited volume of seven papers arises out of a series of seminars held at King's College, London in the autumn of 1997. Their subject, “faith in law”, is in truth not so much a subject as a premise for jurisprudential inquiry. It is an inquiry in search of a subject and it is to the credit of the editors that they do not pretend otherwise. They do not strain to identify a consensus within the papers and are content instead to suggest three broad themes arising from them. The first is the employment of faith in legal decision-making (faith-based decision-making being contrasted with decision-making based on “right reason”). The second is the co-existence of law and religious faith generally. The third is the law's treatment of diversity within religious faith.

The book is a valuable contribution to the literature on all three fronts, and, with regard to the first theme (faith in legal-decision making), takes up some significant strains in modern legal theory. There is, for instance, a resonance with Kent Greenawalt's consideration of non-rationality in judicial decision-making,¹ and an echo of David Saunders's identification of faith in law with the rule of law.² If we had faith, we might believe that similar truths had begun to emerge mysteriously from independent sources at more or less the same time. The inquiry begins to yield a subject and the subject a school of thought.

In the introduction, the editors describe a number of possible relationships between the concepts of faith and reason, and thereby set up a dichotomy between faith and reason which permeates much of the remainder of the book. The first of these

⁵ Brownsword and Adams, *Understanding Contract Law* (Sweet & Maxwell, 2000) at p. 236.

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¹ See, for instance, “Religious Convictions and Law Making”, (1985) 84 Mich. L. Rev 352 at 404 and “The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment”, 27 Wm & Mary L. Rev. 1011.

² Especially where the editors note, at p.12, that “... [t]he system of law is as much about the appearance of impartiality as it is about decision.”

relationships is demonstrated where one puts one's *faith* in another person because one has *reason* to value another's opinions over and above one's own. This is a profoundly simple illustration of the potential "rationality" of faith. It also put this reviewer in mind of the law of fiduciaries and trusts.³ The editors' next suggestion is that faith can itself be treated "as a reason" to act in a particular way. As they put it, "[t]he fact that one is faithful may be considered a virtue in itself".⁴ Thus, the concept of reasonableness is flexibly employed. In the first example, it is reasonable (in an instrumental, utilitarian sense) to trust another. In the second example, it is reasonable (in a virtuous, moral sense) to be faithful.

However, the editors do not alert the reader to this diversity in their use of the notion of reasonableness and, generally, throughout the introduction, a contrary impression is given. This is the impression that the editors believe in "right reason" or that, at very least, they are prepared to proceed on the assumption that "right reason" is a more or less coherent notion, untroubled by the tempests of post-modernity. This observation leads me to my only substantial criticism of the collection as a whole; namely, that faith is defined throughout in contra-distinction to "reason" without reference to the literature on the philosophical crisis concerning reason and rationality.⁵ If "reason" or "rationality" do not exist, any concept of faith defined in distinction to them will be phantasmal. The closest the editors come to acknowledging this crisis is where, turning the challenge to faith on its head, they suggest that it is reason, and not faith, that might be in need of "a proper place or a guiding principle".⁶

The only contributors who expressly acknowledge the implausibility of the basic faith/reason dichotomy are John Gardner and Maleiha Malik and even they do so only in passing. John Gardner's lucid treatment of this dichotomy deserved to be promoted from the footnote, in which he states that:

"... [s]ome people thought that I was presenting Abraham's dilemma as a struggle between "Faith" and "Reason". Not so. The dilemma as I present it is even-handedly rational, i.e. both alternatives in the dilemma are supported by reasons. As I say, Abraham has reasons to love Isaac as well as reasons to have faith in God. The resulting dilemma is within rationality, between duties of faith and duties of love. As for "Reason" with the God-like capitalisation, I do not know what this is unless it is just rationality, i.e. the capacity and propensity to be guided by reasons, including those mundane ones I have just been discussing – reasons for faith and reasons for love, reasons of faith and reasons of love, etc."⁷

The next step is irresistible: faith *as* reason, faith *as* law. The title of Gardner's paper, the first in the collection, "Law as a Leap of Faith", is therefore very appropriate. He observes that Abraham did that which was reasonable according to his faith, but which, absent his faith, would have been unreasonable. He draws a sophisticated parallel with judicial adherence to the legal *Grundnorm*. If it can be morally correct for Abraham to sacrifice his son, even if he did not acquire his faith by moral choice, it can likewise be morally correct for a judge to apply law, even if the judge did not come to the law by moral choice.

