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The right to self-representation before International Criminal Tribunals, while not absolute, should only be denied in limited circumstances

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Abstract

One of the most controversial aspects of the International Criminal Tribunals (ICTs) and the International Criminal Court (ICC) concerns the right to self-representation. Many defendants have sought to use the trial as a stage on which to challenge the legitimacy of the court and to play to the crowd in their own home states. As a result, the various ICTs have sought to place limitations on the accused's right to self-representation. The recent amendment to the Statute of the Supreme Iraqi Criminal Tribunal (SICT) is an example of this. This evolution raises questions concerning the effect such limitations may have on the overall fair trial rights of the accused. This article argues that there is a need to establish a guaranteed right of self-representation, provided the accused adheres to an objective set of conditions placed on the right. Such conditions should be confined to those strictly necessary to ensure the integrity of the court. Such a move would allow the court to gain some much needed legitimacy while at the same time deny defendants the ability to turn the court into a political stage.

Introduction

One of the most controversial aspects of the ICTs and the ICC concerns the right to self-representation. Many defendants have sought to use the trial as a stage on which to challenge the legitimacy of the court and to address the public in their own home states. Faced with disruptive and obstructionist behaviour, the various ICTs have sought to place limitations on the accused's right to self-representation. The amendment to fair trial rights in the Statute of the SICT is an example of this. Article 19(4)(d) provides certain minimum guarantees to the accused but the right to self-representation is conspicuous by its absence.[1]

For some this is a logical and sensible development, considering the problems encountered in tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) with disruptive defendants, including in the cases of *Milosevic*[2] and *Seselj*.[3] However, this development raises questions concerning the effect such limitations

1 Unofficial translation of revised Statute, available at www.law.case.edu/saddamtrial/documents/ist_statute_offcialenglish.pdf. Article 19(4)(d) provides that the accused is entitled to the following minimum guarantees: "To be tried in his presence, and procure legal counsel of his choosing; to be informed of his right to ask for legal assistance in case he does not have sufficient means to pay for it; and of his right to receive assistance that allows him to procure legal counsel without financial burden."

2 *Prosecutor* v *Milosevic* IT-02-54-Misc.1: Milosevic.

3 *Prosecutor* v *Seselj* IT-03-67-R77.2: Seselj (contempt) issues on 24 July 2009.

may have on the overall fair trial rights of the accused. In particular; is there a right to self-representation in international criminal proceedings and what limitations should be placed on that right?

This article argues that, while there is a need to place limitations on the right to self-representation, these limitations should be confined to those strictly required to protect the integrity of the court and the fair trial rights of the accused. It is important to recognise the distinction between objective fair trial standards required and the concept of autonomy for the accused. It will be argued that the court can ensure a fair trial for a self-representing accused through the innovative use of amici curiae and standby counsel while still affording the accused the desired level of autonomy over their own defence.

It is contended that there is a need to establish the right to self-representation based on a set of objective conditions. Counsel should only be assigned against the will of the accused where the conditions placed on self-representation are violated. Such conditions would give the desirable level of certainty and fairness to the manner in which the right is qualified. Crucially, these conditions would also deny the accused the opportunity to portray the decision to assign counsel as an arbitrary example of victor's justice. Such a move would allow the court to gain some much needed legitimacy while at the same time deny defendants the ability to turn the court into a political stage.

1 Right of self-representation in international law

The basis for the right to self-representation has been the subject of much debate. In *Milosevic*, Judge May stated that the right to self-representation is a matter of customary international law.[4] This position is supported by Markovic.[5] The right to self-representation in criminal proceedings is recognised under Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6(3)(c) of the European Convention on Human Rights (ECHR). Article 14(3)(d) of the ICCPR has been incorporated into the statutes of the ICTY,[6] the International Criminal Tribunal for Rwanda (ICTR)[7] and the Special Court for Sierra Leone (SCSL).[8] Self-representation is also provided for in Article 67(1)(d) of the Rome Statute of the ICC.

The various ICTs to date have placed a heavy reliance on US Supreme Court jurisprudence when dealing with the right to self-representation. The US Supreme Court has always placed great emphasis on protecting the rights and freedoms of the individual from unwarranted intrusion on the part of the state. Markovic argues that the US Supreme Court views the right to self-representation as a bulwark against judicial paternalism.[9] The US Supreme Court has given the right to self-representation constitutional status.[10] In *Farreta* v *California* the Supreme Court stated that:

> the defendant and not his lawyer or the state, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.[11]

4 M Scharf, "Self-representation in international criminal justice" (2006) 4(1) *International Criminal Justice* 31.

5 M Markovic, "In the interests of justice? A critique of the ICTY trial court's decision to assign counsel to Slobodan Milosevic" (2004–05) 18 *Georgetown Journal of Legal Ethics* 947.

6 Article 21(4)(d).

7 Ibid.

8 Article 17(4)(d).

9 Markovic, "In the interests of justice?", n. 5 above, p. 954.

10 *Faretta* v *California* 422 US 806 (1975).

11 *Faretta* v *California* 422 US 806, 834 (1975).

This decision was expressly considered by the ICTY Trial Chamber in the *Milosevic* case when considering the accused's right to self-representation.[12] The ICTR also relied heavily on US jurisprudence when considering the issue of self-representation. In *Prosecutor* v *Barayagwiza*, the Trial Chamber, when deciding on the appointment of standby counsel stated "this solution has been tried and tested in the United States, and has been proved to be an effective and appropriate procedure to assist the proper administration of justice".[13]

The right to self-representation is not universal. In France, the presence of a lawyer is required before the Cour d'Assises, a court with jurisdiction over serious criminal offences.[14] Germany also requires an accused to be represented by counsel when charged with a serious criminal offence.[15] Additionally, the Supreme Court of India stated that the fairness of a trial may adversely be affected where a self-represented defendant cannot adequately follow proceedings.[16] Scharf concludes that on this basis the right to self-representation cannot be considered a matter of customary international law.[17]

Clearly, the customary law status of the right to self-representation is in some doubt. However, in contrast to the legal systems mentioned above, the ICTs and the ICC are primarily adversarial in nature. The right to self-representation has been applied in adversarial legal systems to a much greater extent. The incorporation of Article 14(3)(d) ICCPR into the statutes of the ad hoc tribunals and the express provision for self-representation in the Rome Statute establishes that there is a presumptive right in ICTs to self-representation.[18] As it is expressly provided for, self-representation must be considered the rule, making its derogation the exception. As such, exceptions from the fair trial rights of the accused should not be permitted except where strictly required.

2 Fair trial rights

Autonomy v fair trial standards

The dominant rationale applied by the different ad hoc tribunals when restricting the right of self-representation has been that it is necessary in the interests of justice.[19] In *Barayagwiza*, the ICTR held that, due to the adversarial nature of the proceedings, it was essential in the interests of justice that the accused should have legal counsel to ensure an effective defence at his trial.[20] This was later applied in *Norman* by the SCSL where the Trial Chamber held that self-representation would result in the judges having to take a proactive role in the accused's defence to ensure a fair trial.[21] In *Seselj*, the ICTY Trial Chamber's reasons for imposing counsel included the interests of justice and the complicated nature

12 *Prosecutor* v *Milosevic* IT-02-54-T: Trial Chamber reasons for decision on the prosecution motion concerning assignment of counsel, 4 April 2003, para. 18.

13 *Barayagwiza* ICTR 97-19-T, Gunawardana J concurring (citing *Faretta* 422 US 806 (1975)).

14 V Dervieux, "The French system" in M Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (Cambridge: CUP 2002), pp. 218, 231; *The French Code of Criminal Procedure*, G L Kock and R S Frase (trans.), with an introduction by R S Frase (Littleton CO: F B Rothman 1988).

15 See *Strafprozeßordnung* (Criminal Procedure Code), Article 140, available online at www.iuscomp.org/gla/statutes/StPO.htm.

16 Scharf, "Self-representation", n. 4 above, p. 33.

17 Ibid. p. 38.

18 *Milosevic* IT-02-54-AR73.7: decision on interlocutory appeal of the Trial Chamber's decision on the assignment of defense counsel, Appeals Chamber, 1 November 2004, s. 9.

19 G Boas, *The Milosevic Trial: Lessons for the conduct of complex international criminal proceedings* (Cambridge: CUP 2007), p. 215.

20 Ibid.

21 Scharf, "Self-representation", n. 4 above , p. 37.

of the proceedings.[22] Bassiouni makes the argument that the right to self-representation is intended to complement the right to counsel rather than be a substitute for it.[23] He states that the court should impose counsel on the accused where it is necessary in the interests of justice. This balancing test is supported by Sluiter and Jorgensen.[24]

The manner in which the ICTs have restricted the right to self-representation is inconsistent with the "interests of justice" rationale expressed above. The practice of assigning standby counsel to the accused does not remedy the problems identified in *Barayagwiza*[25] and *Norman*.[26] In *Milosevic*, the ICTY Appeals Chamber permitted the accused to retain the primary role in the presentation of his defence despite the assignment of standby counsel.[27] This meant that Milosevic was still making the strategic decisions regarding the conduct of his defence. Before counsel was imposed in *Norman*, as a result of disruptive behaviour, the accused was given strategic control over the presentation of the defence case with a standby counsel assigned.[28] Therefore, the accused's perceived lack of expertise will still have a significant impact on the presentation of their case.

Another difficulty with the reasoning of the various tribunals is that the interests of justice concept is very vague. Boas claims the court should confine itself to the issue of fair trial rights in its reasoning.[29] The court has an obligation to vindicate the fair trial rights of the accused. However, it is essential that the court recognises that one of the central components of the accused's overall right to a fair trial is autonomy over the defence. In *Milosevic*, the ICTY held that the rights afforded under ICTY Statute Article 21(4)(d), including the right to defend oneself in person or through legal assistance, were merely elements of the overarching requirement of a fair trial.[30] While this is true, the fact that it is included as one of the requirements places an obligation on the court to vindicate that right as much as possible. Markovic makes the argument that the right to self-representation was created precisely to avoid the type of judicial paternalism evident in *Norman*.[31] The US Supreme Court has stated that, as the accused is the person who will suffer the sanctions of any conviction, the accused should be allowed to decide whether counsel is to their advantage in any case.[32] In *Milosevic*, the prosecution argued that, where an issue arose between the accused and counsel as to what was in the best interests of the accused, counsel's judgment would prevail.[33] Such a position is a clear violation of the accused's right

22 M Sharf and C Rassi, "Do former leaders have an international right to self-representation in war crimes trials?" (2005) 20(3) *Ohio State Journal on Dispute Resolution* 31–2.

23 M C Bassiouni, "Human rights in the context of criminal justice: identifying international procedural protections and equivalent protections in national constitutions" (1993) 3 *Duke Journal of Comparative and International Law* 283–4.

24 G Sluiter, "Fairness and the interests of justice, illusive concepts in the Milosevic case" (2005) 3 *Journal of International Criminal Justice* 3; see also N Jorgensen, "The problem of self-representation at international criminal trials: striking a balance between fairness and effectiveness" (2006) 4(1) *Journal of International Criminal Justice* 64, p. 68.

25 Boas, *The Milosevic Trial*, n. 19 above, p. 227.

26 Ibid. p. 224.

27 Ibid. p. 219.

28 Scharf, "Self-representation", n. 4 above, p. 34.

29 Boas, *The Milosevic Trial*, n. 19 above, p. 232.

30 J Jackson, *Autonomy and Accuracy in the Development of Fair Trial Rights*, UCD Working Papers in Law, Criminology and Socio-Legal Studies, Research Paper No 09/2009 (Dublin: UCD 2009), p. 16.

31 Markovic, "In the interests of justice?", n. 5 above, p. 954.

32 *Faretta* v *California* 422 US 806, 834 (1975).

33 Jorgensen, "The problem of self-representation", n. 24 above, p. 70.

to present the defence of their choice. For this reason, it is essential that the imposition of counsel be seen as a measure of last resort.

It is also important for the legitimacy of international criminal justice that courts be seen to afford the accused the greatest degree of autonomy possible. The ICTY in particular suffers from the perception of being "victor's justice" in Serbia. The fact that Milosevic's right of self-representation was revoked two years into the trial, after his very strong performance as counsel, was seen as an attempt to silence him. Assigning counsel without any objective criteria to guide the court also gives the decision the appearance of the court favouring expediency over justice. Markovic argues that the decision to impose counsel on Milosevic would have severely affected the legitimacy of any conviction in the eyes of the Serbian public.[34]

Jackson claims that a trade-off is often necessary between those standards that emphasise an effective defence and those that accentuate the importance of individual autonomy.[35] Thus far the various tribunals seem to have valued expediency and objective fair trial standards higher than the accused's right to present the defence of their choice. Considering the legitimacy problems faced by the international criminal justice system as a whole, it is necessary for the court to give effect to the autonomy of the accused to the greatest extent possible, without allowing the overall fair trial rights of the accused to be undermined. In the following section it will be argued that there are measures available to the court, short of assigning counsel, capable of achieving this.

Equality of arms

The principle of equality of arms is central to any consideration of the right to self-representation. The statutes creating all the ad hoc tribunals and the Rome Statute oblige the courts to ensure that neither party is at a significant disadvantage in the presentation of their case.[36] Scharf and Rassi argue that the inherent equality of arms defects resulting from self-representation necessitate the assignment of counsel.[37] They believe the lack of experienced legal counsel makes an effective defence impossible.[38]

This argument overlooks certain measures available to ICTs that would allow them to ensure effective equality of arms while stopping short of denying the accused the right to self-representation. Regulation 119(2) of the Regulations of the Registry of the ICC states that the Registry is responsible for providing assistance to an accused who has chosen to exercise the right to self-representation. Jorgensen claims that the various statutes and the Rules of Procedure and Evidence establishing the ICC and the ad hoc tribunals provide the powers required to take such measures.[39] One such measure is the assignment of standby counsel or legal associates.

Standby counsel is a form of expert assistant who aids the accused in their defence. Standby counsel should not strictly raise issues on their own initiative and it is primarily the responsibility of the accused to determine how to present the case.[40] In *McKaskle* v *Wiggins* the US Supreme Court held that where a court appoints a standby counsel for this purpose, even against the will of the accused, no sixth amendment violation will be found.[41] In

34 Markovic, "In the interests of justice?", n. 5 above, pp. 955–6.

35 Jackson, *Autonomy and Accuracy*, n. 30 above, p. 2.

36 ECHR, *Ankerl* v *Switzerland*, judgment of 23 October 1996, Reports 1996-V, pp. 1565–6, para. 38.

37 Scharf and Rassi, "Former leaders", n. 22 above, p. 25.

38 Ibid.

39 Jorgensen, "The problem of self-representation", n. 24 above, p. 1.

40 Ibid. p. 69.

41 *McKaskle* v *Wiggins* 465 US 168 (1984).

McKaskle, the standby counsel provided the role of explaining courtroom procedure to the accused and relieved the judge of the burden of assisting the accused in his defence.

The ICTY, ICTR and the SCSL have all applied the standby counsel model when dealing with the complexities of self-representation.[42] Depending on the requirements of the case, standby counsel can be more or less intrusive on the accused's management of the case.[43] In *Seselj*, the ICTY provided for the use of standby counsel.[44] In departing from an earlier decision of the court in *Milosevic*, the Trial Chamber held the right to self-representation or representation through legal counsel was "not an either or relationship" and that standby counsel could assist the accused.[45] In *Seselj*, the Trial Chamber outlined the duties of standby counsel. It expressly likened the role to a legal assistant for the accused.[46] The standby counsel was to assist the accused in preparing documents for the court and to be present to assist the accused during the trial, although the accused would retain control over the presentation of the case. In *Norman*, the Trial Chamber of the SCSL held that, in the circumstances, the right to self-representation could only be permitted on the basis that the accused would be assisted by counsel, acting in the capacity of standby counsel.[47] Another possibility is to allow the accused to communicate with legal associates. This was provided for in *Milosevic*.[48] Although the Trial Chamber never defined the role of "legal associate", it provided the accused with an avenue to prepare his defence effectively.[49]

In its report on the *Milosevic* trial, Human Rights Watch argued that all self-representing defendants should be afforded some level of assistance from qualified legal counsel.[50] Human Rights Watch believes that this would allow for much more effective presentation of a defence by the accused. If implemented, this would allow the court to ensure that the equality of arms within the trial process is maintained and, at the same time, give effect to the accused's right to self-representation provided under Article 14(3)(d) of the ICCPR and Article 67(1)(d) of the Rome Statute.

Another measure available to the court to ensure that the overall fairness of the trial is maintained is by extending the role of the amici curiae. An amicus curiae is a "friend of the court" and a position from which legal counsel, although not strictly a party to the proceedings, can make submissions to the court on areas of expertise, perspectives and fairness. The role of amicus curiae is provided for by rule 74 of the ICTY, the SCSL and the ICTR Rules of Procedure and Evidence and rule 103 of the ICC Rules of Procedure and Evidence. The ICC permits the amicus participation at any stage of the proceedings.[51] The range of issues upon which the court may accept submissions is within the Trial Chamber's discretion.[52]

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42 Boas, *The Milosevic Trial*, n. 19 above, pp. 61–62.

43 Jorgensen, "The problem of self-representation", n. 24 above, p. 69.

44 *Prosecution* v *Vojislav Seselj* IT-03-67PT: decision on prosecutor's motion for order appointing counsel to assist Vojislav Seselj with his defence, 9 May 2003.

45 Ibid para. 29.

46 Ibid para. 28.

47 *Norman, Fofana and Kondewa* SCSL-04-14-T: decision on the application of Samuel Hinga Norman for self-representation under Article 17(4)(d) of the Statute of the Special Court, Trial Chamber, 8 June 2004, s. 26

48 Boas, *The Milosevic Trial*, n. 19 above, pp. 258–9.

49 Ibid.

50 S Darehshori, *Weighing the Evidence. Lessons from the Slobodan Milosevic trials* (New York: Human Rights Watch December 2006) www.hrw.org/en/reports/2006/12/13/weighing-evidence.

51 Boas, *The Milosevic Trial*, n. 19 above, p. 250.

52 Ibid.

The role of amicus curiae was innovatively expanded in Milosevic.[53] When the accused's request for self-representation was accepted, the Trial Chamber ordered the registrar to appoint amici curiae to enter submissions on aspects concerning the fairness of the proceedings and on issues that were open to the accused to challenge. Over the course of the trial, the role of the amici curiae expanded, becoming increasingly similar to a "de facto defence", even being entitled to submit appeals.[54] The role of the amici curiae was a very substantial safeguard for the accused. They made submissions on a number of issues including objections to hearsay evidence being admitted against the accused,[55] the manner of certain cross-examinations[56] and, most importantly, entered a motion for judgment of acquittal of the accused.[57]

Another advantage of the use of amici curiae providing a role similar to a de facto defence is that they are not bound by the same ethical obligations to obey the client's instructions as an assigned defence counsel would be.[58] An amicus curiae is not a representative of the accused and the duty of the amicus is to the court rather than to the accused. Such a duty to an uncooperative accused could adversely affect the way the defence is presented, due to the code of Professional Conduct for Defence Counsel.[59] Additionally, in the event that the accused is unable to continue to represent him or herself the court can assign counsel who has been involved in the trial from the beginning to act as defence counsel.

Zapala is critical of this evolution in the amicus curiae role.[60] Two of his criticisms deserve analysis. Firstly, he states that judges should not need assistance in ensuring a fair trial.[61] While correct in theory, the history of the ad hoc tribunals illustrates that, where defendant's insist on representing themselves, they are often more concerned with making political statements than defending the charges presented at trial. Although the fair trial rights provided in Article 14 ICCPR attach to the accused, it is the responsibility of the court to ensure that the trial is conducted in an overall fair manner. Therefore, it is important that the court takes the necessary measures to ensure that the fair trial rights of the accused are upheld. In addition, due to the complex nature of international criminal trials, judges are accustomed to having a large defence team to present arguments to them. It may be difficult for judges to perform their function when they are not in possession of all the relevant facts and arguments. Tunistra argues that the amici curiae can provide judges with a broader range of arguments to consider.[62]

Zapala also argues that in adversarial criminal trials there is no role for the amici curiae because the format provides for two parties contesting a charge before an impartial

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53 Boas, *The Milosevic Trial*, n. 19 above, p. 251.

54 *Prosecutor* v *Milosevic* IT-02-54-T: decision granting request by the amici curiae for certification of appeal against a decision of the Trial Chamber, 25 September 2003.

55 *Prosecutor* v *Milosevic* IT-O2-54-T: amici curiae brief on rule 92 bis procedure, 20 February 2002.

56 *Prosecutor* v *Milosevic* IT-O2-54-T: response by the amici curiae to prosecution's motion for variation of an order of the Trial Chamber, 26 April 2002.

57 *Prosecutor* v *Milosevic* IT-O2-54-T: amici curiae motion for judgment of acquittal pursuant to rule 98 bis, 3 March 2004.

58 Darehshori, *Weighing the Evidence*, n. 50 above.

59 G Higgins, "The development of the right to self representation before the International Criminal Tribunals" in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP 2010), pp. 284–5.

60 S Zapala, *Human Rights in International Criminal Proceedings* (Oxford: OUP 2003).

61 Ibid. p. 63.

62 T Tunistra, "Assisting an accused to represent himself: appointment of amici curiae as the most appropriate option" (2006) *Journal of International Criminal Justice* 53.

judge.[63] While it is correct that adversarial criminal trials consist of the two-party conflict, the ICTs are hybrids of adversarial and inquisitorial systems and therefore are free to conduct the proceedings as they determine necessary. In addition, the role of an amicus curiae is not to defend an accused but to assist the court by enhancing its understanding of the issues before it.

The innovative use of the amicus curiae role in *Milosevic* is an excellent method of ensuring the overall fairness of the trial while, at the same time, vindicating the right to self-representation. The criticisms of the expanded amicus curiae role outlined by Zapala are more theoretical than practical. Human Rights Watch stated that, due to the technical nature of international criminal trials, the role played by amicus curiae in challenging the more complicated aspects of cases can be an invaluable part of ensuring a fair trial for the accused.[64] Given the very wide scope of amici curiae involvement provided for in the ICC and ad hoc tribunals' Rules of Procedure and Evidence, it is open to judges to apply the rules creatively to give effect to the rights of the accused where possible.

The two measures examined above are avenues that the various ICTs and the ICC could explore when adjudicating on motions to impose counsel on a defendant who is representing him or herself. Where less severe measures are available, the court should not derogate from the accused's right to self-representation on the basis that the fair trial rights of the accused are at risk. Any decision based on this rationale is ignoring the necessary element of individual autonomy of an accused over the presentation of the defence. The equality of arms principle can be satisfied by either assigning standby counsel to assist the accused, as in *McKaskle*, or by expanding the role, through judicial creativity, of the amicus curiae in the trial to something resembling a de facto defence.

3 Necessary limits on the right to self-representation

Thus far, the argument against restrictions on the right to self-representation has focused on the imposition of counsel on the basis that it is necessary to ensure a fair trial. Another set of issues arises where the court seeks to impose counsel on the accused due to disruptive behaviour during the trial, damaging the integrity of the court. It is contended that there is a need to establish an objective set of conditions and limitations placed on the accused prior to the commencement of the trial. The violation of such conditions would result in the accused losing the right to self-representation, as provided for in *Faretta* v *California*.[65] Such conditions being put in place prior to the trial would have two distinct advantages. Firstly, it would act as a deterrent to a potentially disruptive accused. The knowledge that disruptive behaviour would result in counsel being imposed could be an important check on the accused in court. The second advantage is that, by clearly stating these conditions prior to any disruptive/insulting behaviour manifesting itself, the court is denying the accused the opportunity to portray him or herself as a martyr, silenced by the court to ensure a guilty verdict. The imposition of counsel should always be a last resort. However, the court must have the power to put in place a regime to ensure that the trial can proceed and that justice can be done.[66] It is now necessary to examine those circumstances that would require denying the accused the right to self-representation.

63 Zapala, *Human Rights*, n. 60 above, p. 64.

64 Darehshori, *Weighing the Evidence*, n. 50 above.

65 (1975) 422 US 806.

66 *Milosevic* IT-02-54-T: reasons for decision on assignment of defence counsel, Trial Chamber, 22 September 2004, s. 33.

Disruptive/insulting behaviour

Many defendants seek to use the right to self-representation in international criminal trials as an opportunity to attack the legitimacy of the court and to address the public in their own states. The ICTs have been heavily influenced by American jurisprudence in the area of self-representation. The right to self-representation was given constitutional status in the United States Supreme Court decision of *Faretta* v *California*.[67] However, a number of US courts have determined that the defendant forfeits the right when he or she acts in a disruptive manner.[68] In *United States* v *Cauley*, the accused was denied the right to self-representation due to disruptive conduct in court.[69] There was an identical ruling in *United States* v *West* where the accused's conduct was held to be an attack on the dignity of the court.[70] In *United States* v *Mack*, the court held that the accused's right to self-representation was subject to the court's duty to maintain order during the trial.[71]

The ICTs have also considered this issue. Throughout the *Milosevic* trial, the accused engaged in political speeches and the brow-beating of witnesses during cross-examination.[72] He also failed to show the requisite respect for the judges conducting the trial. However, there are a number of measures available to a court in these circumstances aside from the revocation of the right to self-representation. The Rules of Procedure and Evidence could be used to limit counsel (or a self-representing accused) to matters at issue in the case during cross-examination.[73] The problem with such a solution is that it may restrict the ability to cross-examine effectively, adversely affecting the overall fairness of the trial. An innovative solution to this low-level disruption is to place time limits on the parties' examinations of witnesses. Human Rights Watch has argued that such a position would result in less confrontation between the accused and the bench while still allowing the accused to use the time allocated as they wished.[74] In *Milosevic,* this was applied to good effect, with the judges even suggesting fruitful areas of cross-examination to the accused.[75]

Where disruptive or insulting behaviour brings the integrity of the trial into disrepute it is important that any international tribunal should have the power to revoke the right to self-representation. In *Seselj*, the accused routinely insulted other officers of the court and even attempted to violate witness protection measures in his cross-examinations.[76] The Trial Chamber referred to the European Court of Human Rights' (ECtHR) case of *Saday* v *Turkey* where counsel was imposed on the accused because of disruptive behaviour.[77] The ECtHR stated that "personal verbal attacks against a judge may warrant sanction if they create an atmosphere detrimental to the orderly functioning of justice".[78] The *Jankovic* trial

67 (1975) 422 US 806.

68 Jackson, *Autonomy and Accuracy*, n. 30 above, p. 14.

69 697 F2d 486, 491 (2nd Cir 1983).

70 877 F2d 281, 286 (4th Cir 1989).

71 362 F3d at 601.

72 Scharf, "Self-representation", n. 4 above , p. 31.

73 Rule 140(2)(c) of the ICC Rules of Procedure and Evidence limits the issues that can be raised by the parties during cross-examination.

74 Darehshori, *Weighing the Evidence*, n. 50 above.

75 Ibid.

76 M Milanovic, "The arrest and impending trial of Radovan Karadzic?" (2009) 58 *International and Comparative Law Quarterly* 212, p. 217.

77 *Saday* v *Turkey*, App. No 32458/96.

78 M Ellis, "Saddam trial: challenges to meeting international standards of fairness with regard to the defense" (2006–08) 39(1) *Case Western Reserve Journal of International Law* 176–7.

faced similar problems due to the intentionally disruptive conduct of the accused.[79] If such a disruptive defendant was afforded an absolute right to self-representation it would be inconsistent with other Articles of the Rome Statue or the statutes creating the ad hoc tribunals.[80] Where measures such as time limits and enforcement of the Rules of Procedure and Evidence are not sufficient to ensure the integrity of the proceedings, the court must have the power to revoke the accused's right to self-representation. If respectful behaviour in court was an express condition on the right to self-representation the court would have the power to take decisive action to restore order.

Obstructing/frustrating the proceedings

One situation where the court must have the power to assign counsel is where the accused does not wish to be represented by counsel purely to frustrate the trial. In *United States* v *Harris*, the court rejected the defendant's request for self-representation.[81] The court found that the defendant refused to acknowledge the authority of the court, showed disrespect for the court, and that his attempts to proceed unrepresented were meant to disrupt the court.[82]

In *Prosecutor* v *Barayagwiza*, the accused sought the withdrawal of his counsel, citing reasons of lack of competence and loyalty.[83] The ICTR Trial Chamber examined the right to self-representation as articulated in the statute but held, by referring to international jurisprudence, that the right is not absolute. The Trial Chamber, in rejecting the motion for withdrawal, held that the accused was seeking to obstruct the proceedings by not permitting an effective defence to be put forward. The accused in this instance was not seeking to represent himself at the trial. His intention was not to enter any defence, in an attempt to damage the legitimacy of any verdict reached against him.

The SCSL also established that counsel could be assigned to an accused who refused to recognise the court. In *Gbao*, the defence sought a motion that the accused be afforded his right not to have counsel representing him.[84] The Appeals Chamber held that this was a motion to have counsel withdrawn and not a motion for self-representation. The reason for the accused's request was to obstruct the proceedings.[85] On this basis the chamber rejected the appeal to have the defence counsel withdrawn.

The ICC and the ad hoc tribunals have a legitimate interest in ensuring that justice is done and that trials proceed. If the court was to allow the accused to frustrate the proceedings by refusing to participate in person or through counsel, the fairness of the proceedings would be adversely affected. The legitimacy of a verdict issued *in absentia* would be questionable and would allow the accused to portray him or herself as the victim of an unjust court. Therefore, where an accused is attempting to boycott the trial by entering no defence, the court should be allowed to assign defence counsel to ensure the fairness and legitimacy of the proceedings.

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79 Ellis, "Saddam trial", n. 78 above.

80 Article 64(2) of the Rome Statute states that the Trial Chamber must conduct proceedings with due regard for the protection of victims and witnesses.

81 317 F Supp 2d 542, 546 (DNJ 2004).

82 Scharf, "Self-representation", n. 4 above, p. 35.

83 Ibid. p. 36.

84 Boas, *The Milosevic Trial*, n. 19 above, pp. 225–6.

85 Ibid.

Late requests for self-representation

The third situation where ICTs have held that the accused's right to self-representation can be set aside is where the request is made after the commencement of the trial. The rationale behind this is linked to the issue of obstructing justice discussed above. In *Krajisnik*, the ICTY rejected the accused's request for self-representation.[86] The chamber held that "the assertion of a right to self-representation will succeed or fail depending on the factual context" and that a relevant factor is the potential disruption to proceedings that self-representation may cause.[87] The chamber also referred to *Faretta* and held that the timing of a request for self-representation was a factor to take into account when considering what effect to give the right. Where such a request is made during the trial, the judge has a greater discretion to reject it as it may have a disruptive effect on the trial. In *Norman*, the accused's request for self-representation was made during the trial.[88] In rejecting the request, the Trial Chamber found the fact that Norman did not state his intention to represent himself prior to the commencement of the trial was a factor that would allow a judge a greater discretion to deny an accused the right to self-representation.[89]

The connection between a late request and perceived disruption to the trial was also evident in *Ntahobali*.[90] In this case the court took into account that the accused was not attempting to disrupt the proceedings. The accused had volunteered to represent himself pending the assignment of new counsel. Despite amending the order to assign standby counsel the chamber allowed the accused to dispose of his counsel.[91] This illustrates that where a request is made during the trial the likely disruption to the proceedings will be the determining factor for the court assessing the request. One of the conditions placed on the right to self-representation should be that any request is submitted to the court prior to the trial commencing to ensure that the proceedings are not significantly disrupted.

Health of the accused disrupting the trial

The most controversial circumstance where the accused's right to self-representation has been revoked is where ill health has prevented attendance at trial. In *Milosevic*, the accused's right to self-representation was revoked two years into the trial for this reason.[92] His condition required that he reduce his workload to such a degree that the Trial Chamber could only sit three days a week. Although the Appeals Chamber modified the decision of the Trial Chamber and assigned standby counsel rather than imposing defence counsel on Milosevic, it did uphold the Trial Chamber decision that it was not an abuse of its discretion to assign counsel in the circumstances. The Appeals Chamber held that "the right may be curtailed on the grounds that a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial".[93] The result of the decision was that Milosevic was permitted to present his case when physically capable.

This position was not followed in *Seselj*. The judgment, which in effect overruled Milosevic, held:

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86 IT-00-39-A (2009).

87 Jorgensen, "The problem of self-representation", n. 24 above, p. 66.

88 *Sam Hinga Norman* SCSL-04-14-T: decision on the application of Samuel Hinga Norman for self-representation under Article 17(4)(d) of the Statute of the Special Court, Trial Chamber, 8 June 2004, s. 32.

89 Scharf, "Self-representation", n. 4 above , p. 37.

90 Boas, *The Milosevic Trial*, n. 19 above, pp. 227–8.

91 Ibid.

92 Milosevic IT-02-54-T: reasons for decision on assignment of defence counsel, Trial Chamber, 22 September 2004.

93 Jackson, *Autonomy and Accuracy*, n. 30 above, p. 16.

> In light of the Appeals Chamber, and in the interests of justice of fairness to Seselj, the Appeals Chamber nullifies the opening of the proceeding in this case and orders that the trial restart. Due to the current health conditions of the accused, the Appeals Chamber orders that his trial should not open until such time as he is fully able to participate in the proceeding as a self-represented accused.[94]

The contradictory caselaw raises arguments on both sides. Jorgensen makes the point that the accused may perceive a greater degree of unfairness when the right to self-representation is revoked on health grounds alone.[95] Prior to *Milosevic*, there was no precedent for assigning counsel on the basis that the accused's health was affecting the proceedings. The Trial Chamber recognised that extensive research had not identified any jurisdiction where counsel had been assigned to an accused person because the defendant was unfit to conduct the case as the result of impaired physical health.[96] The difficulty this creates is that the accused is losing the right to self-representation through no fault of their own.[97] This affects the fairness of the proceedings. Markovic argues that the chamber should also have considered whether the accused was fit to stand trial if he was no longer fit to represent himself.[98]

Human Rights Watch believes that the health of the accused should be a factor in considering the right to self-representation.[99] Accused individuals should have the condition placed on their right to self-representation from the beginning that they be able to attend court a minimum number of times per week. Had this condition been placed on *Milosevic* and *Seselj* from the beginning, it would have been less controversial for the court to impose counsel on the defence. The fact that the condition is placed on the accused from the beginning, even before any issue over the accused's health arises, would give the court's decision to impose counsel an increased sense of legitimacy and fairness. The court's obligation to conduct "fair and expeditious trials" also includes taking into account the interests of the victims and the public and of the defendants themselves in having an efficient trial process. The right to a fair trial, provided by Article 14 ICCPR and guaranteed by the Rome Statute in Article 67, attaches to the accused and not to the other parties to a trial. However, given the obligation on the court to ensure the expediency of the trial and the vindication of the fair trial rights of the accused, it is not unreasonable for the court to assign standby counsel in such a situation.

Conclusion

The right to self-representation is recognised as an element of the overall fair trial rights attached to the accused. While it is not an absolute right, any violation must be strictly necessary. If a trial is to be fair, it is essential that the accused be allowed to exercise the maximum degree of autonomy over their own case as possible. ICTs and the ICC should take whatever measures are reasonably available in the circumstances before revoking or denying the right to self-representation as a last resort. Higgins believes that it is only through creative judicial interpretation that the ICC and the ad hoc tribunals will be able to uphold the rights of the accused while at the same time ensuring a fair and expeditious

94 Boas, *The Milosevic Trial*, n. 19 above, p. 235.

95 Jorgensen, "The problem of self-representation", n. 24 above, p. 68.

96 Higgins, "The development of the right to self representation", n. 59 above, p. 258.

97 Ibid.

98 Markovic, "In the interests of justice?", n. 5 above, p. 954.

99 Darehshori, *Weighing the Evidence*, n. 50 above.

trial.[100] In particular, the expanded use of amici curiae, as in *Milosevic*, and standby counsel, as applied in *Seselj*, allow the court to ensure the overall fair trial rights of the accused are upheld while still allowing accused people to present their defence in the manner they choose. For this reason, Article 19(4)(d) of the SICT represents a regressive step in the fair trial rights afforded to defendants in international criminal trials.

However, limitations of the right to self-representation are required in some circumstances. Where an accused's behaviour is significantly disrupting the proper and expeditious conduct of the trial, the court has a legitimate interest in imposing counsel. If an objective set of conditions were placed on the exercise of the right it would give the court an objective basis to limit the right where the integrity of the trial was under threat. Such conditions would give the desirable level of certainty and fairness to the manner in which the right is qualified. This argument is supported by Higgins who believes that ICTs need to determine an objective threshold to be reached before counsel should be imposed on an accused.[101] The advantages of establishing a set of conditions based on the arguments outlined in this article are clear. It would allow the international criminal law system to gain some much-needed legitimacy while at the same time it would deny defendants the ability to turn the court into a political stage.

100 Higgins, "The development of the right to self representation", n. 59 above, p. 253.
101 Ibid. p. 283.

NILQ 62(3): 249–67

Shielding the state of emergency: organised crime in Ireland and the state's response

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In July 2009, after consulting the Council of State, President Mary McAleese signed the Criminal Justice (Amendment) Act 2009 (CJAA 2009) into Irish law without referring it to the Supreme Court under Article 26 of the Irish Constitution for an anticipatory test of its constitutionality.[2] As much maligned as it was welcomed, the CJAA 2009 introduced wide-ranging powers to deal with organised crime including prolonged periods of detention,[3] trials in front of the non-jury Special Criminal Court[4] and the creation of the offence of membership of a criminal gang.[5]

At a time when concern about organised crime had reached unprecedented levels in the public and media domains in Ireland,[6] such measures were considered by many as necessary to tackle effectively the actions of persons and organisations engaged in serious criminal activity. Others considered the CJAA 2009 to be of such a draconian nature that Ireland was being transformed into a police state and shamed in the eyes of the international community.[7] The purpose of this paper is not to analyse or prophesise on the effectiveness of the CJAA 2009 in tackling the problem of organised crime; rather what will be explored is the political and legal correlation between the Act and the means by which states react to emergencies.

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2 Under Article 26 of the Irish Constitution, the President may refer a Bill to the Supreme Court to test its constitutionality before it is signed into law. See R Byrne and J P McCutcheon, *The Irish Legal System* 4th edn (Dublin: LexisNexis Butterworths 2002), para. 5.71–5.

3 S. 16 amends s. 41 of the Criminal Justice Act 1999 increasing the penalty for jury and witness intimidation from 10 years to 15 years. The offence of directing a criminal organisation under s. 5 may be punishable by life imprisonment and the offence of participating in or contributing to certain activities under s. 6 may be punishable by up to 15 years' imprisonment.

4 S. 8(1).

5 S. 5 amends s. 71 of the Criminal Justice Act 2006 to create the offence of "directing a criminal organisation". S. 6 amends s. 72 of the Criminal Justice Act 2006 and makes it an offence to "participate in or contribute to certain activities" which are subsequently outlined.

6 See L Campbell, "Responding to gun crime in Ireland" (2010) 50 *British Journal of Criminology* 414, p. 417.

7 "Criminal Justice (Amendment) Bill", *Irish Times*, Dublin, 8 July 2009.

As declaring a state of emergency in general permits derogations on human rights obligations and encroachments on the separation of powers doctrine, scrutiny of the existence of such an emergency should be of paramount importance for legislators and the judiciary alike.[8] Consequently, a "state of emergency" may be described as a "sword and a shield" from a human rights and democratic perspective. As a sword it allows a state to breach human rights obligations that ordinarily constrain the range of responses a state may undertake. Yet also, in an ideal type situation, by outlining the discrete conditions when such measures may be undertaken, a state of emergency may also act as a shield, constraining such draconian measures and protecting human rights and democracy in times when conditions do not meet the sufficient severity threshold in order to constitute a state of emergency.

However, an emergent trend in the literature and empirical evidence is that it is now impossible to isolate and separate a state of emergency from normalcy. This is related to three different issues. Firstly, conditions that would not previously have been described "emergencies" are being increasingly used to justify the declaration of a state of emergency. The term emergency, already elastic in nature, is therefore becoming stretched to a point whereby it snaps and becomes useless in describing what conditions should trigger an emergency. Secondly, the phenomena in modernity that trigger a state of emergency are often incapable of temporal or spatial separation from the background of normalcy resulting in an "entrenched" or "perpetual" emergency. Finally, states often respond to situations in a manner similar to the way they would respond during a state of emergency without actually declaring a state of emergency to exist; in other words, de facto emergencies are emerging. In such situations, normalcy is technically in existence in strict legal terms (i.e. there is no de jure state of emergency) but the state is engaging in activities more akin to emergency situations (i.e. there is a de facto state of emergency). The result of this tri-frontal attack on the emergency paradigm is that the "shielding effect" of emergencies is being eroded, while their hazardous effects on human rights, democracy and the rule of law not only remain but are expanded. By showing a correlation between the CJAA 2009 and an emergency response in the absence of a legally declared state of emergency, this paper argues that the Irish government's response to organised crime seriously threatens the shielding effect of emergencies and lends weight to arguments that the emergency paradigm is obsolete.

This paper commences with an outline of what constitutes an emergency and an emergency response. Part 2 illustrates the correlation between the previously constructed paradigm and the CJAA 2009. Finally, this paper concludes with a discussion of the consequences of utilising an emergency response in dealing with organised crime and the implications this may have on formulating an understanding of the nature of emergencies and dealing with threats to the life of the nation.