In suggesting that Abraham's dilemma is within rationality, Gardner argues that Abraham should not abandon reason in favour of blind faith, but should act according

³ See R. Cotterrell, "Trusting in Law: Legal and Moral Concepts of Trust" (1993) C.L.P. 75.

⁴ P. Oliver, S. Douglas Scott and V. Tadros (eds), *Faith in Law* (Hart Publishing, 2000), at p. 6.

⁵ As Roger Trigg has observed, "[t]he notion of rationality has been privatized and turned over if not to the individual, then at least to different associations of individuals". See R. Trigg, *Rationality and Religion – Does Faith Need Reason?* (Blackwell Publishers, 1998), at p. 19.

⁶ P. Oliver, S. Douglas Scott and V. Tadros (eds), *Faith in Law* (Hart Publishing, 2000), at p. 7.

⁷ *Ibid.* at p. 23, n. 9.

to whichever practical course is morally most reasonable. Likewise, he argues that the judge should not act according to blind faith in law, when his reason indicates a morally superior course. At one level, there is a stark contrast with Hobbes's assertion that "the law is the public conscience . . . private consciences . . . are but private opinions".⁸ However, at another level, there is consensus. Hobbes and Gardner agree that personal faith should be subordinated. For Gardner, it should be subordinated to moral reason.⁹ For Hobbes, it should be subordinated to the rule of law. To this conclusion, as the editors rightly acknowledge, "some of the faithful may object".¹⁰

In "Living In and Out of the Law", the second paper in this collection, Zenon Bankowski and Claire Davis do not challenge the faith/reason dichotomy in express terms. In a sense, however, they go one better, by challenging the very notion of dichotomy and by singling out the law/love dichotomy for particular criticism. In doing so, they find support in the efforts of Gillian Rose to repair the "broken middle" of these polar positions.¹¹ The editors suggest that, for the purposes of their thesis, law is equivalent to reason, and love is equivalent to faith.¹² However, to suggest equivalents in this way surely serves only to buttress the faith/reason dichotomy. How much harder will be the task of breaking the faith/reason dichotomy if we must also break the law/love dichotomy? Nevertheless, Bankowski and Davis succeed in identifying a "middle" between the poles of love and law that might apply equally well to the poles of faith and law. Between law and love is the choice to obey law or love. When we take responsibility for that choice, we, like Abraham, are where we ought to be.

In "Faith, Love and a Christianity to Come: St Augustine and the Coming of Justice", Adam Gearey presents an ambitious re-reading of St. Augustine's *De Civitate Dei* which portrays Augustine's Christian society of love as an enduring challenge to pagan modernity with its ideas of ownership and rationing and rationality. The depth of Gearey's scholarship is evident from the helpful foot-notes, which extend to at least twice the length of the main body of the text, but in places the path he invites us to follow is unnecessarily obscured by an over-elaborate mode of expression. If I stand back far enough from Mr Geary's text, it is possible to make out a pleasing picture; it is a picture of a future hope beyond law. However, when viewed close-up, some passages appear, like the heavy *impasto* brush-strokes of an impressionist painter, to lack meaning. Maybe this is art, not science, and maybe my objection is therefore a matter of taste. If so, and since *de gustibus non est disputandum* (as Mr Gearey might say), I have selected a passage upon which readers might base a provisional opinion of their own (provisional, that is, upon reading the entirety of the paper for themselves). "This" in the passage refers to the quote from Derrida immediately preceding it:

As Kant has been hailed as possibly one of the greatest "Christian moralists", this engagement with a Kantian vocabulary can perhaps best describe the coming together of alterity and Christian ethics. The categorical imperative is refigured as an interpellation of a radical otherness that resists reduction to thought; it is thus a re-appraisal of an ethic in which the rational subject gives himself the law.¹³

⁸ *Leviathan* II, c. 29.

⁹ There is a strong flavour of Locke here, and also of Raz – to whom Gardner makes frequent reference.

¹⁰ P. Oliver, S. Douglas Scott and V. Tadros (eds.), *Faith in Law* (Hart Publishing, 2000), at p. 9.

¹¹ G. Rose, *The Broken Middle* (Blackwell, 1992).

¹² P. Oliver, S. Douglas Scott and V. Tadros (eds.), *Faith in Law* (Hart Publishing, 2000), at p. 10.

¹³ *Ibid.* at p. 59.

Wittgenstein once said that “[w]hat can be said at all can be said clearly; and whereof one cannot speak, thereof one must be silent”.¹⁴ Mr Gearey would, I suspect, disagree. He has had the courage to address the ineffable and it may churlish therefore to suggest that he could have explained it more clearly.

The next paper in the collection is Timothy Macklem’s “Reason and Religion”, in which he offers a faith-based approach to freedom of religion as an alternative to conventional and psychological approaches. According to Macklem, the former is obsessed with the meaning of the term religion and with distinctions based on the doctrinal content of religions, while the latter favours an inclusive but impractical assertion that religion is whatever is of ultimate concern to the individual. They are both flawed by their monism (the idea that there might be a single ultimate factor representing that which is valuable in an individual’s life) and by their subjectivity. Macklem’s alternative is to see faith as a value uniting a plurality of religions. In doing so, it is arguable that he does not free himself from monism and conventionality to the extent that he would wish. Could it be that he has merely replaced monist values such as dignity, redemption and honour with faith? Maybe, but he would doubtless respond that faith lends itself to plurality more readily than these other monist values. After all, faith is meaningless unless we mean faith in X, Y or Z. As for conventionality, it is notable that, for Macklem, some types of religion are “in” and some are “out”. This, of course, is a position which itself relies upon particular conventions. Macklem favours a convention which sees “faith as a secular value”.¹⁵

Overall, Macklem’s vision of faith as the key to “a value-pluralist account of freedom of religion” is lucid and attractive and deserves to be taken up in more detail elsewhere. There is, however, a nagging doubt. It is clear that Macklem cannot decide whether faith is a “form of rival to reason” or whether it is “that which can be established by reason, but not for that reason”.¹⁶ Again, it should be pointed out that where faith is delineated against a monolithic and inaccurate notion of reason, a monolithic and inaccurate account of faith will be produced.

“Faced by Faith”, Anthony Bradney’s paper, is the fifth in the collection. He considers the cases of *Chauhan v. Ford Motor Company*¹⁷, *R v Salford Area Health Authority*, *Janaway v. Salford Area Health Authority*¹⁸ and *Re ST (A Minor)*.¹⁹ In the first, a Hindu sought to be relieved of the requirement of Union membership on religious grounds. In the second, a Roman Catholic medical receptionist sought to be relieved of the requirement to write a letter referring a patient for an abortion. The third concerned a grandmother’s application to take custody of her grandson, who was at that time living with his mother in a communal group that was part of the new religious movement known as “The Family”. The common aspect of all three cases, and the central focus of Bradney’s paper, is the way in which the judges tended to privilege their rationality (what Bradney refers to, tongue-in-cheek, as an “acceptable view of the world”)²⁰ over that of the religious believers in the cases before them. His conclusion is pessimistic but realistic. It is that obdurate believers will only win their cases when their interests happen to coincide with interests valued and recognised by law. Accordingly, he calls for greater education of judges and for greater toleration

¹⁴ *Tractatus Logico-Philosophicus*, C.K. Ogden (trans.), (Routledge, 1922), at p. 27.

¹⁵ This is the title of a related piece by the same author, which can be found at (2000) 45 *McGill Law Journal* 1.

¹⁶ P. Oliver, S. Douglas Scott and V. Tadros (eds.), *Faith in Law* (Hart Publishing, 2000), at p. 83.

¹⁷ (1985) 280 *Industrial Relations Legal Information Bulletin* 11.

¹⁸ [1989] A.C. 537.