1 Discerning the emergency paradigm

The idea of a state of emergency cannot truly be defined in any concrete, juridical manner. In fact, attempts to do so may be counter-productive, resulting in an inflexible concept

8 It is beyond the scope of this paper to enter into discussion on which body is most effective in evaluating the existence of an emergency. Indeed, such a discussion would warrant a separate article in itself. For our purposes it is enough to assume that a declaration of emergency is in general left to the realm of the politicians and the executive as the slow judicial process could hamper an effective response. Similarly, a court or judicial procedure as to the existence of an emergency would require the disclosure of matters of state security which often require a high level of secrecy due to their sensitivity. See, generally, F de Londras and F Davis, "Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms" (2010) 30(1) *Oxford Journal of Legal Studies* 19.

devoid of practicality in situations where flexibility, discretion and speed are necessary.[9] Reflecting this, legislative and constitutional sources of emergency powers do not generally offer strict definitions of a state of emergency, but use broad brushstrokes and give indications of situations in which a state of emergency may be deemed to exist in order to draw the parameters of these powers. Legally "defined" emergencies are therefore intangible in nature and elastic in applicability covering a multitude of phenomena.[10] The term emergency itself connotes a destructive or dangerous event of great magnitude that requires a swift response, a level of urgency and a severe detriment incurred by the state if such a response is not taken.[11] These situations constitute an emergency because of both the phenomenon that is the source of the crisis and the dire consequences that may result from an unresponsive state.

The purpose of declaring a state of emergency in legal terms is to permit a course of action that would otherwise be unavailable or even unlawful for the state to pursue.[12] A state will always face crises of varying severity, yet not all these crises will qualify as emergencies. It is only when the crisis crosses a certain threshold of magnitude and urgency that a state of emergency may be declared.[13] However, given the often increased scrutiny of a state's actions by international human rights bodies, observers and civil society once an emergency is declared, for reasons of *mala fides* a state may not actually declare a state of emergency even though it is reacting as if an emergency exists.[14] Similarly, given the security biases that may influence a state in times of crisis, it may be prone to overestimating the severity of the situation and declare a state of emergency in conditions that may not warrant such a declaration in the eyes of an external observer.[15] Consequently, it is necessary for the legal scientist to strive for an objective approach when assessing the existence of a state of emergency. Given the interdependent nature of the phenomenon and response which a state of emergency entails, I submit that we ought to observe a state's response in order to assess whether an emergency is thought to exist regardless of whether there has been a legal declaration to that end or not. This approach strives for a level of objectivity when

9 O Gross, "'Once more unto the breach": the systematic failure of applying the European Convention on Human Rights to entrenched emergencies" (1998) 23 *Yale International Law Journal* 437, p. 438.

10 Ibid. p. 439.

11 This is surmised famously by Thomas Jefferson who said: "A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." See J Lobel, "Emergency power and the decline of liberalism" (1989) 98 *Yale Law Journal* 1387, p. 1393.

12 Hence, in international human rights law sources of emergency powers are often called "derogation clauses" as they permit a state to derogate from some of its ordinary obligations under the treaties. In addition, Article 28.3.3 of the Irish Constitution explicitly states that: "[N]othing in this Constitution other than Article 15.5.2 shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law." Article 15.5.2 refers to the prohibition of the death penalty.

13 Of course the identification of this "threat-severity threshold" may not be capable of scientific analysis. There will invariably be debate as to whether or not a threat does cross this severity threshold. A "state of emergency", as we shall see, is very much a legal term whereby there will be cases which come within the core understanding of the term, and those which are very much within the "penumbra" of "emergency". See H Hart, "Positivism and the separation of law and morals" (1958) 71 *Harvard Law Review* 593, p. 607.

14 J Fitzpatrick, *Human Rights in Crisis: The international system for protecting rights during states of emergency* (Philadelphia: Philadelphia UP 1994), p. 18.

15 O Gross, "Chaos and rules: should responses to violent crises always be constitutional?" (2000) 112 *Yale Law Journal* 1011, pp. 1038–41.

ascertaining the existence of a state of emergency and allows one to critically analyse situations when a state does declare an emergency and to infer the existence of an emergency even if not officially declared or recognised by a state party. In other words, it offers a mechanism of recognising de facto and not only de jure emergencies.[16] Inquiry as to the existence of an emergency should therefore move beyond the legal realm to analyse the socio-political context within which the legal response takes place. Within this wider sphere of analysis, we can focus on discerning the following key constituent parts of an emergency response: reaction to a "serious" threat, representation of that reaction as necessary, and the separation of emergency from normalcy and assertion of abnormality.

Reaction to a "serious" threat

In order for an emergency to exist, a real and imminent threat to the state must exist that warrants a situation being described as such. Emergencies are consequently reactive in nature[17] and ideally cannot be pre-emptively declared in order to deal with a hypothetical threat.[18] In addition, the nature of this threat may be completely different from one emergency to another. Given the difficulties arising from the intangible nature of emergencies, attempting to identify and describe which scenarios cross the requisite threat-severity threshold thus warranting an emergency response can itself be challenging. That conceded, it is possible to identify core cases in which the existence of an emergency would be undisputed. The dictatorship of the Roman Republic is a prime lens through which we can view these core cases of undisputed states of emergency.

The dictatorship of the Roman Republic is seen as the archetypal emergency response mechanism and, consequently, as an ideal type through which one can analyse the concept of emergency and what threats may warrant an emergency response. In times of crisis, when the ordinary system of governance was unable to act decisively, power would be consolidated in a single individual: the dictator.[19] He was appointed for a period of six months to deal with the threat and was empowered to do anything he considered to be necessary to further his cause.[20] He could not be held to account for his actions once he relinquished office, however, he could neither extend his period of office nor appoint another dictator. He was also unable to make laws so the legal system that existed before he was appointed remained exactly the same once he abdicated from his office.[21] The military nature of the Roman dictatorship was written into its DNA; his original title of *magister populi* translates as master of the citizen army,[22] the duration of his term in office – six months – equated to the working year of the army in the ancient world,[23] and the dictatorship was most frequently used in the early days of the republic when the state had not a firm enough basis to maintain itself against foreign invasion.[24] However, the dictatorship was also used to deal with natural disasters such as the outbreak of plague.[25] The inherent power (*imperium*)

16 Gross, "Chaos and rules", n. 15 above, p. 310. See also Fitzpatrick, *Human Rights*, n. 14 above, pp. 21–2.

17 O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency powers in theory and practice* (Cambridge: CUP 2006), p. 22.

18 "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 *Human Rights Quarterly* 3, p. 8.

19 C Rossiter, *Constitutional Dictatorship* (London: Transaction Publishers 2002), ch. 1.

20 A dictator was appointed *re gerundae causa* (to get things done). Ibid. p. 21. Rossiter also describes the dictator as "as absolute a ruler as could well be imagined", p. 23.

21 N Machiavelli, *The Discourses* (London: Routledge & Kegan Paul 1950), p. 194.

22 Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, p. 21.

23 Rossiter, *Constitutional Dictatorship*, n. 19 above, p. 26.

24 J-J Rousseau, *The Social Contract and Discourses* (London: Everyman 1993), p. 294.

25 D Cohen, "The origin of Roman dictatorship" (1957) 10 *Mnemosyne* 300, p. 305.

of the dictator gave him an almost spiritual potency, enabling him, for example, to tackle disease by hammering a nail into a tree that was considered to be the source of the plague.[26] Extrapolating from this archetypical example of emergency powers, it would appear that war or severe natural disaster constitute core cases of emergency.

Modern sources of emergency powers corroborate the assertion that war or armed insurrection would warrant a state of emergency: Article 28.3.3 of the Irish Constitution, which lays down broad emergency powers, explicitly mentions a "time of war or armed rebellion".[27] In international human rights law, the Siracusa Principles interpret Article 4 of the International Covenant on Civil and Political Rights (ICCPR)[28] which deals with declarations of emergencies as requiring "a situation of exceptional and actual or imminent danger which threatens the life of the nation";[29] similarly Article 15 of the European Convention on Human Rights (ECHR)[30] describes a time of "war or emergency threatening the life of the nation".

The phrase "threatening the life of the nation" is arguably the clearest indication in Article 15 of what an objective analysis of what constitutes an emergency entails. That notwithstanding, however, a consideration of the caselaw on this issue is of little assistance in discerning the severity threshold a threat must reach in order to warrant a declaration of a state of emergency. In *Lawless* v *Ireland*,[31] an emergency was defined as:

> a situation of exceptional and imminent danger or crisis affecting the general public as distinct from particular groups and constituting a threat to the organised life of the community which composes the state in question.[32]

The minority in this case sought a more rigorous definition of emergency, tantamount to war, that could only be said to exist when the constitutional order had broken down.[33] Nevertheless, a lay reading of the preferred interpretation would suggest a threat would have to meet quite a strict threshold of severity in order to justify a state derogating its obligations under Article 15 of the ECHR. There is, however, a dramatic divergence between the theory and the facts which the court considered amounted to an emergency in the *Lawless* case and in subsequent jurisprudence.

In *Lawless*, the threat posed to the Republic of Ireland by the Irish Republican Army (IRA) was deemed to constitute an emergency as:

> in the first place, the existence in the territory of the Republic of Ireland of a secret army engaged in unconstitutional activities and using violence to attain its purposes, secondly, the fact that this army was also operating outside the territory of the state, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; thirdly, the steady and alarming increase in terrorist activities from the autumn of 1956 and throughout the first half of 1957.[34]

This is in spite of the fact that the IRA posed no threat to the institutions of Ireland, never mind to the existence of the state itself. Indeed, Gross and Ní Aoláin note with scorn

26 Cohen, "The origin", n. 25 above.

27 Article 28.3.3 further states that: "time of war includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists".

28 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 ICCPR.

29 "The Siracusa Principles", n. 18 above, p. 3.

30 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended).

31 3 ECHR (Ser A) (1960–61).

32 *Lawless* v *Ireland* 1 ECHR (Ser B) (1960–61) (Commission Report), para. 90.

33 Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, p. 249.

34 *Lawless* v *Ireland* 1 ECHR (Ser B) (1960–61) (Commission Report), para. 28.

the idea that an indirect deterioration of international relations between two governments could be used to infer the existence of an emergency.[35] Such a finding of fact stands vastly out of line with a literal interpretation of the phrase "threatening the life of the nation".

Thus, the severity threshold which a crisis must meet to correspond to an emergency under the ECHR is much lower than one would expect. In spite of this problem, however, there are some key identifiable indicators such as the fact that the political nature of the threat is considered to be a central element of phenomena that legitimise an emergency response. Protecting the life of the nation entails protecting not just the citizens of the state but also the institutions of governance and the legal order. Lawlessness and anarchy that may ensue in the aftermath of a natural disaster would also produce the requisite political nature of a threat to warrant a declaration of emergency. Similarly, the symbolic nature of terrorist attacks as an affront to the legitimacy of a state's claim to sovereignty would qualify as a threat to the life of the nation given their (generally) political nature.[36]

The representation of necessity

The Roman dictator was appointed in order to allow the state to act in a manner that was otherwise prohibited under the legal and political conditions of normalcy. In modernity, declaring an emergency in some jurisdictions allows for the introduction of measures that would otherwise be not only unlawful but in fact unconstitutional. Article 28.3.3 of the Irish Constitution for example allows the state to pursue measures that would, but for a declaration of emergency, be deemed inconsistent with the provisions contained in the Constitution.[37] It is in the nature of emergency measures that they are generally draconian in nature, sacrificing individual liberties and normal constitutional procedure for a more security-conscious state of affairs.[38] These measures are, however, represented as being necessary (and justified) in order to protect the life of the state.[39]

The term emergency connotes a crisis that is unforeseen, sudden and requires immediate action.[40] The speed of a response is vital in order to combat the threat. The consolidation of powers in the dictator in Rome was designed to enable the dictator to act swiftly and decisively, free from the ordinary constitutional procedure of complex checks and balances that impeded swift decision-making in periods of normalcy.[41] In modernity, emergencies generally result in the consolidation of powers in the executive branch of government at the expense of the legislature and judiciary.[42] The executive is the body most capable of acting quickly and decisively given the general consensus of opinion at cabinet

35 O Gross and F Ní Aoláin, "From discretion to scrutiny: revisiting the application of the margin of appreciation doctrine in the context of Article 15 of the European Convention on Human Rights" (2001) 23 *Human Rights Quarterly* 625.

36 J Friedrichs, "Defining the international public enemy: the political struggle behind the legal debate on international terrorism" (2006) 19 *Leiden Journal of International Law* 69, p. 71.

37 Casey notes that Article 28.3.3 is extremely broad, effectively giving the Oireachtas carte blanche to legislate at will. Thus, theoretically, the Oireachtas could re-write the constitution, e.g. expanding the size of the Dáil and its duration, altering the balance of powers between the Oireachtas and government or decreasing the powers of the President. Indeed, the only caveat contained in Article 28.3.3 is a prohibition on the introduction of the death penalty. See J P Casey, *Constitutional Law in Ireland* 3rd edn (Dublin: Roundhall Sweet & Maxwell 2000), pp. 180–1.

38 Lobel, "Emergency power", n. 11 above, pp. 1387–92.

39 Ibid. p. 1387.

40 Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, p. 171.

41 H F Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge: CUP 1965), p. 153.

42 M Tushnet, "Controlling executive power in the war on terrorism" (2005) 118 *Harvard Law Review* 2673, p. 2674.

or the absence of formal procedures that may slow down such decision making. In contrast, a slow legislative procedure is seen as dangerous, hampering the swift and decisive response that is necessary to dispose of the threat.[43] Similarly, as the executive is afforded a level of secrecy, it is considered to be the body best situated to deal with matters of state security.[44]

The separation of normalcy from emergency and the assertion of abnormality

Emergencies and normalcy are composed in terms of a dichotomised dialectic.[45] They are mutually exclusive with only one state in existence at any one time. Normalcy is considered to be the empirical regularity of modernity. It is the representation of the status quo and of the state as it exists from day to day. Emergencies on the other hand are conveyed as outliers to the status quo. They constitute rare phenomena that consequently require measures to tackle them that are equally rare. These often draconian measures are made more palatable and acceptable by their ultimate goal which is the restoration of normalcy.[46] An emergency is only declared in order to utilise these extraordinary measures that in turn restore normalcy and the status quo.[47] Without this goal, such draconian measures merely alter normalcy rather than protect it. In order to facilitate this distinction between normalcy and emergency, a number of mechanisms may be utilised. Restoration of normalcy indicates that emergencies are only temporary, as indicated by the common practice of placing (at least prima facie) temporal limits on emergencies.[48] As we have already seen, for example, the Roman dictator was limited to six months in office without the opportunity of renewal.[49] Often, however, he would step down before the six months was up once the threat was eliminated.[50] As the threat ceased to exist, there was no need for his office. This temporal limit ensured and reassured Rome that the resort to authoritarianism was only temporary.[51]

Many modern manifestations of emergency powers also include express time limits to curtail a state of emergency. Constitutions such as those of Poland and Chile contain a time-limit expressed therein.[52] Time limits may also be seen in emergency legislation such as the USA Patriot Act (passed in the aftermath of the 11 September 2001 attacks) and the UK Counter Terrorism Act 2005.[53] In addition, the lack of an express time limit does not necessarily mean that a state of emergency may be permanent. Article 27 of the American Convention on Human Rights (ACHR) does not contain a time limit, however, the Inter-American Court has ruled that such derogations on the basis of emergencies are only permitted "for the period of time strictly required by the exigencies of the situation".[54]

43 E A Posner and A Vermeule, *Terror in the Balance: Security, liberty and the courts* (Oxford: OUP 2007), p. 45. See also G Lawson, "Ordinary powers in extraordinary times: common sense in times of crisis" (2007) 87 *Boston University Law Review* 289, p. 311.

44 de Londras and Davis, "Controlling the executive", n. 8 above, p. 27.

45 Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, p. 172.

46 ICCPR, General Comment No 29: States of Emergency (Article 4) 31 August 2001 c/21/Rev1/Add11.

47 The ICCPR's General Comment on Article 4 states that the purpose and justification of a derogation under Article 4 of the convention is the restoration of a state of normalcy where full respect for the covenant can again be secured. See ibid.

48 Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, pp. 174–81.

49 Rossiter, *Constitutional Dictatorship*, n. 19, p. 23.

50 Ibid. p. 24.

51 Machiavelli, *Discourses*, n. 21, p. 194.

52 Article 40.1 of the Chilean Constitution requires a state of siege, state of emergency or internal commotion to last no longer than 90 days but it may be renewed by the President subject to legislative oversight. Similarly Art. 230 of the Polish Constitution states that a state of emergency lasts for a period of 90 days but may be subject to a renewal for a period no longer than 60 days.

53 See, however, Part 3 below (p. 260), in this article and how these time limits have operated in practice.

54 See further, however, on how the ECHR has interpreted Article 15 in *A* v *UK*.

As emergency powers are equipped to deal with a threat, one may reasonably expect that they will only be utilised against the threat. A distinction is thus made during states of emergency between friend and enemy.[55] Ideally, the draconian measures only impact negatively on those who are considered enemies of the state. Theoretically, they should not impact on the ordinary person in society, however, if they do, once the enemy is neutralised, the need for such draconian measures is assuaged, the measures cease to exist and normalcy is restored. As the enemy has been neutralised, he too no longer exists in normalcy.

A third distinction may also be made in terms of a geographical or spatial context.[56] Different rules may be applied in different areas. Emergency powers will only be utilised in areas where a threat is evident, e.g. a war zone, the aftermath of a natural disaster, etc. The dictator generally utilised his powers in leading the army outside the walls of Rome, however, given the close proximity between ordinary life and the military sphere, the appointment of a dictator essentially turned all of Rome into a war camp.[57] In modernity, the US Federal Emergency Management Agency (FEMA) uses this spatial separation between crisis-affected and non-crisis-affected areas in order to define the disaster and allocate resources accordingly. "Emergency" is used to describe a catastrophe with local effects managed with local resources.[58] Proceedings along this continuum of magnitude and space, a catastrophe is considered by FEMA to have national implications with local resources ineffective.[59]

We are thus left with the above parameters indicative of an emergency response and which may be used to stress-test government actions both when a state of emergency is formally declared (de jure state of emergency) and when one is not declared (possible de facto state of emergency). One is therefore able to objectively analyse the state's reaction to a phenomenon and describe it as an emergency response independent of the state's own assessment of the situation.

The next part of this article contains an analysis of the legal implications of the CJAA 2009 as well as the socio-political background surrounding the enactment of the legislation in light of these parameters with a view to assessing its correlation to the emergency response paradigm outlined here and the consequential impact this has on human rights, democracy and the rule of law in Ireland.

2 Is the CJAA 2009 an emergency response?

Organised crime has been of increasing concern in Ireland since the killing of journalist Veronica Guerin in 1996.[60] Hard on the heels of the moral panic[61] that ensued in the aftermath of her death, the government at the time introduced a series of measures, such as the Criminal Assets Bureau, to deal with this apparent new phenomenon.[62] Echoing this situation, it was the killing of Roy Collins in Limerick that crystallised media and public

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55 Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, p. 220.

56 Ibid. p. 181.

57 Rossiter, *Constitutional Dictatorship*, n. 19 above, p. 21.

58 See http://training.fema.gov/emiweb/edu/docs/crr/Catastrophe%20Readiness%20and%20Response%20-%20Session%201%20-%20Course%20Intro.ppt.

59 Ibid.

60 I O'Donnell and E O'Sullivan, "The politics of intolerance Irish style" (2003) 43 *British Journal of Criminology* 41, p. 49.

61 See, generally, S Cohen, *Folk Devils and Moral Panics: The creation of the mods and rockers* (New York: St Martins Press 1980). See also Campbell, "Responding to gun crime", n. 6 above, p. 428.

62 Campbell, "Responding to gun crime", n. 6 above. See also I O'Donnell, "Crime and justice in the Republic of Ireland" (2005) 2(1) *European Journal of Criminology* 99, p. 101.

outrage at organised crime in 2009 and prompted the Oireachtas to pass the CJAA 2009 in July of that year.[63] This reaction bears all the hallmarks of an emergency response. An apparently serious threat to the state was identified by the government, Oireachtas and media, requiring a swift decisive response that had grave repercussions for human rights and the democratic order in Ireland.

Reaction to a "serious" threat

Crimes are by definition committed against the state. Yet, it would be spurious to consider all crimes to be a threat against the life of the nation as most criminal activity is not of a political nature. Terrorism in contrast, while often reduced by politicians to merely criminal acts, nevertheless is distinguished from ordinary acts of criminality due to its inherently political nature.[64] It is submitted that the debate surrounding organised crime has portrayed its participants and the crimes they commit as equivalent to terrorist activity.[65] Their actions are distinguished from ordinary criminal acts, obtaining a level of politicisation that qualifies them as a threat to the state, its citizens and the rule of law. Politicians and the media are the main source of this rhetoric, distinguishing organised crime from "ordinary" crime and attempting to create an equivalency between organised crime and terrorism. Organised crime is considered "an affront to society just as the terrorists who were running around this island were an affront to society".[66] Consequently, "The men who prey on our society are treated as terrorists".[67]

The strongest endorsement of organised crime as a threat to the state in the context of the passage of the CJAA 2009 was articulated by Labour TD Tommy Broughan calling such acts "A threat to the state . . . such a threat to society . . . [that] . . . can't be allowed go on."[68] Minister for Justice Dermot Ahern reiterated the notion on numerous separate occasions, saying that the "grave situation we face" had "brought communities to their knees" and constituted a threat to the nation:

> Members of these gangs have displayed a callous disregard for human life and a brazen contempt for the community. They have come to believe that they can take on the criminal justice system and act as a law unto themselves. It is beyond

63 In media interviews and Dáil debates, Minister for Justice Dermot Ahern frequently invoked the circumstances surrounding the murder of innocent rugby player Roy Collins to justify the introduction of the CJAA 2009. See *Dáil Debates*, vol. 687, No 2, 3 July 2009. See also M Clifford, "New gangland laws would put us on par with tin-pot dictatorships; the Criminal Justice (Amendment) Bill is a PR stunt for Dermot Ahern, who knows the means to really hit gangs will be cut", *Sunday Tribune*, Dublin, 12 July 2009.

64 Although there is no universally accepted definition of terrorism, numerous sources of terrorist definitions specifically mention the political nature of such terroristic acts. See, generally, Gross and Ní Aoláin, *Law in Times of Crisis*, n. 17 above, pp. 366–71. Thus the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council Resolution 1566 (2004) describes terrorism as: "any action . . . that is intended to cause death or serious bodily harm . . . to compel a Government or an international organization to do or to abstain from doing any act". Similarly, the UN General Assembly's working definition of terrorism delineates the phenomenon as "criminal acts intended . . . to provoke a state of terror in the general public . . . for political purposes". See also T Miesels, *The Trouble with Terror: Liberty, security and the response to terror* (London: CUP 2008), pp. 5–30. Also, as Ashworth has shown, the increased politicisation of criminal acts is not a new phenomenon. See A Ashworth, "Crime, community and creeping consequentialism" (1996) *Criminal Law Review* 220.

65 "Editorial: Vital first step in defeating gangs", *Sunday Independent*, Dublin, 18 April 2009.

66 Ibid.

67 Ibid.

68 S Coleman, "Labour TD defends his 'gut feeling' in defying party on Criminal Justice Bill", *Sunday Tribune*, Dublin, 12 July 2009.

> question that criminal gangs will try to take whatever action is open to them to thwart the criminal justice system.[69]

Organised crime was thus portrayed as a phenomenon that undermines the rule of law and legitimacy of the state, threatening the life of the nation and its citizens. Members of the opposition were keen to go along with this correlation between organised crime and terrorism with Opposition Leader Enda Kenny describing the situation "as a war which the Taoiseach does not appear to be winning".[70] By hyperbolising the threat that organised crime poses to society, support and justification for draconian measures to counter the threat were achieved and consequently the measures were enacted.

The representation of necessity

The portrayed seriousness of the threat by politicians and the media was used to justify enshrining "necessary" powers in legislation to tackle the serious problem of organised crime, hence the CJAA 2009. Amongst other provisions, the Act introduced the offence of directing a criminal organisation.[71] In assisting the prosecution in proving this offence, a member of the Irish police force (An Garda Síochána), regardless of rank, who, it appears to the court, possesses the appropriate expertise, may express an opinion as to the existence of a particular organisation. Provision is also made for the potential of post-release supervision for a person convicted of such an offence, similar to that for registered sex offenders.[72]

Arguably the most draconian measure introduced by the Act is contained in s. 8. It states that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace. Consequently, the non-jury Special Criminal Court will be used to try certain organised crime-related offences. Originally established to deal with counter-terrorist cases and dissidents,[73] the Special Criminal Court has been subject to a number of criticisms from human rights bodies, such as the United Nations Human Rights Commission, due to its impact on the right to a trial in due course of law.[74] By utilising the Special Criminal Court, the Oireachtas enshrined the organised crime-terrorism equivalency in law. Organised crime was thus crystallised as a threat to the life of the nation, justifying such draconian encroachments on civil liberties and representing them as increasing the security of the ordinary law-abiding citizen.

The scope of measures introduced in the CJAA 2009 prompted a barrage of criticism from a number of sources. More than 130 lawyers wrote a letter to the *Irish Times* claiming Ireland would be shamed by the Act in the eyes of the world.[75] Similarly, Labour Senator, professor of criminal law and practising barrister Ivana Bacik expressed staunch objection to placing organised crime cases before the Special Criminal Court, arguing that this would create a separate justice system running parallel to the ordinary courts and thus

69 *Dáil Debates*, vol. 687, No 2, 3 July 2009.

70 *Dáil Debates*, vol. 666, No 3, 11 November 2008.

71 S. 5.

72 S. 14.

73 See F Davis, *The History and Development of the Special Criminal Court* 1922–2005 (Dublin: Four Courts Press 2007), pp. 64–70. Davis notes that the Offences against the State Act 1939 which first created the Special Criminal Court was drafted at a time when the activities and statements of the IRA were increasingly challenging the state's authority. Indeed, the general political unrest at the time explains why the Constitutional Review Group of 1934 suggested the inclusion of a clause permitting the establishment of non-jury courts in the new constitution. This became enshrined in Article 38.3 of the 1937 constitution. See ibid. pp. 56–62.

74 *Human Rights Committee Concludes Sixty-Ninth Session*, HR/CT/587, www.un.org/News/Press/docs/2000/20000728.hrct587.doc.html.

75 "Criminal Justice (Amendment) Bill", *Irish Times*, Dublin, 8 July 2009.

undermining the judicial system as a whole.[76] The Irish Council for Civil Liberties (ICCL) described the measures as seeming to "fly in the face of our own Constitution and international norms. To have this situation in 2009 in a republic strikes me as extraordinary." Furthermore, the ICCL argued that the legislation "bears all the hallmarks of a police state".[77]

The severity of the measures contained in the CJAA 2009 was acknowledged by Minister Ahern who conceded that the state had "stretched the elastic as far as we can in any democracy".[78] Yet that admitted, the measures were frequently defended as being necessary[79] and consequently justified when dealing with the threat organised crime posed to the nation. The Garda Commissioner echoed similar sentiments calling the measures "proportionate and necessary".[80]

Although the CJAA 2009 was comfortably passed by both houses of the Oireachtas, there was controversy at the speed at which it was enacted. The period of debate was drastically curtailed to a mere 90 minutes by the government's use of a guillotine procedure.[81] Although Fine Gael supported the Bill, it frequently expressed concern at the way Minister Ahern appeared to be "rushing the legislation through".[82] Even members of government parties expressed concern with the speed at which it was passed, with Ciarán Cuffe TD remarking that he would prefer more time for the Bill to be debated but conceded it was not a point he would be pressing.[83] Minister Ahern, however, defended the need to rush the legislation through as "from the minute it is passed people can be charged with directing criminal organisations and participating in criminal organisations . . . we cannot wait three months".[84] Similar sentiments were echoed in the media with Kevin O'Connor remarking in the *Irish Times* that: "Limerick needs this now."[85] Under this representation, organised crime was portrayed as a phenomenon requiring urgent action which could not be postponed.

The manner in which the CJAA 2009 passed through the Oireachtas is indicative of a consolidation of powers in the executive in periods of emergency: the gravity and nature of the threat is one that we are told must be dealt with swiftly, the luxury of time to allow the cogs of democracy to grind in the usual way is not one which can be afforded, normal parliamentary procedure and constitutional "niceties" must be sacrificed for the sake of society and the nation. In other words, the legislature accedes to the "diktat from government",[86] acting as no more than a rubber stamp for the will of the executive.

The assertion of abnormality

Although the use of the Special Criminal Court to deal with organised crime was acknowledged to be a serious power with the potential for severe encroachments on the right to a fair trial, Minister Ahern stressed a number of safeguards to mitigate the potential

76 I Bacik, "Senator Bacik speaking on Criminal Justice Legislation and Israel", www.ivanabacik.com/archives/309.

77 "Court laws 'fly in the face of the Constitution'", *Irish Examiner*, Cork, 4 July 2009.

78 "Gang lords facing life terms in crackdown", *Irish Independent*, Dublin, 26 June 2009.

79 J Walsh, "Ahern stresses need for new powers", *Irish Times*, Dublin, 15 July 2009.

80 Ibid.

81 M Regan, "Dáil debate on gang laws cut to just 90 minutes", *Irish Examiner*, Cork, 3 July 2009.

82 "Government denies coalition rift over gangland crime Bill", *Irish Independent*, Dublin, 10 July 2009.

83 M Hennessy, "Greens want more time to debate Bill", *Irish Times*, Dublin, 6 July 2009.

84 "Ahern denies introducing gangland Bill too quickly", *Irish Independent*, Dublin, 18 July 2009.

85 K O'Connor, "Using Constitution as a mask for self-interest", *Irish Times*, Dublin, 9 July 2009.

86 Coleman, "Labour TD", n. 68 above.

scope of the measures in an attempt to afford a certain level of protection for the rights in question. Section 8(4) states that:

> This section shall . . . cease to be in operation on and from the date that is 12 months from the passing of this Act unless a resolution has been passed in each house of the Oireachtas resolving that this section should continue in operation.

Section 8 therefore appears temporary in its nature. If it is not renewed after 12 months it will cease to exist. The relevant crimes under s. 8 would no longer be able to go to the Special Criminal Court and would have to be dealt with in the ordinary courts. If such an outcome were to occur, then one would have to assume that the ordinary courts were once again capable of dealing adequately with organised crime. The time limit therefore extrapolates the current threat of organised crime from the background of normalcy and portrays it as a temporary phenomenon. Once the threat is defeated, s. 8 will simply expire as the need for it will no longer be evident. A balance is apparently struck between the need for swift decisive action to protect the security needs of the state and the human rights of its citizens as such encroachments are merely temporary,[87] *provided* of course the time limit is actually given effect and not easily renewed.

As stated previously, political and media rhetoric surrounding the Act attempted to suggest an equivalence in severity between organised crime and terrorism. By describing murders and related crimes as "gangland", a separation between friend and enemy was made. The "us v them" model was utilised to distinguish the perpetrators from the rest of society.[88] Consequently, the measures enacted in the 2009 Act will not affect society as a whole but merely those involved in gangland activity. The measures are therefore more palatable to society as a whole because the ordinary person's rights are not being encroached upon.[89] A geographical distinction is also employed by the term gangland. Immediately, one thinks of areas in major cities such as Dublin and Limerick in relation to which there is frequent media reporting of organised crime. A geographical distinction is thus made between "normal" law-abiding areas and zones in which the rule of law has broken down, areas in which necessary measures will be employed in order to re-establish the state's authority therein.[90]

The CJAA 2009 is thus presented by politicians and the media as an extraordinary measure that was necessary to deal with the corresponding extraordinary threat that faced the Irish state in the form of organised crime. This assumption of abnormality is thus illustrated by the substantive measures contained within the Act, the means by which the government forced the Act through the Oireachtas, and the political and media rhetoric surrounding the Act. It is this abnormality that both necessitates the measures contained within the Act and, in an ideal type situation, mitigates our concern as to the erosion of civil liberties because, once this abnormality disappears, so too will the necessity for the measures and consequently the Act itself disappear. We shall now explore how this theory plays out in reality.

3 The consequences of using an emergency response to deal with organised crime

The parallels between the situation in Ireland in July 2009 and the emergency paradigm are startling even though an emergency was not officially declared in accordance with Article

87 Gross, "Chaos and rules", n. 15 above, p. 1073.

88 See Friedrichs, "Defining the international public enemy", n. 36 above, pp. 69–70.

89 Gross, "Chaos and rules", n. 15 above, pp. 1075–7.

90 Ibid.

28.3.3 of the constitution or, indeed, with Ireland's various international human rights law obligations including Article 15 of the ECHR. As stated previously, the belief that one can separate normalcy from emergency is being increasingly challenged in the literature for three reasons: expansion of the term emergency to cover a multitude of phenomena; the inability to isolate a threat in modernity from the background of normalcy; and the use of emergency responses that do not coincide with an official declaration of a state of emergency or the equivalent. Consequently, the shielding effect of a state of emergency is reduced while its potential harmful impact increases. With the passing of the CJAA 2009, Ireland finds itself in a situation where a de jure state of normalcy prevails but a de facto state of emergency exists. The detrimental effect this has on the distinction between normalcy and emergency and the consequent potential to undermine human rights, democracy and the rule of law require consideration.

Challenging the emergency–normalcy dichotomy

The emergency response paradigm is founded upon the fundamental assumption that one can separate normalcy from emergency.[91] It is upon this assumption that the often draconian measures introduced in emergencies appear more palatable. The belief that they are necessary, temporary and shall only be used against "the enemy" should in principle placate the very real concerns one may have about the effect an emergency response has on human rights, democracy and the rule of law. Ultimately, however, it is this most fundamental of assumptions that is being increasingly challenged by the literature and empirical evidence.

Gross considers that in modernity it is impossible to differentiate between normalcy and exception given the increasingly blurred demarcations between the two states.[92] The erosion of the assumption of separation between time/space and friend/enemy corroborate the notion that emergencies are now the norm.[93] In modernity, threats to states have evolved, from simple armed invasion by a foreign army; rather such threats come in the intangible form of terrorism, the perpetrators of which wear no identifiable uniform differentiating them as an armed force. These "terrorists" live among and look like us.[94] They are not limited in their actions to one geographical area and neither are the effects or implications of their acts. In the aftermath of the 11 September 2001 attacks in the USA, the UN Security Council passed Resolution 1368 requiring all member states to pass laws dealing with terrorism; the impact of the attack on the USA transcended borders and plunged the world into a state of emergency.

The fragility of the separation between normalcy and emergency is even more pronounced when the emergency paradigm is applied to a phenomenon like organised crime; a more mundane phenomenon of greater empirical regularity. By effectively othering those that partake in organised crime and clearly identifying the geographical areas in which such gangs operate, politicians and the media isolated the phenomenon of organised crime from the other experiences of people's lives in Ireland in 2009. However, the perpetrators of organised crime, like terrorists, wear no identifiable uniform that clearly demarcates them from civilians. Similarly, although organised crime is portrayed by the media and politicians as affecting certain core areas, Limerick city and Dublin, for example,[95] these borders are clearly less robust than international borders and the implications and consequences of

91 Gross, "Chaos and rules", n. 15 above, pp. 1071–2.

92 Ibid. pp. 1089–95.

93 Ibid.

94 Ibid. pp. 1082–9.

95 Campbell, "Responding to gun crime", n. 6 above, p. 427.

such criminal actions may not truly be confined within these areas. As a result, it is hard to identify when, if ever, the threat of organised crime may be wholly neutralised.

Indeed, there are some indications from the European Court of Human Rights (ECtHR) that the emergency paradigm as applied within international human rights law may be doctrinally stretched to encompass entrenched or perpetual emergencies. In response to the attacks on the USA and Security Council Resolution 1368, the United Kingdom declared a state of emergency and lodged a notice of derogation from some treaty provisions in accordance with Article 15 of the ECHR and Article 4 of the ICCPR. The existence of a state of emergency was subsequently challenged in *A* v *UK*[96] in which the ECtHR held that, in light of the new threat of Islamic terrorism, an emergency declared under Article 15 could be perpetual in nature.[97] Decisions of this kind add more weight to the argument that in fact a clear distinction between normalcy and emergency cannot be identified.

In addition to the attempted spatial separation and identification of the enemy by politicians and the media, the inclusion of a "sunset clause" requiring annual renewal of the Special Criminal Court provisions is an attempt to temporally extract the threat of organised crime from the background of normalcy. Again, this theoretically assuages the Act's potential impact on human rights. In reality, however, the theory behind such legislative time limits rarely corresponds with their implementation in practice, as can be seen in the history of the Special Criminal Court itself. Part V of the Offences against the State Act 1939 permits the establishment of the non-jury Special Criminal Court when the ordinary courts are considered to be no longer adequate. Conditions rendering the ordinary courts inadequate were deemed to exist during the Second World War from 1939–46, in light of increasing IRA activity from 1961–62 and, finally, in relation to the "troubles" in Northern Ireland from 1976 to the present day.[98] The supposedly temporary nature of the language contained in Part V has nevertheless created a non-jury court that is essentially a permanent institution of the Irish legal system.[99]

The ineffectiveness of time limits may also be seen by analysing the United Kingdom's Prevention of Terrorism Act 2005. Sections 1–9 of this Act, which include provisions relating to control orders, must be renewed by the legislature each year. Despite the severe encroachments on individual liberties that these measures may impose without the need of a criminal trial and requisite burden of proof,[100] their cost[101] and apparent ineffectiveness in tackling terroristic activity,[102] they have nevertheless been renewed annually; most recently in March 2010.[103] In the USA in 2001, the Patriot Act made serious encroachments on citizen's individual rights, such as those of liberty, due process and privacy. It allowed both foreign nationals and US citizens to be detained as enemy non-combatants and restricted their rights to due process. Certain provisions of the Act (16 in total) were subject to sunset clauses that were to expire on the 31 December 2005. Out of the 16 provisions due to lapse

96 *A* v *United Kingdom*, App. No 3455/05, judgment of the Grand Chamber, 19 February 2009.

97 Ibid. para. 108.

98 Davis, *History and Development*, n. 73 above, pp. 64–70.

99 This danger was recognised by Mary Robinson in 1974 when she argued that a specific time limit or renewal clause be inserted in the Offences Against the State Act 1939. See M Robinson, *The Special Criminal Court* (Dublin: Dublin UP 1974), p. 36. However, as we shall see, this would probably have had no practical effect on preventing entrenchment.

100 S. 2 invests the power of making a non-derogating control order in the Home Secretary.

101 Justice, "Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2010 Justice Briefing for House of Commons Debate", March 2010, para. 8.

102 Ibid at para. 12–15.

103 Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2010.

on the that date, 14 were not only renewed but made permanent, and the provisions relating to wire-tapping were given a new four-year extension.

One only has to look at the rhetoric surrounding the CJAA 2009 to understand that in practical terms s. 8(4) will not prevent the permanent encroachment of emergency powers in the legal system. Minister Ahern stressed that the fight against organised crime would be long and tough. The Act was subsequently renewed by the Oireachtas on 24 June 2010 despite the fact that the Director of Public Prosecutions had not directed any cases to be tried in the Special Criminal Court.[104] Again, Minister Ahern stressed that combating organised crime would be a long process:

> In passing the 2009 Act, I do not think anyone expected instant results. Given the nature of organised crime, the investigation and prosecution can be lengthy and difficult, particularly given the power that criminal gangs hold over those who are involved with them. The 2009 Act has been in operation for just under a year at this stage and while there have been arrests under the relevant sections of the Act, no cases have yet come before the Special Criminal Court. This does not, however, invalidate the reason for having such a provision available for use in appropriate circumstances.[105]

Rather than undermining its necessity, the lack of use of s. 8 was considered by Senator Denis O'Donovan to justify its renewal as it reinforced its position as "extraordinary"[106] and only to be used as "a last resort"[107] thus mitigating its draconian nature. Senator O'Donovan also considered the yearly renewal clause to be "frustrating . . . [as] . . . each year this matter must be brought before the Oireachtas".[108] He considered a renewal period of "every two or three years" to be appropriate.[109]

Similarly, overuse of the Act is unlikely to ring alarm bells as to its encroachments on civil liberties. Detention powers under the Criminal Justice (Drug Trafficking) Act 1996, which are widely used, were subject to a similar renewal clause and were consequently renewed on a number of occasions, most recently until 31 December 2010. Section 21 of the CJAA 2009 removes this renewal clause, however, because Minister Ahern stressed that:

> at the time of the enactment . . . detention of up to 7 days was considered a major departure. However, those detention powers are now an established and essential part of the fight against drug crime.[110]

Rather than protecting against encroachment, the renewal clause became seen as a blockade to the effective running of normal police investigative procedures. The result is that, as with the changes introduced in the Criminal Justice (Drug Trafficking) Act 1996, extraordinary measures will become normalised over time, changing the legal system permanently. Time limits are of little assistance in preventing this. Senator O'Donovan's contribution to the renewal debate surrounding s. 8 indicates that a similar frustration with the s. 8(4) time limit may occur also. These encroachments on human rights, like the emergency itself, become permanent.

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104 Joint Committee on Justice, *Defence and Women's Rights*, 24 June 2010, p. 2, http://debates.oireachtas.ie/DDebate.aspx?F=JUJ20100624.XML&Ex=All&Page=2. See also F Gartland "No gang case taken in Special Criminal Court", *Irish Times*, Dublin, 25 June 2010.

105 Joint Committee on Justice, *Defence*, n. 104 above.

106 Ibid.

107 Ibid.

108 Ibid.

109 Ibid.

110 *Dáil Debates*, vol. 687, No 2, 3 July 2009.

THE PERMANENT EMERGENCY AND THE LIBERAL-DEMOCRATIC ORDER

One can thus project that, in the aftermath of the CJAA 2009, Ireland is now in a state of de facto permanent emergency as regards organised crime. By its nature, an emergency should be exceptional. This is reflected by its synonym: a state of exception.[111] It must therefore constitute a rare response to a rare phenomenon and must also be a prohibited course of action when normal conditions exist. As empirical evidence in modernity has shown, the state of exception has now become so frequent that many academics argue it is essentially permanent.[112] The de facto emergency that now pertains in relation to organised crime in Ireland further corroborates this assertion. It is upon this observation of the unexceptional emergency that Carl Schmitt bases his attack on the liberal-democratic order.[113] States of emergencies are not merely limited to liberal-democratic constitutions, however, their inclusion in these constitutions fundamentally undermines the very values that a liberal-democratic state cherishes: liberalism and democracy. By recognising conditions whereby the values of liberalism and democracy cannot be realised lest ruin be visited upon the state, Schmitt argues that a liberal-democratic order is incapable of protecting a state's citizens, which is the fundamental goal of the state.[114] Consequently, in periods of emergency, these states must reach for a blunter, embryonic form of governance: absolute power in a dictatorial head of state, namely the sovereign.[115] It is thus a dictatorial form of governance that is ultimately capable of securing the very existence of the state. In order to do this, however, the sovereign needs to be free from the rule of law and able to exercise his or her decision-making powers effectively.[116] Only then is the sovereign capable of effectively exercising the ultimate political act: distinguishing between "friend" and "enemy" and consequently protecting the state by creating a state of exception.[117] This distinction between friend and enemy is, Schmitt argues, incapable of being described or controlled by a legal norm. So, too, therefore, is a state of emergency incapable of such a legal-normative description. This theory thus formulates itself in its simplest and most famous form as: "Sovereign is he who decides the exception."[118] The weakness of the liberal-democratic order is further corroborated by the frequency with which states resort to emergency powers. This permanent emergency, according to Schmitt, is merely the logical conclusion of the liberal-democratic order, with the sovereign showing his or her true face in times of crisis.[119]

When one applies Schmitt's theory to the CJAA 2009, Ireland's status as a liberal-democratic state with respect for human rights is compromised by an emergency response that will have a permanent effect on the political and legal landscape.[120] The ordinary legislative process is portrayed as incapable of accommodating the phenomenon of organised crime as it is unable to react in a sufficiently swift and decisive manner.

111 See, generally, G Agamben, *State of Exception* (London: University of Chicago Press 2005), p. 4.

112 Ibid. See also Gross, "Chaos and rules", n. 15 above, pp. 1089–94.

113 See, generally, C Schmitt, *Political Theology: Four chapters on the concept of sovereignty* (Cambridge MA: M1T Press 1988). See also O Gross, "The normless and exceptionless exception: Carl Schmitt's theory of emergency powers and the 'norm–exception' dichotomy" (1999–2000) 21 *Cardozo Law Review* 1825, pp. 1847–8.

114 C Schmitt, *The Crisis of Parliamentary Democracy*, E Kennedy (trans.) (London: MIT Press 1985), p. 28.

115 Ibid. pp. 28–32. See also Schmitt, *Political Theology*, n. 113 above, ch. 1.

116 Schmitt, *Political Theology*, n. 113 above, ch. 1.

117 See C Schmitt, *The Concept of the Political*, G Schwab (trans.) (London: University of Chicago Press 2007), p. 26.

118 Schmitt, *Political Theology*, n. 113 above, p. 5

119 See, generally, Schmitt, *The Crisis*, n. 114 above. See also Gross, "The normless", n. 113 above, pp. 1847–8.

120 See S Kilcommins and B Vaughan, "A perpetual state of emergency: subverting the rule of law in Ireland" (2004) 35 *Cambrian Law Review* 55, pp. 72–4.

Consequently, the government, by "necessity" consolidates its power at the expense of the legislature to rush the legislation through.[121] Evidently, during periods of normalcy in Ireland, the separation of powers between the executive and legislature is already extremely weak given the requirement that members of the government must also be members of the Oireachtas and are elected by the Oireachtas.[122] However, it is submitted that the use of the guillotine procedure in passing the CJAA 2009 effectively enshrines the singular wishes of the executive into law with minimal interference from, or dilution by, the legislature. Guillotining of debate time on the CJAA 2009 to 90 minutes effectively erased the already weak separation between the legislature and executive that exists under the Irish Constitution.[123]

Such a system is more symptomatic of a dictatorial regime than a liberal-democratic order with a separation of powers doctrine. Kilcommins and Vaughan argue that a wholly Schmittian "emergency" is unlikely in Ireland given that a state of emergency in accordance with Article 28.3.3 of the Irish Constitution, which suspends the rule of law completely, will probably not be declared. Rather, limited zones of non-legal applicability are created which are often expanded. They, as I do here, argue that these zones have expanded to cover organised crime. However, where I distinguish my position from Kilcommins and Vaughan is in their belief that, as a state of emergency has not been declared, this will stop a Schmittian dystopia. Rather, as the shielding effect of emergencies has been eroded to a point of futility, and a de facto emergency is in existence, an official de jure declaration of a state of emergency is not needed to prevent a dystopian Schmittian outcome. All that is needed is for the political sphere to supersede the rule of law.

Liberalism, a respect for human rights and the rule of law are all undermined by the CJAA 2009. The right to trial by jury as recognised in the Irish Constitution and international human rights law is cast as an obstruction, hampering the state's ability to protect its citizens from the perceived threat at hand. This barrier is thus removed, no longer curtailing the state's actions and, consequently, its duty to protect the citizen. Schmitt is again affirmed as the dictatorial nature of the state reveals itself as unshackled by the law. The state is thus left free to utilise actions to engage with the identified "enemy". The dystopian outcome of a Schmittian analysis of Ireland is even more pronounced given the relatively low threat that organised crime evidently poses to the life of the nation.[124] We are thus presented with a state that reacts to a low-level threat by curtailing the very fabric of the constitution that distinguishes it as a democratic document which affirms human rights.

Shielding the emergency

The use of an emergency response to deal with low-level threats corroborates with the thesis of Mark Neocleus[125] who offers an alternative explanation to why it is increasingly difficult to differentiate between normalcy and emergency. Ideally, one could avoid this abuse of the term emergency by looking beyond whether the phenomenon is described as an emergency and instead focus on whether the response equates to an emergency response, in other words through application of the methodology used here. However, as

121 See F de Londras and C Kelly, *European Convention on Human Rights Act: Operation, impact and analysis* (Dublin: Roundhall 2010), pp. 235–6.

122 Article 28.7.1 of the Irish Constitution states that the Taoiseach and Tánaiste must be members of Dáil Eireann. Article 28.7.2 states that the other members of government must be members of either the Dáil or Seanad but with not greater than two members from the Seanad.

123 de Londras and Kelly, *European Convention*, n. 121 above, pp. 235–6.

124 Kilcommins and Vaughan, "A perpetual state", n. 120, pp. 76–7.

125 M Neocleous, "The problem with normality: taking exception to permanent emergency" (2006) 31 *Alternatives* 191.

has been shown, an emergency response does indeed accurately describe the CJAA 2009. Neocleus' second argument is thus affirmed: that the range of phenomena which are subject to emergency responses has also increased.[126] Emergency powers are no longer used merely to deal with armed invasions and natural disasters but with terrorist threats and, indeed, economic disasters. The increasingly diminishing severity threshold which crises must meet in order to constitute an emergency makes it ever more difficult to discern normalcy from emergency. This also has the effect of destroying the potential shielding effects of a state of emergency. Firstly, as an emergency under Article 28.3.3 of the constitution was never declared, we are left with a situation in which draconian measures are enacted while a de jure state of normalcy prevails. Human rights, democracy and the rule of law are thus constrained to a level symptomatic of an emergency. However, as this is "normalcy", this level now becomes the status quo. Thus, these restrictions become normal and perpetual, rather than exceptional and temporary. Secondly, and more importantly, even if a state of emergency were declared, the emergency–normalcy response is rendered folly as the term emergency is one devoid of any tangible meaning. Its elastic nature is stretched to the point where it breaks and the theoretical underpinnings of the emergency–normalcy dichotomy become increasingly refuted despite their potential merit. Thus, this severity threshold is lowered to such a level that the shielding effect of emergencies is destroyed.

Conclusion

States of emergency, whether de facto or de jure, have serious consequences for democracy, human rights and the rule of law. Utilised effectively, a temporary aberration from these obligations can ultimately preserve the state and the liberal-democratic order. In addition, insistence on a de jure state of emergency can protect these rights further. Of course, organised crime has serious consequences for both individuals and communities, yet it is submitted that the severity of the threat is not such as to cross the threshold into a state of emergency. That notwithstanding, the state has responded to the phenomenon of organised crime as if it were of sufficient magnitude to threaten the life of the nation. In addition, the ordinary democratic procedure was treated by the government as a barrier to tackling this phenomenon. The emergency response paradigm was thus lowered to cover a phenomenon that does not threaten the existence of the state and became stretched to a point where it absorbed a phenomenon that exists in normalcy. Consequently, there appears a negligible difference between normalcy and emergency, and emergency responses become viewed as increasingly normalised. The non-jury Special Criminal Court, which was once established to deal with dissidents who did actually challenge the authority of the state,[127] is now used to deal with criminal activities devoid of a political element. The permanent feature of the Special Criminal Court in the Irish legal system stands as a testament to the dangers of utilising an emergency response to deal with a phenomenon such as terrorism which blurs the lines of demarcation between normalcy and emergency. The expansion of the Special Criminal Court to deal with organised crime further blurs this distinction.

If a war on terror is often considered unwinnable, what hope is there for a state in winning the war on organised crime? What is the acceptable level of organised crime in a state in order for these measures to be relinquished or must all organised crime be eliminated? Calls for internment[128] for participants in organised crime are perhaps the ultimate example of the negative consequences that can ensue when the nuclear option of

126 Neocleous, "The problem", n. 125 above, p. 195.

127 Davis, *History and Development*, n. 73 above, pp. 64–70.

128 V Robinson, "Latest murder sparks calls for internment of Limerick gangs", *Irish News*, Belfast, 3 March 2010.

an emergency response is employed to deal with such a low-level threat to the state. When an even more serious threat to the state is evident, one can assume that it will respond with even more draconian measures. If citizens were prepared to accept internment to deal with organised crime, one can only postulate at the dystopian state that may ensue if a more pertinent and real threat to the life of the nation were to come into existence.

Emergencies are supposed to constitute a threat to the life of the nation. In utilising emergency responses when dealing with increasingly low-level threats such as organised crime, the state erodes this definition further. Ireland is a liberal democracy that affords a prominent level of respect to human rights in its constitution. It is these values that represent the true life of the nation and draconian laws eroding these fundamental principles that constitute the real threat to it.[129]

129 See Lord Hoffman's dissent as to the existence of a state of emergency in the UK in *A* v *UK* [2009] All ER 203, para. 108.

NILQ 62(3): 269–89

Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law

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Introduction

Since its genesis, criticism of the doctrine of diminished responsibility has been extensive, both in respect of its underlying principles and practical effects. It has been called all sorts of names: "elliptical almost to the point of nonsense",[1] inaccurate[2] and essentially illogical.[3] Yet, in 2006, the Irish legislature deemed it appropriate to incorporate the partial defence into Irish law. To attempt to ascertain why, this paper reflects upon the development of the doctrine throughout the jurisdictions of the United Kingdom, and tracks its gradual progress to the republic under s. 6 of the Criminal Law (Insanity) Act 2006. With the doctrine now firmly enshrined in Irish law, the paper moves to consider the underlying rationale peculiar to s. 6, in addition to the early signs of its impact in practice.

The first part of this paper charts chronologically the fluctuating nature and scope of the doctrine in the jurisdictions discussed, showing the malleable margins pertaining to the defence in practice. It shows how the language used to define the doctrine, and its interpretation, are shaped not so much by academic agreement on how the wording should be understood, but on political and social issues of the time. Consideration is afforded to the foundational nature of the doctrine in Scotland in order to arrive at an understanding of its original intention. The impact of its mid-twentieth-century migration to the statute books of England and Wales, and later Northern Ireland, is then discussed as this marks an important shift in the status and interpretation of the doctrine. Following this, the ascent of the doctrine into Irish law is considered, in conjunction with more recent statutory developments affecting this area of law in England and Wales, Northern Ireland and Scotland.

The second part discusses in greater depth the nature and scope of the law in Ireland, in particular, its relationship with the insanity defence and its role as a means of mitigating the harsh effect of the mandatory life sentence for murder. Recent Irish caselaw is also taken into account, with a view to identifying the emergence of patterns in the

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1 E Griew, "Reducing murder to manslaughter: whose job?" (1986) 12 *J Med E* 18. Griew's criticism was in the context of the definition under s. 2(1) of the Homicide Act 1957.

2 G H Gordon, *Criminal Law of Scotland* 3rd edn (Edinburgh: Green 2000), p. 451.

3 B Wootton, "Diminished responsibility: a layman's view" (1960) 76 *LQR* 224, p. 236.

interpretation of the law since its introduction in 2006. The options available to the courts at the disposal stage are shown to be lacking and the approach of the judiciary inconsistent.

1 Historical reflections

1.1 Scotland: origins to mid-twentieth century

That the doctrine was initially applied to both capital and non-capital charges[4] suggests that at its core is a larger ideal, a more general expression of "tenderness to the frailty of human nature".[5] A pragmatic statement of the concept is evidenced as early as the late seventeenth century in Scotland,[6] with an attitude in stark contrast to its neighbouring jurisdiction.[7] Its incarnation in caselaw has been identified as early as 1704,[8] and by the nineteenth century, the notion of diminished responsibility was established within the Scots law as a form of mitigatory plea, albeit somewhat informally.[9]

Flexibility was the order of the day in Scotland, but as the nineteenth century progressed, and with it the legal system, the doctrine took on a more structured countenance.[10] Judges began to take the initiative by directing juries to provide recommendations as to mercy, as opposed to leaving judges to arrive at such a decision of their own accord.[11] Following this, it was not long before the verdict of murder with a recommendation to mercy was dispensed with altogether in this context in favour of the more potent verdict of culpable homicide.[12] This development marked a shift in disposal power from the Crown to the court, as there was no possibility that such a verdict could be rejected by the Crown, the significance being that it became the role of the judge to decide upon a suitable sentence in light of an accused's mental state.[13]

Diminished responsibility as a flexible yet structured legal concept is epitomised in the landmark case of *HM Advocate* v *Dingwall*,[14] where Lord Deas referred to culpable homicide as including "murder with extenuating circumstances". In a series of further decisions, the notion that various types of "mental weakness" could have the effect of reducing what would otherwise be a conviction of murder to one of culpable homicide became

4 In respect of non-capital charges the court would grant a reduced sentence in light of the accused's mental disorder, see *William Braid* (1835) 1 Hume Com, ch. I; *Thomas Henderson* (1835) (Bell's Notes 5); and *James Ainslie* (1842) 1 Broun 25. For capital cases, mental disorder was taken into account only by way of the Royal Prerogative of Mercy, for example, see *Archd Robertson* (1836) 1 Swin 15.

5 *Commonwealth* v *Webster* (1850) 5 Cush 296.

6 Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal*, vol. 1, 1–8 (1678): "It may be argued, that since the Law grants a total Impunity to such as are absolutely furious, that therefore it should by the Rule of Proportions, lessen and moderat the Punishments of such, as though they are not absolutly mad, yet are Hypocondrick and Melancholly to such a Degree, that it clouds their Reason."

7 At around the same time in England Hale wrote that "partial insanity . . . seems not to excuse . . . in the committing of any offence for its matter capital": M Hale, *The History of the Pleas of the Crown* (1736). See N Walker, *Crime and Insanity in England: vol. 1, The historical perspective* (Edinburgh: Edinburgh UP 1968) and J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh: Green 2006), p. 221.

8 *John Somerville* (1704) Hume, i, 42 and 44. See Chalmers and Leverick, *Criminal Defences*, n. 7 above, p. 222.

9 See Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 458–9, for further discussion of the early origins of the doctrine.

10 The term "diminished responsibility" seems to have been first used by Lord Bell in *William Braid* (1835) I Hume Com, ch. I.

11 *Jas. Denny Scott* (1853) 1 Irv 132.

12 *John McFadyen* (1860) 3 Irv 650.

13 Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 459–60.

14 (1867) 5 *Irv* 466.

entrenched.[15] It is noteworthy, however, that Lord Deas did not regard the accused's weak mental state as the sole ground for a verdict of culpable homicide on the basis of diminished responsibility; it was rather one of a number of grounds or "elements" which he thought might justify the decision.[16]

The "golden age" of flexibility was not destined to last, however, and the twentieth century brought with it a marked shift in the attitude of the courts. There were growing concerns that diminished responsibility was becoming a loophole for murderers. A murder conviction resulted in hanging, and the usual outcome for a successful insanity plea at the time was indefinite incarceration in an asylum. Thus, diminished responsibility, as an alternative to an insanity plea, resulted in an accused evading either hanging or the asylum – a "win-win" so to speak. Diminished responsibility was given a bad reputation as it was seen to facilitate an escape from appropriate punishment for the accused who was not insane and who should, in fact, have been convicted of murder.[17]

The approach of the courts at this time may also be attributed to the rise of the psychiatric profession and the emphasis placed on expert evidence at trial.[18] Whereas previously, a recognised mental condition or disease was not a prerequisite, now it was moving in that direction, a move which was spurred on by the progress of psychiatric medicine.[19]

Such scepticism culminated in the key decision of *HM Advocate* v *Savage*,[20] where Lord Alness set out the test for the doctrine which has since been taken as the definition of the plea:

> that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility . . . that there must be some form of mental disease.[21]

A number of cases which followed supported this trend.[22] Adding further to the restrictive tendency of the law at this time was the practice of the courts of interpreting the aforementioned set of factors so as to be collective in nature as opposed to alternatives.[23] As a result, the test to establish diminished responsibility became highly restrictive and the courts adopted the position that the scope of the plea was not to be further widened.[24]

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15 See *John McLean* (1876) 3 Coup 334.

16 For example, see *Granger* (1878) 4 Coup 86; *Ferguson* (1881) 4 Coup 552.

17 Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 463.

18 For example, see *HM Advocate* v *Aitken* (1902) 4 Adam 88; *HM Advocate* v *Robert Smith* (1893) 1 Adam 34. For further discussion, see Chalmers and Leverick, *Criminal Defences*, n. 7 above, pp. 224–5.

19 *HM Advocate* v *Aitken* (1902) 4 Adam 88 (per Lord Stormonth Darling), 94–5; *HM Advocate* v *Higgins* (1913) 7 Adam 229.

20 1923 JC 49.

21 Ibid. at 51. *HM Advocate* v *Aitken* (1902) 4 Adam 88, a particularly restrictive interpretation of the doctrine, was the only authority quoted by Lord Alness, yet this formula has become the authoritative origin of the modern law notwithstanding its inconsistencies with the nineteenth-century cases. See Gordon, *Criminal Law of Scotland*, n. 2 above, pp. 465.

22 For example, see *HM Advocate* v *Braithwaite* 1945 JC 49, where Lord Cooper stated that "[t]here must be something amounting or approaching to partial insanity and based on mental weakness or aberration", at 51.

23 *Connelly* v *HM Advocate* 1990 JC 349; *Williamson* v *HM Advocate* 1994 JC 149.

24 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* No 195 (Scottish Law Commission: Edinburgh July 2004), para. 3.2. The courts established that intoxications (*Brennan* v *HM Advocate* 1977 JC 38), psychopathic personality disorder (*HM Advocate* v *Carraher* 1946 JC 109), or a combination of immaturity and personality difficulty (*HM Advocate* v *Connolly* 1990 SCCR 505) would not be sufficient to establish diminished responsibility in the absence of a specific mental illness.

From its origins, the doctrine appears to emerge from a desire to blame and punish those with a mental disorder, whether they be killers or not, in an appropriate and morally justifiable manner; a doctrine which makes a concession to the weakness inherent in the human condition. Over time, with the emergence of a more ordered legal system, a rising psychiatric profession and a more sophisticated public, such liberal ideals – fluid in nature – became difficult to locate within the legal system. And so diminished responsibility was tapered to fit.

It was during this episode of narrow interpretation of the doctrine in Scotland that the jurisdiction of England and Wales, followed shortly by Northern Ireland, decided to incorporate diminished responsibility into legislation.

1.2 England and Wales and Northern Ireland: new beginnings

It is assumed by most that the rationale behind the introduction of diminished responsibility in England and Wales was to assuage the restrictive nature of the insanity defence under the M'Naghten rules.[25] However, one commentator would argue that it is "a commonly held misconception" that the doctrine was introduced for such a purpose, and that it was instead incorporated to appease the abolitionist faction of the death penalty debate.[26] This can be supported by the fact that as early as 1883, Stephen suggested that when madness was proved, one of three verdicts could be brought in: "Guilty; Guilty, but his powers of self-control were diminished by insanity; Not Guilty, on the grounds of insanity".[27] Yet the idea was not entertained again until the capital punishment debate ignited almost a century later.

The idea of incorporating the Scottish doctrine into English law was considered, and rejected, by the Royal Commission on Capital Punishment in 1953.[28] Although setting out strong arguments in favour of the doctrine of diminished responsibility, the commission appears to have lost its nerve upon recommendation, citing its limited mandate. Its overall conclusion was that: "the outstanding defect of the law of murder is that is provides a single punishment for a crime widely varying in culpability."[29] The report did not receive the acclaim it perhaps deserved and was not debated in the House of Commons for two years following its publication.[30]

After a brief interlude, light was again shone on the matter by a group of Conservative lawyers who published a pamphlet,[31] inferior both in size and content when compared to

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25 R v *McNaghten* (1843) 10 Cl and F 200. See A Ashworth, *Principles of Criminal Law* (Oxford: OUP 2006) who speaks of a "long-standing dissatisfaction" with the insanity defence, p. 277; S Prevezer, "The English Homicide Act: a new attempt to revise the law of murder" (1957) 57(5) *Columbia Law Review* 624, who considers s. 2 as an "addition to the M'Naghten rules", p. 636. According to Ashworth, the primary criticism of the rules is their confinement to cognitive defects and exclusion of emotional or volitional disorders from the insanity defence (p. 207). The rules can be summarised as follows: "[T]o establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong" (1843) 10 Cl and F 200, at 210.

26 F Boland, "Diminished responsibility as a defence in Irish law: past English mistakes and future Irish directions" (1996) 6(1) *ICLJ* 19, p. 19; T O'Malley, *Sentencing Law and Practice* 2nd edn (Dublin: Thomson Round Hall 2006), p. 408.

27 Sir J F Stephen, *History of the Criminal Law of England* (London: 1883).

28 *Report of the Royal Commission on Capital Punishment*, 1949–53, Cmnd 8932 (London: HMSO 1953).

29 Ibid. para. 790.

30 *HC Debs*, 10 February 1955, vol. 536, cols 2064–183.

31 Sir Lionel Heald, *Murder: Some suggestions for the reform of the law of murder in England* (London: Inns of Court Conservative and Unionist Society 1956).

the Royal Commission Report.[32] Though not proposing any change to the insanity defence, it recommended that when mental abnormality did not come within the confines of the M'Naghten rules, diminished responsibility was a useful addition to the law in this area.[33] Largely due to a number of sensational cases,[34] the government took heed and published a Homicide Bill, in suppression of a Private Members' Bill to abolish the death penalty for murder. The following year, s. 2(1) of the Homicide Act 1957 incorporated the doctrine into law, with the following definition:

> Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

Ironically, for those such as Boland who argue that diminished responsibility was brought in to mitigate capital punishment and appease the abolitionists,[35] the Homicide Act abolished the capital penalty for about three-quarters of capital crime.[36] Even so, the doctrine was still limited to murder which had ceased to a significant extent to be a capital crime at all.[37] This serves to substantiate the claim that diminished responsibility in England and Wales amounts to "a peculiar balance between a number of vectors of policy, principle and understanding".[38]

The ambiguous nature of the s. 2(1) definition was evident from the start, with one Member of Parliament remarking that: "[t]he Clause is disappointing, because it obviously sets out to do something that most of us want to do, but is intolerably vague and woolly".[39] This attitude found its way to the courtroom also, where judges either left the section to the jury to interpret or described the relevant state of mind as "borderline insanity" without further explanation.[40]

It was not until 1960 that the courts provided an authoritative explanation of the definition. In *R* v *Byrne*,[41] Lord Parker said that the concept of "abnormality of mind" was considerably wider than the concept of "defect of reason" under the McNaghten Rules. He went on to hold that the term was:

> wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control his physical acts in accordance with that rational judgment.[42]

32 S Prevezer, "The English Homicide Act", n. 25 above, p. 630.

33 B P Block and J Hostettler, *Hanging in the Balance: A history of the abolition of capital punishment in Britain* (Winchester: Waterside Press 1997).

34 For example, *R* v *Evans* [1950] 1 All ER 610; *R* v *Ellis*, *The Times*, London, 21 June 1955, p. 6, col. 3; *R* v *Craig*, *The Times*, London, 12 December 1952, p. 2, col. 4.

35 Boland, "Diminished responsibility", n. 26 above.

36 S Silverman, *HC Debs*, 28 November 1956, vol. 561, cols 433, 481–2.

37 Ibid. Suspension of the death penalty became permanent in England, Wales and Scotland in 1969 and in Northern Ireland in 1973.

38 A Norrie, *Crime, Reason and History: A critical introduction to criminal law* 2nd edn (London: Butterworths 2001), p. 185.

39 A Greenwood, *HC Debs*, 28 November 1956, vol. 561, cols 433, 491.

40 *R* v *Spriggs* [1958] 1 QB 270; *R* v *Walden* [1959] 1 WLR 1008. For commentary on early cases, see J E Hall Williams, "The psychopath and the defence of diminished responsibility" (1958) 21(5) *MLR* 544–9.

41 [1960] 2 QB 396.

42 Ibid. at 404, (per Lord Parker CJ).

The court appears to have had very little to say about the issue of aetiology, as represented by the bracketed words which follow it in s. 2(1).[43] Criticism from the medical profession was inevitable. For example, the phrase "abnormality of mind" was considered obscure and inadequate from a psychiatric perspective – it is not a medical term and so its meaning has had to develop in the courts on a case-by-case basis.[44]

The *Byrne* case, and the body of caselaw which was to follow, however, engineered such ambiguity to its advantage so as to bring about flexibility in practice. As a result, the scope of the definition was deemed to cover a wide range of mental conditions, including psychopathy, volitional insanity and alcoholism.[45] The defence even applied to the mercy killer, of which Glanville Williams has remarked:

> One may question whether leniency has not sometimes gone too far . . . there can be no doubt of the beneficial effect of the defence in [such] cases. Here it is invariably accepted by the jury on the flimsiest medical evidence, and thankfully used by the judge as a reason for leniency.[46]

Turning to the situation in Northern Ireland, due to a dearth of murder cases and no executions for murder for 20 years, there was little public demand for the law to be amended along the lines of the 1957 Act.[47] However, two controversial hangings in the 1960s which would probably have resulted in life sentences in England and Wales brought an end to public indifference. Initial attempts to introduce diminished responsibility together with the abolition of the death sentence were unsuccessful;[48] however, the doctrine was eventually introduced in Northern Ireland under the Criminal Justice Act (Northern Ireland) 1966.[49]

The next significant review of the law came in 1975, with the highly publicised and well-received Butler Report.[50] The Butler Committee remarked that: "the only substantial justification for maintaining the existing provision for a finding of diminished responsibility appears to be the continued existence of the mandatory life sentence for murder".[51] Its preferred solution was to abolish the mandatory life sentence for murder and with it, diminished responsibility.[52] Failing such reform, it recommended a reformulation of the s. 2 definition.[53]

Soon after, the Criminal Law Revision Committee[54] gave a majority view that diminished responsibility should be retained even if flexibility in sentencing for murder

43 R D Mackay, "The abnormality of mind factor in diminished responsibility" (1999) *Crim LR* 117, p. 117.

44 Law Commission Report, *Murder, Manslaughter and Infanticide* No 304 (Law Commission: London 2006), para. 5.111.

45 See Mackay, "Abnormality", n. 43 above, p. 117; *R* v *Tandy* [1989] 1 All ER 267; *R* v *Wood* [2008] WLR(D) 204.

46 G Williams, *Textbook of Criminal Law* 2nd edn (London: Stevens & Sons Ltd 1983), p. 693. See also E Griew, "The future of diminished responsibility" (1988) *Crim LR* 75, pp. 79–80.

47 W N Osborough, "Homicide and Criminal Responsibility Bill (NI) 1963" (1965) 16 *NILQ* 73, p. 73.

48 The Homicide and Criminal Responsibility Bill 1963 did not receive a second reading in the Northern Ireland House of Commons.

49 S. 5 (effect, in cases of homicide, of impaired mental responsibility); s. 6 (unlawful killing while under voluntary intoxication).

50 *Report of the Committee on Mentally Abnormal Offenders* (London: HMSO 1975). See H R Rollin, "Report of the Committee on Mentally Abnormal Offenders" (1976) 1(600) *BMJ* 48.

51 Butler Report, n. 50 above, para. 19.27.

52 Ibid. paras 19.14–16.

53 Ibid. para. 19.17: "the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter".

54 Criminal Law Revision Committee, *Fourteenth Report: Offences against the person*, Cmnd 7844 (London: HMSO 1980), paras. 92–4.

were introduced.[55] Its proposed wording eventually formed the basis of the definition of diminished responsibility in the draft Criminal Code Bill,[56] however, despite bouts of progress, enthusiasm for codification, and indeed amendment to the law of murder, dwindled somewhat.[57] It was during this lull in England and Wales and Northern Ireland that matters took an interesting turn in Scotland.

1.3 A RETURN TO FLEXIBILITY IN SCOTLAND

The restrictive direction that the defence had taken in Scotland was not sitting easily. In 2001 some concerns were raised by the Millan Report[58] which recommended that the Scottish Law Commission should be invited to review diminished responsibility in conjunction with the insanity defence.[59] Before the commission had the opportunity to do so, however, the judiciary stepped in to reverse the trend with the decision in *HM Advocate* v *Galbraith*[60] which has broadened significantly the scope of the doctrine in practice. The court in this case provided a definitive common law definition of the plea to the effect that: "at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts".[61] According to the Scottish Law Commission, the decision was welcomed on the whole in Scotland, and as such, it recommended that a new legislative definition should do little more than re-state the *Galbraith* criteria.[62]

Prior to *Galbraith*, it was assumed that diminished responsibility in Scotland depended upon a finding that the accused had a mental illness or disease, however, this is not now necessary,[63] with the result that the reach of the plea has been considerably widened.[64] The commission's recommendations in respect of diminished responsibility were taken on board by the Scottish Executive and implemented by the Criminal Justice and Licensing (Scotland) Act 2010.[65]

It is noteworthy that the current Scots law test is very similar to the original English test under s. 2, although, as Chalmers and Leverick have remarked, that may not be entirely

55 Criminal Law Revision Committee, *Fourteenth Report*, n. 54 above, paras 76 and 42. See Griew, "The future", n. 46 above; C Wells, "Criminal Law Revision Committee, 14th Report: Offences against the Person: Homicide" (1980) 43(6) *MLR* 681, p. 688.

56 Law Commission, *Report on Criminal Law: Codification of the criminal law – a report to the Law Commission*, No 143. HC270 (London: HMSO 1985).

57 Law Commission, *Report on a Criminal Code for England and Wales*, No 177 (London: HMSO 1989): "The present Government has, however, made it clear . . . that it sees no reason to alter the present constituents of the law of murder, nor indeed, to alter the mandatory life sentence for murder", para. 1.28. The Law Commission's programme of simplification has overtaken its codification mandate, see *Tenth Programme of Law Reform*, No 311 (London: HMSO 2007), para. 2.24.

58 Millan Committee, *New Directions: Report on the review of the Mental Health* (Scotland) Act 1984 (SE/2001/56), ch. 29, paras 51–61.

59 Ibid. para. 29.6 (Recommendation).

60 2002 JC 1.

61 Ibid. at 21.

62 Scottish Law Commission, *Report on Insanity and Diminished Responsibility*, SE/2004/92 (Edinburgh: Stationery Office 2004), para. 3.4.

63 In so far as the cases of *Connelly* v *HM Advocate* (1990) SCCR 504 and *Williamson* v *HM Advocate* (1994) SCCR 358 required mental illness or mental disease as a critical element of a successful diminished responsibility plea, they were disapproved in *Galbraith*, 20G, para. 52.

64 G H Gordon, *Criminal Law of Scotland* 3rd edn, Supp. Service (Edinburgh: Green 2005), p. 49.

65 S. 51B(1) provides that: "A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind."

inappropriate given that s. 2 was drafted in order to "introduce into English law the Scottish doctrine of diminished responsibility".[66] This implies that the current draft definition in Scotland is merely a clarification of the law as it was intended in the first instance. Yet, this comes at a time of further change in the definition in England and Wales and Northern Ireland.

1.4 A surprising shift in England and Wales and Northern Ireland

Debate surrounding the doctrine was revived in 2003, this time in the particular context of domestic violence and the partial defences, resulting in the Law Commission's 2004 report.[67] In terms of diminished responsibility, the commission recommended that any amendment to the definition should be suspended until such time as the government should task the Law Commission with conducting a comprehensive review of the law of murder, at which time partial defences could be considered from first principles.[68]

Thus, in its 2006 report on *Murder, Manslaughter and Infanticide*,[69] the Law Commission proposed a restructuring of the offence of homicide by setting out a hierarchy of categorised offences existing within the realm of homicide, reflecting the offences' degree of seriousness.[70] There would be two degrees of murder, with the fixed penalty applying to first degree murder only.[71] Diminished responsibility would be retained as a partial defence which would have the effect of reducing first degree murder to second degree murder if pleaded successfully.[72] In terms of the definition itself, the commission was of the view that it required clarification and modernisation along the lines of current diagnostic practices.[73]

However, the idea of a "full panoply of restructuring"[74] with regard to the law of murder proved too much for the government and, once again, diminished responsibility was utilised as a form of compromise by the legislature.[75] In its 2008 consultation paper,[76] the government was in agreement with the commission's proposed definition; however, it diverged from the commission in terms of the scope of reform. The government was of the view that the proposed changes to diminished responsibility should be implemented within the existing structure pertaining to murder, notwithstanding that the commission's recommendations were made only in the context of its proposed homicide offence.[77]

66 *HC Debs*, 27 November 1956, col. 318 (statement of the Attorney General). See Chalmers and Leverick, *Criminal Defences*, n. 7 above, pp. 227–8.

67 Law Commission, *Report on Partial Defences to Murder*, No 195 (London: HMSO 2004).

68 It is only in the context of a full review that the commission proposed a definition of diminished responsibility based on its prior consultation process. The commission's proposal received much support from academic commentators. For example, see "Editorial: adjusting the boundaries of murder: partial defences and complicity" (2008) 11 *Crim LR* 829.

69 Law Commission, *Murder*, n. 44 above.

70 Ibid. para. 1.64.

71 Ibid. para. 1.67.

72 Ibid. para. 5.83.

73 Ibid. para. 5.107.

74 M Eagle (then Parliamentary Under-Secretary of State for Justice), Coroners and Justice Bill, *HC Public Bill Committee Debs*, 3 March 2009, col. 413.

75 However, the door is not entirely shut on reform – see discussion of reforms on a "staged basis" in Ministry of Justice (MoJ), *Murder, Manslaughter and Infanticide: Proposals for reform of the law, summary of responses and government position*, responses to consultation (London: HMSO 2009), para. 120.

76 *Murder, Manslaughter and Infanticide: Proposals for reform of the law* CP(R) 19/08 (July 2008). For discussion see "Editorial", n. 68 above.

77 MoJ, *Murder, Manslaughter and Infanticide*, n. 75 above, para. 9.

Whether or not the government will further reform the law of murder any time soon is a moot point. In any event, our focus for present purposes is upon the introduction of a new definition of diminished responsibility under s. 52 of the Coroners and Justice Act 2009.[78] Much can be said of the legislature's choice of vehicle for redefining diminished responsibility,[79] suffice it to say that a more fitting course of action would have seen a framework of reform dedicated to a complete re-evaluation of the law of murder.

Section 52 replaces the existing definition under s. 2(1) of the Homicide Act 1957 as outlined above, with the following definition:

> (1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which–
>
> (a) arose from a recognised medical condition
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are–
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

Although certainly fulfilling the aims of clarity and modernisation in line with current diagnostic practices with the introduction of terms like "mental functioning" and "recognised medical condition", the new definition is far from flawless.[80] Its overall effect on diminished responsibility in England and Wales and Northern Ireland[81] is to curb the scope of the doctrine to a considerable degree.

As discussed above, the 1957 definition of diminished responsibility facilitated a broad interpretation of the doctrine by the courts. Indeed, the Law Commission describes its use by legal and medical experts as a "benign conspiracy"[82] in circumstances where the mental condition of the offender was not strictly recognised as a mental disorder or medical condition, such as the case of the mercy killer.[83] The curtailment of the definition under

78 The Act received Royal Assent on 12 November 2009. The commencement date was 4 October 2010 (Commencement No 4). Many provisions of the Act are applicable to Northern Ireland, with some also applicable to the Scottish Executive.

79 The Act consists of seven parts in all, which address a miscellany of subject matters both inside and outside the realm of criminal justice, for example, coroner law and practice, data sharing, legal aid and child pornography offences. For a summary of the parts, see "Editorial: the Coroners and Justice Act 2009" (2010) *Crim LR* 1, pp. 1–2. For discussion, see J Miles, "The Coroners and Justice Act 2009: a 'dog's breakfast' of Homicide Reform" (2009) 10 *Arch News* 6, p. 6.

80 For a detailed review of the wording, see R D Mackay, "The Coroners and Justice Act 2009 – partial defences to murder (2) the new diminished responsibility plea" (2010) *Crim LR* 290.

81 S. 53 (persons suffering from diminished responsibility (Northern Ireland)) replaces s. 5 of the Criminal Justice Act (Northern Ireland) 1966.

82 Law Commission, *Partial Defences*, n. 67 above, para. 2.34.

83 See R D Mackay, "The diminished responsibility plea in operation – an empirical study", in Law Commission, *Partial Defences*, n. 67 above, Appendix B, where Mackay's study of 157 cases in which diminished responsibility was raised suggests that six were cases of mercy killing.

the new Act, to internationally recognised and documented medical conditions, may result in such defendants being convicted of murder and sentenced to life imprisonment, notwithstanding that he or she may have been a "highly stressed killer".[84]

It remains to be seen whether s. 52 will in practice have a detrimental bearing upon a particular type of offender who would have been convicted of manslaughter rather than murder under the 1957 definition of diminished responsibility. Furthermore, in the section there is no link to the special verdict under the M'Naghten rules, and indeed the Law Commission expressed concern that "there is a need to reconsider the relationship between . . . diminished responsibility and insanity".[85]

In terms of scope, the journey so far for the doctrine has oscillated from broad to narrow and back again within the jurisdictions of Scotland, Northern Ireland and England and Wales. It seems torn between analysis in the context of the mandatory life sentence for murder, and its relationship with the insanity defence, with the result that its true aim or nature is often left unmentioned, i.e. an acknowledgment of the frailty of human nature. With this in mind, the next part examines the Irish experience of the doctrine.

1.5 Diminished responsibility in Ireland

The closest resemblance to diminished responsibility in Irish law prior to the 2006 Act was the Infanticide Act 1949, whereby the jury is entitled to return a verdict of infanticide, in lieu of murder, the punishment for which is as for manslaughter.[86] Indeed, the 2006 Act amends the definition of infanticide[87] and provides that a woman found guilty of the offence may be dealt with in accordance with the diminished responsibility section.[88]

Throughout the twentieth century, a few attempts were made to recognise diminished responsibility as forming part of the Irish common law, none of which were successful. The origins of the possibility of a reduced sentence for a murder conviction based on the presence of "mental abnormality" can be traced to the 1931 case of *AG* v *O'Shea*.[89] Here, the jury found the accused guilty and added a rider to its verdict recommending that special consideration be given to the fact that the crime was unpremeditated and committed during a period of mental abnormality. On appeal, however, it was held that the rider did not contain anything which constituted a qualification of the crime of murder, and the verdict was not modified.[90]

Of relevance also is the 1974 decision of *Doyle* v *Wicklow County Council*,[91] wherein a volitional insanity test was approved of which would question whether the accused was debarred from refraining from committing the act because of a defect of reason due to mental illness. The test was in addition to the M'Naghten rules under the ambit of insanity, as opposed to existing as a form or element of diminished responsibility.

84 See "Editorial", n. 68 above, p. 830.

85 Law Commission, *Tenth Programme of Law Reform: Project 7 unfitness to plead and the insanity defence*, No 311 (London: HMSO 2008–11).

86 S. 1, Infanticide Act 1949.

87 S. 22, Criminal Law (Insanity) Act 2006.

88 S. 6(3), Criminal Law (Insanity) Act 2006.

89 [1931] IR 728.

90 Ibid. (Kennedy CJ).

91 [1974] IR 55, approving *The People (AG)* v *Hayes* (Central Criminal Court, November, 1967) noted in R J O'Hanlon, "Not guilty because of insanity" (1968) 3 *Irish Jurist* 61. The test had previously been held as not forming part of Irish law in *(People) AG* v *Michael Manning* [1955] 89 ILTR 155.