¹⁹ Unreported.

²⁰ P. Oliver, S. Douglas Scott and V. Tadros (eds.), *Faith in Law* (Hart Publishing, 2000), at p. 97.

(even affirmation) by judges of the diversity of religious views of the world. This excellent paper is a welcome addition to the discourse on judicial recognition of religious claims.

In "A Comfortable Inauthenticity: Post-Theological Law", Victor Tadros presents a powerful and clear challenge to the faith that post-modernists such as Drucilla Cornell place in the autobiographical process. That is, the faith they place in self-narrative as a means of self-determination. He cites Princess Diana's famous *Panorama* "confessional" and President Clinton's televised "confessional" in response to the Monica Lewinsky affair as evidence that we have become a "singularly confessing society".²¹ Whether one can extrapolate general social tendencies from examples such as these is doubtful. However, Tadros's point is that the "confessions" were inauthentic, and yet made compelling viewing. Self-narrative can be used to deceive the self and to deceive others. However, these somewhat playful illustrations of the phenomenon are really little more than a prelude to his two major points. The first is that the law is adept at protecting its own "story" by ascribing alternative narratives to the behaviour of citizens and by managing the available narrative choices. He provides strong illustrations of both tactics. With regard to the former, he cites section 1(1) of the Infanticide Act 1938, which provides the possibility of ascribing temporary mental illness to a mother who kills her child before that child's first birthday. As to the latter, he cites provocation and manslaughter on the grounds of diminished responsibility as alternatives pleas that are available to a woman who kills her husband or long-term partner. The woman can choose whichever story she prefers, regardless of authenticity, but she may not have the space to choose her own true story.

Tadros's second major point is that too much faith in self-narrative is undesirable because empowering others to be judged on their own version of events leads to unpredictable consequences. Cornell argues that a woman's right to an abortion is inherent in her right to determine her own life-story.²² The problem is that the breadth of the latter right is such that child-abusers, rapists and murderers might find refuge in it (and, some would say, in some cases already have). Tadros pulls short of identifying such consequences and of describing them as necessarily undesirable, preferring instead to object to the unpredictability of placing our faith in self-narrative.²³

In Maleiha Malik's paper, "Faith and the State of Jurisprudence", the idea of faith in things other than religion (such as race, tradition, culture, post-modernism, feminism) is further explored. Wisely, she notes the problems that are inherent in any "contrast between reason and faith". She suggests that the latter is legitimated by *reasons*, but reasons which are found in cultural and traditional sources. According to traditions, things are believed because they have worked, although the legitimation goes beyond the merely pragmatic. Crucially, these culturally-derived reasons are legitimate even if "rationally" falsifiable. Perhaps the most important value for Malik is that culturally-based faith should be accurately represented in law. A great merit of this approach is that it does not lead to a blanket inclusion of every imaginable world view within the category of legally recognised faith. She willingly acknowledges that uncritical recognition of the plurality of faiths risks mere condescension and is counter-productive.²⁴

²¹ *Ibid.* at p. 108

²² D. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge, 1995).

²³ P. Oliver, S. Douglas Scott and V. Tadros (eds), *Faith in Law* (Hart Publishing, 2000), at p. 26.

²⁴ *Ibid.* at p. 141.

On that note, I do not wish to risk further misrepresentation of the subtlety and interest of her paper, nor indeed of the other papers in this book. This volume was compiled by three editors and one reviewer cannot hope to do justice to the entirety of the scholarship contained within it. Readers should take the opportunity to explore the book for themselves. It is sure to stimulate further profitable consideration of the relationship between faith and law. Finally, although one should not judge a book by its cover, Hart ought also to be congratulated on this front too. This slim hardback volume is beautifully presented. Indeed, in every aspect of this publication, Hart has again confirmed its commitment to legal academic publishing of the highest quality.