Diminished responsibility was more overtly canvassed by defence counsel in the 1985 case of *DPP* v *Joseph O'Mahony*.[92] Here the accused was charged with murder and at trial the defence argued that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for his acts as to entitle the jury to consider the alternative of finding a verdict of manslaughter instead of murder.[93] On appeal, it was argued that there always had been a defence of diminished responsibility at common law and that it should, if necessary, be expanded by the court so as to equate with the formula proposed by the accused in light of modern psychiatric expertise. This argument involved necessarily a suggestion that the Homicide Act of 1957 was declaratory only and not the introduction of a new legal principle.[94] However, Finlay CJ disagreed, adding that the Act was introduced in order to liberalise the rigid M'Naghten rules.[95]

This decision put to an end the possibility of introducing diminished responsibility by means of judicial activism[96] and certainly impeded any progress that had been made on a legislative basis by the Henchy Committee following its 1978 report.[97] Indeed, despite that committee's recommendation, which included a draft Criminal Justice (Mental Illness) Bill – introducing the doctrine together with a new insanity formula[98] – no such legislation was enacted.[99]

Eventually, the implementation of the Criminal Law (Insanity) Act 2006 gave legal standing to the partial defence of diminished responsibility in Irish law. Section 6 provides that:

> (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person–
>
> (a) did the act alleged,
>
> (b) was at the time suffering from a mental disorder, and
>
> (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act, the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.

"Mental disorder" is defined so as to include "mental illness, mental disability, dementia or any disease of the mind but does not include intoxication".[100]

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92 [1985] IR 517.

93 The formula suggested was that proposed by the Butler Report, n. 50 above, in 1975.

94 Ibid. p. 521.

95 Ibid. p. 522.

96 Boland, "Diminished responsibility", n. 26 above. See also B Chubb, *The Politics of the Irish Constitution* (Dublin: Institute of Public Administration 1991).

97 Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons: The Henchy Committee (chair: S Henchy), *Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Courts on Criminal Charges* (Dublin: Stationery Office 1978). The purpose of the report was to set out, in draft legislative form, its recommendations as to the changes deemed necessary in the law as it affects persons suffering from mental illness or serious personality disorders who come before the courts on criminal charges.

98 See 2.1.1 below for further discussion.

99 Of note, is the fact that, notwithstanding the decision in *O'Mahony*, the courts have not always accepted this situation. For example, *In Re Ellis* [1990] 2 IR 291, the Court of Criminal Appeal stated obiter that the circumstances of the case: "[highlighted] the necessity for [Parliament] to examine as a matter of real urgency whether legislation is now needed to define the nature and scope of the plea of insanity and, possibly, of diminished responsibility, as a defence in criminal trials", at 295.

100 S. 1, Criminal Law (Insanity) Act 2006.

In 2003, the Law Reform Commission stated that the scope of the doctrine in Ireland is narrower than that of s. 2(1) of the Homicide Act 1957, and is instead more similar to the Scottish definition. It adds that in order to be in a position to bring a defence, the accused would have to be suffering from a mental disorder "just short of insanity". Thus, for instance, it is likely that psychopathy does not fall within the scope of s. 6.[101]

Since the introduction of s. 6, the defence has been invoked in the Irish courts on several occasions, four of them successfully.[102] Though it is perhaps too early to tell what will be its enduring effect, a theoretical and practical analysis at this time is useful, in that it gives context to emerging judicial attitudes towards the law in question and the offenders upon whom it impacts.

2 Present day analysis of the law in Ireland

2.1 The nature of diminished responsibility under s. 6

A cross-jurisdictional, historical analysis of the doctrine reveals that there is no one principle underlying the law relating to diminished responsibility. Instead, its nature appears to juxtapose two core positions: firstly, as a partial defence which offsets the restrictive nature of the insanity defence and facilitates degrees of criminal responsibility, rather than an all-or-nothing approach; and, secondly, as a form of extenuating circumstance in murder cases, necessitated by the existence of the mandatory life sentence for murder. This part considers each position in turn, with reference to the Irish experience.

2.1.1 Compensating for the insanity defence

The draconian verdict of "guilty but insane" under the Trial of Lunatics Act 1883 was replaced by s. 5 of the 2006 Act,[103] which allows a special verdict of "not guilty by reason of insanity" in the following circumstances:

(1) (a) the accused person was suffering at the time from a mental disorder, and

(b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she–

(i) did not know the nature and quality of the act, or

(ii) did not know that what he or she was doing was wrong, or

(iii) was unable to refrain from committing the act

The special verdict does little more than enshrine in legislation the Irish common law position relating to the insanity defence. The first two parts retain the substance of the M'Naghten rules, which do not amount to the sole or exclusive test for insanity in Ireland. The third part reflects this by incorporating the volitional control test as set out in the

101 See, Law Reform Commission, "Synopsis of Irish law relating to the defence of diminished responsibility" in Law Commission, *Partial Defences to Murder – Overseas studies*, appendices to Consultation Paper 173 (London: HMSO 2003), p. 111, p. 116. See D Whelan, *Mental Health Law and Practice: Civil and criminal aspects* (Dublin: Round Hall 2009), pp. 468–76; L Campbell, S Kilcommins and C O'Sullivan, *Criminal Law in Ireland: Cases and commentary* (Dublin: Clarus Press 2009), ch. 24.

102 *DPP* v *Patrick O'Dwyer* (18 June 2007, unreported), Central Criminal Court; *DPP* v *Leigh Crowe* [2009] 2 ILRM 225; *DPP* v *Stephen Egan* (21 April 2009, unreported), Central Criminal Court; *DPP* v *Anne Burke* (23 March 2010, unreported), Central Criminal Court.

103 S. 5, Criminal Law (Insanity) Act 2006. The Trial of Lunatics Act 1883 was repealed in full by s. 25 of the 2006 Act.

decision in *Doyle*. Thus, the Irish insanity defence extends its reach significantly beyond its English counterpart and is more akin to the position in Northern Ireland.[104]

While the continued extension of the M'Naghten rules is welcomed, it should not be assumed that an "irresistible impulse" type defence solves the M'Naghten conundrum.[105] An opportunity to re-evaluate this much criticised approach was not availed of by the legislature, despite the proposed definition by the Henchy Committee which suggested simpler and more flexible wording. The committee recommended that, where a person is suffering from a mental disorder at the time of the act such that he or she should not be found guilty of the offence, a verdict of "not guilty by reason of mental disorder" should apply.[106]

In any event, the Irish legislature constructed a position whereby the diminished responsibility defence would be necessary in order to supplement a still unsatisfactory insanity defence. Even at the Bill stage, the legislature alluded to potential problems with the special verdict. The Explanatory Memorandum to the Criminal Law (Insanity) Bill 2002 states that the availability of the verdict of diminished responsibility:

> should reduce the danger that a jury will return an insanity verdict when faced with a person whom they regard as not being completely sane, even if he or she does not meet the legal criteria for insanity.

This statement suggests that a major purpose of the 2006 Act was to appease a perceived danger (or risk) that juries are returning insanity verdicts in respect of murder cases where the accused has a mental disorder, but does not satisfy the legal criteria for insanity. It contrasts markedly with the concerns of the Henchy Committee, to the effect that offenders with mental disorders were being treated as "normal" people at sentencing.[107]

In any event, the statement can be undermined on a number of bases. Most obviously, it is difficult to appreciate the source of the concern voiced by the government in light of the secrecy surrounding jury deliberations. Furthermore, the number of insanity acquittals in Ireland has declined markedly from the nineteenth century[108] to the present day,[109]

104 Ss. 1 and 3, Criminal Justice Act (Northern Ireland) 1966. The Irish defence is less comparable with that in the Scottish jurisdiction, which is based on the "alienation of reason" test; see *HM Advocate* v *Kidd* 1960 JC 61, at 70–1; *Brennan* v *HM Advocate* 1977 JC 38, at 45.

105 The Butler Report, n. 50 above, highlights the central criticism of the test when it asks: "How can one tell the difference between an impulse which is irresistible and one which is merely not resisted?", para. 18.16. See, further, Royal Commission, *Report*, n. 28 above, pp. 313–14; E R Keedy, "Irresistible impulse as a defence in criminal law" (1952) 100(7) *University of Pennsylvania Law Review* 956–93.

106 S. 13, Draft Criminal Justice (Mental Illness) Bill.

107 Henchy Report, n. 97 above, p. 3.

108 P Gibbons, N Mulryan and A O'Connor, "Guilty but insane: the insanity defence in Ireland 1850–1995" (1997) 170 *British Journal of Psychiatry* 467. See also E Dooley, *Report on Homicide in Ireland 1992–1996* (Dublin: Stationery Office 2001). Dooley examines the 205 homicide incidents that arose in Ireland for the five-year period between 1991 and 1996. He reports that in all only 1.5% of the 205 cases received a legal psychiatric disposal, which was a marked decrease from the proportion 5.1% in the period of his previous study from 1972 to 1991, p. 26.

109 See Dooley, *Report*, n. 108 above, p. 26. In 15 of the 205 cases Dooley examined, the primary motive for the incident was considered to be some form of psychotic illness or other mental disorder. Only 4 of the 15 resulted in a court verdict, and 2 in a psychiatric verdict (either "unfit to plead" or "guilty but insane"). The Courts Service Annual Reports (Dublin Courts Service 2000–08) show the Central Criminal Court received 51 new murder cases, 24 of which went to trial. Of the 24, 2 defendants were found not guilty by reason of insanity. Of the 44 cases disposed of in 2007, again, 2 resulted in verdicts of not guilty by reason of insanity, p. 26. Figures for 2009 provided by the Central Criminal Court Registrar, Mr Liam Convey, to the *Irish Times* show 53 murder and murder-related cases, 3 of which resulted in an insanity acquittal and committal to the Central Mental Hospital, see C Coulter, "Drop in new Central Criminal Court cases", *Irish Times*, Dublin 14 January 2010.

which suggests that either juries have not been over-zealous with their acquittals, or defendants are slow to plead the special defence, or both.

The statement is further challenged by the apparent unpopularity of the insanity defence in Ireland, as illustrated by *DPP* v *Redmond*.[110] In this case, the accused purposefully did not plead "not guilty by reason of insanity" on the basis that he would prefer to have a definite sentence rather than a situation whereby he would be detained at the pleasure of the government in the Central Mental Hospital under the Trial of Lunatics Act 1883. Although a successful plea of insanity no longer results in automatic detention under the 2006 Act, uncertainty as to the consequences of such a verdict remains.

An additional point also raises questions about the accuracy of the government's statement. During the second-stage debate of the 2002 Bill, Senator Tony Kett highlighted the fact that Central Criminal Court lawyers are critical of the narrow remit of the insanity verdict because they find it difficult to convince a jury to return the special verdict on that basis (citing the controversial *Gallagher* and *O'Donnell* cases)[111] as they fear that the individual may walk free. This implies that juries are less likely to acquit and more likely to convict if they have doubts about the mental condition of an offender.[112] More than this, it suggests that both the senator's view and the government's statement are largely conjecture and, while this may be forgiven in the context of a Seanad debate, it is less easy to excuse in an Explanatory Memorandum.

The ease by which the government's rationale for the introduction of the doctrine is undermined suggests a further purpose to the law, which extends beyond any perceived danger of juries acquitting in borderline insanity cases. It is suggested that a primary function of diminished responsibility is to compensate for a rigid and largely unworkable insanity law, and a reluctance on the part of the legislature to re-evaluate from first principles the efficacy and relevance of a dwindling defence.[113] This can be supported to some degree by the fact that there is little evidence to suggest that the courts instruct the jury on the issue of insanity in cases where diminished responsibility is raised, notwithstanding that s. 6 requires that "the mental disorder was not such as to justify finding him or her not guilty by reason of insanity".[114]

Coonan and Foley argue that this procedure is too unwieldy as it technically seems to require the trial judge when directing the jury on diminished responsibility to first direct it on insanity and then, if it is satisfied that the insanity defence does not apply, to continue to direct it on diminished responsibility. Both are based on the existence of the same definition of mental disorder, while the insanity defence incorporates the M'Naghten rules together with a volitional insanity wing, the diminished responsibility definition's relation to the special defence suggests that the same test can be applied, but in the context of a lesser degree of responsibility.

Coonan and Foley highlight the unprecedented nature of this approach,[115] yet some logic can be garnered from the position if one considers the definitions put forward by the Henchy Committee. Both draft sections required the accused to suffer from a mental disorder at the time of the offence; the insanity defence such that the accused should not

110 [2006] 3 IR 188.

111 See, *Application of Gallagher (No 1)* [1991] 1 IR 31; *Application of Gallagher (No 2)* [1996] 3 IR 10.

112 *Seanad Éireann Debs*, 19 February 2003, vol. 171, para. 777 (Criminal Law (Insanity) Bill 2002: second stage).

113 Boland views diminished responsibility "as a solution to the problems inherent in the insanity defence", Boland, "Diminished responsibility", n. 26 above, p. 183.

114 See G Coonan and B Foley, *The Judge's Charge in Criminal Trials* (Dublin: Round Hall 2008), pp. 318–20.

115 Ibid. For example, see *Galbraith* v *Her Majesty's Advocate* [2001] SCCR 551, at para. 47, where the court criticised any approach which interpreted diminished responsibility by reference to insanity.

be found guilty; and the diminished responsibility defence not such as to find the accused not guilty by reason of mental disorder, but such as to diminish substantially his or her responsibility.[116] Each definition is drafted with the other in mind, with a view to focusing on levels of guilt, in a manner similar to Stephen.[117] The ambiguity pertaining to the relationship between the definitions under the 2006 Act may be due to the "cut and paste" mentality of the legislature.

Though still in its infancy, the caselaw in this area to date appears to indicate that diminished responsibility is not an issue in so-called "borderline" insanity cases, and that they are not cases where the jury is likely to acquit. For example, two successful diminished responsibility cases, *O'Dwyer*[118] and *Crowe*,[119] which were both based on "weak" mental diagnoses, did not see the insanity defence entertained.[120] Furthermore, in the case of *Seamus Fitzgerald*,[121] a defendant with a major psychiatric history was convicted of murder, despite a number of psychiatrists testifying to the effect that the accused had an anti-social personality disorder.[122]

2.1.2 Mitigating the mandatory life sentence for murder

The question under consideration is whether, in Ireland, mitigation of sentence in respect of diminished responsibility is a mere procedural effect of a successful defence, or goes to the nature of the doctrine itself. If it is a procedural effect in order to "get around" the mandatory penalty in the context of murder, then the doctrine is a symptom of an arguably outdated homicide structure with an ever-diminishing shelf-life.[123] If, on the other hand, the doctrine exists for a more fundamental purpose, it matters not as to the existence of the mandatory penalty and diminished responsibility stands as a partial defence in its own right. The evidence appears to be in favour of the former contention.

The government makes its position clear. The Explanatory Memorandum to the Criminal Law (Insanity) Bill 2002 states that:

> [t]he effect of [its application to murder only] will be that if diminished responsibility is successfully pleaded, a conviction for manslaughter will be recorded with the sentence, at the discretion of the court . . . [t]here is no need to apply the concept in the case of other crimes where there is no mandatory sentence.

Furthermore, the Law Commission of England and Wales has said that the concept of a "partial defence" such as diminished responsibility is "something of a misnomer", and a means by which the law has facilitated discretion in sentencing in respect of murder convictions.[124] It adds that such an outcome could equally have been achieved by "making proof of the exceptional mitigating circumstances relevant to whether the sentence for murder was still mandatory, without affecting the verdict of murder". Indeed, most

116 See ss. 13 and 18 of draft Criminal Justice (Mental Illness) Bill.

117 Stephen, *History*, n. 27 above.

118 See n. 102 above.

119 See n. 102 above.

120 In *O'Dwyer*, the accused was diagnosed with depersonalisation disorder and temporal lobe epilepsy and a psychiatric assessment of the accused in Crowe revealed a post-traumatic stress disorder.

121 (30 May 2008, unreported), Central Criminal Court.

122 See "Man pleads not guilty to murder of his father", *Irish Times*, Dublin, 23 May 2008.

123 On two occasions the Law Reform Commission has recommended the abolition of the mandatory life sentence. See *Report on Sentencing* No 53 (Dublin: LRC 1996) and *Report on Homicide: Murder and Involuntary Manslaughter* No 87 (Dublin: LRC 2008).

124 Law Commission, *Murder*, n. 44 above. para. 2.150.

commentators would argue that the very existence of the doctrine is dependent upon the retention of the fixed penalty for murder, and that if the fixed penalty was abolished, diminished responsibility could be dispensed with. For example, Dell has remarked that diminished responsibility exists "only to provide a means of escape from the mandatory penalty for murder" – a situation which she describes as a "fundamental anomaly".[125]

However, Wasik[126] maintains that it is a mistake to regard the fixed penalty and partial excuse as causally dependent on each other; it is rather that both phenomena stem from a third consideration, the fact that murder is marked as a "crime standing out from all others".[127] Wasik's view is based on the premise that murder is considered to be the most serious of crimes, and it is perhaps appropriate that the punishment too is correspondingly serious to reflect this.

This argument is an oversimplification of the situation. There exists in Ireland and elsewhere strong support for the more realistic and humane contention that, just as with manslaughter, there is considerable moral variability within the offence category of murder.[128] For example, Bacik has argued that the mandatory life sentence gives rise to injustice as it does not reflect the varying degrees of culpability in the crime of murder.[129] Some murders are more heinous than others and differing levels of heinousness should be reflected in sentencing.[130] Of course, this was also the view of the Law Commission of England and Wales in its murder report.[131]

A second factor which undermines Wasik's view is that most claims pertaining to murder as a "crime apart from all others" are born from a sensationalist journalistic and political culture. Murder is habitually depicted as a "charismatic" word in the vocabulary of popular legal discourse, such that often anything less than the maximum penalty can result in a torrent of criticism for the courts from the media and the political sphere.[132] Blom-Cooper and Morris allude to this when they describe politicians as "prisoners of orthodoxy" who cause the stagnation of the resolution of the mandatory life debate due to their reluctance to think "outside the box" for fear it would "spell some form of cataclysmic disaster" in terms of public confidence.[133] Such an attitude inhibits the introduction of important criminal justice reform by reason of the superficial aim of appearing "tough on crime".

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125 S Dell, "The mandatory sentence and section 2" (1986) 12(1) *Journal of Medical Ethics* 28, p. 28.

126 M Wasik, "Partial excuses in the criminal law" (1982) 45 *MLR* 516, p. 520.

127 Criminal Law Revision Committee, *Fourteenth Report*, n. 54 above, para. 84.

128 Law Reform Commission, *Report on Homicide*, n. 123 above, para. 1.46. The commission has noted elsewhere that if the fixed penalty for murder were removed, the problem of heterogeneity within offence categories could be seen in its proper perspective, that is, as a normal feature of the criminal law, Law Reform Commission, *Seminar Paper on Homicide: The mental element in murder* SP1 (London: LRC 2001) at 59.

129 Ibid.

130 See S Breen, "Issue is for politicians not judges, says reform commission", *Irish Times*, 30 October 2003.

131 Law Commission, *Murder*, n. 44 above.

132 "Editorial: a flexible approach to sentencing" (1998) 148 *New LJ* 685. For a more thorough analysis of this issue, see J E Stannard, "Murder and the ruthless risk-taker" (2008) 2 *Oxford University Commonwealth Law Journal* 137, where the author highlights the tension between competing objectives of the law in the particular context of the ruthless risk-taker. That is, the principle of legality on the one hand, and the demands of public policy on the other, pp. 156, 157.

133 L Blom-Cooper and T Morris, *With Malice Aforethought: A study of the crime and punishment for homicide* (Oxford: Hart Publishing 2004), p. 171.

Thirdly, this attitude may be criticised on the basis of the constitutional principle of proportionality.[134] The caselaw in this area, in particular, raises questions about the fairness of mandatory sentencing in light of the centrality of the proportionality principle.[135] As O'Malley observes, a mandatory sentence essentially prevents the courts from fulfilling their constitutional obligation to impose a proportionate sentence.[136]

The above arguments support the contention that a key purpose of the introduction of the doctrine in Ireland is to offset the harsh effect of the mandatory life sentence for murder, while evading the need to deal with its abolition. Although the abolition of the mandatory life sentence would obviate the need for the defence of diminished responsibility, this is unlikely to happen anytime soon due to a number of factors, most notably the novelty of the doctrine in Irish law and political inertia in relation to the mandatory sentence.

2.2 A note on judicial interpretation of s. 6

Two key questions go to the heart of the interpretation of diminished responsibility in practice: firstly, the notion of what amounts to a mental disorder for the purposes of s. 6; and, secondly, the question of causation, that is, does the mental disorder have to be the primary or the sole cause of the offender's diminished responsibility, or is a significant cause sufficient? This section briefly considers each in turn in light of the new caselaw in this area.

Most cases have dealt with the issue of diminished responsibility by relying on psychiatric evidence in an uncontroversial manner. The case of *DPP* v *John Collins*,[137] however, is of particular interest in this regard, as during the trial two experts clashed on the fundamental issue of the definition of mental disorder: they could not agree on whether the ICD 10[138] definition or the DSM IV[139] definition should be followed.[140] Alexander summarises the problem relating to psychiatric definition within the courtroom when she says:

> experts are free to interpret these legal terms in light of their professional beliefs. Without guidance . . . there is a lack of uniformity and predictability in the application of these terms . . . this encourages unseemly battles of experts in court, [and] inconsistency of findings between judges.[141]

This suggests that the discrepancy in expert findings may be a factor which feeds the inconsistency which is evident at the sentencing stage of cases involving convictions of manslaughter on the grounds of diminished responsibility, but this issue will be considered further in the next section.

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134 According to a strong body of caselaw, the principle of proportionality at the sentencing stage is a requirement of the Irish Constitution, for example: *The State (Healy)* v *Donoghue* [1976] IR 325, at 353; *Deaton* v *Attorney General and Revenue Commissioners* [1963] IR 270; *The State (O)* v *O'Brien* [1973] IR 50, at 67; *DPP* v *C(W)* [1994] 1 ILRM 321, at 324, among others. For in-depth analysis of Irish sentencing policy, see T O'Malley, "Principles of sentencing" (1991) 1(2) *ICLJ* 138.

135 See *DPP* v *M* [1994] 2 ILRM 541, and the earlier case of *People (AG)* v *O'Driscoll* (1972) 1 Frewen 351.

136 See T O'Malley, "Sentencing murderers: the case for relocating discretion" (1995) 5(1) *ICLJ* 31.

137 (28 March 2007, unreported), Central Criminal Court. See also, S Griffith, "Alcoholic given life for 'grudge' murder of boxing coach", *Irish Independent*, Dublin, 28 March 2007.

138 World Health Organisation, *International Classification of Diseases*, 10th revision (Geneva: WHO 2007).

139 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edn, text revision (Washington DC: American Psychiatric Association 2000).

140 S Griffith, "Murder accused 'normal' doctor tells trial", *Irish Independent*, Dublin, 23 March 2007; S Griffith, "Alcohol caused accused to shoot coach", *Irish Independent*, Dublin, 24 March 2007; D Duggan, "Law shows maturity with hints of grey", *Irish Independent*, Dublin, 1 April 2007. A similar situation arose in *O'Dwyer*, n. 102 above; "A tale of two mental experts, two theories and a jury's dilemma", *Irish Independent*, Dublin, 20 April 2007.

141 C Alexander, "Oregon's Psychiatric Security Review Board – trouble in paradise" (1998) *Law and Psych Rev* 22.

In terms of the extent to which the mental disorder must diminish the responsibility of the accused in order to bring a successful defence, the case of *O'Dwyer*[142] is instructive. The accused brutally killed his teenaged sister in motiveless circumstances, following an evening spent watching television together. The psychiatric experts for the defence were successful in arguing that the accused was suffering from temporal lobe epilepsy and depersonalisation disorder, the latter condition, according to one expert,[143] being under-recognised by the professional psychiatric community.[144] The prosecution pointed to several other factors apart from the mental disorder which may have provided an explanation, or been the cause (in whole or in part) of the actions of the accused. It was the prosecution's contention that the accused was suffering from a severe alcohol problem, but nonetheless knew what he was doing at the time of the killing.[145] The prosecution's expert, Dr Kennedy, undermined the defence expert's diagnosis of depersonalisation disorder and said that it was an attempt to find an explanation for the tragic outcome of the offence. He further added that even if he was wrong and the accused did suffer from depersonalisation disorder, he did not see its relation to the offence in question, the more likely reason for the killing being that the accused was overcome with "profound feelings of shame and embarrassment" having been extremely drunk that weekend.[146]

The jury accepted that the accused was suffering from a condition amounting to a mental disorder, which substantially diminished his responsibility for the killing. However, it is difficult to say with certainty that the depersonalisation disorder did substantially diminish the accused's responsibility for the act. Given strong prosecution evidence, it may be that the accused had his charge reduced to manslaughter not alone due to the defence psychiatrist's diagnosis, but perhaps also due to his individual circumstances, or the "tragic outcome" of the case. This underlying sense of humanity over strict legal principle is reminiscent of the early origins of the diminished responsibility doctrine which emerged from the Scottish jurisdiction.[147]

Considering the various elements at play in this case, it would appear that the mental disorder must essentially amount to a significant contributory factor in causing the diminishment in responsibility, as opposed to the sole factor. This would be in line with s. 52 of the Coroners and Justice Act 2009 as discussed above in the context of England and Wales and Northern Ireland. This provides that, not only must mental disorder substantially impair the accused's ability to understand the nature of his or her conduct, to form a rational judgment or to exercise self-control, but it must also provide an explanation for the act, in that it must either cause or be a significant contributory factor in causing the defendant to carry out the killing.[148] It will be interesting to see what future cases may bring to the interpretation of the definition under Irish law as this body of law develops.

142 See n. 102 above.

143 Dr Paul O'Connell, Central Mental Hospital.

144 See, "A tale of two mental experts", n. 140 above.

145 It is unlikely that an alcohol problem could amount to a "mental disorder" within the meaning of the 2006 Act, as s. 1 expressly states that "mental disorder" does not include intoxication, unless there is an underlying mental disorder, alcohol dependency syndrome or another mental disorder which the court might find does not come under the ambit of "intoxication" as defined in s. 1 of the Act. See Whelan, *Mental Health Law and Practice*, n. 101 above, pp. 473–5.

146 S Griffith, "Doctors 'clutching at straws' in murder case", *Irish Independent*, Dublin, 20 April 2007.

147 *Alex Dingwall* (1867) 5 Irv 466.

148 See also R v *Dietschmann* [2003] 1 AC 1209, at 1217, per Lord Hutton: "I think that in referring to substantial impairment of mental responsibility the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing."

2.3 Consequences of a s. 6 verdict

The result of a diminished responsibility verdict is that the general law concerning manslaughter applies, in that the court may apply any sentence up to a maximum of life imprisonment and/or a fine.[149] Needless to say, sentencing for manslaughter resulting from a successful diminished responsibility defence is highly discretionary, as it should be, but its effectiveness depends on the range of suitable dispositions available to the courts[150] which are somewhat lacking in the Irish criminal justice system.[151] It is unfortunate that the opportunity was not seized by the legislature to ameliorate this position with the implementation of the 2006 Act.

Post-2006, the *O'Dwyer* case demonstrates the dearth of options available when sentencing the mentally disordered offender and the resultant frustration of the court. At the sentencing hearing, Carney J stated that he had to examine similar cases in England and Wales for guidance where he said that the law relating to sentencing in diminished responsibility cases was more "sophisticated" than its Irish counterpart, the expression of which he labelled as "crude" in that it boiled down to a question of imprisonment (there being no alternatives such as a hospital order available).[152] O'Dwyer was sentenced to six years' imprisonment. Counsel for the DPP informed the sentencing judge that, were it not for the defence of diminished responsibility, the DPP would consider the killing on the "top end" of the range of manslaughter cases, and that it was for the sentencing judge to assess the degree to which the defence brought the offence down the scales of the hierarchy of manslaughter cases.[153]

In *Crowe*, the DPP accepted the accused's plea of not guilty to murder but guilty of manslaughter on the grounds of diminished responsibility, despite arguably "weak" evidence of mental disorder.[154] At trial, the court imposed a sentence of life imprisonment. The accused appealed against the severity of the sentence and the Court of Criminal Appeal found that the appropriate sentence was 20 years. Understandably, the significant alcohol and drug problems of the accused,[155] together with his 23 previous convictions, would have weighed heavily on the mind of the trial judge – perhaps to the extent that he dismissed the psychiatric evidence altogether. Indeed, the Court of Criminal Appeal held the view that the sentencing judge did not even take into account the plea of guilty to

149 Manslaughter is punishable with a maximum sentence of life imprisonment, a fine at the discretion of the court, or both. See O'Malley, *Sentencing Law and Practice*, n. 26 above, p. 248.

150 Ibid. p. 409. See also Whelan, *Mental Health Law and Practice*, n. 101 above, pp. 477–9.

151 For example, see *DPP* v *Donnan* (8 July 2003, unreported) Central Criminal Court, where Carney J contended at the sentencing hearing that the accused suffered from a mental illness and that he therefore wished to impose a hospital order but was unable to do so. Instead, the judge suspended the sentence, on certain conditions which "might be of benefit to him" on the basis that he did not attribute any moral blame to the accused.

152 S Griffith, "Judge rejects mother's plea that her son had 'no control'", *Irish Independent*, Dublin, 19 June 2007.

153 "Man jailed for six years for killing sister (17)", *Irish Times*, Dublin, 19 June 2007.

154 Following the implementation of the 2006 Act, there were conflicting views on whether or not it is possible for the accused to plead guilty of manslaughter on the grounds of diminished responsibility, for example, see D Robinson, "Crazy situation" (2003) 97 *LSG* 12, p. 15, which argues that only the jury can return a verdict of diminished responsibility, so strictly it cannot be put forward by way of an "acceptable plea". However, it is now accepted that a plea of guilty to manslaughter on the grounds of diminished responsibility is possible; see Whelan, *Mental Health Law and Practice*, n. 101 above, p. 469. This procedure is standard practice in England and Wales and Northern Ireland.

155 For further comment, see: "Father of two jailed for life for shotgun killing", *Irish Times*, Dublin, 9 October 2007, and "Life term for 'execution' cut to 20 years", *Irish Times*, Dublin, 28 May 2009.

manslaughter on the grounds of diminished responsibility, which had been accepted by the DPP, when imposing the life sentence.[156]

The difficulty for the appeal court lay in the fact that the trial judge had rejected the very basis upon which the DPP had accepted a plea of manslaughter by reason of diminished responsibility due to mental disorder.[157] As in *O'Dwyer*, the appeal court too was left without an answer when it asked counsel for the DPP whether he felt that the case was at the upper end of the scale of manslaughter. In the opinion of the court, a plea to manslaughter *simpliciter* would certainly have permitted the trial judge to impose the maximum sentence of life imprisonment notwithstanding the plea of guilty. It went on to hold, however, that:

> implicit in the acceptance of a plea to manslaughter by reason of diminished responsibility due to mental disorder is the recognition that the applicant can not and should not be treated in precisely the same manner as a person fully responsible for his own actions. It would be utterly destructive of s. 6 of the Criminal Law Insanity Act, 2006, to hold otherwise.[158]

Kearns J concluded that at the very least, the applicant should expect to receive a sentence "*short* of life imprisonment" (emphasis added), due to the "associated stigma" attached to a life sentence.[159]

Inconsistency in the sentencing of individuals found guilty of manslaughter on the grounds of diminished responsibility is also evident when one considers the judgment in *DPP* v *Egan*,[160] where the accused was given a sentence of life imprisonment without recourse to the fact that the diminished responsibility element should normally act to shorten the sentence, as stated by Kearns J (above).[161] The accused, who suffered from schizo-affective disorder, was found guilty of manslaughter on the grounds of diminished responsibility for beating to death his cellmate in Mountjoy Prison. He carried out the attack in a holding cell which the two men were sharing with five other prisoners.[162] Evidence was tendered that the accused had been transferred to the prison from the Central Mental Hospital just days before the attack without the anti-psychotic medication prescribed to him to manage his condition.[163]

The prosecution and the defence both urged the jury to find the accused not guilty of murder but guilty of manslaughter by reason of diminished responsibility in light of his mental disorder. Although the defence was successful, the accused was nonetheless sentenced to life imprisonment.[164] In imposing the sentence, the judge indicated that it was "best calculated to protect the public".[165] The accused has since failed in his attempt to overturn his sentence.[166]

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156 See n. 102 above, at 230–1.

157 This action would have amounted to a sentencing error in England and Wales, see *R* v *Lawrence* (1981) 3 Cr App R (S) 49.

158 See n. 102 above, p. 234.

159 Ibid.

160 (21 April 2009, unreported), Central Criminal Court.

161 See, n. 102 above, at 234.

162 In response to the appalling circumstances of the case, the government has appointed a commission (headed by barrister Grainne McMorrow) to investigate the killing and examine the management of prisoners with mental disorders.

163 "Prisoner acquitted of murdering cell mate", *Irish Times*, Dublin, 22 April 2009.

164 Sentence was imposed on 29 June 2009, Central Criminal Court.

165 "Prisoner gets life sentence for killing cellmate", *Irish Times*, Dublin, 30 June 2009.

166 "Man who killed cellmate fails to have sentence overturned", *Irish Times*, Dublin, 30 October 2010.

Although intrinsically inconsistent, the early caselaw is still of value in terms of assessing the level of punishment to be applied by the courts within the manslaughter scale at this time. It also goes toward highlighting the gross inadequacy of the options available to the sentencing judge under the 2006 Act and in Irish sentencing law generally;[167] options which neither recognise the special nature of such offences, nor take into account the particular needs of the offender with a mental disorder.

Conclusion

Diminished responsibility is an unusual legal animal. It has become a necessity in the jurisdictions discussed in this paper, due in the most part to the inability of legislatures to provide the radical reforms required both in respect of the insanity defence and of murder law.[168] And while the introduction of the doctrine into Irish law is a welcome development in that it stays true to its principle of acknowledging the frailty of the human condition, its manifestation in s. 6, while tipping the scales towards flexibility, is flawed both in terms of its language and effect.

When introducing the 2006 Act, the legislature gave much weight to the fear that juries might be utilising the special verdict to acquit individuals with mental disorders in cases which amount to "borderline" insanity.[169] This is undermined by the fact that there has been a decrease in the raising of the insanity defence in Ireland since the nineteenth century. Furthermore, we have seen how, in the cases since 2006, there is little evidence to suggest that the courts instruct the jury on the issue of insanity in circumstances where diminished responsibility is raised, despite the fact that s. 6 appears to indicate that for a jury to proceed to consider a diminished responsibility defence, it must have found that the accused is not legally insane.[170] Thus, it would appear that in terms of insanity, the diminished responsibility defence is merely acting to compensate for a largely unworkable and archaic special defence.[171]

That the diminished responsibility defence was introduced essentially to offset the harshness of the insanity defence and the mandatory life sentence for murder respectively is not, in itself, unhelpful. Indeed, it is welcome if it results in improved provision (no matter how minimal) for defendants with mental disorders within the criminal justice system. The problem, rather, is that diminished responsibility merely patches over deeper problems pertaining to this area of law (most notably, the inadequacy of the insanity defence and the continued existence of the mandatory life sentence); and also impedes any possibility of a much needed re-evaluation from first principles of the position of individuals with mental disorders within the criminal justice regime. But that is a subject matter for another time and place.

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167 For further discussion, see Law Reform Commission, *Report on Sentencing*, n. 123 above.

168 For example, in the context of England and Wales see *Report of the Committee on Mentally Abnormal Offenders* (London: HMSO 1975), Law Commission, *Murder*, n. 44 above. For Ireland, see Law Reform Commission, *Homicide*, n. 123 above.

169 See 2.1.1 above.

170 Coonan and Foley, *The Judge's Charge*, n. 14 above, p. 319.

171 Criticism of the insanity defence in recent years is rife, particularly in relation to the retention within the law of the term "insanity" itself, which is seen by many as outdated and pejorative. It is noteworthy that in 1978 the Henchy Committee recommended that the insanity verdict be replaced by a verdict of "not guilty by reason of mental disorder"; s. 13, Criminal Justice (Mental Illness) Bill. For further discussion, see L Kennefick, "What the doctor ordered: revisiting the relationship between psychiatry and the law in the UK and Ireland" (2008) *COLR* 58.

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Judicialising history or historicisng law: reflections on *Irving* v *Penguin Books and Lipstadt*

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Of all the poisons capable of vitiating a piece of evidence, the most virulent is deception.

First of all there is . . . forgery.

[then] there are sly alterations . . .

Marc Bloch, *The Historians Craft*, pp. 75, 81

Abstract

In 2000, David Irving brought a libel action against Professor Deborah Lipstadt and Penguin Books focusing on allegedly defamatory allegations in her book Denying the Holocaust *associating him with the Holocaust revisionist movement. The case concluded in April 2000 with Irving's defeat. By focusing on Irving's methodological technique, the defendants succeeded in establishing that Irving's misrepresentations and falsifications were neither accidental nor careless but ideologically motivated. His character was presented and censured as one which manipulated and distorted in order to facilitate a racist agenda.*

Presiding judge, Mr Justice Gray was keen not to pollute the exercise of justice by acting as a quasi-historian, nevertheless Irving *sharpened the focus on the relationship between historians and courts. Can history migrate from the amphitheatre to the witness box and re-emerge with its integrity intact? Historians are increasingly called as expert witnesses and this has resulted in huge controversies, intra-historian strife and debates on experts' ethics. Thus, despite this article's mooring in a Holocaust context, it raises questions relevant to the much wider context of history and law, and as regards "public history". Law and history will meet continuously during litigation. Judicial and historical understandings of evidence should not be either intuitively or automatically elided and even a Holocaust context should not conquer the quest for a mutually self-aware relationship. Without engaging in endless discussions concerning the nature of knowledge and the philosophy of history, judges require standards for assessing the weight of historical evidence to ensure "intellectual due process" and that, evidentially at least, legal conclusions are sound. How can historians best facilitate the legal process and how can lawyers avoid mistranslating historical work? A legally created standard (such as Mr Justice Gray attempted) for expert evidence appears attractive. Admissibility or reliability tests are options and open up issues such as bar-appointed experts and expert ethical codes. Ultimately, the quest is not to crowbar unwilling historians into roles as mere judicial handmaidens, but instead to recognise wider societal contributions of historians and to give due credit to the "reasonable historian".*

When historians appear as expert witnesses, they are not "doing history", they are communicating historical expertise in another forum. Such cross-pollinating communication or "public history" is a process of translation. Undoubtedly, law is the dominant discipline in court and history is being instrumentalised. However, with due care, such interactions need not distort complex historical studies or restrict future historical research. Disciplinary faithfulness can be preserved by legal reliance on historical guild-standards. In this way, standards regarding intellectual rigour and methodological integrity are safeguarded and notions that there is one history for historians and another/lesser one for courts are avoided.

1 *Irving* v *Penguin Books Ltd and Lipstadt*, No 1996-I-113, [2000] All ER (D) 523 2000 WL 362478 (QB 11 April 2000). The Court of Appeal (2001 WL 825074) refused leave to appeal.

1 Introduction

David Irving's High Court libel case against Professor Deborah Lipstadt and Penguin Books concluded in April 2000. Irving's action focused on allegedly defamatory allegations in Lipstadt's book *Denying the Holocaust* [2] associating him with the Holocaust revisionist movement. These included that, as an ultra-nationalist with Hitler's self-portrait over his desk, Irving conceived of himself as carrying on Hitler's legacy, and that Irving was scheduled to speak at a 1992 Swedish anti-Zionist conference alongside representatives from anti-Semitic and anti-Israel organisations.[3] Finally, Lipstadt maintained that Holocaust deniers misstate, misquote, falsify statistics and falsely attribute conclusions to reliable sources. *Irving* was thus distinguishable from other Holocaust denial cases which tended to focus on the criminality of publications or utterances.[4] Ultimately, the defence of justification succeeded overall against Irving,[5] simultaneously demolishing his status as a historian.

Just as the Nuremberg trials' narrative is simplified as the unfolding of a conspiracy tale (rather than an examination of each defendant's conduct),[6] so *Irving* has often been reduced to a straightforward reaffirmation of the Holocaust's existence and a condemnation of those disputing it as racists.[7] However, *Irving* entertains wider possibilities for influencing and refining the interactions between historians and lawyers in contentious legal proceedings. It poses questions regarding the management of this very particular form of "public history"[8] whereby historians move beyond intra-disciplinary discussions. Renouncing "the privacy and protection of their classrooms and research institutes . . . [historians] . . . become public figures".[9] This article addresses a variety of issues including complexities in defining Holocaust denial and the distinctions between legitimate criticism and prejudiced vilification. Mr Justice Gray (sitting alone) emphasised his avoidance of polluting justice with quasi-historical analysis.[10] Nevertheless, historiographical methodologies and skills were key issues in play. Mr Justice Gray's reliance on documentary evidence and repeated references to expert historical witnesses resulted in his moulding criteria with potential to clarify judicial roles regarding the admission and evaluation of historical evidence. *Irving* revealed the complexities of the law–history relationship, notably in the differing understandings of evidence. The justification defence demanded analysis not of whether the Holocaust happened but whether Irving's research was driven by his particular (racist and anti-Semitic) ideology. Dismissing his alleged links with other deniers as guilt by association,[11] Irving denied membership of Holocaust denial or

2 D Lipstadt, *Denying the Holocaust* (London: Penguin 1994).

3 Ibid. pp. 14, 111, 161, 179, 181, 213, 221.

4 This article does not deal with the detail of Holocaust denial laws or trials.

5 Judgment 13.165–8, A Julius, "London and libel" (2000) 11(Fall) *Experience* 8, p. 13.

6 T O'Donnell, "Executioners, bystanders and victims: collective guilt, the legacy of denazification and the birth of 20th century transitional justice" (2005) 25(4) *Legal Studies* 627, referring to D Cohen, "Beyond Nuremberg: individual responsibility for war crimes" in R C Post and C Hesse (eds), *Human Rights in Political Transitions* (New York: Zone Press 1999).

7 See the comments of Rabbi Dr Jonathan Romain (Reform Synagogues of Great Britain) and Dror Zeigerman (UK Israeli ambassador), V Dodd "Irving consigned to history as a racist liar", *The Guardian*, 12 April 2000.

8 P K Leffler and J Brent, *Public and Academic History: A philosophy and a paradigm* (Malabar FL: Krieger 1990) and J B Gardner and P S LaPaglia, *Public History: Essays from the field* ((Malabar FL: Krieger 1999), P Novick, *That Noble Dream* (Cambridge: CUP 1999), pp. 512–21.

9 C Fink, "A new historian?" (2005) 14 *Contemporary European History* 135, p. 147.

10 C Ginzburg, *The Judge and the Historian* (New York: Verso 1999) 119. See also A I Davidson, "Carlo Ginzburg and the renewal of historiography" in J Chandler, A Davidson and H Harootunian (eds), *Questions of Evidence* (Chicago: Chicago UP 1994), p. 304.

11 Judgment 8.11.

"revisionist"/"negationist" movements (despite having acted as an expert witness in Ernest Zundel's Canadian prosecution for the publication of false news harmful to the public interest).[12] Irving proclaimed historians' rights to dissent from mainstream views[13] on the Holocaust, thereby spurring examinations of "objective" and "relativist" (or "perspectival") historical schools. This article will focus upon the empirical character of litigation rather than normative understandings of historical knowledge. It will defend a legal standard benchmarking reliability of expert evidence, in this case, that of the "reasonable historian". Such a standard will avoid an imperial project by law into the realm of history by instead encouraging a partnership between law and history in an effort to enhance the administration of justice. Clio (the muse of history) should be able to migrate from the amphitheatre to the witness box to aid Portia in her endeavours.[14]

2 Holocaust denial

Definitions of Holocaust denial

Without a specific UK law, defining Holocaust denial/negationism is difficult. Broadly, denial definitions veer along a spectrum. At one end, negationism only occurs where the specific figure of 6m dead and the existence of concentration camps are denied. At the other end, denial is considered wide enough to embrace: any questioning of a survivor's testimony; denunciation of Jewish collaborators' roles; suggestions of German suffering during the Dresden bombing; or statements that any state except Nazi Germany committed Second World War crimes.[15] Wide definitions might exclude legitimate intellectual discourse[16] and although negationism is distinguishable from legitimate historical debate by virtue of its in-built anti-Semitism,[17] divining the borderline between the two can be difficult. For some, denying the Holocaust's uniqueness constitutes denial. Lipstadt herself considers comparisons with Armenian, Cambodian or Stalinist massacres to be invalid, believing them to be problematically designed to assist Germans in embracing their past as being indistinguishable from those of countless others.[18] While accepting that such comparative historians are not crypto-deniers, she considers the results of their work to correspond: the blurring of boundaries between fact and fiction, and between persecuted and persecutor.[19] However, many contemporary oppressors take behavioural cues from Nazism. Rather than diminishing the Holocaust, descriptions of "Nazi-style" practices may instead emphasise the horror of subsequent events, for example ethnic cleansing, detention centres, ghettoes and camps in Yugoslavia.[20]

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12 R v *Zundel*, *Zundel* v *Canada* (1993) 95 DLR (4th) 202; [1992] 75 CCC (3d) 449, G Weimann and C Winn, *Hate on Trial* (Oakville: Mosaic Press 1986). Zundel had published a pamphlet entitled "Did six million really die?". Tried twice, his conviction was overturned twice.

13 Judgment 8.13.

14 O Dumoulin, *Le role social de l'historien: De la chaire au prétoire* (Paris: Albin Michel 2003); Fink, "New historian", n. 9 above, p. 137. See the approach of the historians Lucien Febvre and Marc Bloch who encouraged inter-disciplinarity in considering the structures which explain events and the social functions of ideas and institutions. See M Bloch, *The Historian's Craft*, P Putnam (trans.) (Manchester: Manchester UP 2010), pp. 18, 155.

15 Lipstadt, *Denying*, n. 2 above, pp. 6, 12, 22, 89–90.

16 Judgment 13.104.

17 J Cooper and A M Williams, "Hate speech, holocaust denial and international human rights law" (1999) *EHRLR* 593, p. 595.

18 Lipstadt, *Denying*, n. 2 above, ch. 11.

19 Ibid. pp. 212–15.

20 Application of the Convention on the Prevention and Punishment of the Crime of Genocide http://www.icj-cij.org.

Professor Richard Evans acted as an expert witness in *Irving*. Drawing on his and others' expertise[21] in historiographical practice, he concluded that Holocaust denial encompassed certain allegations:

a) Jews killed by the Nazis amounted to only a few hundred thousand, being similar to or less than, numbers of German civilians killed in Allied bombing raids;

b) gas chambers were not used to kill large numbers of Jews at any time;

c) neither Hitler nor the Nazi leadership in general had an extermination programme regarding Europe's Jews, wishing simply to deport them to Eastern Europe;

d) the Holocaust was an Allied wartime propaganda-myth, since sustained and utilised by Jews to gain political and financial support for Israel or for themselves;

e) any evidence for Nazi wartime Jewish mass murder by gassing and other means was fabricated post-war.[22]

Irving traversed into Holocaust denial by numerically equating camp deaths with deaths resulting from Allied bombing raids, claiming they amounted to thousands not millions. He disputed the systematic nature of concentration camp exterminations,[23] and Hitler's sanctioning of such killings.[24] He frequently questioned the existence of the Auschwitz gas chambers, once asking a Holocaust victim how much money she had made from her tattoo.[25]

Holocaust denial's academic pretensions

> [Holocaust denial's] perfidiousness lies precisely in its seeming to be precisely what it is not, an attempt to write and think through history.[26]

By imitating the mainstream academy, deniers seek acknowledgment as purveyors of an alternative historical truth. Relying on each other's work, they organise journals, conferences and institutes to exchange views and disseminate publications. Robert Faurisson (prosecuted for revisionism under French law in 1991)[27] was a former university lecturer involved in the Institute of Historical Review which ran conferences and published an associated journal. Such academic mimicry attempts clear distinctions between serious historical work and obviously racist violence. However, as creators of a virtual history geared at an event's eradication from history, deniers have been denounced as "paper Eichmanns".[28] If the Final Solution anticipated both extermination and the "erasure of any memory of the killings" then clear conceptual linkages between denier-trials and perpetrator-trials[29] emerge. Distinctions between legitimate historical research and negationists' work lie not in fallibility tests (historical truths can always be revisited) but in

21 Evans was the modern German history professor at Cambridge University, and drew on Michael Marrus, Martin Gilbert and Landau. See also P Vidal-Naquet, *Assassins of Memory*, J Mehlman (trans.) (New York: Columbia UP 1992), pp. 18–19.

22 R Evans, *Lying About Hitler* (New York: Basic Books 2001), p. 110.

23 Judgment 8.9, 8.15–8.17

24 Discussed below.

25 Judgment 13.95, 8.17.

26 Vidal-Naquet, *Assassins*, n. 21 above, p. 111.

27 E.g. *Faurisson* v *France* Comm No 550/1993, UN doc. CCPR/C/58/D/550/1993, (1997) 18 HRLJ 40. The 1990 Gayssot Act made it an offence to contest publicly (Nuremberg-defined) crimes against humanity.

28 Vidal-Naquet, *Assassins*, n. 21 above, p. 98, 24.

29 L Douglas, *The Memory of Judgment* (New Haven: Yale UP 2001), pp. 215.

deniers' willingness to manipulate, mistranslate, use discredited testimony, falsify statistics or apply double standards.[30] Indeed, revisionists' apparently scholarly tactics even mimic the outer extremities of law's adversarialism.[31] As such, several established historians argue that law never overlaps with history, only quasi-history, ideological history or law-office history[32] (referred to below).

Irving shunned academic communities, criticising "inter-historian incest".[33] Relying on primary sources, he prided himself on recovering original facts and documents, obsessively and cumbersomely footnoting and referencing. However, for both historians and lawyers, direct participant evidence is not always the best evidence. Such memoirs might be sentimental or, with one eye on posterity, self-interested. Irving's "meticulous" sourcing could be recast as fetishistic, journalistic or even illusionist-like. Fact isolation is a hallmark negationist approach, whereas mainstream historians draw their conclusions from the convergence of varyingly sourced evidence. Irving's approach evidenced a pathological desire for historical proximity, to "touch" history rather than expertly evaluate it – emotional rather than scientific. From a liberal perspective, universities might appear optimal venues for exposing Irving's views. However, the Oxford University Union was pressured into withdrawing a 2001 offer of participation and the UK National Union of Students adopted a "no platform" policy towards racist speakers of which Irving fell foul.[34] Irving's attempts to speak at Trinity College Dublin and University College Cork were met by student protests. No speaking invitations emanated from university history departments, highlighting the mainstream academy's contempt for Irving's work.

Having alluded to the general definitional difficulties surrounding Holocaust denial and the community's *modus operandi*, the article will now move to an examination of the case.

3 The evidence and purpose of *Irving* v *Lipstadt*

Overview: writing the wrongs of history or spin time for Hitler?

Irving's success depended on his establishment that, as a matter of ordinary probability, the disputed material contained passages which would cause ordinary, reasonable, readers to think worse of him. A prima facie case was established as the relevant book passages bore defamatory meanings. First, that Irving was an apologist for and partisan of Hitler who distorted evidence to exonerate Hitler and portray him as sympathetic towards Jews. Secondly, Irving was a dangerous spokesman for Holocaust denial by denying that the Nazis had embarked upon a deliberate planned extermination of Jews and by maintaining that Auschwitz's gas chambers were a Jewish deception. Thirdly, in denying the Holocaust's occurrence, Irving had misstated evidence, misquoted sources, falsified statistics, misconstrued information and bent historical evidence so that it conformed to his neo-fascist political agenda and ideological beliefs. Fourthly, Irving had allied himself with representatives of a variety of extremist and anti-Semitic groups and individuals. Finally, Irving was discredited as an historian. Lipstadt was simply required to prove that the allegations were substantially true and that Irving's misrepresentation and falsification were deliberate, motivated by his ideological beliefs or prejudices. Mr Justice Gray acknowledged

30 Evans, *Lying*, n. 22 above, pp. 33 and 239, discussing Lipstadt's accusations and Tony Judt's thoughts in "Wahrheit oder Integrität", *Süddeutsche Zeitung*, 14 April 2000.

31 Douglas, *The Memory*, n. 29 above, p. 235.

32 J D Martin "Historians at the gate: accommodating expert historical testimony in federal courts" (2003) 78 *NYULR* 1518, pp. 1525–6.

33 D Irving, *Hitler's War* (London: Hodder & Stoughton 1977).

34 See also the Education Act 1986 No 2.

that despite the standard of proof remaining the civil standard, serious allegations demand stronger evidence. This weighted standard captured the peculiar character of the case. Ultimately, despite the prima facie presumption against Lipstadt's allegations, her defence succeeded overall.

The defendants outlined 19 instances of Irving's distortion of the evidence. Only particularly significant instances chronicling events both before and during the Second World War, the genesis of the Final Solution and Irving's portrayal of Hitler as sympathetic to the Jews are highlighted below.

The evidence

Hitler: the responsible authority figure

Hitler went on trial in 1924 for the 1923 Munich Beer Hall *putsch*.[35] In *Hitler's War* (1991 edition), Irving claimed that Hitler disciplined a Nazi squad for looting a Jewish delicatessen during the *putsch*. Despite later changing such castigation to a mere reprimand of only one individual, it clearly implied Hitler's abhorrence of anti-Semitic acts. Evidence came from a police sergeant's statement, but neither he, nor the date of his statement, was footnoted – an absence Irving blamed on the publisher's desire for editing. Professor Evans tracked down the witness. Hoffman was a Nazi Party member, the admonition was before the *putsch* and, in fact, evidence existed that Hitler had ordered a raid on a Jewish printing house. Hitler was not trying to maintain order. Irving claimed no knowledge that Hoffmann was a long-standing Nazi, despite its obviousness on the testimony's face. Claiming not to have read the verbatim transcription of trial evidence, Irving had not "paid attention" to Hoffmann's statement regarding his background and maintained that readers could discern Hoffmann's lack of objectivity. In fact, Irving embroidered evidence of Hitler, presenting him as behaving responsibly in disciplining a recalcitrant soldier.[36] In his book *Goering*, Irving misleadingly recast the consequent violent theft of 14.5bn marks as a "requisition" of funds.

During *Kristallnacht*[37] 1938, 76 synagogues were destroyed, a further 191 set on fire, 7500 Jewish shops and businesses were destroyed and widespread looting occurred. Twenty thousand Jews were arrested and sent to concentration camps. Irving placed blame squarely on Goebbels, alleging that Hitler neither knew about nor approved the actions and, upon late discovery on 9 November, was angry and tried to stop events.[38] The defence maintained that Irving's position was only sustainable by mistranslating Goebbels' diary entry which actually recorded a Hitler order to "withdraw" the police, i.e. the complete removal of the police from the violence. Irving's *Goebbels* book translated it as "hold back". Hitler's desire for the Jews to "feel the people's fury" was recast in Irving's *Goebbels* as them merely being "given a taste of the public anger".

The defendants further alleged that Irving distorted Hitler's role by omitting reference to a telegram sent at 11.55pm on 9 November 1938 by Muller, the head of Security Police, to officers. This warned of imminent anti-Jewish demonstrations, ordered no interruptions and ostensibly showed Muller's acting on the highest orders, reflecting precisely Hitler's earlier order. Evans criticised Irving's use of telexes as misleadingly portraying Hitler as trying to use the police to halt events when proper interpretations indicated police non-intervention unless non-Jewish properties were threatened.[39] Irving had introduced evidence of Wilhelm

35 Judgment 5.17–5.28.

36 Judgment 13.12.

37 Judgment 5.37–5.72.

38 However, *Kristallnacht* operations were reported in the Nazi press early on 9 November 1938.

39 Judgment 5.59.

Bruckner, Hitler's former chief personal adjutant, testifying to Hitler's being "livid" on discovering the facts at 1am on 10 November 1938, but he could not produce any documentary evidence.[40] Mr Justice Gray considered that re-directing sole blame onto Goebbels stood at odds with documentary evidence. Scant attention was paid to evidence implicating Hitler, instead a misleading and partial account of Goebbels' diary was offered. Evidence from Hitler's adjutants should have been treated with considerable scepticism and rejected where it conflicted with the evidence of contemporaneous documents.

Hitler's views on the Jewish question[41]

Although Hitler may not always have spoken in actually genocidal terms, by 1941 his pronouncements on the Jewish question were sinister, especially seen in the context of: Hitler's history of anti-Semitism; Nazism's ideology of racial purity; pre-war attacks on Jews/Jewish property; policies of Jewish deportations; and (Hitler-approved) systematic shootings of Jews in the East. Despite Irving's evidence of Hitler's sympathetic and protective attitude to the Jewish question, post-1941, the few documents emerging were unequivocal. Interpretations suggesting deportation (rather than extermination) were perverse. Irving had seriously misrepresented Hitler's views by misinterpreting, mistranslating and selectively using documents, notably the Schlegelberger memo[42] which Irving maintained was from spring 1942 and demonstrated Hitler's wish to postpone the Jewish question until post-war. However, Irving could not explain Hitler's supposed decision in March 1942 to halt a programme already underway on a massive scale for at least six months. Professor Evans' evidence that the note solely referred to *mischlinge* (half-Jews) was more convincing.[43]

The scale and systematic nature of *Einsatzgruppen* shootings of Jews, the extent of Jewish gassings in certain camps (excluding Auschwitz) and Hitler's knowledge and complicity in this particular gassing programme, evidenced his persistent anti-Semitism to any dispassionate historian.[44] When Irving told audiences that *Einsatzgruppen* killings were arbitrary, unauthorised and individually executed, he misrepresented the historical evidence. Irving's eventual acceptance that Chelmo, Treblinka and Sobibor were Nazi killing centres was grudging and disingenuous.[45] Mr Justice Gray was unconvinced of Hitler's being "kept in ignorance" of genocidal gas chambers at Reinhard camps.[46] Himmler's daily calendar recorded regular meetings between himself and Hitler discussing the Jewish question while Himmler was supervising the establishment and operation of gas chambers in these camps. Further, the January 1942 Wannsee protocol recorded Heydrich's opening remarks that he spoke with Hitler's authority. Such evidence was as available to Irving as it was to two defence expert historians, Christopher Browning and Peter Longerich (the latter testifying to Hitler's role in the formulation and execution of Nazi anti-Semitic policies).[47] These witnesses gave convincing testimony that the evidence made it inconceivable that Hitler did not know of and authorise mass gassing of Jews.[48]

40 In fairness, Irving had donated Bruckner's papers to the Institute of History in Munich to which he no longer had access.

41 Judgment 5.123–5.150, 13.26–13.31.

42 An official in the Reich Ministry of Justice. See Judgment 5.151–169.

43 Judgment 13.35–13.36.

44 Judgment 13.55–13.67.

45 Claiming to do so only to quicken the trial's progress, Judgment 13.63.

46 Which Irving argued were planned and implemented by Heydrich and overseen by Himmler, Judgment 13.64–7.

47 He later published, *The Unwritten Order* (Stroud: History Press 2001).

48 Judgment 13.67 and 6.105

Auschwitz[49]

Irving eventually acknowledged that at least one gas chamber existed at Auschwitz (for fumigation of clothing) and that gassing of Jews took place there "on some scale". The question therefore centred on numbers and on causes. Such is Auschwitz's emblematic power in Holocaust history that it is impossible for preconceptions not to intrude. Mr Justice Gray was extremely conscious about the dangers of remembering representations of the real while overlooking the real evidence itself. The danger of learning history from dramas, and even more confusingly, docudramas,[50] is prevalent in the post-modern world. Reconstructions or images of events seem more real than the events themselves – *la société du spectacle*.[51] As one defence expert, Robert Jan van Pelt noted, Auschwitz has become detached from its own evidence. van Pelt is an architectural historian who testified to the existence of Auschwitz's gassing equipment and even he felt compelled to engage in a reflective epistemological analysis regarding his own knowledge of Auschwitz.[52]

Irving doubted the authenticity of a letter dealing with the incineration capacity of ovens, and photographic evidence. He also cast doubt on accounts given by camp survivors and camp officials: that some witnesses invented some/all of the experiences described; accounts were cross-pollinated; that repeated and embellished testimony led to construction of a corpus of false testimony; and that some witnesses were clearly wrong or had exaggerated. However, eye-witness evidence in one case was so clear and detailed that no objective historian would dismiss it without powerful reasons. Documents did exist for which it was hard to find an innocent explanation, including a letter from the Chief of Central Construction at Auschwitz regarding ovens' capacity. Converging evidence indicated that large numbers of Jews were killed at Auschwitz. Exceedingly powerful reasons were required to reject that conclusion. Irving partially relied on the 1988 Leuchter Report which employed chemical analysis of samples taken from brickwork and plaster at Auschwitz to argue that the concentrations of cyanide found were insufficient to kill humans and that such buildings were fumigation, not extermination, facilities. The report was produced by Fred Leuchter during one of Ernst Zundel's previously mentioned Canadian trials. Its foreword was written by the aforementioned convicted denier Robert Faurisson. Given the Leuchter Report's general discrediting,[53] any objective historian would have doubted it. An undressing room (requested by the camp doctor in January 1943) would have been unnecessary for a corpse-fumigation chamber. A spy-hole in a gas-tight door was equally inexplicable. Crematorium 2 was not an air raid shelter. At best, Irving's non-genocidal position could only be a conceptual, not a historical possibility. Auschwitz intertwined with all of the other contemporaneous history, including *Einsatzgruppen* behaviour, deportations to the East, initial experiments with Zyklon B, the expansion of concentration camps, and so on. Proving isolated facts meant nothing, inter-connectedness was crucial. As van Pelt noted, challenging Auschwitz meant challenging "not only the history of the Holocaust but much of the history of the war itself".[54] Leuchter and Irving were stuck in the wider consensus.

49 Judgment 13.68–13.91.

50 Ginzburg, *The Judge*, n. 10 above, Evans, *Lying*, n. 22 above, pp. 323–4.

51 G Debord, *The Society of the Spectacle* (Sussex: Soul Bay 2009).

52 R J van Pelt, *The Case for Auschwitz* (Bloomington and Indianapolis: Indiana UP 2002), pp. 103–4.

53 S Shapiro (ed.), *Demolishing Holocaust Denial: The end of the "Leuchter Report"* (New York: St Martin's Press 1990).

54 van Pelt, *The Case*, n. 52 above, p. 104.

Dresden[55]

Irving estimated approximately 100,000 Jewish deaths at most in Auschwitz and relied on a particular order (*Tagesbefehl*) TB47 which estimated Allied-bombed Dresden dead at 200,000 to 250,000. Consequently, the numbers grotesquely "neutralised" each other. The widely accepted Dresden death figure is approximately 30,000.[56] Having previously acknowledged in 1963 that TB47 was a forgery, Irving subsequently changed his mind. Yet its use surely demanded extreme caution especially in the light of increasing documentation doubting its reliability. Corroborating evidence for the higher figure was never produced. Irving's evidence was second-hand, unverified and lacking any evidential basis.

Irving's ideological position

Ostensibly, Irving's racism, anti-Semitism or associations seem irrelevant, implying judgment of character rather than conduct. However, the defence needed to establish that Irving's misrepresentations and falsifications were neither accidental nor careless but ideologically motivated.[57] Irving's anti-Semitism (defined by the defendants as "theory, action or practice directed against the Jews")[58] was established via numerous of his diary entries, speeches and the "Action Report" available on his website. Evidence regarding Irving's alleged association with German right-wing and neo-Nazi groups/individuals was given by Dr Hajo Funke, Professor of Political Science at Berlin Free University. Suggesting that anti-Semitism sprang from Jewish conduct and attitude, Irving referred to Holocaust compensation claims and Jewish financiers' dishonesty.[59] Claims that he was merely explaining anti-Semitism were unsustainable given his descent into prejudiced vilification,[60] including likening the British Board of Jewish Deputies to cockroaches.[61] Irving also associated with extreme right-wing political groupings, including a revisionist organisation (the Institute of Historical Review) and a neo-Nazi, anti-Semitic organisation (the National Alliance), which indicated compatible ideologies.[62]

Conclusion on Irving the historian

All of Irving's "mistakes" converged to exonerate Hitler, none had the opposite effect. The level of perversity and egregiousness which some of them displayed excluded Irving's innocent explanations.[63] For example, he claimed the exclusion of details of a Hitler order concerning the shooting of Berlin Jews in Riga resulted from an effort to ameliorate reader boredom. He dismissed documents which contested his thesis, did not conform to his ideological agenda, or were inconvenient. Irving employed double standards to sources – accepting TB47 yet criticising Anne Frank's diaries which had been rigorously forensically tested. Similarly, in relation to eye-witnesses, testimonies of survivors and camp officials were doubted yet those of Hitler's adjutants were accepted. Irving's manipulation of the

55 Judgment 11.1–11.55 and 13.116–13.126. See J Vergés' tactics in *Barbie* regarding French crimes in Algeria and N Wood, "Crimes or Misdemeanours? Memory on trial in contemporary France" (1994) 5 *French Cultural Studies* 1, p. 9.

56 Judgment 11.19, 11.40.

57 Judgment 9.1.

58 Judgment 9.4.

59 Judgment 9.5, 9.6 (including Irving's recitation of a derogatory rhyme with his infant daughter on seeing "half-breed children"), 9.10, 13.101.

60 Judgment 13.103–13.105.

61 Judgment 9.5(xxiv).

62 Judgment 13.109–13.115.

63 Judgment 13.142.

evidence together with his denials of the Holocaust, his racism, his anti-Semitism and his association with right-wing extremists evidenced a pattern in his activities and attitudes.[64]

THE HISTORIOGRAPHICAL APPROACH

Despite the European Commission of Human Rights having taken notice of the Holocaust as a historical fact involving "overwhelming evidence of all kind",[65] concerns persist over courts operating as arbiters of history. Mr Justice Gray was clear that "it is not for me to form, still less express, a judgment about what happened. That is a task for historians."[66] After all, the Holocaust's validity as an event did not depend upon it being judicially established. History is not written in courts and *Irving*'s outcome could not change the events of 1933–45.[67]

However, in *Irving*, law and history did interact by being concerned with interpretations of the past and legally judging them against acceptable historical standards, as testified to by expert historians. By focusing on methodology and historiography, *Irving* involved empirical analysis of Irving's method[68] in judging whether a defence of justification was made out. Criminal "perpetrator trials" look at the contrasting evidence regarding an event's occurrence and apportion responsibility accordingly. Instead, *Irving* concerned the representation of events. As "a trial about the Holocaust in history", instead of a Holocaust trial,[69] it was less about the life of Auschwitz than the afterlife of Auschwitz.[70] Is this distinction technically attractive but disingenuous? Arguably, adopting the historiographical approach (legal analysis of method) as opposed to the "historical" one (i.e. proving the Holocaust did happen) allowed an arrival at the same conclusion as the latter approach, minus the positive burden of proving the Holocaust.[71] However, differences underlie the motivation of each approach. In *Irving*, the defence expert reports went a long way to showing the evidence of past events but, more importantly, they highlighted evidence which objective, fair-minded commentators were required to take into account, illustrating Irving's shortcomings and thereby laying the ground for a successful defence.

EXPERT WITNESSES V SURVIVOR WITNESSES

Notwithstanding the acknowledged power of first-person testimony,[72] its use is limited in trials involving the Second World War. Even the contemporaneous Nuremberg proceedings (perhaps highlighting law's desire for systematic objectivity) preferred documentary "disinterestedness and unquestioned authenticity".[73] While first-hand testimony is an

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64 Judgment 13.162–13.163.

65 European Commission of Human Rights case of *X* v *FRG* 29 DR 194 (1982). In the first Canadian *Zundel* case, Judge Locke refused judicial notice and was supported in the Ontario Court of Appeals despite it overturning the conviction. In the second *Zundel* case, general judicial notice of the Holocaust was taken, justified as being within judicial discretion, Douglas, *The Memory*, n. 29 above, pp. 246–7.

66 Judgment 1.3.

67 S Moss, "History's verdict on Holocaust upheld", *The Guardian*, 12 April 2000.

68 R Evans, "History, memory and the law: the historian as expert witness" (2002) 41 *History and Theory* 326, p. 341.

69 D D Guttenplan, *The Holocaust on Trial* (London: Granta 2001), p. 96.

70 D Pendas, "The case for Auschwitz", book review (2003) 17(2) *Holocaust & Genocide Studies* 375, p. 377.

71 Julius, "London and libel", n. 5 above, p. 13.

72 See Claude Lanzmann's landmark documentary *Shoah*. See S Felman, "Film as witness: Claude Lanzmann's *Shoah*" in G Hartman (ed.), *Holocaust Remembrance: The shapes of memory* (Cambridge MA: Blackwell 1994), p. 90, and "A ghost in the house of justice: death and the language of the law" (2001) 13 *Yale JL & Human* 241.

73 R H Jackson, *The Nurnberg Case* (New York: Alfred A Knopf 1947), p. viii; P Novick, *The Holocaust in American Life* (Boston/New York: Houghton Mifflin 1999).

historical source, in *Irving* what was needed was expertise involving empirical knowledge of historiography.[74] For example, first-hand, autobiographical evidence could not testify regarding evidence of an extermination programme's overall scale. Using survivor witnesses would have ended up debating the Holocaust's existence, not Irving's method. Brutal cross-examination[75] overstating minor inconsistencies would have transferred attention away from Irving's method[76] as had been seen in the first *Zundel* case.[77] Absenting the "voice of memory" imposed greater pressure "on the words of history".[78] Thus begins the analysis of the role of expert historians in court.

4 The relationship between history and courts

Law and history: soulmates or strangers?

Both law and history employ the "evidential paradigm".[79] Historians authenticate documentation in cases,[80] utilise court records in their research, file amicus curiae briefs.[81] and benefit from the emergence of new historical information during legal proceedings which fuels ongoing historical debates.[82] Lawsuits often lend urgency, prompting litigation targets to open archives, thus aiding the historian's enterprise. David Rosner explicitly attributes his book *Deceit and Denial: The deadly politics of industrial pollution* to litigation which made possible his access to internal memos and minutes of meetings involving company representatives. The book in turn facilitated further legal actions.[83] Indeed, it is often law which determines historical access to classified archives, facilitating history's eternal re-examination of the past. Companies have also commissioned official histories which have been crucial as regards litigation for wartime wrongs. Nevertheless, antagonism pervades much of history's interaction with law. A key question is therefore whether the ostensibly strained, combative relationship between lawyers and historians (as regards the importance and use of expert evidence) be recast from a zero-sum, winners/losers paradigm, into a working partnership in the administration of justice? There is a need to move from the sense that law seeks smoking guns or indisputable "fingerprints",[84] that law's desire for legal finality eschews any nuance and contradiction and somehow tarnishes the historical process

74 Evans, "History", n. 68 above, pp. 332, 339. See also H Rousso, *The Haunting Past*, R Schoolcraft (trans.) (Philadelphia: Pennsylvania UP 2002), p. 79.

75 *Eichmann* illustrated the traumas of giving evidence even in supportive surroundings, H Arendt, *Eichmann in Jerusalem* (New York: Viking Press 1987), ch. 24.

76 Evans, *Lying*, n. 22 above, pp. 263–4. See also Libson's and Julius' concerns referred to in Guttenplan, *The Holocaust*, n. 69 above, pp. 95–6.

77 An Auschwitz escapee Rudolf Vrba was challenged over his calculations of a cremation pit's dimensions. Such witnesses were notably absent from the prosecution case in the second set of proceedings, Douglas, *The Memory*, n. 29 above, pp. 239, 248.

78 Ibid. p. 246.

79 C Ginzburg, "Clues: roots of an evidential paradigm" in J and A C Tedeschi (trans.), *Clues, Myths, and the Historical Method* (Baltimore: Johns Hopkins UP 1992), p. 96.

80 See Raul Hilberg's evidence in *US* v *Stelmokas* 100 F3d 302, 307 (3d Cir 1996) mentioned in M D Goodman, "Slipping through the gate: trusting *Daubert* and trial procedures to reveal the 'Pseudo-historian' expert witness and to enable the reliable historian expert witness – troubling lessons from Holocaust related trials" (2008) 60 *Baylor LR* 824, pp. 834–5.

81 *Lawrence* v *Texas* 539 US 558 (2003) concerning Texan sodomy laws, *Planned Parenthood of Se. Pa.* v *Casey* 505 US 833 (1992) regarding abortion waiting periods and parental consent.

82 Regarding inter-historian rivalries post-*Romer* v *Evans* 517 US 620 (1996), see Goodman, "Slipping through", n. 80 above, fn. 37.

83 D Rosner, "Trials and tribulations: what happens when historians enter the courtroom" (2009) 72 *Law & Contemporary Problems* 137, pp. 149–51.

84 Moss, "History's verdict", n. 67 above.

of eternal re-examination, and that law is history's particular nemesis in the way it is not for other disciplines.

It is important to note that clear divisions exist among historians as to how they envisage their relationships with law. One school pursues a separatist line, notably Henry Rousso who refused to testify in various French war crimes trials in the 1990s.[85] This was borne of concerns that history appeared as a tool for another (more powerful and elite) discipline, for judgmental purposes,[86] which is anathema to those considering history as an evaluative discipline.[87] By contrast, a more integrationist school of historians envision a harmonious relationship with law. In their view, no legal trump exists. History can do what it does very well via reports and expert evidence, which may or may not point up individual responsibility. Law can do what it does thereafter. Richard Evans is clearly within this school. Notably so is Christopher Browning who gave evidence in both the *Irving* and *Zundel* proceedings.

Smoking gun or wider evaluation?

Historians certainly move beyond reiteration of abstract data such as emerges from events, statements and isolated documents. Their entire *raison d'être* is the contextualisation and linkage of otherwise apparently idiosyncratic events.[88] Indeed, as noted, event dismantlement is a typical denier tactic – their only exit route out of the wider historical context. Lawyers may also try to disassemble convergence and context to create doubt, consequently disinclining historians from acting as experts. Such legal deconstruction of historical evidence takes advantage of the historical academy's radar for "complexity and ambiguity".[89] Lawyers are playing historians at their own game. This might be alleviated by allowing historical witnesses to provide written reports for judges and juries (discussed below). By the same token, it has been noted by historians of their peers that historians ably render obfuscations[90] leaving the unhelpful conclusion that no one anywhere could ever know anything for sure. This radical scepticism can appear as historians playing lawyers at their own game, trumping them with doubt. Arguably this produces a quasi-history or law-office history, specially rendered for courts, the worst of all worlds.

The US historian James Mohr (an expert contributor to a brief in US litigation regarding abortion)[91] considered that historians teased out compelling interpretations from contexts of "complexity, ambiguity, and paradox" but that such "alternative explanations, mixed motives, and inconvenient facts" were anathema to lawyers.[92] Historians' misconceived view that lawyers seek the smoking gun arises from misconceptions about legal actors. Lawyers' roles as advisers and as advocates are distinguishable. Advocates certainly spin evidence to a client's advantage. However, as advisers during client consultations, lawyers must deal openly with clients regarding unfavourable issues. Lawyers more clearly resemble historians in the latter setting (even if what they ultimately *do* with the evidence will be different in other places). Court is not the only forum within which lawyers operate and it is not a given

85 Rousso, *The Haunting Past*, n. 74 above.

86 Ibid. p. 53.

87 Potentially, Rousso's position empties of all meaning notions of individual legal responsibility in these particular contexts. P Pezzino, "Experts in truth? The Politics of Retribution in Italy and the Role of Historians" (paper delivered at Strathclyde University, spring 2010).

88 Rosner, "Trials and tribulations", n. 83 above, pp. 152, 154.

89 Ibid. p. 158.

90 Ibid. pp. 155–7.

91 *Webster* v *Reproductive Health Services* 492 US 490 (1989).

92 J C Mohr, "Historically based legal briefs: observations of a participant in the Webster process" (1990) *Public Historian* 19, p. 22.

that they are antipathetic to historical method. When queried as to particular interpretations of the past, historians are prone to responding "it is more complicated than that",[93] so lawyers are regularly mocked for their similar stock response to queries of "it depends". Perhaps it is not so much history and law which are incompatible but history and advocacy.[94]

It seems within history there are two key strands which compete: (1) the desire to establish *wie es eigentlich gewesen*[95] via thorough empiricism; while (2) simultaneously favouring nuance, probability and uncertainty.[96] The two strands presumably come together in notions that historians simply try to understand/evaluate what happened. Some lawyers feel that the adversarial system allows them to arrive at some form of truth,[97] having overcome the barriers presented by doubt and argument. The criminal standard of "beyond reasonable doubt" certainly fuels this and US Federal Rule 702 which concerns evidence admissibility (discussed subsequently) explicitly refers to truth ascertainment. Other lawyers more cautiously consider that evidence points in different directions, the adversarial process illustrates where the preponderant conclusion lies. This is more about persuasiveness and apparent "justness" and it sidesteps potential philosophical cul-de-sacs bedevilling discussions as to what constitutes truth and fact. It also reveals a potential meeting point for history and law by replacing grandiose notions of absolute truth with more helpful notions of plausibility.

Finality v eternal re-examination

Arguably historians' process of eternal re-examination means that their work never forms safe bases for judicial evidence. This suggests that only experts who can give "final answer" evidence (historians often cite scientists) are sufficiently safe, particularly for criminal proceedings. It seems precarious to base a conviction, and its dire consequences, on work whose future determination could vary. From this perspective, law, unlike history, seeks conclusions, it is not a "process of refinement".[98] In law, there are winners and losers, whereas in social science the argument never ends.[99] However, historians are mistaken in assuming that other experts provide incontrovertible, definitive answers. In UK murder trials, expert pathologists will always be presented by both the Crown and defence legal teams. Most experts work in constantly evolving areas of knowledge. Tobacco litigation and the asbestosis mesothelioma claims are testament to scientific disputes. No expert evidence is foolproof, nor is it ever the sole evidence. Law also countenances its internal nightmare – wrongful convictions and miscarriages of justice. The long-term appeal process clearly envisages this. In the notorious British "cot-death" controversy, expert evidence previously delivered by a lauded scientist, Professor Sir Roy Meadows, resulted in an unsafe murder conviction. In other contexts, the possibility of revisiting legal judgments is evident, witness the re-opening of criminal cases due to the emergence of DNA evidence.[100] The

93 J C Williams, "Clio meets Portia: objectivity in the courtroom and the classroom", referred to in Martin, "Historians at the gate", n. 32 above, p. 1535.

94 Martin, "Historians at the gate", n. 32 above, p. 1532.

95 "How it really was", see Leopold von Ranke and the nineteenth-century move to characterising history in scientific, empirical terms.

96 Davidson, "Carlo Ginzburg", n. 10 above, p. 307; Rousso, *The Haunting Past*, n. 74 above, pp. 82–3.

97 J Sanders, "Expert witness ethics" (2007) 76 *Fordham LR* 1539, pp. 1539–43, referring to Susan Haack's "Inquiry and advocacy, fallibilism and finality: culture and inference in science and the law".

98 Martin, "Historians at the gate", n. 32 above, p. 1524, referring to Bloch's work, *The Historian's Craft*, n. 14 above; *Daubert* at 597; and D Abraham, "Where Hannah Arendt went wrong" (2000) 18 *Law & History Review* 607, p. 609.

99 C Perelman, *The Idea of Justice and the Problem of Argument* (London: Routledge & Kegan Paul 1963).

100 Sanders, "Expert witness ethics", n. 97 above, fn. 45.

International Court of Justice statute explicitly refers to revision of judgments and Bosnian counsel in the *Bosnia* v *Serbia* case expressed willingness to invoke this provision (as regards Serbian state responsibility for genocide) should new historical evidence come to light.[101] Perhaps historians' anxieties regarding the possibilities of a judicially skewed and frozen version of the past arises from the emergence, since the 1970s, of perspectivalist history which re-emphasises the importance of respecting diverse opinions.[102] This is dealt with below but, as an early note, just as science is not the definitive series of interpretations historians often believe it to be, by the same token, historians are not incapable of providing testimony. They are just other experts.[103] The experience of historians in legal proceedings differs among jurisdictions with particularly negative encounters being recounted from US cases,[104] possibly attributable to this system's extreme adversarialism. For example, coaching witnesses, often professionally unacceptable in other jurisdictions, is commonplace in the US. It seems particularly misguided and fruitless in a context where the expert is filling a gap for the inexpert coacher.

The relationship between lawyers and historians has not always been so fraught. Both the Nuremberg and Eichmann proceedings generated extensive historical evidence, the latter most notably revealing the full meaning of the infamous Wannsee Protocol. In *Irving*, both Peter Longerich and Robert Jan van Pelt uncovered new and valuable historical evidence[105] and they, together with Richard Evans, subsequently published important books.[106] Of course, while law can prompt historical revelations, historical involvement in cases should not be motivated by this tantalising prospect. Indeed, van Pelt's participation in *Irving* caused him to reflect more broadly upon his established historiographical understandings.[107] There are concerns that law does not serve wider historical purposes because its remit is so narrow. Concerned with "the provable rather than the probable" it does not demand a "reading between the lines of . . . documents".[108] However, this does not imply that history wants no relationship with law, it simply yearns for a more complete outcome. The establishment of an evidential standard which draws on the acceptable methodology of the historical academy, and which relates to admissibility or reliability, represents a way forward.

JUDICIALISING THE PAST: HISTORY AS JUDGMENT RATHER THAN EVALUATION

Over the centuries, shifts in historical practice are detectable. The original classical tradition of argument eventually developed into a judicial model where historians sought to establish the guilt or innocence of historical figures. However, this moralistic, judgmental historiography (with its legal overtones) was ultimately rejected in favour of historical understanding.[109] The post-1980s trend[110] for historians to give evidence in contemporary trials regarding Second World War crimes may worryingly suggest a return to the classical

101 M Milanovic, "State responsibility for genocide: a follow-up" (2007) 18 *European Journal of International Law* 669, p. 676.

102 Rosner, "Trials and tribulations", n. 83 above, pp. 145–6.

103 Criticised by Dumoulin, *Le role*, n. 14 above.

104 H H Tanner, "History vs. the law: processing Indians in the American legal system" (1998–99) 76 *University of Detroit Mercy LR* 693, p. 694.

105 Evans, "History", n. 68 above, p. 343.

106 Longerich, *Unwritten Order*, n. 47 above; van Pelt, *The Case*, n. 52 above; Evans, *Lying*, n. 22 above.

107 van Pelt, *The Case*, n. 52 above, pp. 103–4.

108 D Bloxham, *Genocide on Trial* (Oxford: OUP 2005), p. 221.

109 C Ginzburg, "Checking the evidence: the judge and the historian", in Chandler et al., *Questions*, n. 10 above, pp. 290–4.

110 See generally, H Jones, K Östberg and N Randeraad (eds), *Contemporary History on Trial* (Manchester: Manchester UP 2007).

juridical tradition and the moralising of that history.[111] Crude classifications of individuals as executioners or victims disturb notions of an explanatory discipline. Characterised as a malign "judicialisation of the past", this envisages historians as enslaved into the service of moral and legal forms of judgment, eschewing the subtleties and nuances of the historian's craft.[112] However, equally, such a characterisation appears to overlook both the social responsibilities of historians and the possibility that law may not leave its fingerprints on historical research after litigation.