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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 CENTRE FOR LEGAL RESEARCH – FOUR YEARS ON

PETER KUNZLIK*

THE CENTRE'S MISSION

The Centre for Legal Research was set up in 1996 in order to provide the necessary dedicated administrative infrastructure and facilities to enable the School to develop its links with policy makers, the legal professions and commerce through the carrying out of contract research and through the development of sponsorship and consultancy relationships. Briefly stated, its task is to

- (1) carry out research projects designed to inform and influence both branches of the legal profession and their regulatory bodies on matters of policy and practice;
- (2) carry out applied legal research programmes for commercial, governmental and quasi-governmental clients from the UK and other jurisdictions;
- (3) participate in the legal policy discourse in a range of other contexts;
- (4) develop close professional relationships with legal policy makers, practices and other having a stake in the development of the law and legal practice;
- (5) disseminate leading-edge applied knowledge of the law and legal institutions through scholarly and professional publication;¹ and
- (6) design and deliver advanced courses within its specialist fields of activity aimed especially at bridging the divide between leading-edge practice and advanced scholarship.

Ancillary to its mission the Centre publishes this *Journal* and is the home to a small number of post graduate research students.²

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¹ Members of the Centre's Faculty are expected to make a significant contribution to the School's Research Assessment Return.

² Current/recently examined Ph.D. research projects include; an investigation into the consultation exercise leading to adoption of the new contaminated land regime (Dr. Laurence Etherington); an investigation into the law concerning the tracing of the proceeds of fraud by means of international litigation (Mr. Ian Hutton); an investigation into the relationship between commercial law firms and their clients (Ms. Sarah Scott); and a comparative study into the obligation to report crime under French and English law respectively (Ms. Rachel Stretch).

MEMBERS OF FACULTY

Although the Centre has a small Faculty,³ it has achieved a considerable degree of success within its specialist fields and can, when a contract requires other specialist expertise, draw upon nearly a hundred other colleagues from the School's two main teaching departments⁴ by agreement with their heads of department.⁵ The Centre has its own web page⁶ on which further information about members of Faculty, their publications and other activities can be found.

The Centre has already achieved considerable success in both its commercial and policy – orientated work. This was recently reflected in *The Times*' description of the Centre as "Nottingham Law School's *highly acclaimed* Centre for Legal Research."

THE CENTRE'S WORK TO DATE

A knowledge of, and a research interest in, legal practice and the legal professions pervades all areas of the Centre's work. When the Centre was first established, however, it had particular specialist strengths in the fields of civil justice and environmental law.

Civil Justice

Through its civil justice work the Centre has made a significant contribution to the ongoing process of reform. This began with work carried out for the Association of Personal Injury Lawyers into "Costs in Personal Injury Cases"⁷ and in the design and execution of a simulation-based action research conference for the Woolf Inquiry itself, "The Fast Track in Medical Negligence Cases".⁸ This was followed by contracts for the Association of British Insurers, "Review of the Law of Champerty"⁹ and for the Lord Chancellor's Department, "Piloting the Fast Track".¹⁰ The Centre has also sought to contribute to the development of policy about civil justice reform by participating in other events. Thus in 1998, at the invitation of Lord Brennan QC (then Chairman of the Bar Council), it carried out an investigation into the ethical implications for the Bar of the extension of conditional fees which was the basis of a select conference organised by the Bar Council.¹¹ Members of the Centre's faculty also designed hypotheticals which demonstrated the emerging ethical issues and which served as the focus of the conference.¹² They also took part in leading the conference itself. In 1999 the Centre also organised a select, consultative meeting for The Lord Chancellor's Department, concerning the "Regulation of Conditional Fees".

³ Professors Peter Kunzlik, Stuart Bell, Mark Findlay, Martin Hunter, Mark Mildred, John Peysner, Mary Seneviratne, Stephen Tromans, and Philippa Watson; Dr. Laurence Etherington and Messrs. John Hodgson and Alan Riley. The Centre's administrator is Mrs Lesley Comerie. Ms. Natasha Golding assists members of faculty as a research associate.

⁴ The Department of Academic Legal Studies and the Department of Professional Legal Studies.

⁵ Professors Michael Gunn and Philip Knott.

⁶ <<http://www.clr.ntu.ac.uk>>.

⁷ Armstrong & Peysner, 1996. See N. Armstrong and J. Peysner, "What Price the Fast Track" (1997) J.P.I.L. 287.