Courts as memorial sites

An alternative interpretation sees courts as providing a context for the instrumentalisation of *both* law and history by outside politics.[113] One such political force might be the promotion of a particular national ideological/historical identity. This was clearly the case in the French prosecutions of Klaus Barbie and Maurice Papon, wherein legal definitions of "crimes against humanity" were, due to political imperatives, varyingly recast. Propping up Gaullist myths of national resistance while unpicking the varyingly presented characterisations of Vichy as a racist regime or Nazi puppet was the unpalatable task left to historians dragged into the accordingly difficult issues of proof.[114] The "duty to remember" might be another political force, with trials as vectors of memory, focused upon redressing past wrongs. An example of memory's performativity was evidenced in the "commemorative ritual" of victims' name-reading against a projection of their photographs during the *Papon* trial.[115] This, of course, can produce a *Geschichtmüdigkeit* – historian fatigue or a "surfeit of eventfulness".[116] Germany, for example, has arguably adopted a posture of "obsessive mindfulness of the past"[117] which appears as a distancing process, saying more about Germany's present than its past. This overt rejection of amnesia can prompt moral judgments (thus explaining its comfort in courts) potentially reconstructing either idealised or demonised pasts. Lipstadt herself said that *Irving* became "a personal quest for the preservation of truth and memory".[118] However, as a scholarly reconstruction of the past, history is epistemologically based. Memory, part of existential experience, is "endowed with magical virtues and an aura of human spirit absent from history's accounts".[119] As such, it is transcendental and talismanic, a value rather than an objective phenomenon. In its encouragement of affective emotional relationships with the past, it may impede "a real apprenticeship of the past".[120] More sinisterly, "[freighting] . . . contemporary identity with historical reminiscence"[121] means that memory has capacity to be collectively manipulated and mobilised by those seeking to privilege values and ideals of particular social groups.[122]

111 See Pezzino's reference to his Guardistallo study, "Experts", n. 87 above, and Dumoulin, *Le role*, n. 14 above, generally.

112 Rousso, *The Haunting Past*, n. 74 above, pp. 50, 52.

113 Evans, "History", n. 68 above, p. 332.

114 Fink, "New historian", n. 9 above, pp. 139–40, commenting on Golsan, and T O'Donnell, "The trial of Maurice Papon: the night and fog of France's Vichy past" (2002/2003) 6(2) *CIL* 133.

115 N Wood, "The Papon trial in an 'era of testimony'" in R J Golsan (ed.), *The Papon Affair* (New York: Routledge 2000), pp. 96, 97.

116 P Mandler, "The responsibility of the historian" in Jones et al., *Contemporary History*, n. 110, p. 13.

117 Douglas, *The Memory*, n. 29 above, p. 220. See also M Fulbrook, *German National Identity after the Holocaust* (Cambridge: Polity Press 1999), p. 230.

118 V Dodd, "How the web of lies was unravelled", *The Guardian*, 12 April 2000.

119 Rousso, *The Haunting Past*, n. 74 above, p. 2.

120 Ibid. pp. 2, 3, 7, 4, 16. See Golsan, *The Papon Affair*, "Introduction", n. 115 above, p. 25, outlining similar sentiments from Todorov, Conan and Maier.

121 Mandler, "The responsibility", n. 116 above, p. 19.

122 K-G Karlsson, "Public uses of history in Europe" in Jones et al., *Contemporary History*, n. 110, p. 36.

This, in turn, might explain why certain eras are of more popular interest than others (see references to the Holocaust's "awful majesty")[123] because they easily tap into fantasies and imaginations. They permit a continuing history or a "living through history" without the attendant dangers or implicatory overtones.[124]

Unreflective uses of oral sources confuse history and memory[125] which is anathema to explicatory historians anxious about becoming law's accomplice in agitating memory[126] – particularly when there are human consequences. For them, legal categorisation is a blunt condemnatory instrument, leaving unrecognised the very complex situations and choices facing individuals very long ago. It casts aside how specific understandings of morality at particular times produced or resisted particular behaviours.[127] This "why" of events means that it is always more complicated.[128] Perhaps there is a need for historians to develop a more sophisticated comparative historiography of public history,[129] although this article favours maintaining the same intellectual rigour for testimony as for academic publishing.

There is undoubtedly more likelihood of an expert witness feeling "cornered"[130] in cross-examination in criminal cases. Even if centrally important, historical testimony is but one piece of evidence in a very complex mosaic. At the same time, expert historians rather than non-experts are preferable sources[131] and perhaps the description of historical testimony as simply providing a secondary "point of departure for enquiries" which are then developed by judicial analysis[132] is more helpful. Further, criminal trials represent only one particular version of proceedings regarding the Second World War/Holocaust. Holocaust denial trials represent a separate (sometimes criminal) category, where law is being invoked to police history.[133] Classic "hate speech" or Holocaust denial trials routinely involve the imposition of criminal penalties and attendant judicial condemnations of an accused. In the German trial of Robert Althams (who was filmed in an Auschwitz gas chamber declaring it "a gigantic lie") the judge declared him a "dangerous intellectual arsonist".[134] Such symbolic Durkheimian banishments exile negationists while simultaneously, reassuringly (but perhaps wrongly) confirming that certain (anti-Nazi) values are identifiable with that exiling society.[135]

Finally, there is a case such as *Irving* where the Holocaust both intercedes and recedes in prominence as a contextual anchor. *Irving* was not a criminal trial. Oscillating between empirical detail and epistemological reflection, it potentially allowed for more nuanced analysis. The historical experts were being asked about Irving's *modus operandi*, including his

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123 Mandler, "The responsibility", n. 116 above, p. 15.

124 Ibid. pp. 13–14.

125 Pezzino, "Experts", n. 87 above, p. 4.

126 Rousso, *The Haunting Past*, n. 74 above, pp. 2, 12. See also Evans, "History", n. 68 above, pp. 333–4.

127 A Kessler-Harris, "Legal theory and gendered history" (2010) 19 *Columbia Journal of Gender and Law* 125.

128 For example, regarding *Papon*, Rousso was critical of historical experts' non-elaboration regarding Vichy officials' assistance to the *Résistance*; Rousso, *The Haunting Past*, n. 74 above, pp. 63, 73.

129 Fink, "New historian", n. 9 above, p. 147.

130 See A Kessler-Harris, "*Equal Opportunity Employment Commission* v *Sears, Roebuck and Company*: a personal account" (1986) 35 *Radical History Review* 57, p. 74.

131 Fink, "New historian", n. 9 above, p. 141, commenting on Ginzburg's criticisms of judicial behaviour, *The Judge*, n. 10 above, pp. 110–19.

132 Pezzino, "Experts", n. 87 above; Bloch, *The Historian's Craft*, n. 14 above, p. 3.

133 See D McGoldrick and T O'Donnell, "Hate-speech laws: consistency with national and international human rights law" (1998) 18 *Legal Studies* 453.

134 Referred to in R Kahn, "Sentencing at Political Trials: The Case of Holocaust Revisionism" (paper presented at Sentencing and Society: An International Conference, Glasgow, 24–26 June 1999).

135 Ibid.

obfuscations, the nature of groups he associated with and the professional standards of conscientious historians. This seems entirely consonant with the expertise held by historians. *Irving* concerned defamation, an area (unlike Holocaust denial or defaming the dead) not depending for its existence upon the Holocaust's occurrence. Potentially prurient interest in the Holocaust's often pornographically violent detail was neither encouraged nor relevant. However, although *Irving* concerned a civil wrong, the finding impugned Irving's professional method as one which manipulated and distorted in order to facilitate his anti-Semitic and racist agenda. Mr Justice Gray's condemnatory conclusions evoked a prisoner's sentencing. Thus, while it is probably true that historians might feel safer in civil proceedings, it is not entirely clear that the *Irving* trial was the "purest" example thereof.

Courts as historical didactic sites

The judicially sited denunciation is notionally allied to re-conceptualisations of courts as educational *mises en scène* which can also disincline historians from participating in cases. Statements stressing *Irving*'s didactic value came from Yad Vashem[136] and Lord Janner of Braunstone QC, chair of the UK Holocaust Educational Trust.[137] Indeed, on one reading, *Irving* exposed the *modus operandi* of revisionist historians,[138] which in itself might be revelatory and illuminating.[139] However, arguably, courts simply deliver verdicts not grand educational narratives. To assume a pedagogical judicial function implies a view that events are structured by repeating and inevitable recyclable logic. Assuming that individuals are immutably identical to their ancestors overlooks the fact that different political opportunities are presented by differing times. Further, didactic imperatives inspire Arendtian concerns regarding the Eichmann trial and fears of Soviet-style show trials.[140] Indeed, for historians, didacticism is potentially imprisoning or even distorting of future historical interpretations. Long-term historical confusions as regards the so-called *Führerbefehel* (Führer order) and the timing of the Final Solution[141] arose from the *Einsatzgruppen* case. Future historical interpretations potentially become limited to the legal conclusions of the court record. Yet as the sceptical historian Donald Bloxham notes, among law's specific ends, "the historical record is a wild card".[142] Similarly, utilising Holocaust history, including Holocaust trials, to provide a distinctive sense of Jewishness (in place of the synagogue) seems problematic,[143] distorting and incomplete. Historical witnesses would simply be adding ornamental, academic lustre to proceedings offering nothing to historical understandings. Although a concern in perpetrator trials, it comes into sharper focus in the Holocaust denial context. Indeed, Zundel's criminal "false news" trial was denounced as displaying "the perils of relying on legal dramaturgy as a means of buttressing the integrity of history".[144]

136 P Reeves, "State built on suffering breathes a collective sigh of satisfaction", *The Independent*, 12 April 2000.

137 I Burrell, "Rascist. Anti-Semite. Holocaust denier. How history will judge David Irving", *The Independent*, 12 April 2000.

138 Although he doubted tribunals' value, Vidal-Naquet asserted "Confronting a paper Eichmann, one should respond with paper", *Assassins*, n. 21 above, p. 76.

139 See E Zuroff's comments (director of the Jerusalem Simon Wiesenthal Centre), in Reeves, "State built on suffering", n. 136 above.

140 Bloxham, *Genocide*, n. 108 above, p. 225.

141 H Earl, *The Nuremberg SS Einsatzgruppen Trial* (Cambridge: CUP 2009), pp. 184–216.

142 D Bloxham, "The Holocaust in the courtroom" in D Stone (ed.), *The Historiography of the Holocaust* (Basingstoke and New York: Palgrave Macmillan 2005), p. 398, although he refers principally to criminal trials.

143 Mandler, "The responsibility", n. 116 above, pp. 18–19.

144 Douglas, *The Memory*, n. 29 above, p. 225.

Nevertheless, despite all of the concerns expressed above, the Holocaust context should not defeat the establishment of a general judicial standard for historical evidence. In the US, in particular, historians have been called to give evidence in a wide range of both public and private interest litigation[145] including tobacco litigation,[146] water rights,[147] trademark disputes,[148] voting rights, deportation/denaturalisation, and tort actions against the lead-paint industry.[149] Huge controversies, intra-historian strife and debates as to the ethics of experts have ensued.

De-judicialising history

As previously noted, not all law–history interactions are replete with anxiety. Courts determine verdicts; historians reconstruct relationships "between individual lives and the contexts in which they unfold".[150] Some hybrid models manifest a complementarity. The UK Spoliation Advisory Panel which deals with Nazi property expropriations, and thus has serious regard to legal provisions, is also sensitive to the wider social context of alleged expropriations and both lawyers and historians (including Richard Evans) are panel members. Further, in civil litigation, the outcome relies on the balance of probabilities given the preponderance of the evidence. This is much closer to historical readings of evidence.

As previously noted, historical research has also been commissioned by companies which may uncover complicity in Nazi crimes deserving of legal redress. Commissioning such historical studies might even itself perform some "admission restitution".[151] However, while broadly framed historical investigations might bolster moral arguments and contribute evidentially, they should be decoupled from the essence of the litigation. For example, the official Dutch inquiry into Srebrenica[152] or the Saville tribunal on Bloody Sunday[153] resulted from public controversy, potentially placing pressures on historians to reach politically desirable conclusions. Confusion occurs if the evidence of historians, who are not state prosecutors or court officers, is spun into evidence resulting in legal liability, without having passed through the crucible of court proceedings. If it is true that "truth sets in motion other consequences", then historians must eventually make way for judges, as desires for historians to "do justice" are problematic.[154] Declaring individuals' acts does not automatically impose legal liability without further intervention by legal agents. To enunciate and evaluate events, and to judge and condemn them are quite different tasks requiring demarcation.

Allowing experts to submit written materials in advance of hearings might provide a bulwark for historical evidence against legal onslaughts. Indeed, under the English Civil

145 Martin, "Historians at the gate", n. 32 above, p. 1518.

146 *Covert* v *Liggett Group Inc.* 750 F Supp 1303 (MD La 1990), Rosner, "Trials and tribulations", n. 83 above, pp. 138–9.

147 *Denson* v *Stack* 997 F2d 1356, 1363–8 (11th Cir 1993).

148 *Harjo* v *Pro-Football Inc.* 50 USPQ 2d (BNA) 1705 (1999).

149 Rosner, "Trials and tribulations", n. 83 above, pp. 137–8.

150 Ginzburg, "Checking the evidence", n. 109 above, pp. 300–1.

151 G Feldman, "The historian and Holocaust restitution: personal experiences and reflections" (2005) 23 *Berkeley Journal of International Law* 347, pp. 354–5; O Rathkolb, "Private industry and banking commissions and the Holocaust era assets debate" (2002) *Study Germanica et Austraica* 2, p. 48. http://sga.euweb.cz/002/debata/download/rathkolb-002.pdf.

152 H Blom, "Historical research where scholarship and politics meet: the case of Srebrenica" in Jones et al., *Contemporary History*, n. 110, p. 104.

153 P Bew, "The Bloody Sunday tribunal and the role of the historian" in Jones et al., *Contemporary History*, n. 110, p. 62.

154 Pezzino, "Experts", n. 87 above, referring to Maier's work.

Procedure Rules referred to below, the presumption is that in the case of evidence from a single joint expert (one jointly selected and approved by the parties), the written evidence will displace oral testimony. The supply and use of affidavits by historians in the German Auschwitz trials of 1963–65 was noted with approval and these were later published.[155] In *Irving*, van Pelt's 770-page report introduced the nuance he felt was denied in his oral testimony being neither skewed by questions nor misleadingly streamlined by him.[156] The credibility of such written material would be enhanced if based on pre-litigation work. Arguably, intricately technical and dense reports might be less helpful in jury proceedings, however, such arguments relate to juries, not judges and courts in general.

Historicising law

In Nuremberg and *Eichmann*, the input of historians was not significant whereas in *Irving*, the historical guild asserted itself via the defence expert witnesses.[157] These historians were focused on illustrating the existence and fortification of the highest professional (as opposed to philosophical) standards. van Pelt commented on the pride he felt during a later trip to Auschwitz, in having represented history in a British High Court.[158] Adherence to methodological standards and intellectual rigour emerged as indispensable requirements for guild membership. Further detail on what passes for historical intellectual rigour will be discussed. In short, Irving's behaviour was considered beyond the pale. His prejudiced methodology was considered by historians to be bringing them into disrepute, requiring professional excommunication via legal judgment. The successful defence of justification indirectly aided this exiling. In *Irving*, history was not judicialised so much as law was historicised. The case was brought by a historian invoking a legal claim against another historian, in contrast with Holocaust denial legislation where law is more clearly intruding into history.

5 Ideological advocacy and preserving Clio's integrity

Avoiding the contamination of the justice process by skewed testimony

The *Irving* expert witnesses exhibited differences in their approaches. Defence solicitor Anthony Julius instructed the experts that their duties were to the court, offering technical assistance. They had to be objective, adhering to the terms of their oath[159] – robust, cool professionals. Yet, van Pelt undertook the oath by swearing on his grandfather's Bible which had accompanied his family into hiding from the Nazis. He also had with him his grandmother's yellow star and last letters from her brother after whom he was named. van Pelt defiantly maintained that his report was compiled without prejudice for the defendant and against the plaintiff, declaring his loyalty with Auschwitz's victims as against their murderers.[160]

The myth of the disinterested historical academy engaged in mortal combat with the decidedly interested advocate is a powerful one and, undoubtedly, particular tensions exist

155 H Krausnick, H Buchheim, M Broszat and H-A Jacobsen, *Anatomy of the SS State* (New York: Walker 1968). Although perhaps this only worked because it was done when the history of the Nazi period was still evolving: Rousso, *The Haunting Past*, n. 74 above, p. 66.

156 van Pelt, *The Case*, n. 52 above, p. 456.

157 Evans, "History", n. 68 above, p. 341.

158 van Pelt, *The Case*, n. 52 above, p. 487.

159 Evans, *Lying*, n. 22 above, pp. 7 and 30.

160 www.archive.org/stream/PeltReport/report_djvu.txt.

when historians give themselves over to acting as the advocate's evidential tool.[161] Historical experts should be neither evangelists nor mere amanuenses but rather estimators of the past. Expert witnesses have been denounced as whores,[162] yet the contrasting but naive belief in their possible virginity persists. Even if history is purely an explanatory discipline, history and historians are not value-free. Personally committed historians can provide reliable testimony which assists in the administration of justice. Their mettle is judged by whether these commitments distort their research. Unreliable "junk history" which impedes the legal process must be distinguished from perfectly valid, perspectival history.

One route for judges might be to turn to the accepted methodology of a discipline. However, historians disagree on methodology[163] and "guilds" are potentially prescriptive and imprisoning. Nevertheless, just as technology has gifted an "abundance and heterogeneity" of sources, so it necessitates an acknowledgment or ranking system of the varying historical values of documentaries as against official government archives.[164] Without being sidetracked by discussions concerning the nature of knowledge and the philosophy of history, judges require criteria for assessing the weight of historical evidence to ensure "intellectual due process" and that legal conclusions are evidentially sound.[165] Thus, a legally created standard for experts seems attractive and the options are either admissibility or reliability tests.

Junk history and its exclusion: the methodological test

> The worst that can be said about an expert opinion is not that it is a lie . . . but that it is unreasonable, that no competent expert in the field would hold it.[166]

Certain possibilities exist with a US-style "gatekeeping" test. *Daubert* v *Merrell Dow Pharmaceuticals Inc.*[167] (and its legal progeny) sought to exclude "junk science" from courts. Similarly, harm is done to legal process by "law-office" history[168] (to say nothing of the harm to history). *Daubert* focused on adversarial bias evident in: venal hired guns (conscious bias); those naturally sympathetic to their employer (unconscious bias); and those experts willing to limit their evidence to a particular (usually hiring) perspective (selection bias).[169] Given the allegations of "ersatz history" in denial proceedings, *Daubert*'s tests could be applied to exclude "junk history" following *Kumho Tire Co Ltd* v *Carmichael*[170] i.e. historical evidence based on unreliable methodology.[171] Rule 702 of the US Federal Rules of Evidence (amended via caselaw) admits expert testimony, if it is based upon sufficient facts or data, and is the product of reliable principles and methods which the witness has applied

161 T Haskell and S Levinson, "Academic freedom and expert witnessing: historians and the *Sears* case" (1988) 66 *Texas LR* 1629, pp. 1649, 1657. See also A Kessler-Harris, "Academic freedom and expert witnessing: a response to Haskell and Levinson" (1988) 67 *Texas LR* 429.

162 J Morgan Kausser, "Are expert witnesses whores? Reflections on objectivity in scholarship and expert witnessing" (1984) 6(1) *Public Historian* 5.

163 Goodman, "Slipping through", n. 80 above, p. 857.

164 Rousso, *The Haunting Past*, n. 74 above, pp. 35–6.

165 S Brewer, "Scientific expert testimony and intellectual due process" (1998) 107 *Yale LJ* 1535, p. 1540.

166 Sanders, "Expert witness ethics", n. 97 above, fn. 1, quoting S R Gross, "Expert evidence" (1991) *Wisconsin LR* 1113, p. 1178.

167 509 US 579 (1993) and 43 F3d 1311 (9th Cir 1995).

168 Martin, "Historians at the gate", n. 32 above, pp. 1525–6.

169 D E Bernstein, "Expert witnesses, adversarial bias, and the (partial) failure of the *Daubert* revolution" (2008) 93 *Iowa LR* 451, 453–8.

170 526 US 137 (1999). For recent discussion, see *Lear* v *Fields* 226 Ariz 226, 245 P3d 911, 599 Ariz Adv Rep 37 (Ariz App Div 2 Jan 12 2011).

171 Ibid. 141. Goodman, "Slipping through", n. 80 above, p. 826.

reliably to the facts of the case. Following *Daubert*, *Kumho Tire* acknowledged relevant factors could include peer review[172] and publication, widespread acceptance within the relevant discipline's community, and a particular theory/technique's testing and error rate (including the existence and maintenance of standards controlling its operation).[173] *Kumho Tire* noted *Daubert*'s gatekeeping requirement existed to ensure that an expert:

> whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of *intellectual rigor* that characterizes the practice of an expert *in the relevant field*.[174] [emphasis added]

Courts are clearly trying to avoid imposing their own standards on non-legal disciplines. There is not one set of rules for expert journal publications and another for affidavits or written testimony. Requirements of peer review are helpful for avoiding scholars resting on reputations despite later dips in judgment. Further, if the evidence was based on research findings deriving from work funded by a major research council, for example, the UK Arts and Humanities Research Council, then that too would testify to its satisfaction of academic thresholds. Historians may not agree detailed methodological standards but *Irving* clearly evidenced the existence of a baseline. If experts represent themselves and the knowledge their field has regarding a particular topic,[175] then *Kumho Tire*'s inclusion of peer review is attractive. However, a gatekeeping rule relies on adversarial challenge for its activation, without which the evidence will be admitted. Further, Irving actually did have certain historical credentials somewhat neutralising *Daubert*'s potency, thus it may be best to confine such a qualitative test to matters of credibility and relevance, to be dealt with later in proceedings.[176]

Can we put Clio on the Clapham omnibus?

"Ideological scholarship" can compromise expert integrity. Rather than lying, experts are persuaded away from ambiguity and contrary evidence in favour of unfractured, simplistic narratives. Indeed, in *Brown* v *Board of Education*, one eminent historian felt compromised in fulfilling Thurgood Marshall's legal aims.[177] Perhaps in the school desegregation cases plaintiffs' witnesses considered themselves morally in the right, justifying weighted adversarialism.[178] This might be equally true of gender discrimination cases.[179]

Arguing that historical witnesses are simply providing legal evidence *based* on history, rather than "doing history" is a neat distinction.[180] Indeed, as previously mentioned, James Mohr signed a particular amicus brief regarding abortion because it was closer to his historical view rather than that of the other side.[181] However, such experts have been chosen due to their professional expertise and assumptions that they adhere to certain standards. It

172 S Haack, "Peer review and publication: lessons for lawyers" (2007) 36 *STETLR* 789.

173 See n. 170, at 149–50.

174 See n. 170, at 152.

175 Sanders, "Expert witness ethics", n. 97 above, p. 1558.

176 E.g. see C Pede "The Trail of the Fox", book review (1996) 151 *Military LR* 230. However, Goodman, "Slipping through", n. 80 above, pp. 869–71, notes that Irving's method had not been subject to rigorous peer review prior to the case.

177 R Kluger, *Simple Justice*, p. 640, referred to in Martin, "Historians at the gate", n. 32 above, p. 1528.

178 Sanders, "Expert witness ethics", n. 97 above, pp. 1559-60

179 D A Farber, "Adjudication of things past: reflections on history as evidence" (1998) 49 *Hastings LJ* 1009. See also his referencing of the trial judge's critique of governmental expert witnesses in *US* v *Virginia* 518 US 515 (1996) 1016–17.

180 Mandler, "The responsibility", n. 116 above, pp. 15–16; Pezzino, "Experts", n. 87 above. See also D J Rothman, "Serving Clio and client: the historian as expert witness" (2003) 77 *Bulletin of the History of Medicine* 24, p. 44.

181 Mohr, "Historically based legal briefs", n. 92 above, p. 25.

is problematic if they have been engaged simply for the reflected glow of their "professional aura" upon proceedings. Further, for a historical expert in his or her evidence to issue a disclaimer as to that evidence not being "truly historical" is confusing and disorientating.[182]

In judging what passes for "intellectual rigour" in the historical field, lawyers are trying to put Clio on the Clapham omnibus. In *Irving*, after hearing the historical experts, Mr Justice Gray invoked an "objective historian" standard. This required that historians:

1) treat sources with appropriate reservations;
2) not dismiss counter-evidence without scholarly consideration;
3) be even-handed in the treatment of evidence, eschewing "cherry-picking";
4) clearly indicate any speculation;
5) not mistranslate documents or mislead by omitting parts of documents;
6) weigh the authenticity of all accounts, not merely those that contradict favoured views; and
7) take the motives of historical actors into consideration.[183]

Such reliability tests clearly echo judicial directions to juries. This standard avoided an alien grafting exercise as it emerged from a case where both historians and lawyers played prominent roles. The test's allusions to integrity support its recasting as a "conscientious historian" standard.[184] Alternatively, renaming it as the "reliable historian" standard[185] emphasises that the expertise is being viewed both on its terms and as regards its reliability for another discipline. This standard simply says this evidence is reliable, not definitive. Unfortunately, this test relies on skilful cross-examination or considerable judicial wherewithal as regards historical methodology. This may emphasise the appeal of a bar-appointed historian, an issue discussed below. It does not mean that such a standard is so unworkable as to be rejected out of hand.

However, just as Mr Justice Gray's standard says something about the reliability of certain histories for law, it also implies something about one historian's reliability for other historians. As such, it moves (perhaps uncomfortably) close to notions of a normative historical methodological standard. Apart from the straightforward worries regarding a perceived imperial expedition by law onto the territory of history, normatively based understandings of objective historical methodology are also controversial and provoke intra-historian anxieties. There are two prominent aspects to these controversies, the debates over whether there is objective history and the notion of a historical guild.

Avoiding over-exclusivity: distinguishing between ideological and perspectival scholarship

As noted, gatekeeping tests can be over-exclusive, potentially silencing and excluding new voices in scholarship, leaving courts with an incomplete historical picture. Tensions exist between the objectivist[186] and relativist[187] historical schools. Objectivists maintain a "truth-

182 Ginzburg, *The Judge*, n. 10 above, p. 7.

183 W E Schneider, "Past imperfect" (2001) 110 *Yale LJ* 1531, pp. 1534–5.

184 Ibid. pp. 1539–40.

185 Goodman, "Slipping through", n. 80 above, p. 838, referring to the work of M Howell and W Prevenier, *From Reliable Sources* (Ithaca and London: Cornell UP 2001), p. 2.

186 See G Elton, *The Practice of History* (Sydney: Sydney UP 1969) and T L Haskell, "Objectivity is not neutrality: rhetoric vs. practice in Peter Novick's That Noble Dream" (1990) 29(2) *History and Theory* 129; cf. Novick, *That Noble Dream*, n. 8 above. See generally, R Evans, *In Defence of History* (London: Granta 2000), ch. 8, "Objectivity and its limits".

187 Farber, "Adjudication of things past", n. 179 above. See E Hallett Carr, *What is History?* and its partial critique in Evans, *In Defence*, n. 186 above, pp. 224–30.

seeking" approach and form a minority nowadays. By contrast, relativists or "perspectivalists",[188] favour enhanced and more complete historical narratives achieved by introducing new progressive perspectives, notably those of feminists or critical race scholars. Rejecting notions of absolute truth and orthodox views of historical events/phenomena,[189] and convinced by Foucauldian theories regarding relations between power and knowledge, postmodernists in particular have advocated new approaches to analysing the Holocaust.[190] Rethinking texts and narratives, encouraging historians to take "their surface patina more seriously",[191] chimes with those rejecting central tenets of strict positivism who question the existence of a transparent relationship between historical evidence and historical reality.[192] Although concerns persist that meta-principle is simply being replaced by extreme relativism[193] or radical scepticism, and while relativism/perspectivalism is often accused of revisionism and political correctness, openly relativist views of history are surely preferable to "falsehoods, myths, and ideologically biased narratives masquerading as truths under the banner of objectivity".[194]

Providing it countenances self-criticism and challenge, "committed history is not necessarily bad history".[195] Of course, relativist historians might simply be advocates using their professional authority to conceal their willingness to construct narratives selectively.[196] However, occupying an unorthodox philosophical position does not *inevitably* result in either questionable professional standards or intentional distortion in pursuit of an ideological agenda.[197] While the existence of forged documents, like the *Protocols of the Elders of Zio*n and TB47, is historically important, this says nothing about the value of their content.[198] In fact, Irving might better be described as a misinforming false objectivist.[199]

Mr Justice Gray's standard should not impede the use of evidence for progressive causes. Perspectival historians can make balanced assessments of evidence.[200] Rather than looking for the smallest mistake (as noted, a key denier tactic), the conscientious/reliable historian standard detects patterns of errors, Irving's key downfall.[201] The standard is not perfect but its schema is attractive in its clarity and sensitivity to social-scientific method. All of the *Irving* defence experts were tested in court and none emerged as a liar or politically charged distorter of the sources. Notably, van Pelt's report stood on its own terms, as did his transparent analysis of the hierarchy of historical sources.[202]

188 R E Schiller, "The strawhorsemen of the Apocalypse: relativism and the historian as expert witness" (1998) 49 *Hastings LJ* 1169, p. 1173.

189 Ibid. pp. 1173–4; H White, "The politics of historical interpretation: discipline and de-sublimation" (1982) 9(1) *Critical Enquiry* 113.

190 R Eaglestone, *The Holocaust and the Postmodern* (Oxford: OUP 2004) and A Milchman and A Rosenberg, *Postmodernism and the Holocaust* (Amsterdam/Atlanta GA: Rodopi 1998).

191 Evans, *In Defence*, n. 186 above, p. 248.

192 "A rejoinder to Arnold I. Davidson", Ginzburg, *Questions*, n. 10 above, p. 321.

193 See the critiques of the works of Stanley Fish discussed below.

194 Schiller, "The strawhorsemen", n. 188 above, p. 1169.

195 Evans, "History", n. 68 above, p. 344.

196 Schiller, "The strawhorsemen", n. 188 above, p. 1175.

197 Goodman, "Slipping through", n. 80 above, p. 827; Martin, "Historians at the gate", n. 32 above, p. 1548.

198 Ginzburg, *The Judge*, n. 10 above, pp. 17 and n. 109 above, p. 295.

199 Schiller, "The strawhorsemen", n. 188 above, p. 1177.

200 Schneider, "Past imperfect", n. 183 above, p. 1540–1.

201 Ibid. pp. 1543–4.

202 "Preface", in electronic edition of van Pelt's report, n. 160 above.

Codes for experts?

Codes of conduct for expert witnesses appear attractive.[203] New South Wales (NSW) has developed such a code which complements its Uniform Civil Procedure Rules 2005.[204] The key stipulation that experts are not advocates for parties but instead owe their prime duty to the court[205] chimes with Part 35 of the Civil Procedure Rules (CPR) (England and Wales).[206] The NSW code focuses on removing hired guns and thereby perhaps removes potential ethical conundrums for witnesses.[207] The accompanying rules (concerning both expert reports and oral evidence) emphasise judicial control over the giving of expert evidence, restrict expert evidence to that which is reasonably required (thereby avoiding unnecessary obfuscation) and limit its use to as few experts as possible.[208] The preference is clearly that an expert be engaged jointly by the parties,[209] although if impossible, separate experts can (only with their consent) be appointed.[210] Under the NSW rules, if more than one expert is involved in proceedings, the court may order an expert conference (with or without parties' attendance) and the preparation of a joint report specifying matters agreed and not agreed.[211] In such situations, experts must endeavour to reach agreement and must not act on any instruction or request to withhold or avoid agreement with each other.[212] This might eliminate gratuitous over-complication. Evidence of other experts on the same issue will not be permitted without leave of the court[213] and courts may even issue directions providing for the instruction of a court-appointed expert.[214]

Expert witnesses must be provided with the code. Under the NSW rules, unless otherwise ordered,[215] evidence may not be received without acknowledgment from experts of having read and agreed to be bound by the code.[216] This practically amounts to an additional oath and is a clear example of an ethically influenced procedure. In expert reports before English courts, details must include the person's qualifications as an expert on the report's subject, the facts and material instructions on which the report's opinions are based, reasoning for opinions expressed, whether issues fall outside expertise[217] and the literature or other materials utilised. Reports should include brief summaries. If the expert believes the report may be incomplete or inaccurate without some qualification, that qualification must be stated. If the expert considers that his or her opinion is not conclusive, due to insufficient research or data, for example, again this must be stated. More interestingly, if an expert changes his or her opinion on material matters after providing an

203 Sanders, "Expert witness ethics", n. 97 above; D M Paciocco "Unplugging jukebox testimony in an adversarial system: strategies for changing the tune on partial experts" (2009) 34(2) *Queen's LJ* 565.

204 Sched. 7, of the 2005 NSW Uniform Civil Procedure Rules: www.legislation.nsw.gov.au/scanview/inforce/s/1/?SRTITLE=%22Uniform%20Civil%20Procedure%20Rules%202005%22&nohits=y. For a critique of this approach see G Edmond, "After objectivity: expert evidence and procedural reform" (2003) 25 *Sydney LR* 131.

205 Sched. 7 Part 2.

206 In particular, see rule 35.3 "overriding duty to the court".

207 Sanders, "Expert witness ethics", n. 97 above; p. 1568.

208 NSW rule 31.17.

209 See also the CPR 35.4 and 35.7 and Practice Direction (PD) 35, para. 7.

210 See the rule on pre-appointment approach – NSW rule 31.37.

211 NSW rule 31.24.

212 NSW Sched. 7 Parts 4 and 5.

213 NSW rule 31.44.

214 NSW rule 31.46.

215 See NSW rule 31.35 re timing and sequence of evidence.

216 NSW Rule 31.23; cf. SCR Part 39, rule 2.

217 CPR PD 35, paras 2.4 and 3.2.

expert's report, the expert must forthwith provide the engaging party (or their legal representative) with a supplementary report to that effect.[218]

The requirement of an oath varies among European jurisdictions[219] but awareness of the English code is now mandatory for experts.[220] The "Statement of Truth" required of experts under English rules has been recently revised,[221] apparently imposing a greater onus on experts to distinguish between facts and matters within their own knowledge and those which are not. A change is also evident in the terminological shift from an expert undertaking that the facts stated are "confirm[ed]" to be true rather than "believe[d]" hinting at a more serious understanding of the responsibilities of experts to the court.[222]

The historical guild

This article has eschewed normative standards of epistemological method or historical truthfulness in favour of standards which favour the acceptable practices of the professional historical community. Normative arguments allow negationists opportunities to sustain their biased arguments.[223] By contrast, Mr Justice Gray's standard's attractiveness lies in its transparency and its assessment of reliability by a particularly expert interpretive community. Stanley Fish has also christened such communities as guilds and notions of "guild practice" are helpful. This assumes the guild's position is tenable, usually via extensive research: but does this imply a normative dimension to the guild's standards?[224] Although Mr Justice Gray's standard might be reflective of some normative expectations within the historical guild, it is not prescriptive in this regard. It is not focused on history for historians but rather the reliability of historical evidence in the court process. Of course, if Holocaust deniers, using Irving's method, overtook the historical guild, its input might become questionable. However, questioning the guild's authority could arise from positive engagement with particular political, moral or economic perspectives, rather than on the basis of some "higher" authority.[225] Mr Justice Gray's test, drawing as it did on expert evidence concerning historical methodology, endorses processes producing peer-validated results rather than teaching moral philosophy. This embracing of professional practices echoes *Daubert/Kumho Tire* evidential meta-theories. Alongside models for selecting bar-appointed historians (discussed below) this reinforces notions of a guild. Such tests simply concern the professional/public dimension of expert testimony, stepping aside from intra-disciplinary

218 NSW rule 31.27 and Schedule 7 Part 5. See, similarly, CPR PD 35, para. 2.5.

219 R Verkerk, "Comparative aspects of expert evidence in civil litigation" (2009) *International Journal of Evidence and Proof* 167, pp. 172–3.

220 See the Declaration of Awareness as regards the CPR, PDs and the Protocols. An example of the new format for expert reports is available at www.michael-gerard.co.uk/blog/briefings/changes-to-the-civil-procedure-rules-experts/.

221 The previous version read: "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion." The new version reads: "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.": CPR PD 35, para. 3.3.

222 See the recent decision of *Jones* v *Kaney* [2011] UKSC 13 regarding the end of immunity for experts and the Law Commission Report, Law Com. No 325, regarding criminal evidence and the draft Criminal Evidence (Experts) Bill.

223 S Fish, "Holocaust denial and academic freedom" (2001) 35 *Valparaiso University Law Review* 499, p. 513.

224 R Weisberg, "Fish takes bait: Holocaust denial and post-modernist theory" (2002) 14 *Law & Literature* 131, p. 140. See also R Weisberg, *Vichy Law and the Holocaust in France* (New York: New York UP 1998).

225 Fish, "Holocaust denial", n. 223 above, p. 513. N Spearing, "Don't go changing: on Richard Weisberg's critique of Stanley Fish and Holocaust denial" (2008) 20 *Law & Literature* 318, p. 337.

philosophical debates[226] which can continue unimpeded. Guilds are not static monoliths but vibrant communities capable of re-inventing their values and practices which others then privilege and rely upon because they comport with the aims, objectives and attitudes of their projects.[227] Neither the historical guild nor communities which use law are neutral. However, while a guild creates corporate coherence, it limits autonomy – is this problematic?

Guild limitations on expert testimony and academic freedom

Henry Rousso's refusal to testify at Papon's trial sprang from a desire to preserve his freedom of speech. He refuted the notion of a guild because he did not see his approach as the only ethical one and, indeed, was not personally critical of other historians who testified.[228] Rousso's is a more superficial interpretation of the "guild" since it simply relates to decisions regarding testifying – his position does not discount a methodological guild. A more extreme but essentially similar debate arose following *EEOC* v *Sears, Roebuck & Co.*[229]

Sears' expert was Professor Rosalind Rosenberg a women's history expert who testified that women were socialised not to seek risky employment such as existed with promoted posts. After the case, the Coordinating Committee of Women in the Historical Profession (CCWHP) passed a resolution stating that, as feminist scholars, they had responsibilities not to allow invocation of their scholarship contrary to the interests of women struggling against societal inequity.[230] It noted that a number of women's history experts were asked to testify on Sears' behalf, but only one accepted and, consequently, that this respected scholar "buttressed Sears' defense against charges of sex discrimination". Ostensibly, this particular sub-guild was exercising "communal authority" and fettering academic freedom.[231] While a pre-testimony censuring would be much more difficult to defend than a post-testimony procedure, arguably, academic freedom is irrelevant here. Rosenberg's academic publishing was unaffected. Rather, the resolution condemned the *invocation* of historical scholarship in the judicial lair, with all its profound implications.[232] The resolution appears an extreme version of Rousso's position, threatening not the right to publish but to judicially disseminate research. It is not historians who should object to this resolution but lawyers.

Further, from a lawyer's perspective, given that experts use professional membership to boost their "expert-credibility", it seems entirely fair for professional associations to sanction members regarding irresponsible testimony. As was noted in *Austin* v *American Association of Neurological Surgeons*, such testimony harms the administration of civil justice because membership is used "to dazzle judges and juries and deflect the close and skeptical scrutiny that shoddy testimony deserves".[233] At the same time, an absence of guild-sanctioning should not, of itself, imply that testimony is responsible. The rare enforcement of ethical norms against testifying experts by professional associations suggests the invisibility of testimony to the respective guilds.[234] Secondly, such guild-policing often relates to professions, like medicine, with explicit ethical codes. Beyond a baseline, that seems less the case with historians. Finally, and more worryingly, allowing professional review of members'

226 Fish, "Holocaust denial", n. 223 above, p. 524.

227 Spearing, "Don't go changing", n. 225 above, pp. 325–34.

228 Rousso, *The Haunting Past*, n. 74 above, pp. 55, 58, 86.

229 839 F2d 302 (7th Cir 1988).

230 K Jellison, "History in the courtroom: the *Sears* case in perspective" (1987) 9(4) *Public Historian* 9, p. 12.

231 Haskell and Levinson, "Academic freedom", n. 161 above, p. 1630.

232 Farber, "Adjudication of things past", n. 179 above, p. 1015; Kessler-Harris, "Academic freedom", n. 161 above, p. 430, Fink; "New historian", n. 9 above.

233 253 F3d 967 (7th Cir 2001) 972.

234 Sanders, "Expert witness ethics", n. 97 above, p. 1566.

testimony risks the danger that the interests of the profession, not the public, are prioritised unjustifiably, thus restricting potential testimony particularly for plaintiffs.[235]

It is undeniably uncomfortable to witness guilds apparently invoking professional chills against those perceived to have uncovered ideologically inconvenient truths.[236] However, the question of academic freedom only arises if ex-witnesses find it difficult to get published regardless of the methodologically sound, intellectually valuable, quality of their work. This would be unacceptable guild-wrath, potentially questioning the guild's authority. Such fears seemed unfounded in *Irving*. Irving had established historians testify for him without it spelling the end of academic careers, namely Sir John Keegan whose knighthood was for services to military history; and Professor Donald Cameron Watt, Emeritus Professor of International History at the London School of Economics. However, it should be acknowledged that both men had to be subpoenaed to ensure their appearances. Perhaps it might have been more self-imperilling for them to have given their evidence voluntarily.

Bar-appointed historians

Given the aforementioned difficulties, the appeal of a bar-appointed historian is strong as it appears to eliminate preconceptions of bias. In civil cases requiring specialist knowledge, European continental jurisdictions have traditionally used court-appointed experts.[237] The trend is increasing in common law jurisdictions and is permissible in the US under rule 706 of the Federal Rules of Evidence. The NSW rules, previously mentioned, also make provision for court-appointed experts,[238] specifying that courts can issue directions regarding issues to be dealt with in expert reports. Following the European Court of Human Rights, parties must be equally able to participate in a report's production (e.g. by submitting comments/documentation)[239] and not only post-hoc.[240] Bar-appointments could advise on admissibility and may appear instead of, or in addition to, adversarial experts.[241] However, under the NSW rules, if a court-appointed expert has been appointed, parties face difficulties in arguing for the admission of any other expert's evidence.[242] Given the concerns regarding the institutionalisation or incorporation of experts into court processes, a legislative basis ensures that the expert–court relationship is defined in public not private law terms.

The bar-appointment initiative represents a shift away from oppositionalism and attendant presumptions that adversarialism's crucible produces more reliable conclusions.[243] Inevitably, bar-appointment is resisted in gladiatorial US litigation as it wrests control from lawyers and challenges adversarialism,[244] although there are some indicators of change.[245] Historical bar-experts could still be cross-examined[246] but, arguably, the advocates would be

235 P S Appelbaum, "Law and psychiatry: policing expert testimony: the role of professional organizations" (2002) 53 *Psychiatric Services* 389, p. 390.

236 Farber, "Adjudication of things past", n. 179 above, pp. 1015, 1018.

237 Verkerk, "Comparative aspects", n. 219 above.

238 NSW rule 31.46.

239 *Mantovanelli* v *France* App. No 21497/93, paras 30 and 36.

240 *Cottin* v *Belgium* App. No 48386/99, para. 32.

241 Bernstein, "Expert witnesses", n. 169 above, p. 478.

242 NSW rule 31.52, cf. SCR Part 39, rule 6.

243 Martin, "Historians at the gate", n. 32 above, pp. 1544–7.

244 Sanders, "Expert witness ethics", n. 97 above; p. 1581.

245 Verkerk, "Comparative aspects", n. 219, p. 184.

246 NSW rule 31.51; cf. SCR Part 39, rule 4.

closer to historical method with experts "weigh[ing] the evidence and stand[ing] by interpretations even as they acknowledge the imprecision and revisability of their claims".[247] Such a model also reinforces a favouring of professional validation (and some guarantee of faithfulness to methodological standards) over higher normative "truths".

In choosing experts, arbitration models could be followed whereby parties each choose one arbitrator, co-operating to choose a third.[248] Presumably, for most issues, historical expertise is evident from membership of, principally though not exclusively, universities or professional associations such as the Royal Historical Society. Lists of experts could be compiled, although the creation of sacrosanct "thoroughbred stables" should be avoided. Further, the bar-appointment process should be transparent enough to ensure that experts are being engaged for their expertise rather than for the reflected glow of their hierarchically elite institutions,[249] otherwise, a misplaced knowledge-aura might come into play. Finally, it is probably best to avoid resorting to private historical consulting enterprises who commercially depend on serving clients. Similarly, lawyers should not be nominees as they could slip in biased experts who would then appear with a misplaced burnish of neutrality.[250] Some have suggested creating an obligation for lawyers to vet experts, but, leaving aside knowledge deficits, and difficulties regarding the consequences for failing such tests, ethical conundrums may arise as regards ensuring optimum representation for their clients.[251] Rules which sanction lawyers for colluding in perjury will often be irrelevant as biased experts usually simply overstate or obfuscate.

At the moment, historians have discretion in acting as experts. Yet very few are registered with relevant expert witness bodies and perhaps such circumspection is understandable. However, should sufficiently qualified experts enjoy such discretion, especially in the scenario of bar-appointment? Some historians may wish to avoid appearing in conflict with their particular historical school of thought. Indeed, two prominent women's history experts refused to testify in *Sears*.[252] Nevertheless, historians are not the most vulnerable witnesses and, in France, witnesses may not refuse to testify without the permission of the chief justice.[253] Further, as has been noted, historical knowledge can be an indispensable factor in litigation. *Mobile* v *Bolden* concerned racial tensions accompanying the establishment of at-large voting districts in Mobile, Alabama.[254] Few would have been impressed at historians refusing to testify due to the delicacies of historical truth. Such apparent preciousness would effectively debar *any* public discourse for historians.[255] Surely historians can simultaneously defend what is unique and peculiar to history while accepting wider societal responsibilities as historians.[256] That is surely true "total history".[257] Further, despite pervasive nineteenth-century myths of historical disinterestedness, professional historians, as public servants and citizens "never escaped the burning questions of their age,

247 Martin, "Historians at the gate", n. 32 above, p. 1547, noting the favour for such an approach among historians, N E H Hull and P C Hoffer, "Historians and the impeachment imbroglio: in search of a serviceable history" (2000) 31 *Rutgers LJ* 473.

248 Martin, "Historians at the gate", n. 32 above, p. 1548.

249 Rousso, *The Haunting Past*, n. 74 above, pp. 46, 65.

250 Goodman, "Slipping through", n. 80 above, p. 865.

251 Sanders, "Expert witness ethics", n. 97 above, pp. 1562–4.

252 Jellison, "History in the courtroom", n. 230 above, p. 12.

253 Rousso, *The Haunting Past*, n. 74 above, p. 88.

254 446 US 55 (1980).

255 Haskell and S Levinson, "Academic freedom", n. 161 above, pp. 1657–8.

256 Mandler, "The responsibility", n. 116 above, p. 22.

257 F Braudel, *A History of Civilisations* (London: Penguin 1993).

either as participants or analysts".[258] As one historical witness noted, perhaps the legal system can force historians "to crystallize our sense of purpose and the humanistic traditions that lend legitimacy to our field".[259] Compelling expert witnesses depersonalises witnessing, perhaps removing post-litigation difficulties for those testifying.

6 Conclusion

Irving clearly contributed to the Holocaust's historical identity – how it is written about, described and represented as a historical event and Israelis in particular awaited the outcome with interest.[260] In truth, negationists are despised due to their perceived miring in prejudice, the details of their arguments generally defy the liberal values of post-Holocaust democracies.[261] Indeed, British National Party personnel attended the *Irving* proceedings and the conclusion of the case coincided with the contemporaneous election victories of extreme right parties. It was in this context that Lipstadt assuredly maintained that the verdict was a "victory for all those who speak out against hate and prejudice",[262] and that Mr Justice Gray denounced Irving as a lying anti-Semite and racist.

Anthony Julius summed up *Irving*'s importance thus: "It would have been important had we lost."[263] Two possible meanings might be drawn from Julius' statement. An Irving triumph might have installed him and his methodology in the credible historical academy.[264] Alternatively, debates as to the Holocaust's existence might have been revived. This apparently challenges notions that the case used the historiographical approach rather than the historical one. It is important to avoid a "false complacency"[265] about *Irving*'s lesson and to be clear about its limits. It did not re-stage the reality of the Holocaust and the door remains open to the methodologically sound Holocaust deniers, if they can exist. This may not please many of *Irving*'s key actors. However, removing pre-ordained normative imbalances (as regards "factuality") deprives negationists of martyrdom. Instead, their indisputable shortcomings and inadequacies are examined and laid bare.

Irving condemned the judgment as "firstly, indescribable, and secondly, perverse".[266] He denied being anti-Semitic, maintaining that he had been victimised with the backing of Jewish leaders.[267] While security staff hustled Irving out of court via a back exit, Lipstadt and her solicitors, along with Penguin's managing director, emerged through the front gates to greet the assembled press. Should successful defendants in cases debating evidence of atrocity offer triumphal sound-bites in bursts of camera flashes? Or, should they appear noble, unassuming, unaffected by victory's thrill? The latter sentiment derives much from the paradigm of liberation newsreels where silent images offer reproach. However, this would be to analogise inappropriately the court victory with the Holocaust itself and

258 Fink, "New historian", n. 9 above, p. 136.

259 Rosner, "Trials and tribulations", n. 83 above, p. 158.

260 Reeves, "State built on suffering", n. 136 above.

261 Spearing, "Don't go changing", n. 225 above, p. 338.

262 A Buncombe, "A victory for all who speak out against prejudice", *The Independent*, 12 April 2000.

263 Julius, "London and libel", n. 5 above, p. 9. See also J Libson and A Julius, "Losing was unthinkable. the rest is history", *The Independent*, 18 April 2000.

264 Burrell, "Rascist", n. 137 above.

265 Spearing, "Don't go changing", n. 225 above, p. 324.

266 S Busfield, "Unrepentant Irving blasts 'perverse judgment'", *The Guardian*, 11 April 2000.

267 Ibid.

Holocaust cases should not be theatricalised re-enactments of the past.[268] *Irving* will not paralyse historical inquiry into this era,[269] but it did highlight the difficulties in providing a legal context for the interpretation of historical evidence. This case was not really about tragedy but about evidence of misrepresentation – there is little of the heroic and nothing of the tragic about that. The judgment cannot resurrect the dead, but it does reinforce law's role in ensuring that the historical evidence of the lives and deaths of millions will not be misrepresented or distorted in court.

268 Rousso, *The Haunting Past*, n. 74 above, pp. 50, 56.

269 C Browning, "Historians and Holocaust denial in the courtroom" in J K Roth and E Maxwell (eds), *Remembering for the Future* vol. 1 (New York: Palgrave 2001), pp. 773–8. For more recent perspectives, see R Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: CUP 2011).

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Nesting the taxonomy in the remedial: a re-examination of promissory terms

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Introduction

The area of contract law doctrine identifiable by the terms "condition", "warranty"[1] and "innominate term" – promissory terms – has retained an unsettled feel. This is partly a function of the relative newness of some of its caselaw. The Court of Appeal's decision in *Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd*[2] dates from 1961 yet, as observed in 1995, compared to other parts of contract law, such as the formation of contract, this was then "almost the day before yesterday".[3] Added to the passage of this relatively short period of time is the fact that in the common law jurisdictions of Singapore and Australia, *Hong Kong Fir* was only recently considered at appellate level.[4] Furthermore, it is apparent that scholars and judges have held different views on a variety of questions pertaining to this area of the law. These include what was decided in *Hong Kong Fir*;[5] whether this case introduced a new type of term or merely brought to our attention a pre-existing principle;[6] if the latter, what the rule is; and how many types of promissory term exist today to name

* The author thanks SOAS students Edmond Fung and Benjamin Ng for their research assistance.

1 In this article "condition" and "warranty" are used in their technical sense as promissory terms and exclude the meaning of "warranty" in insurance contracts.

2 [1962] 2 QB 26.

3 J Bird, R Bradgate and C Villiers (eds), *Termination of Contracts* (London: Wiley Chancery 1995), p. 8.

4 See nn. 8 and 9 below.

5 See, e.g. M Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* 15th edn (Oxford: OUP 2006). For a discussion of other uncertainties over *Hong Kong Fir* see J W Carter, G J Tolhurst and E Peden, "Developing the intermediate term concept" (2006) 22 *J Cont L* 268–9, which has a section titled "What did *Hong Kong Fir* decide?"

6 One not uncommon rendering of the law is that until the introduction of the intermediate term in *Hong Kong Fir*, there were only two types of promissory term. Lord Diplock in *Hong Kong Fir* itself presented it as a rediscovery of principles that had already been applied in earlier cases and Lord Denning in *Cehave NV* v *Bremer Handelsgesellschaft mbH*, *The Hansa Nord* [1976] QB 44, at 60, referred forcefully to the many cases on the intermediate term that stretched continuously from *Boone* v *Eyre* (Note) 1 Hy BL 273 to *Mersey Steel and Iron Co. Ltd* v *Naylor, Benzon and Co.* (1884) 9 App Cas 434. See the very compelling arguments on the historical development of the law in D Nolan, "*Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd*, *The Hong Kong Fir* (1961)" in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Oxford: Hart Publishing 2008), pp. 269–98. The discussion there shows that the concern for the consequences of the breach in determining the right of the injured party to terminate the contract in *Hong Kong Fir* is a continuation of a line of cases stretching back to the cases allowing termination based on the concept of the condition precedent.

but a few. There have also been normative arguments, particularly over contending values or ideals. Indeed, one common law jurisdiction considered rolling back the developments of the preceding few decades by collapsing the condition, warranty and innominate term into a single term.[7]

Many of the arguments in this area of the law have involved dichotomies of oppositional pairings. Each side of the pairing is presented as a threat to the other: increase in support for one necessarily diminishing support for the other. Thus, we have often heard arguments between "construction" and "breach"; between "nature of the term" and "seriousness of the consequences that follow the breach"; between *ab initio* and "wait-and-see" approaches; and between "predictability" and "fairness". The recent decisions from Singapore and Australia – *RDC Concrete Pte Ltd* v *Sato Kogyo (S) Pte Ltd*[8] and *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd*[9] respectively – continue this trend but also provide clarity on the position of the ostensibly opposing values.[10] Most of the oppositional pairings mentioned above can be accommodated in the dichotomy of "certainty" and "fairness". This is indeed the pairing that has dominated discussion since *Hong Kong Fir* and, as we shall see, is part of the Singapore Court of Appeal's "integrated" scheme in *RDC*. In this article, I argue that the narrow lens through which the dichotomy of certainty and fairness has been discussed in this context has obscured from view two different perspectives on the question of when, in the face of a breach of contract, the injured party is allowed to terminate the contract. The perspective, which I call the "taxonomic" perspective, emphasises a rational and orderly taxonomy of promissory terms and aspires to a schema in which each category of term is invested with a unique characteristic or consequences unique to that category sufficient for each category to be differentiated from the other two. The "remedial" perspective, by contrast, treats any taxonomy of terms as subsidiary, being chiefly interested in the question of remedies for breach of contract and in particular the question of whether the party not in breach may terminate for that breach.[11] The confrontation between these two approaches provides a better vantage point from which to understand the accommodation of the competing values of certainty and fairness, to appreciate the solution reached in *RDC* and to explore refinements to it.

The filing cabinet and the China Sea

As already mentioned, debates in the law concerning promissory terms have been conducted on the basis of a binary opposition between certainty, whose importance in commercial cases is often stressed, and fairness. Fairness, in this context, has usually meant remedial fairness, that is commensurability between the breach and the remedy. The capacity to determine the remedy so that it is proportionate to the breach explains why it has been referred to as remedial flexibility. Fairness is also often judged to include some aspects of the idea of good faith so that the injured party, for example, should not be allowed to take advantage of a breach causing little prejudice (sometimes referred to as a "technical breach") in order to terminate the contract. Certainty, on the other hand, privileges any approach or rule that increases predictability in the rights of the injured party after a breach

7 The Law Reform Commission of New South Wales suggested this for the law relating to the sale of goods in a working paper: see Working Paper on the Sale of Goods (1975), discussed in J W Carter and C Hodgekiss, "Conditions and warranties: forebears and descendants" (1977) 8 *Sydney LR* 31–67, pp. 63ff.

8 [2007] 4 SLR 413. Also reported in [2007] SGCA 39; 115 ConLR 154.

9 (2007) 241 ALR 88; [2007] HCA 61; (2008) 82 ALJR 345.

10 For an article discussing both cases, see J W Carter, "Intermediate terms arrive in Australia and Singapore" (2008) 24 *J Cont L* 226–50.

11 Cf. Nolan, "*Hong Kong Fir*", n. 6 above, which uses a more historically rooted analysis to arrive at a similar view of the law being a contest between two approaches.

has occurred. One typical version of the argument puts on one side of this opposition the approach that privileges the *nature* of the term. In its extreme form, this approach demands an exhaustive division of promissory terms into the categories of either condition or warranty and is thus referred to here as the twofold approach.[12] Although there will be situations in which it is not clear whether a term is a condition or a warranty, this does not in any way diminish the fact that a term is either a condition or a warranty. The central value attached to the twofold approach – whether it was ever an accurate description of the law – and the root of its appeal in the eyes of its proponents, is that of certainty. The injured party may not in the event choose to terminate the contract, yet the twofold approach is said to serve the need for certainty better because whether the injured party has the right to terminate upon breach can be ascertained from the outset of the contract by looking at the nature of the term, including any nature ordained by statute or precedent, and in the absence of that, by way of construction of the terms of the contract. Thus, writing in 1976 after *Cehave NV* v *Bremer Handelsgesellschaft mbH*, *The Hansa Nord*,[13] a case in which the Court of Appeal relied on its own decision in *Hong Kong Fir*, Tony Weir observed:

> Under the old dispensation, when the right to reject depended on the nature of the term in the contract which was broken, the innocent party simply had to go to the filing-cabinet, consult the contractual document and then decide whether the term broken was a very serious one or not; this final step admittedly called for judgment, and there could often be two views, but at any rate the requisite data were immediately and presently available. Now that the right to resile turns on the gravity of the consequences of the breach, the necessary data are not words but events, they may be in the China Sea rather than in the head office where decisions are taken, and one will probably have to wait for them, since consequences tend to occur, after their cases; nor has the difficulty of assessment been alleviated, rather the reverse. There has therefore been an undeniable loss of speed and sureness of decision-making, and the Court of Appeal is responsible for it. This is a matter of regret . . .[14]

The breach of a term and its consequences may, under "the old dispensation", be a part of the consideration of the "nature of the term" but only as an abstraction; the courts may consider the consequences likely to occur if the term in question were to be breached, but it is not the actual breach which has occurred – not the events "in the China Sea" that are taken into account.

On the opposite side of this pairing is the approach that takes into account the consequences that have in fact flowed from the breach. This is the approach in *Hong Kong Fir* where, it will be remembered, there had been a breach of the term that the vessel should be "seaworthy". In disposing of the appeal, the Court of Appeal stated that with a term such as this, regard must be had to the consequences of the breach. The seaworthiness term

12 As we shall see, this approach is not the same as the more limited "condition–warranty" approach as it is identified by the Singapore Court of Appeal in *RDC*.

13 [1976] QB 44.

14 T Weir, "The buyers' right to reject defective goods" (1976) 35 *CLJ* 33–8. In *The Hansa Nord*, the Court of Appeal had overturned the finding that the delivered goods were unmerchantable but found that there was a breach of the express term that the goods be "shipped in good condition". As an express term, the term was not within the scope of the Sale of Goods Act. This enabled the Court of Appeal to find that the term was an innominate term and, thus, whether the injured party could terminate the contract depended on the consequences of the breach. In the passage quoted in the text, Weir is primarily criticising the Court of Appeal for extending *Hong Kong Fir* to contracts for the sale of goods. In his opinion, in sale of goods contracts, the common law principles on the innominate term should have no application since the Act specifically deals with the promissory terms in one of two categories – conditions and warranties. Weir acknowledged that "the doctrine of the *Hong Kong Fir* case . . . was welcomed widely and enthusiastically".

could be broken in a number of ways and with consequences that could be trivial or serious. Whether the charterer was permitted to terminate the contract would therefore depend on the seriousness of the consequences of the particular breach that had occurred.[15]

Leaving aside the question of whether this was an introduction or a re-introduction of legal principle, relevant to the question of certainty and fairness, we should note that the Court of Appeal is accused of introducing uncertainty with its decision in *Hong Kong Fir* because, instead of permitting the parties to know from the outset that in the event of a breach of a term the injured party may terminate (in the case of a condition) or that the injured party may not terminate (in the case of a warranty) following a breach, both parties must wait and see as the consequences unfold. In practice, there will be difficulty in assessing whether the events are sufficiently serious to entitle the injured party to terminate the contract and the attendant risk of wrongful termination. For the loss of certainty, however, fairness is gained because the right to terminate only arises when the events are sufficient to warrant termination. In this context, sufficiency may also act as a proxy for reasonableness: when termination is warranted because the consequences are sufficiently severe, this will usually coincide with it being reasonable for the injured party to terminate the contract. Reasonableness, in turn, can be seen as an aspect of fairness.[16] Whatever the disagreements are as to the precise formula and required standard of severity or reasonableness, it is clear that the approach in *Hong Kong Fir* requires an assessment, not of the importance of the term that has been breached, but of the consequences of the breach – sometimes referred to as the "event" or "events" which have taken place as a result of the breach.

These models, in which the twofold approach and *Hong Kong Fir* are associated with certainty and fairness respectively, have been presented here with their features exaggerated so as to emphasise the difference between them. As straw men, the impression they give of mutually exclusive association with either certainty or fairness is easily assailed. The following statements provide a flavour of the deconstructive arguments that can be made in this context:

1) the twofold approach offers less certainty than appears at first glance because whether a term is a condition or a warranty will often be unclear;
2) certainty and fairness are not in fact opposites – certainty can be viewed as a species of fairness since being able to predict the possible outcome enables the parties to make arrangements for the various risks entailed by their entry into the contract;
3) in the twofold approach, a court is meant to construe the term without taking into account the "events" that have by this time taken place including, as may be the case, the actual motive of the party that has terminated the contract in response to the breach by the other side. A judge, when shown the contract which has been retrieved from the filing cabinet may well find it impossible to prevent any knowledge already gained of the events in the China Sea from influencing the conclusion as to whether the injured party should be allowed to terminate.

These sorts of arguments indicate that certainty and fairness do not constitute a logical contradiction; while remaining distinct, traces of one are to be found in the other. For present purposes, these comments are sufficient to show that *Hong Kong Fir*, while it may

15 *Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

16 R Brownsword, "Bad faith, good reasons and termination of contracts", in Bird et al., *Termination of Contracts*, n. 3 above, pp. 227–52. This is a revised version of "Retrieving reasons, retrieving rationality? A new look at the right to withdraw for breach of contract" (1992) 5 *J Cont L* 83 107 by the same author.

have added to the opportunities for uncertainty, did not introduce uncertainty. The choice is therefore less stark than portrayed in the models set out earlier or as imagined, for instance, by Weir. In spite of these observations, it remains possible to say that the twofold approach contains in it a stronger allegiance to certainty than does the approach taken in *Hong Kong Fir*, in which remedial flexibility is the privileged objective.

As is implied in Weir's dislike of the *Hong Kong Fir* decision, extreme arguments in favour of certainty would support a division of all promissory terms into conditions and warranties. This is thought to be because it is only in this way that the answer to the question of whether, in the event of a breach, the party not in breach may terminate can be answered at the outset of the contract. On the other hand, extreme versions of the argument favouring remedial fairness would prefer extensive or even exclusive use of the *Hong Kong Fir* approach so that the remedy and the breach or its consequences are commensurate.[17] As the two approaches are imagined to be locked in a zero-sum game, judges and others have either counselled for or against the liberal application of *Hong Kong Fir*.

In order to appreciate the improved clarity in the law offered by the Singapore Court of Appeal, we turn next to a few observations regarding the law on promissory terms.

Hong Kong Fir and the law on promissory terms

In the foregoing section, *Hong Kong Fir* has for the most part been treated as a decision which provided an approach or a principle on termination which is dependent upon the consequences of the breach. Albeit overlapping with this, *Hong Kong Fir* has also been treated as authority for a type of promissory term possessing a "complex nature" and thus an "intermediate" term between the two other types.[18] At least from the time of the Sale of Goods Act 1893, in the general law of contract, the language of the Act has fostered a view of conditions as important terms in a contract and warranties as terms which are less important or "collateral to the main purpose of the contract".[19] However, at least since *Hong Kong Fir*, no perfectly ordered hierarchy of terms has existed. For instance, it has been obvious for some time that the typology of terms bears an imperfect relationship to the remedy that is available when the term is breached or to the damage that ensues from a breach. Of the latter, a perfect hierarchy would require that the following set of propositions be true:

1) *all* breaches of a condition cause serious prejudice;
2) *some* breaches of an intermediate term cause serious prejudice; and
3) *no* breaches of warranty cause serious prejudice.[20]

17 For an example of this tendency, see the decision of Slynn J in *Tradax International SA* v *Goldschmidt* [1977] 2 Lloyd's Rep 604–12, who was of the view that there should be a leaning in favour of classifying a term as an intermediate term.

18 There is sufficient support for the view that current law acknowledges that "condition", "warranty" and "innominate term" are the three terms of art denoting types of promissory term: see J Beatson, *Anson's Law of Contract* 12th edn (Oxford: OUP 2002), p. 135, where he states: "Another approach, often seen as more modern but in fact with older roots, rejects the proposition that every term of the contract can be classified as either a condition or a warranty. On this approach there is a third category of intermediate (or 'innominate') terms."; and G Treitel, *Some Landmarks of Twentieth Century Contract Law* (Oxford: Clarendon Press 2002), at p. 113, where Treitel speaks of a "third type of contract term" in *Hong Kong Fir* be that one that was therein "invented" or "rediscovered".

19 S. 62 of the Sale of Goods Act 1893, a provision which is retained in the 1979 Act.

20 Treitel, *Some Landmarks*, n. 18 above, p. 117, points out the impossibility of such a representation of the law. See also his earlier discussion at p. 110 which is based on passages from the judgment of Lord Diplock in *Hong Kong Fir*.

Of the former, the following set of propositions would need to be true:

1) termination is available for a breach of a condition;
2) termination may be available for a breach of an intermediate term; and
3) termination is not available for a breach of a warranty.

Neither set of propositions holds water. In the first set, only proposition 2) is unfalsifiable and then only because it is a statement which makes no commitments. The other two are easily defeated. As for the second set, it is clear that if the consequences of a breach of a warranty are sufficiently serious, the injured party will be allowed to terminate the contract.[21] The first of the propositions in this second set is true in theory but can be side-stepped by construing the term so that it is not, after all, a condition.[22] While construction is used in the case of what is apparently a condition, where a term which is a warranty is concerned, the technique used to allow termination is to establish that while there may be a prima facie rule that the remedy for a breach of warranty is an award of damages, that rule can be displaced by the application of an external principle (external, that is, to the law on promissory terms) in the form of the doctrine of substantial failure of performance. More will be said of this doctrine below. Meanwhile, these observations suggest that, in practice, in no type of term is there a conclusive relationship between the type of term and the availability of termination. At present, it is sufficient to add that the modern principle that allows termination for a sufficiently serious breach of warranty has been thought to derive from *Hong Kong Fir* though its resemblance to the doctrine of substantial failure of performance is great.[23] Related to this is the observation that where the remedial prospects of the injured party are concerned, the warranty appears so similar to the innominate term that the question arises whether there is any merit in retaining the distinction between the warranty and the innominate term. This is another question to which we shall return.

A further point to bear in mind is that the law recognises the intention of the parties where it is made sufficiently clear. Parties can, by express stipulation, provide for a right to terminate for breach of a term even if no serious prejudice is caused to the injured party, including doing so by sufficiently explicit use of the designation "condition", so long as it is used in its technical sense. It should also be open to parties to provide expressly that there is to be no termination in the case of a warranty even if there is serious prejudice.[24] Furthermore, some terms, by the operation of precedent, have or will become recognised by the courts as being of commercial importance. This is what was meant by Lord Roskill in *Bunge Corp.* v *Tradax Export SA* when he remarked that there were:

> [M]any cases . . . where terms the breaches of which do not deprive the innocent party of substantially the whole benefit which he intended to receive from the

21 See the judgment of Ormrod LJ in *The Hansa Nord* where the point is grounded on an application of *Hong Kong Fir*. *RDC Concrete Pte Ltd* v *Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413; [2007] SGCA 39 and *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* (2007) 241 ALR 88; [2007] HCA 61 adopt much the same position.

22 See n. 14 above on *The Hansa Nord*. See also *Schuler (LG) AG* v *Wickman Machine Tool Sales Ltd* (1974) AC 235 where the majority of the Court of Appeal took the view that the parties could not have intended to use the word "condition" in its technical sense.

23 See n. 21 above.

24 In the context of the law in Singapore, this was urged in Gao Yihan, "Towards a consistent approach in breach and termination of contract at common Law: *RDC Concrete Pte Ltd* v *Sato Kogyo (S) Pte Ltd*" (2008) 24 *Journal of Contract Law* 251–67 and given clear support as a principle by the Singapore Court of Appeal: see Phang JA, delivering the judgment of the court in *Sports Connection Pte Ltd* v *Deuter Sports GmbH* [2009] 3 SLR(R) 883; [2009] SGCA 22, paras 28ff.

contract were nonetheless held to be conditions any breach of which entitled the innocent party to rescind.[25]

To summarise the foregoing discussion, the condition, warranty and intermediate term are categories of promissory term which are distinct, yet each term cannot easily be distinguished on the basis of either the remedy that is offered upon breach or the seriousness of the consequences which would flow from a breach. The principles regarding breach of promissory terms and termination may, however, be reduced to a set of practical rules from which we can assess the approach advocated in *RDC*. In the absence of the parties' clear intention:

1) when a condition has been breached, the injured party has the option to terminate the contract;
2) when an intermediate term has been breached, the injured party has the option to terminate if the consequences of the breach are sufficiently serious; and
3) when it is a warranty that has been breached, likewise there is an option to terminate if the consequences of the breach are sufficiently serious.

Decisions from Singapore and Australia

Significant in *RDC Concrete Pte Ltd* v *Sato Kogyo (S) Pte Ltd*[26] is the decision tree articulated by the Singapore Court of Appeal. According to Phang JA, delivering the judgment of the court, when faced with a breach, once it is clear that the parties have not made their intentions on the matter clear, the question as to whether the injured party has the right to terminate the contract should be dealt with in accordance with the following steps.[27]

1) The first question to be asked is whether the term that was breached is a condition. If it is, the injured party may terminate the contract.
2) If the term is not a condition, the court should look at the consequences of the breach. Even if the term is a warranty, the presence of serious consequences would entitle the injured party to terminate.

The Singapore Court of Appeal explained that these steps are driven by two approaches employed consecutively. The first, which the court referred to as the "condition-warranty" approach, involves looking at the nature of the term, rather than at the consequences of the breach. This condition–warranty approach should not be confused with the twofold approach discussed above. The intent of the Singapore Court of Appeal is that the condition–warranty approach is only one part of its integrated approach; the twofold approach, in contrast, was intended to represent the entirety of the principles which link promissory terms and termination. The condition–warranty approach, according to

25 [1981] 1 WLR 711 at 724. Arguably, s. 15A of the Sale of Goods Act, introduced by s. 4(1) of the Sale and Supply of Goods Act 1994, is an acknowledgment that breaches of conditions can result in trivial consequences (for which termination would not be a reasonable remedy, consumers excepted). The section refers to a breach by the seller that is "so slight that it would be unreasonable for the buyer to reject the goods" where the buyer is a non-consumer.

26 See n. 8 above.

27 *RDC*, n. 8 above, paras 89ff. Only the part of the decision tree relevant to the present discussion is mentioned here. The decision tree of the court (also discussed in a lecture delivered by the same Singapore Judge of Appeal, A Phang, "Doctrine and fairness in the law of contract" (2009) 29 *Legal Studies* 534–75, pp. 546ff) is provided in the form of a helpful table by the court. See also *Man Financial (S) Pte Ltd* (formerly known as *ED & F Man International (S) Pte Ltd*) v *Wong Bark Chuan David* [2008] 1 SLR 663 where the Singapore Court of Appeal repeated the scheme of the law in very similar terms. See also the addition made in *Sports Connection* mentioned in n. 24 above.

Phang JA, is conclusive only if, upon applying it, the term is found to be a condition. When the term is found to be a warranty, the second approach – the *Hong Kong Fir* approach – becomes relevant. We should note that in *RDC*, although the phrase "innominate term" is used, *Hong Kong Fir* is almost exclusively treated as an approach or principle which allows for termination for a sufficiently serious breach of a term which is not a condition. As such, it poses a large threat to the condition–warranty approach and, according to the Singapore Court of Appeal, this threat is resolved by giving each a sequential role.[28]

Although the High Court of Australia was not referred to *RDC*, the approach of that court bears some similarities to the approach presented in *RDC*. One of the key points made by the majority of the court in its joint reasons (Gleeson CJ, Gummow, Heydon and Crennan JJ), and for agreeing with the trial judge, was that whether the injured party had a right to terminate after a breach was first a question of construction of the contract. This would include both where the parties have provided expressly for termination following breach and also where the parties intended that the term that has been breached is a condition. While accepting a tripartite classification of promissory terms in which the intermediate term is placed amongst terms which were non-essential, the main distinction that was considered was between conditions and non-conditions (also referred to as "essential" and "non-essential" terms). According to the joint reasons, if a term is an essential term, the injured party has a right to terminate the contract. If the term is a non-essential term, termination will be allowed if there is a sufficiently serious breach. Only Kirby J disagreed with the reception of the intermediate term into the common law of Australia.[29] Thus, in line with the Singapore Court of Appeal, the majority in the High Court of Australia accepted the applicability of *Hong Kong Fir* as a principle concerning termination. Furthermore, similar to *RDC*, the joint reasons do not offer a clear distinction between the warranty and the intermediate term.

From a pragmatic, decision-making perspective, the decision of the Singapore Court of Appeal in *RDC* is welcomed. At least four observations can be made about the decision tree proffered in *RDC*. First, it appears to privilege certainty in that the recommended decision procedure is to be applied only if the parties have not expressed any intention as to whether a breach of a term is to lead to termination.[30] The importance of certainty is also shown through the recognition that once a term is a condition, the right to terminate the contract following a breach exists without any enquiry into the seriousness of the breach. It is only when this possibility is exhausted that fairness in the sense of remedial flexibility is allowed to operate. The Singapore Court of Appeal was keen to point out that the *Hong Kong Fir* approach was to be engaged only at this second stage of the enquiry. Second, in the *RDC* approach, the main concern is to mark out the condition clearly; it supports the suspicion that, parties' intention aside, the line dividing a warranty from an intermediate term is faint. Third, we should note that the decision procedure gives the impression that its application can produce an answer to the termination question when it is more accurate to observe that there remains room for judicial manoeuvre. For example, the standard required to determine whether a breach is considered to be sufficiently serious is subject to debate and variation, and even if governed by an agreed formula or test, will remain a question of fact to be decided in each case. The balance between certainty and fairness can still be adjusted

28 This position appears more clearly in *Sports Connection Pte Ltd* v *Deuter Sports GmbH*, see n. 24 above, paras 31ff.

29 Kirby J dissented on this point (but not on the conclusion that the appeal should be allowed), favouring the greater simplicity of a law whose only division is that between "conditions" and "other terms" (para. 108); once it is established that it is a non-essential term that has been breached, the consequences of the breach should be looked at without any further classification of the term.

30 At para. 106, for example.

in favour of fairness by inventive judges if they are determined to reach the *Hong Kong Fir* stage of the *RDC* decision tree. This will affect the balance between certainty and fairness because effectively, the second question may be reached more often than not and, if this is the case, more cases will be subject to the *Hong Kong Fir* approach than to the condition–warranty approach. Fourth, the Singapore Court of Appeal, in reviewing this area of the law, provided no explanation of the basis for allowing termination for a sufficiently serious breach of a warranty.[31]

Taxonomic and remedial perspectives

The discussions examined above – the certainty versus fairness debate and the two stages of the integrated *RDC* approach – are premised upon the assumption of conflicting approaches in competition over the same area of the law. This is clearest in the passage from Weir cited above, but it is also present in the *RDC* approach and the concern expressed by the same court in *Sports Connection* that neither the *Hong Kong Fir* nor the condition–warranty approach should be given free reign as each is capable of "effacing" the other. Each needs to be given "legal space".[32] The principles that have emerged regarding promissory terms, however, are more accurately seen as being located alongside other principles and doctrines. It is the potential conflict and resulting accommodation between promissory terms and other principles of the law over the consequences of a breach that is critical for an understanding of this area of the law.

When taking this broader view, the two perspectives mentioned earlier – taxonomic and remedial – offer a useful handle. Each has its own starting point. From a taxonomic perspective, the main concern is with the types of promissory term – the definition of each type of term and its conceptual identity so that every promissory term can be identified as a condition, warranty or innominate term. By whatever means the words "condition" and "warranty" became terms of art denoting types of promissory term, those with taxonomic tendencies would have been greatly encouraged by the Sale of Goods Act to see conditions and warranties presented therein as separate types of contractual term. Not only did the provisions of this Act distinguish between the two types of term by reference to their relative importance to the contract, they also differentiated the two types of term by providing the buyer of goods with a different permitted response when a breach occurs. So the buyer of goods is allowed to reject the goods if the breach is of a condition but not if the term is merely a warranty.[33] When the Court of Appeal delivered its judgment in *Hong Kong Fir*, taxonomists were presented with a third type of term, which was very different from both the condition and the warranty. This term could not be a condition or a warranty in accordance with the important/collateral distinction because the term "seaworthiness" is in fact an umbrella term sheltering a collection of obligations of varying importance, any

31 Andrew Phang has since explained that termination for such a breach is available as one example of how contract law, through its doctrines, achieves outcomes which are substantively fair. *Hong Kong Fir* is a case which identifies the "tipping point" after which substantive fairness is pursued by the law more directly, in that, even where a term is a warranty, severe consequences would lead to termination being allowed because it is here that we see substantive fairness trumping the sanctity of a contract: Phang, "Doctrine and fairness", n. 27 above.

32 *Sports Connection Pte Ltd* v *Deuter Sports GmbH*, see n. 24 above, para. 36. See also paras 34 and 35 for the treatment of *Hong Kong Fir* as an approach.

33 Note how Carter has shown that, although the Sale of Goods Act was for a long time thought to have codified existing law, this part of the Act was based on the drafter's misunderstanding of the pre-existing law. See Carter and Hodgekiss, "Conditions and warranties", n. 7 above.

one of which if not performed or fulfilled is a breach of that term.[34] As Lord Diplock explained in a well-known passage:

> [T]he shipowners' undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to "unseaworthiness," become one of the most complex contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.[35]

One main difference lay in the prominence given, in a breach of this third type of term, to the consequences of the breach. As can be seen from the criticisms made by Weir mentioned above, this third type of term is, on the taxonomic view, an incursion into the territory occupied by the condition and the warranty in that every term that is an innominate term cannot, thereby, be a condition or a warranty. As we saw above, because the intermediate term looks at the seriousness of the breach rather than the term's importance to the main purpose of the contract, it was seen as introducing fairness at the expense of certainty. Importantly, however, from a taxonomic perspective, *Hong Kong Fir* itself provided a definition of the term which was based on its complex nature – this definition gave it conceptual distinctiveness. Taxonomists would naturally have looked to the following passage in Lord Diplock's judgment as being amongst the most important aspects of the *Hong Kong Fir* decision:

> There are, however, many contractual undertakings of a more complex character which cannot be categorized as being "conditions" or "warranties" . . . Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking . . . depend on the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty".[36]

The implication that it can be predicted that all breaches of a condition will lead to serious consequences and that all warranties will not was made express when Lord Diplock said:

> No doubt there are many simple contractual undertakings . . . of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract . . . So too there may be other simple contractual undertakings of which it can be predicated that no breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract.[37]

The flaw in these remarks concerning all breaches of a condition leading to serious consequences and the corollary in the case of the warranty has already been discussed. Here, we note the strong indication that the intermediate term was meant as a type of term

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34 As Michael Furmston has observed, the seaworthiness clause is "so heterogenous a clause" that "it might perhaps have been helpful to regard the undertaking of 'seaworthiness', not as a single term, but as a bundle of obligations of varying importance", *Cheshire, Fifoot and Furmston*, n. 5 above, p. 191.

35 *Hong Kong Fir*, 71.

36 Ibid. 70.

37 Ibid. 69.

that is neither a condition nor a warranty. Furthermore, prior to these remarks, Lord Diplock had already addressed directly the argument of counsel for the charterer that the two types of term mentioned in the Sale of Goods Act represented an exhaustive list of the types of promissory term by saying that this was "by no means true of contractual undertakings in general at common law".[38]

For taxonomists, the passages of Lord Diplock's judgment mentioned above provide encouragement because they point towards a tripartite taxonomy of promissory terms which, while not completely conceptually free from difficulties, is of some consequence when it comes to the question of termination for breach.[39] The fact that, for the purposes of disposing of the appeal, there was no need to explore the question of into which category of term seaworthiness fell[40] adds cogency to the argument that Lord Diplock was thinking of a classification of terms, and a tripartite one at that. For remedialists, on the other hand, the basic question is whether the injured party may terminate the contract upon breach. Lord Upjohn's judgment in *Hong Kong Fir* is illustrative of the remedialist approach; it is framed largely in terms of whether damages would be an adequate remedy for the breach that had occurred. It is in this way that the following passage from Lord Upjohn's statement should be understood:

> Where . . . on the true construction of the contract, the parties have not made a particular stipulation a condition, it would be unsound and misleading to conclude that being a warranty, damages is a sufficient remedy.[41]

Where the question of whether damages are an adequate remedy is the starting point, the term's classification is only of partial importance and other relevant legal principles will need to be taken into account. Those are, first, that the primary remedy for a breach of contract is the award of damages. This statement would be trite but for the fact that it is often absent from the analysis of cases dealing with promissory terms. Subject to some established exceptions, a fundamental principle of the law of contract assumes that an award of damages will be an adequate remedy. In this light, termination for breach of a contract is allowed only as an exception to this rule. The second relevant principle is the doctrine of substantial failure of performance, under which the injured party is permitted to terminate the contract. As its name suggests, this doctrine allows for termination for breach if the breach amounts to a substantial failure of performance. What amounts to substantial failure has not proven easy to define, but phrases approximating "a breach which substantially deprives a party of the benefit of the contract" or which "goes to the root of the contract" have been used. In some cases, the courts have assessed the breach against the performance of the whole contract to see if the breach is substantial.[42] As Peel points out, the cases show that a consideration of the inadequacy of damages, whether the party not in breach would be unjustly enriched by the termination, and the likelihood of further

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38 Indeed, it is now accepted that the intermediate term applies even in contracts for the sale of goods.

39 This remains arguable even though the phrase "intermediate term" or "innominate term" was not used by Lord Diplock but comes from the head note in the report of the case where the phrase "intermediate stipulation" was used.