⁸ Peysner, 1996. For Lord Woolf's comments on this work see his Final Report p. 193, paragraphs 88–91.

⁹ Walters & Peysner, 1998. See A. Walters and J. Peysner, "Event – triggered Financing of Civil Claims: Lawyers, Insurance and the Common Law" (1999) 8(1) Nott. L. J. 1.

¹⁰ Peysner, Unell, Scott & McLauchlan, 1999. See *The Report of the Fast Track Simulation Pilot*, Research Secretariat, Lord Chancellor's Department, Research Paper 9/98. As to the innovative methodology deployed in this project see J. Peysner, "Focus Groups and Analogue Vignettes: Modelling and Piloting Civil Justice Procedural Reform" (1999) 18 C.J.Q. 113.

¹¹ Kunzlik, Peysner & Jones, 1998. See also P. Kunzlik, "Conditional Fees – The Ethical and Organisational Impact on the Bar" (1999) 62:2 M.L.R. 850.

¹² *Ibid.*

This meeting,¹³ held under Chatham House Rules, involved officials of the Lord Chancellor's Department, solicitors, insurers, Nottingham Law School personnel and external academics from legal and economics backgrounds. Later in 1999, the Centre hosted a high ranking delegation from the Ministry of Justice, People's Republic of China.¹⁴ The visit, which lasted a day, was arranged under the auspices of the British Council. Professors Kunzlik, Seneviratne and Peysner gave presentations to the delegation concerning the legal profession, regulation of lawyers, and current reform of civil litigation. Ms. Jane Ching and Mr. John Hodgson addressed issues of legal education and training. Since then the Centre's involvement in civil justice has continued to develop through the involvement of members of faculty in the policy arena; Professor Mark Mildred has continued to be a member of the Lord Chancellor's Department Working Party on Representative Actions; Professor John Peysner has served as a Member of the Lord Chancellor's Department's Committee (the Blackwell Committee) investigating Claims Assessors and Employment Advisers (2000);¹⁵ and Professor Mary Seneviratne has twice given expert evidence at the invitation of the House of Commons Select Committee on Public Administration (2000).¹⁶

Environmental Law

The Centre's environmental work has benefited from substantial support from Eversheds (a major national law firm with an international environmental law practice) and from Wilbraham and Co. (a leading specialist planning law practice). This has come through the firms' respective sponsorship of Stuart Bell's Chair¹⁷ and Laurence Etherington's Senior Research Fellowship.¹⁸ The Centre very much values these relationships, not only because of the invaluable financial support that they provide, but also because they allow us to maintain close relationships with lawyers within these two elite environmental law practices.

There has also been a great deal of activity within the Centre's environmental law specialism. Contracts have been carried out for the Environment Agency (Midlands), concerning the "Manual of Enforcement Practice & Procedure",¹⁹ and for the EC Commission (Environment), concerning "The Transposition of the Directive on Pollution from Industrial Plant"²⁰ and "The Transposition of The Shellfish and Freshwater Fish Waters Directives".²¹ In 1999 the environmental law team was joined by Professor Stephen Tromans.

Once more, members of faculty working in environmental law have participated in the broader process of policy debate and formulation in several different ways. In particular, Professor Stuart Bell was the UK delegate to the European Commission's Joint Public Hearing into the Implementation of EC Environmental Legislation. Professor Stephen Tromans is Specialist Legal Adviser to the House of Commons

¹³ This was led by Peysner with Kunzlik, Mildred, Seneviratne, Walters and Scott participating on behalf of the School.

¹⁴ The visiting delegation included the Director-General, The Judicial Assistance and Foreign Affairs Department, The Ministry of Justice; the Director-General, The Bureau of Justice, Jiangsu Province; the Deputy Director, The Judicial Research Institute of the Ministry of Justice; the Secretary-General, The Public Law Centre, Law Institute, China Academy of Social Science; and a member of The China Judicial Research Institute, Academy of Social Science.

¹⁵ See the *Report of the Lord Chancellor's Committee to Investigate the Activities of Non-legally Qualified Claims Assessors and Employment Advisers (The Report of the Blackwell Committee)*, The Lord Chancellor's Department, February 2000. For an appreciation of Professor Peysner's contribution to the work of the Committee see the Preface to the *Report*.

¹⁶ See the Select Committee on Public Administration, Third Report, *Review of Public Sector Ombudsmen in England*, HC 612, 1999–2000.

¹⁷ Professor Bell is the Eversheds Professor of Environmental Law and Practice.

¹⁸ Dr. Etherington is the Wilbraham and Co. Research Fellow in Environmental Law.

¹⁹ Bell & Etherington, 1997.

²⁰ Bell, Kunzlik & Etherington, 1998.

²¹ Kunzlik, Bell & Etherington, 1999.

Select Committee on the DETR on its inquiry into the Environment Agency. He was also Specialist Legal Adviser to the House of Lords' European Community Committee on its inquiries into access to environmental information (1987), into civil liability for damage caused by waste (1990) and into repairing environmental damage (1993). The environment team is currently designing an advanced diploma and an associated LL.M. course in environmental law and practice which will be delivered for the first time in 2001.

Legal Practice and the Profession

Although the Centre has particular strengths in its civil justice and environmental work, its members, through their academic work and their considerable experience of private practice, share an interest in all aspects of legal professional regulation, organisation and management. These interests pervade several of the activities already mentioned but were also central to the major empirical research projects which the Centre has carried out for British Nuclear Fuels plc concerning legal and legal-organisational aspects of "Dispute Management",²² "Internal Clients",²³ and "Procurement"²⁴ all in the context of the letting, management and dispute management of major construction and engineering contracts.²⁵

New Specialist Fields – Criminal Justice and Competition Law

In 1999 the decision was taken to build on the Centre's success to date by developing strength in two further areas. Thus, the appointment of Professor Mark Findlay marked the beginning of a major project in the field of criminal justice. Led jointly by Mark and by Professor Ralph Henham this project will investigate "The International Criminal Trial Process".²⁶ An early outcome of the project will be the holding of an expert seminar on the subject in early 2001.

The second new area within which the Centre is developing specialist expertise is in the field of competition law. In early 2000 one of the UK's leading legal publishers, Butterworths Tolley, agreed to fund two appointments within the Centre in competition law. The Centre has therefore been fortunate to be able to appoint Professor Philippa Watson²⁷ and Mr. Alan Riley²⁸ and under their leadership the Centre will develop its programme of competition law work. It is anticipated that the team will, in addition to its research work, design an advanced diploma and associated LL.M. degree in competition law and practice.

Relationships with Other Stakeholders in the Law

The close working relationship which the Centre enjoys with leading law firms and legal publishers is reflected in the fact that several appointments within the Centre are currently funded through the support of leading law firms and publishers. In addition to the current sponsorship relationships with Eversheds, Wilbraham & Company and Butterworths Tolley several other appointments within the Centre have been externally

²² Kunzlik, 1997–8.

²³ Mayson, 1998.

²⁴ Kunzlik, 1999–2000.

²⁵ Other work managed by the Centre has included, in particular, a further contract let by The Government of the North West Territories of Canada which involved a "Review of UK and European Equal Pay Law" (Wheat *et al.*, 1999).

²⁶ Details of which were published by M. Findlay in "Research Work in Progress – the International Criminal Trial Project", (1999) 8(2) Nott. L.J. 121.

²⁷ Butterworths Tolley Professor of Competition Law and Practice.

²⁸ Butterworths Tolley Senior Research Fellow in Competition Law and Practice.

sponsored at different times.²⁹ In addition to such close relationships, the wider engagement of members of the Centre's faculty in public policy discourse is perhaps one of its most notable characteristics. As well as the examples already indicated above, for instance, Professor Martin Hunter was Deputy Chairman of the Saville Committee (the Department of Trade and Industry Committee on Arbitration Law, 1990–1997); and Professor Findlay has served on several governmental commissions in Australia and elsewhere. Members of faculty are also frequently invited to participate in public discourse through publication in the press³⁰ and participation in professional as well as academic conferences.

A Commercial yet Scholarly Culture

When working with clients and colleagues from private practice, from government and in commerce it has been essential for the Centre to demonstrate an effective, professional and commercially aware ethos: to ensure, in other words, that our work meets the highest standards of quality and efficiency of delivery which our partners have every right to expect. Nonetheless, whilst cherishing its close connection to the legal profession, to the commercial world and to the policy community, the Centre has sought to maintain its lively scholarly culture through academic publication, through its own developmental activities³¹ and through participation in a series of lunch time seminars hosted by the Centre (but organised by Professor Ralph Henham of the School's Department of Academic Legal Studies). In these seminars we have had the pleasure of hearing from several distinguished colleagues from other institutions, all of whose contributions have informed lively discussion.³²

PLANS FOR THE FUTURE

During the next few years the Centre intends to consolidate further its work and reputation in its already well-established areas of specialism, civil justice and environmental law; to build on its major project in comparative criminal justice and to develop a reputation in the field of competition law; and to strengthen its already considerable capacity in respect of the study of the legal profession through further externally funded appointments. More generally it hopes to broaden the range of external bodies with which it works and to deepen its existing relationships. The expectation is, furthermore, that within two years it will have established its advanced diploma and LL.M courses in environmental law and in competition law respectively.

²⁹ Other sponsors have included legal publisher Sweet and Maxwell, legal recruitment agency ZMB, and Irwin Mitchell, solicitors.

³⁰ Recent press contributions include articles in *The Times* on the Competition Act (Prof. Peter Kunzlik with Alan Riley, March 2000) and on proposed jury reforms (Prof. Mark Findlay, May 2000)

³¹ Training activities including, for example, the commissioning of a suite of six training workshops on social sciences research for lawyers.

³² Professor Andrew Ashworth, Vinerian Professor of English Law, University of Oxford, speaking on "Defences to Crime: Testing the Boundaries"; Professor Stephen Weatherill, Delors Professor of European Law, University of Oxford, speaking on "New Strategies for the Management of the EC's Internal Market"; the late Professor Hilaire McCoubrey, University of Hull, whose topic was "From Nuremburg to Rome: The Revival of a Defence of Superior Orders"; Professor Avrom Sherr, Woolf Professor of Legal Education, The Institute of Advanced Legal Studies, University of London, speaking on "Professionalism, Control and the Client: Money Laundering and Ethical Rules"; Professor Bob Lee, Head of Cardiff Law School, whose subject was "Large Law Firms: Self Regulation and Market Control"; Ms Estella Baker, Jean Monnet Lecturer in Law, University of Leicester, speaking about Article 10EC: The Erosion of National Sovereignty over Criminal Justice"; Professor John Flood, University of Westminster, whose topic was "The Vultures Fly East: The Creation and Globalization of the Distressed Debt Market"; Professor Conor Gearty, King's College, London, who discussed "The Human Rights Act: A Lawyer's Paradise?"; Professor Lee Bridges, Director, Legal Research Institute, University of Warwick, speaking on "Jury Trial: The Uses and Misuses of Research"; and Professor Michael Bridge, The University of Nottingham, who spoke about "The Rome Convention on Contractual Obligations".

It is likely that further advanced courses will in time be added to the list. Furthermore, as the reputation of the Centre grows the possibility has emerged of developing closer working relationships, focused around our areas of established or emerging strength, with researchers in leading law schools in Australia, the United States and Continental Europe. Opportunities are also emerging to apply our research-based yet practical knowledge to inform the profession, practice and policy within European and international contexts. The challenge facing the Centre in the next few years is to set itself, and to achieve, ambitious goals in these areas.

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ERRATUM

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LEASES, LICENCES, AND CONTRACTUAL TENANCIES

Bruton v. London & Quadrant Housing Trust [1999] 3 All E.R. 481 (H.L.)

(Lords Slynn, Jauncey, Hoffmann, Hope and Hobhouse)

On page 91, line 12/13 an error has occurred at the printers, at present reads as follows:—

“if the individual occupiers fail to be classified as tenants,”

should read:—

“if the individual occupiers fail to be classified as tenants,”