40 See the judgment of Sellers LJ in *Hong Kong Fir*. The appeal could have been disposed of by finding that the breach was insufficient to allow for termination, if necessary, by adding that nothing in previous caselaw had suggested that the seaworthiness term was a condition. This point is made in Carter et al., "Developing the intermediate term concept", n. 5 above. Note also that the authors hint that the issue would simply have been postponed since the seaworthiness term is undeniably one that can be breached in a number of ways.

41 *Hong Kong Fir*, 62. The attention given specifically to the warranty is explicable when it is remembered that the question does not arise in the case of the condition.

42 Examples often cited include *Hong Kong Fir* itself, where after repairs to the ship, it was fit to perform the 17 remaining months of the 24-month charter period.

breaches, may also be relevant considerations.[43] In general, while the existence of the doctrine of substantial failure of performance has not been doubted in the cases on promissory terms, yet the interplay of the two has not received adequate attention.

While the effort of the Singapore Court of Appeal to provide a decision tree for the question of termination is welcomed, further developments would assist. To begin with, the decision tree should proceed from a clearer acknowledgment that prima facie, the injured party cannot terminate for breach unless there is a substantial failure of performance. Where there is no such failure, it will be relevant to ask if the term that has been broken is a condition. If it is, the injured party has the choice of terminating the contract, regardless of the seriousness of the breach.[44] Put in these terms, the decision procedure is a much simplified one. However, it appears to leave no room for any distinction between the intermediate term and the warranty. The only distinction of any significance, which is the position reached in *Koompahtoo*, is that between conditions and non-conditions.

From a taxonomic perspective, this reduced approach would be disappointing because it would mean relinquishing the tripartite division of terms which, as we have seen, is now established in the law. There are other reasons why we should, with some refinements, salvage the taxonomy of terms and give it a greater role within a more developed scheme. The objective would be to give full recognition to the doctrine of substantial failure of performance while at the same time accommodating the taxonomy of terms in a scheme which is effective for the process of determining whether the injured party is allowed to terminate the contract for breach. In *RDC*, Phang JA explained that the warranty was still distinguishable from the intermediate term because "the *spirit* behind the concept of the warranty would *still remain* in appropriate fact situations inasmuch as the innocent party would not be entitled to terminate the contract if the consequences of the breach were found to be trivial".[45]

Even taking into account the reinforcements later given to the warranty by the Singapore Court of Appeal in *Sports Connection*,[46] the better position is that espoused by Treitel that, whereas there is a prima facie rule that the remedy for breach of a warranty is damages alone, there is no such prima facie rule in relation to the intermediate term.[47] This idea of a prima facie rule accompanying the warranty could be extended to the two other types of term. In this regard, we might usefully turn to the technique employed elsewhere in contract law in the requirement of intention to create legal relations. There, rather than requiring intention to be established by the party seeking to enforce the agreement, the courts employ one of two mirror-image presumptions depending on whether the agreement is a commercial agreement or a social or domestic agreement. In the former, there is a rebuttable presumption that the parties intended to create legal relations. The opposite presumption applies to social or domestic agreements. Each of the presumptions may be rebutted by evidence to the contrary. Exceptionally, there will be cases which call for a more contextual approach where all relevant facts would be taken into account without

43 E Peel, *Treitel's Law of Contract*, 12th edn (London: Sweet & Maxwell 2007), pp. 870ff. Notably, this work proceeds on the basis that conditions operate as an exception to the principles regarding the availability of remedies for breach.

44 From the point of view of contracting parties wanting certainty on the question of termination, it may be that asking if a term is a condition should be the first question that is asked, since an enquiry into the seriousness of the breach is avoided if the term is a condition.

45 *RDC*, n. 8 above, para. 108.

46 See n. 24.

47 Treitel, *Some Landmarks*, n. 18 above, p. 116. See also p. 125, where a similar point is made in relation to sale of goods contracts.

the use of a presumption.[48] In proposing an improved scheme from the one presented in *RDC*, and building upon Treitel's use of prima facie rules, a similar use of presumptions could be made as follows.

1) If the term that has been breached is a warranty, there is a rebuttable presumption that termination is not available. The injured party must prove substantial failure of performance in order to justify termination or be allowed to terminate the contract.
2) However, if the term that has been breached is a condition, the injured party may terminate the contract without establishing that there was a substantial failure of performance. This is to say that there is a conclusive presumption that damages are not an adequate remedy.[49]
3) If the term that has been breached is an intermediate term, there is neither a presumption that termination is available nor a presumption that termination is not available. The court must look at all the circumstances of the case and especially at the consequences of the breach to see if termination should be permitted.

The intermediate term differs from the condition because, in the latter case, the party arguing for lawful termination is in an unassailable position with regard to the right to terminate. It differs from the warranty in that the party wanting to terminate the contract for a breach of a warranty has a heavier burden of proof to shift. In looking at the interaction between the basic rule of damages being an adequate remedy for a breach of contract and its main exception, the doctrine of substantial failure of performance, the condition is the only true exception to that exception. The other two types of term are consistent with the rule on substantial failure of performance but differ between them in the way just pointed out.

What is clear from this scheme is that the taxonomy of terms can play a meaningful role in the question of termination, but only if strengthened by accompanying presumptions in favour of or against termination. When so strengthened, the contribution of the taxonomy of terms lies in the evidential rules attached to each of the types of term.

One final point needs to be addressed. This is the question of whether the *Hong Kong Fir* approach is one and the same as the doctrine of substantial failure of performance. The two are functionally similar and both allow the consequences of the breach to determine whether termination is permitted. The overlap in the old cases relied on as authority for the doctrine of substantial failure of performance and the cases relied on by Lord Diplock in *Hong Kong Fir* strongly suggest that the two are one and the same. It is here that the remedialist and taxonomic perspectives offer yet another insight for they cast stronger light on the twin contributions of *Hong Kong Fir* – an approach and a type of term. The approach is indeed difficult to distinguish from the doctrine of substantial failure of performance. The *type of term* contribution of *Hong Kong Fir* can be distinguished from the doctrine of substantial failure of performance and it is this that appears in the taxonomy of terms in the improved scheme suggested here.

Conclusion

The Singapore Court of Appeal has been concerned to salvage the two approaches that it identified as being a part of current law and also to provide a decision tree which ensured

48 See *Edmonds* v *Lawson* [2000] QB 501.

49 As discussed earlier, construction could be deployed to avoid this situation.

that neither approach elbowed out the other. There is a similar concern here in that the taxonomy of terms and the remedial principles which have evolved should both be made more effective. By accommodating as fully as possible both the taxonomic and remedial perspectives, whatever be the historical developments through which both emerged, we are able to observe the following. First, rather than privileging certainty, if we "nest" promissory terms in the doctrine of substantial failure of performance, the law in fact privileges remedial fairness. This fairness is then tempered by certainty, rather than the other way around as is presented in *RDC*.[50] Furthermore, in this enlarged scheme, certainty is only given a limited role, that is when the term breached is a condition or when the parties have made their intention clear that termination is not an option for breach of a particular term. Beyond these instances, remedial fairness is reasserted. Second, where in *RDC* the line between the warranty and the intermediate term is still somewhat blurred, in this scheme, the distinction between the two is developed through the use of evidentiary presumptions. Third, the tension between the ideals of certainty and fairness remains as does the room for discretion and for contestation. A judge can still circumvent the conclusive presumption in favour of termination by finding that the term that has been breached is not a condition or, in the case of a breach of a warranty, by finding that the presumption against termination has not been rebutted and, in the case of the intermediate term, finding that taking all the circumstances into consideration, there was no substantial failure of performance. Fourth, the greater attention paid to the doctrine of substantial failure of performance in the suggested scheme explains the asymmetry between the condition and the warranty when it comes to being able to predict the outcome of the question regarding termination.

50 Such an enlarged decision tree would also fit better with Phang's overarching thesis (based on radicalism on which we have not touched in the present article) that contract law pursues substantive fairness: see, Phang, "Doctrine and fairness", n. 27 above.

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The prevention of terrorism: in support of control orders, and beyond

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Introduction

International law dictates that the United Kingdom must fight terrorism. Article 3 of the Council of Europe's Convention on the Prevention of Terrorism, for example (which the UK has signed but not yet ratified), obliges states to prevent acts of terror and their negative effects.[1] Similarly, the European Union's Counter Terrorism Strategy commits member states to combating terrorism globally so that their citizens can live in an area of freedom, security and justice. It is built around four strands: "prevent", preventing people from turning to terrorism; "protect", protecting citizens and critical infrastructure by reducing vulnerabilities; "pursue", pursuing and investigating terrorists, impeding planning, travel, and communications, cutting off funding and access to attack materials, and bringing terrorists to justice; and "respond", responding in a coordinated way by preparing to manage and minimise the consequences of a terrorist attack.[2] These principles are reflected in the UK's strategy for combating terrorism, "Contest" (but domestically "respond" is replaced by the term "prepare").[3]

One such measure that the UK has adopted to prevent individuals committing acts of terrorism, and therefore fulfilling its other international obligations in protecting its citizens and its infrastructure, as well as managing the risk posed by suspected terrorists, is the controversial control order scheme. But the international documents stated above do require states to respect fundamental rights and freedoms in their adoption of anti-terror initiatives. Indeed, a former Lord Chief Justice, Lord Woolf, has said that, although acts of

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1 Council of Europe, Convention on the Prevention of Terrorism, 16 February 2005, Warsaw: http://conventions.coe.int/Treaty/en/Treaties/Html/196.htm.

2 European Union, Counter Terrorism Strategy, 30 November 2005, Brussels: http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf.

3 HM Government, *Pursue, Prevent, Protect, Prepare*, March 2009. http://webarchive.nationalarchives.gov.uk/20100418065544/http://www.homeoffice.gov.uk/documents/contest-leaflet2835.pdf?view=Binary, p. 4. But note, the UK government has recently published a new approach to "prevent" because of, for example, concern about the previous funding of extremist groups: HM Government, *Prevent Strategy*, CM 8092 June 2011 http://www.homeoffice.gov.uk/publications/counter-terrorism/prevent/prevent-strategy/prevent-strategy-review?view=Binary.

terrorism directed at a civil population are totally inconsistent with the values of human rights instruments such as the European Convention on Human Rights (ECHR), it is when the executive and the legislature dictate issues of national security that the protection of individual freedoms needs particular attention.[4]

Control orders are arguably one such initiative which unnecessarily infringe personal liberty: "[They] are corrosive of constitutionalism, since individual rights are diminished or eliminated without the convincing and legitimating public spectacle of a trial and proof beyond reasonable doubt."[5] They are, therefore, under attack from every quarter, it seems. For example, in July 2010 the Home Secretary, Theresa May, announced a review of the previous Labour government's many counter-terrorism measures, one of which was the control order scheme.[6] She said that, over the past decade, the British state had become "too authoritarian" and the review was "an important first step in meeting our commitment to . . . creating a counter-terrorism regime that is proportionate, focussed and transparent, striking the right balance between security and civil liberties".[7]

Control orders are seemingly unloved by human rights organisations, too. Amnesty International has recently described them as constituting a "shadow justice system", whereby a number of people have been accused by the authorities of involvement in terrorism-related activity, but have not been charged with any offence. The authorities have been relying on secret information in secret judicial hearings to keep those it deems a threat to national security under various forms of administrative control, amounting to a deprivation of liberty.[8] Is it possible, therefore, for the author of this article to present a defensible argument justifying the continuation of the control order scheme? Should he, for his own credibility as an academic lawyer, who teaches a plethora of human rights modules across a range of undergraduate and postgraduate courses, even be trying to do so?

UK strategies for preventing terrorism

Before an attempt is made to defend the seemingly indefensible, it is important to discuss what exactly the author is proposing to support. Prior to the introduction of the control order scheme, the UK was permitted to detain indefinitely international terrorist suspects. Before it ceased to be law, s. 23 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) had conferred such a power on the Home Secretary if, under s. 21(1), s/he reasonably believed that the international terrorist suspect's presence in the UK was a risk to national security, and s/he suspected that the detained person was a terrorist.[9] Affected persons were able to appeal to the Special Immigration Appeals Commission (SIAC) if there were no reasonable grounds for detaining them, as per s. 25. Ordinarily the UK would have deported the foreign nationals to their countries of origin but Protocol 13 and Article 3 of the ECHR prohibited the authorities from doing so where there was a "real

4 Lord Woolf, "European Court of Human Rights on the occasion of the opening of the judicial year" (2003) *EHRLR* 257, pp. 260–1.

5 C Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* 2nd edn (Oxford: OUP 2009), p. 212).

6 Home Office, *Rapid Review of Counter-Terrorism Powers*, 13 July 2010: www.homeoffice.gov.uk/media-centre/press-releases/counter-powers.

7 Home Office, *Taking Urgent Action to Restore Rights*, 14 July 2010: www.homeoffice.gov.uk/media-centre/news/taking-urgent-action.

8 Amnesty International, *United Kingdom: Five years on: time to end the control orders regime*, August 2010: www.amnesty.org.uk/uploads/documents/doc_20571.pdf, p. 4.

9 For criticisms of these previous anti-terror measures, see, for example: H Fenwick, "A proportionate response to 11 September?" (2002) 65 *MLR* 724; A Tomkins, "Legislating against terror" (2002) *PL* 205; and HRW, "Neither just nor effective", 24 June 2004 www.hrw.org/legacy/backgrounder/eca/uk/index.htm.

risk" of either death or torture, as per *Chahal* v *United Kingdom*.[10] Death or torture was certainly likely where an individual had been labelled as an "international terror suspect" by the British government (though now the UK might be permitted to return detainees to countries such as Jordan, Algeria, Lebanon, Libya and Ethiopia where "diplomatic assurances" or "memoranda of understanding" are in place to prevent receiving countries from harming deportees). In order to justify the ATCSA provisions, the UK had to derogate from Article 5 of the ECHR, the right to liberty, by virtue of Article 15(1) of the ECHR ("derogation in time of emergency").

In *A* v *Secretary of State for the Home Department*,[11] the challenge to the indefinite detention measures was heard by the then House of Lords (now Supreme Court) in October 2004. By a majority of 8:1, the judges agreed with the UK authorities that the threat from international terrorism post-9/11 had been a public emergency threatening the life of the nation for the purposes of Article 15(1). But the state's response – the Part IV provisions of ATCSA – was not proportionate to the public emergency as it had not been "strictly required by the exigencies of the situation". They therefore quashed the Human Rights Act (Designated Derogation) Order 2001, permitting the derogation in domestic law, and held that the legislation was "incompatible" with Article 5, as per s. 4 of the Human Rights Act 1998 (HRA). Lord Hoffman said:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.[12]

His Lordship (who was in a minority on this issue) even went as far as suggesting that there had not been a war or public emergency threatening the life of the nation which had justified the derogation under Article 15(1).[13] The House of Lords also ruled that the ATCSA measures had been a disproportionate interference with Article 14 of the ECHR, the prohibition on the discrimination of convention rights, in that the executive detention provisions were applicable only to foreign nationals, not British suspects (this not having been the subject of an original derogation under Article 15(1)). The ruling of the House of Lords has received significant academic praise. For example, one commentator has described it as "perhaps the most powerful judicial defence of liberty since [the 1770s]".[14]

For several reasons the Law Lords doubted the rationality of the indefinite detention measures: for example, no state other than the UK had derogated from Article 5, even though other European countries such as France, Italy and Germany were at risk from international terrorism;[15] the legislation, in targeting only foreigners suspected of threatening the security of the UK, seemed to rule out an attack from British jihadists (which was tragically proven to be incorrect with the terror attacks in London on the 7 July 2005 when four British Muslim men detonated suicide vests on the London transport

10 (1996) 23 EHRR 413.

11 [2004] UKHL 56, [2005] 2 AC 68.

12 Ibid. para, 97.

13 Ibid. para. 96.

14 D Feldman, "Proportionality and discrimination in anti-terrorism legislation" (2005) 64 *CLJ* 271, p. 273. See also: T Hickman, "Between human rights and the rule of law: indefinite detention and the derogation model of constitutionalism" (2005) 68 *MLR* 655; A Tomkins, "Readings of *A* v *Secretary of State for the Home Department*" (2005) *PL* 259; and D Dwyer, "Rights brought home" (2005) 121 *LQR* 359.

15 [2004] UKHL 56, [2005] 2 AC 68, at para. 20.

network, killing 52 people and injuring over 700[16] – see more later);[17] and releasing the detainees, if they left the UK, obviously overlooked the possibility of them pursuing their terrorist objectives abroad.[18]

The declaration of incompatibility issued by the House of Lords in *A*, in common with all such declarations, was not binding on the parties to the application, as per s. 4 of the HRA. The applicants therefore remained in detention, except for the second and fourth applicants who elected to leave the UK, and the fifth applicant who was released on bail on conditions amounting to house arrest. Also, none of the applicants were entitled to compensation in respect of their unlawful detention. In this regard, they lodged complaints with the European Court of Human Rights (ECtHR): *A* v *United Kingdom*.[19] The ECtHR came to a similar conclusion to the House of Lords: the UK was entitled to conclude that the threat from international terrorism had constituted a "public emergency" for the purposes of Article 15(1) of the ECHR. But the ATCSA measures were not "strictly required by the exigencies of the situation" to warrant a derogation from Article 5. The applicants were therefore entitled to compensation ("just satisfaction" as per Article 41 of the ECHR) for a breach of their liberty. (The significance of the ECtHR's ruling in *A* in reference to the legality of evidence relied on by the state is discussed later.)

Following the ruling of the House of Lords in *A*, the government allowed ATCSA to lapse in March 2005 (the legislation had had a sunset clause, requiring it to be renewed, otherwise it would cease). It replaced ATCSA with the Prevention of Terrorism Act 2005 (PTA), introducing control orders. These can be imposed on all terror suspects, whether they are British or foreign. According to s. 1(1) of the PTA a control order is an order against an individual which imposes obligations on him or her for purposes connected with protecting members of the public from a risk of terrorism. Section 1(4) of the PTA states that these obligations may include, for example, (d) a restriction on a person's association or communications with specified persons; (e) a restriction in respect of a person's place of residence; (f) a prohibition on a person being at specified places or within a specified area at specified times or on specified days; or (p) a requirement on a person to report to a specified individual at specified times and places during the day. Section 1(4) therefore permits the state to impose obligations on individuals which include, for example, electronic tagging, curfews, restrictions on visitors and meeting others, a ban on the use of the internet and limits on phone communication. The Home Office has stated that conditions imposed under a control order are "tailored to each case to ensure the person cannot take part in terrorist activity".[20] As of June 2011, there were 12 control orders in force, all of which were in respect of British citizens. Three individuals subject to a control order live in the Metropolitan Police Service area; the remaining individuals live in other police force areas.[21]

16 BBC News, "London attacks", 8 July 2005: http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm.

17 [2004] UKHL 56, [2005] 2 AC 68, para. 30.

18 Ibid. para. 34. In this regard the ruling was perhaps unsurprising, as Starmer argues: K Starmer, "Setting the record straight: human rights in an era of international terrorism" (2007) *EHRLR* 123, p. 124: "Against this background it can hardly be suggested that their Lordships were mischievously dismantling the Government's anti-terrorism strategy. They were simply pointing out that the Government's approach was discriminatory, irrational and, worst of all, ineffective."

19 (2009) 49 EHRR 29.

20 Home Office, "The facts about control orders": www.homeoffice.gov.uk/security/terrorism-and-the-law/control-orders/?version=4#.

21 Home Office, "Written ministerial statement on control orders", 11 March–10 June 2011: http://services.parliament.uk/hansard/commons/bydate/20110616/writtenministerialstatements/part006.html.

Section 2(1) of the PTA allows the Secretary of State to make a control order against an individual if the Secretary of State (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary for purposes connected with protecting members of the public from a risk of terrorism. A control order made by the Secretary of State is called a "non-derogating" control order (s. 2(3)) and is valid for a period of 12 months, but may be renewed on one or more occasions (s. 2(4)).

Section 3 of the PTA concerns the judicial supervision of the making of a non-derogating control order. The Secretary of State cannot impose a non-derogating control order except where s/he has been granted permission by a court (though s. 3(1)(b) does permit the granting of a control order where the urgency of the case requires the order to be made without permission but there must be a court hearing within seven days (s. 3(4)). The function of the judicial supervision at this stage (without the participation or knowledge of the person who will be affected) is to consider whether the Secretary of State's decision to make an order is "obviously flawed" (s. 3(2)(b)). The minister's decision is also subject to a subsequent more substantive review by the High Court, with some participation by the affected person. That is, following the granting of permission by the court, there must be a court hearing judicially reviewing the control order and its conditions "as soon as reasonably practicable after it is made" (s. 3(10)).

The PTA also allows for the provision of "derogating" control orders (from Article 5 of the ECHR, the right to liberty, for example), which are tantamount to house arrest. These orders can be issued only by the High Court under s. 4 and the rules for their issue are stricter than those for non-derogating control orders. There are currently no derogating control orders in operation.[22]

Control orders, human rights and the courts

Before seeking to defend the control order scheme, the author will outline the human rights implications of some of the orders that have previously been issued and the courts' responses to the lawfulness of these orders. In most cases, they will be addressed again later when support for the measures is presented.

1 Article 5 of the ECHR: the right to liberty

Very soon after the introduction of the control order scheme the parliamentary Joint Committee on Human Rights (JCHR) expressed the opinion that the measures were not, per se, contrary to human rights such as Article 5 of the ECHR, the right to liberty.[23] But concern was raised about the combination of obligations imposed on a controlee which were capable of constituting a deprivation of liberty.[24]

The House of Lords in Secretary of *State for the Home Department* v *JJ*[25] came to the same conclusion as the JCHR about the general lawfulness of the control order measures. Nevertheless, individual obligations imposed on a controlee certainly were the subject of judicial censure. In *JJ*, the conditions depriving the liberty of the six applicants included: residency at a one-bedroom flat, away from one's normal home, for 18 hours per day (from 16.00 to 10.00); electronic tagging; compulsory attendance at a police station twice a day;

22 Home Office, "Written ministerial statement", n. 21 above.

23 JCHR, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005* (Continuance in force of sections 1 to 9) Order 2006 (12th report of session 2005–06), 2006, para. 36.

24 Ibid., at para. 37.

25 [2007] UKHL 45, [2008] 1 AC 385.

visitors to have been approved by the Home Office; limited use of the telephone; and a ban on the use of the internet. Adopting the test of the ECtHR in *Guzzardi* v *Italy*,[26] Lord Bingham said that a deprivation of liberty may take numerous forms other than classic detention in prison or strict arrest.[27] What had to be considered was the concrete situation of the particular individual. Account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution or implementation of the penalty or measure in question.[28] Thus, the House of Lords found (by a 3:2 majority) that the specific non-derogating control orders imposed on the controlee applicants were unlawful. Lord Bingham likened the conditions to prison but without the benefit of association with others.[29]

Notwithstanding the House of Lords in *JJ* quashing some non-derogating control orders for deprivations of liberty, the JCHR in 2008 continued to express reservations about the control order scheme itself: "We remain concerned that the regime as it currently stands and as it is currently operated is very likely to result in breaches of . . . the right to liberty."[30] This belief was reiterated in the JCHR's 2009 report on control orders.[31] Assuming therefore that control orders are, in general, infringements of liberty, it is also important to note that controlees' liberty is being deprived without them having been found guilty of an offence.[32] This is outlawed by Article 5(1)(c) of the ECHR.

2 Article 6 of the ECHR: the right to a fair and public trial by an independent and unbiased tribunal

Concern has also been expressed by organisations such as the JCHR about the lack of fair-trial protections with the control order scheme.[33] Article 6(1) of the ECHR entitles a person to a fair and public trial by an independent and unbiased tribunal. Those subject to criminal charges are afforded further protection. Article 6(2) states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law; Article 6(3) states that everyone charged with a criminal offence has the minimum rights such as "(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him" and "(d) to examine . . . witnesses against him". However, control order proceedings are not classified in domestic law as "criminal" in nature. They are intended to be civil orders, used as alternatives to criminal prosecution in cases where prosecution is not possible because of a lack of evidence. There are therefore fewer procedural guarantees given to controlees than those accorded to suspects charged with an "ordinary" crime. In 2006, the JCHR argued that control orders were more than mere civil orders. First, the conduct which was alleged, being the basis for the control order, was not only conduct of a criminal nature, but of a particularly serious criminal nature – involvement in terrorism-related activity. Secondly, the nature of the

26 (1980) 3 EHRR 533.

27 [2007] UKHL 45, [2008] 1 AC 385, para. 15.

28 Ibid. para. 16.

29 Ibid. para. 24. But doubt does still remain about the practical application of the law following *JJ* – see, for example, D Feldman, "Deprivation of liberty in anti-terrorism law" (2008) 67 *CLJ* 4, p. 7.

30 JCHR, *Counter-Terrorism Policy and Human Rights* (9th report): Annual Renewal of Control Orders Legislation 2008 (10th report of session 2007–08), 2008, para. 88.

31 JCHR, *Counter-Terrorism Policy and Human Rights* (14th report): Annual Renewal of Control Orders Legislation 2009 (5th report of session 2008–09), 2009, para. 33.

32 K Ewing and J Tham, "The continuing futility of the Human Rights Act" (2008) *PL* 668, p. 669. The thesis of Ewing and Tham's article is the general weakness of the HRA in protecting fundamental freedoms, especially post-9/11. But see the criticisms of Ewing and Tham's thesis: A Kavanagh, "Judging the judges under the Human Rights Act: deference, disillusionment and the 'war on terror'" (2009) *PL* 287.

33 JCHR 2006, n. 23 above.

restrictions imposed were of a nature and severity to be equivalent to a criminal penalty. Thirdly, they were also of a duration to make them tantamount to a criminal sanction, being, in effect, indefinitely renewable.[34] Human rights organisations such as Amnesty International[35] and Human Rights Watch (HRW) have criticised the civil nature of control orders for these reasons, too. HRW has also remarked that a breach of a control order is a criminal offence punishable by up to five years' imprisonment and/or a fine.[36] In addition, the standard of proof for the issuing of a control order – reasonable suspicion – is far lower than the criminal standard of proof – beyond a reasonable doubt – and indeed is lower than the civil threshold – a balance of probabilities. This means controlees are potentially being deprived of their liberty on the basis of a very low standard of proof – a balance very much in the state's favour.[37]

Furthermore, concern about the lack of procedural safeguards with the control order scheme is directed at the court proceedings. The control order process (very much like that for SIAC, see earlier) uses a system of dual hearings and legal representation. Each person is assigned a security-cleared barrister known as a "special advocate". Classified information and evidence is heard during "closed" sessions attended by the special advocate. Suspects and their lawyers of choice are excluded from those sessions, and contact between the special advocates and the suspects is prohibited once special advocates have been privy to the closed material. Non-classified evidence is heard at "open" hearings with the suspect present. Thus, suspects are being denied a public forum where they are able to confront their accusers if the state's reliance on evidence supporting the control order is presented in a closed session.[38] Moreover, the special advocates' inability to communicate with affected persons after seeing the closed material arguably seriously limits their ability to represent the interests of the controlled persons and therefore the extent to which they can mitigate the alleged unfairness in the closed sessions.[39]

In *Secretary of State for the Home Department* v *MB, AF*,[40] the House of Lords held that Article 6(1) of the ECHR does apply to control order proceedings,[41] but Articles 6(2) and 6(3) do not.[42] However, Lord Bingham did say that in any case in which a person was at risk of a control order containing obligations of the stringency found in this case (AF was subject to a 14-hour daily curfew, for example) the application of the civil limb of Article 6 of the ECHR – Article 6(1) – did entitle such a person to a "measure of procedural protection as is commensurate with the gravity of the potential consequences".[43] So the House of Lords concluded that there would be some cases where the failure to disclose evidence to the controlled person would be incompatible with the requirements of a fair trial.

The evidence against MB, for example, was one such case where there was great reliance by the state on closed material; the open case before him containing no more than a bare

34 JCHR 2006, n. 23 above, paras 50–1.

35 Amnesty International, *United Kingdom: Five years on*, n. 8 above, pp. 5–6.

36 HRW, *Putting Human Rights at the Center of United Kingdom Counterterrorism Policy*, June 2007: www.hrw.org/legacy/backgrounder/eca/uk0607/uk0607web.pdf, p. 18.

37 See, for example, A Tomkins, "National security and the role of the court: a changed landscape" (2010) 126 *LQR* 543, pp. 557–8.

38 Ewing and Tham, "The continuing futility", n. 32 above, p. 669.

39 JCHR 2010, *Counter-Terrorism Policy and Human Rights* (16th Report): Annual Renewal of Control Orders Legislation 2010 (9th Report of Session 2009–10), 2010: www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/64/6402.htm, para. 72.

40 [2007] UKHL 46, [2008] 1 AC 440.

41 Ibid. para. 24.

42 Ibid.

43 Ibid.

assertion of liability. In the case of *AF* the open case for a control order was also very limited; the essence of the case against him was in the closed material. On the facts of the case, the House of Lords found that the control proceedings involving MB and AF had not been Article 6(1) compliant. Nevertheless, academic commentators have argued that the principles from *MB, AF* – how much closed material, if any at all, should be disclosed for the purposes of fair-trial compliance? – was dealt with insufficiently by the House of Lords, especially as it left open the possibility of compatibility even where the state had relied solely on closed evidence.[44]

Greater respect for the fair-trial rights of those subject to, for example, a control order was provided by the ECtHR in *A* v *United Kingdom*,[45] when it considered the lawfulness of the previous indefinite detention provisions under ATCSA. The applicants alleged inter alia that the special advocate procedure before SIAC had not complied with Article 5(4) of the ECHR: a person's detention should be decided speedily by a court. On this issue, the ECtHR said:

> The special advocate could not perform [their] function in any useful way unless the detainee had been provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.[46]

So the ECtHR expressed doubt about the general fairness of the special advocate process. In *Secretary of State for the Home Department* v *AF*,[47] the House of Lords followed the ruling of the ECtHR in *A*, and, arguably, overruled its earlier decision in *MB, AF*, where it had suggested that state reliance on closed material could be compatible with Article 6(1). The court said that non-disclosure on the ground of national security of relevant material could not go so far as to deny a party knowledge of the essence of the case against them, at least where they were at risk of consequences as severe as those normally imposed under a control order. Provided that that requirement was satisfied, there could be a fair trial notwithstanding that a controlled person was not provided with the detail or the sources of the evidence forming the basis of the allegations.[48]

The consequence of this ruling of the House of Lords is significant: a controlee must be made aware of the nature of the allegations against them (but not necessarily the evidence supporting the allegations). The state must therefore either release more information to the suspect or revoke the control order (or issue a derogating control order as per s. 4 of the PTA?).[49] (In some cases, rather than subsequently revoking a control order because the state has failed to publish relevant evidence against a controlee,[50] the courts have quashed an order, thus permitting the controlee the opportunity to sue for damages.)[51]

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44 E.g. C Forsyth, "Control orders, conditions precedent and compliance with Article 6(1)" (2008) 67 *CLJ* 1, p. 4.

45 (2009) 49 EHRR 29.

46 Ibid. para. 220.

47 [2009] UKHL 28, [2009] 3 WLR 74.

48 Ibid. para. 59.

49 The state's action (or inaction) following *AF* has been ridiculed: "[The] Home Office engages in a teasing dance, involving the shedding of intelligence veils from its dossier. The dance is sometimes embarrassing, as when further information has to be revealed, and occasionally impossible, as when the Home Office declines the demand for further disclosure and drops the case.": C Walker, "The threat of terrorism and the fate of control orders" (2010) *PL* 4, p. 5.

50 Following the ruling of the House of Lords in *AF*, the High Court in *Secretary of State for the Home Department* v *AN and Another* (proceedings under the Prevention of Terrorism Act 2005) [2009] EWHC 1966 (Admin), for example, revoked the control order since no evidence against the applicant, AN, had been disclosed by the authorities.

51 E.g. *Secretary of State for the Home Department* v *AE and AF* [2010] EWCA Civ 869.

However, notwithstanding the seemingly positive outcome from the ruling of the House of Lords in AF, the JCHR still remains sceptical about the basic fairness of control order proceedings, especially involving those where the state's reliance on material is largely dependent on closed evidence:

> We heard from the special advocates that, although the Government had said that it would be reviewing the material in each case in the light of AF to see whether further disclosure could be made or whether the control order should be revoked, in practice the Secretary of State has taken a "minimalist" and essentially passive approach . . . not voluntarily disclosing any more material but leaving it to the special advocates to make the running on what more should be disclosed and waiting for the courts to tell the Secretary of State what material he cannot rely on unless he discloses it.[52]

3 Article 3 of the ECHR: the prohibition on torture and inhuman and degrading treatment and punishment

There is also concern that the control order scheme, or individual obligations imposed on a controlee, might contravene Article 3 of the ECHR, the prohibition on torture and inhuman and degrading treatment and punishment. For example, many of the former detainees under ATCSA were said to have suffered from depression and suicidal thoughts. To this end, detainee G was granted bail after SIAC accepted that his detention had triggered "psychotic episodes".[53] In 2005, the European Committee for the Prevention of Torture (CPT) reported on its visit to the UK during 2004. In reference to some of the ATCSA detainees, it stated:

> Two years after the CPT visited these detained persons, many of them were in a poor mental state as a result of their detention, and some were also in poor physical condition. Detention had caused mental disorders in the majority of persons detained under the ATCSA and for those who had been subjected to traumatic experiences or even torture in the past, it had clearly reawakened the experience and even led to the serious recurrence of former disorders. The trauma of detention had become even more detrimental to their health since it was combined with an absence of control resulting from the indefinite character of their detention, the uphill difficulty of challenging their detention and the fact of not knowing what evidence was being used against them to certify and/or uphold their certification as persons suspected of international terrorism. For some of them, their situation at the time of the visit could be considered as amounting to inhuman and degrading treatment.[54]

In 2006, the CPT reported on its visit to the UK during 2005. It was able to interview some individuals subject to control orders. In reference to one individual, P, the CPT stated that he was severely depressed and anxious, in considerable distress and despair, with symptoms of post-traumatic stress disorder. It noted that the depression could not be treated as long as the control order restrictions remained in place. So the risks of self-harm and even suicide were significant.[55]

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52 JCHR 2010, n. 39 above, para. 50.

53 *G* v *Secretary of State for the Home Department* [2004] EWCA Civ 265, [2004] 1 WLR 1349.

54 CPT, *Report to the Government of the United Kingdom on the Visit to the United Kingdom Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 19 March 2004*, 9 June 2005: www.cpt.coe.int/documents/gbr/2005-10-inf-eng.pdf, para. 19.

55 CPT, *Report to the Government of the United Kingdom on the Visit to the United Kingdom Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 25 November 2005*, 10 August 2006: www.cpt.coe.int/documents/gbr/2006-28-inf-eng.pdf, para. 46.

Is it not the case, therefore, that not knowing exactly what one has allegedly done wrong to justify a control order, and sometimes not being able to test the evidence in open court supporting the state's suspicion, possibly causes untold stress and anxiety? Moreover, is this not also compounded by the fact that a control order is imposed without any term (though it must be renewed annually)?

4 ARTICLE 8 OF THE ECHR: THE RIGHT TO PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE

In 2006 the JCHR expressed concern that control orders were "unjustifiably interfering with the human rights of other members of the [controlee's] family".[56] Of particular concern to the JCHR over the currency of the scheme has been the condition requiring a controlee to move away from their normal place of residence, often away from their family and friends.[57] The effects of a control order on a controlee's family and friends has not been lost on the Supreme Court. In earlier House of Lords' rulings, the duration of a control order in terms of curfew hours seemed to be the determining factor (despite Lord Brown and others rejecting Lord Hoffman's opinion in *JJ* that a deprivation of liberty should be confined to actual imprisonment or something little different from imprisonment).[58] But not so in *Secretary of State for the Home Department* v *AP*.[59]

Here the applicant, AP, was confined to a place of residence for 16 hours per day. However, he was living in the Midlands, 200 miles away from the rest of his family in London. The court said that the rights of the applicant under Article 8(1) of the ECHR, the right to respect for private and family life, home and correspondence, were proportionately infringed for the purposes of protecting national security, as per Article 8(2). However, a residency obligation could still affect the lawfulness of a control order. On the facts, the court found that the requirement to live in the Midlands was unlawful, albeit a deprivation of liberty as per Article 5 of the ECHR. So, in practice, this was a denial of liberty but the Article 8(1) right of the applicant, which ordinarily was proportionately infringed, did affect, to some considerable degree, the legality of the control order under Article 5.[60] Interestingly, in *Secretary of State for the Home Department* v *AP (No 2)*,[61] AP was granted anonymity because to do otherwise could risk violating his rights under Article 3 of the ECHR. The town where he had to live was one where there were considerable community tensions. There was organised racist activity and there had been racist attacks, including physical violence, on members of the Muslim community.[62]

The obligation to move 200 miles away from one's family and friends was obviously a condition too far for the Supreme Court in *AP*. But would a residency requirement closer to home have been lawful? This issue still troubles the JCHR. In its 2010 report, the JCHR noted:

> We heard with alarm about the "growing use" of conditions . . . which require the controlled person to move out of the community in which they live and stay away from it – "a form of internal exile" . . . We learned that these "relocation conditions" are being used to require British citizens who have grown up in a particular community to uproot themselves from that community and move to a

56 JCHR 2006, n. 23 above, para. 85.

57 JCHR 2010, n. 39 above, para. 72.

58 [2007] UKHL 45, [2008] 1 AC 385, para. 44.

59 [2010] UKSC 24, [2010] 3 WLR 51.

60 On this issue, see also, for example, *CA* v *Secretary of State for the Home Department* [2010] EWHC 2278 (Admin).

61 [2010] UKSC 26, [2010] 3 WLR 51.

62 Ibid. para. 13.

> new and unfamiliar location. The impact of such relocations on the controlled person's families was described as "extraordinary". The female partners of controlees, we heard, "are treated with complete contempt", told that they can either stay where they are or move to the new location and find a new job. Children are uprooted from the schools they have been attending and forced to relocate in order to be with their family.[63]

5 Other arguments against control orders

In addition to the seemingly unjustified infringements of human rights that the control order scheme continues to cause some controlees, the JCHR has also expressed concern about the financial cost of the scheme. It says that control orders have been the most litigated of the government's counter-terrorism measures since 2001, and "quite probably the most litigated ever".[64] It concludes by questioning whether the cost of maintaining the system is out of all proportion to the public benefit which the orders are said to serve.[65] Notwithstanding the financial cost of the scheme a view shared by the human rights organisation Liberty, Liberty also notes the "absurd" proportion of controlees who have absconded over the years.[66]

In summary, the UK's control order scheme, replacing the discredited indefinite detention provisions for international terror suspects under ATCSA, has been the subject of significant criticism since its inception. In 2007, the JCHR believed that the measure's infringements of human rights required, for example, derogation from Articles 5 and 6 of the ECHR, as per Article 15(1).[67] In its 2009 report on control orders, the JCHR, largely accepting of the then government's intended retention of the scheme, sought to further restrict the effect on controlees and their families by calling for a maximum duration imposed on control orders.[68] But in 2010, although acknowledging that in the past it had had an open mind about the scheme,[69] the JCHR had had enough:

> The continued operation of the . . . system has . . . led to more unfairness in practice, more unjustifiable interferences with people's liberty, more harm to people's mental health and to the lives of their families, even longer periods under indefinite restrictions for some individuals . . . more protracted litigation to which there is no end in sight, more claims for compensation, ever-mounting costs to the public purse, and untold damage to the UK's international reputation as a nation which prizes the value of fairness. For a combination of these reasons, together with serious reservations about the practical value of control orders in disrupting terrorism compared to other means of achieving the same end, we have reached the clear view that the system of control orders is no longer sustainable.[70]

The apparent curtailment of basic liberties – at considerable public financial cost, it appears – seemingly do not justify (at the very least) the control order scheme in its present

63 JCHR 2010, n. 39 above, para. 72.

64 Ibid. para. 99.

65 Ibid. para. 106.

66 Liberty, *From "War" to Law: Liberty's response to the Coalition government's review of counter-terrorism and security powers*, August 2010: www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf.

67 JCHR, *Counter-Terrorism Policy and Human Rights*: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007 (8th Report of Session 2006-07), 2007 www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/60/6002.htmat, para. 63.

68 JCHR 2009, n. 31 above, para. 2.

69 JCHR 2010, n. 39 above, para. 90.

70 Ibid. paras 111–12.

form. The JCHR has now come out in favour of the scheme's complete abolition. A view shared by human rights organisations such as Amnesty International[71] and Liberty.[72]

Arguments in support of control orders

The author's principal support for the control order scheme is public protection – the overriding right of individuals to be free from terrorist violence. Before exploring this argument in more detail, some perhaps "less important" points defending control orders need to be noted. First, the author will address the human rights implications of control orders for those individuals subject to them, beginning with Article 5 of the ECHR, the right to liberty.

1 Article 5 of the ECHR: the right to liberty

Earlier it was argued that controlees are being deprived of their liberty, in cases where they have not been convicted of an offence. But, importantly, the House of Lords has accepted that some control order obligations do not infringe Article 5 of the ECHR: *Secretary of State for the Home Department* v *MB, AF*[73] (AF's 14-hour daily curfew, MB was not subject to a curfew) and *Secretary of State for the Home Department* v *E*[74] (E's 12-hour daily curfew). In *Secretary of State for the Home Department* v *JJ*,[75] Lord Brown offered guidance as to where the boundaries of Article 5 of the ECHR and non-derogating control orders lay:

> [T]aking account of . . . all these various control order cases, provided the "core element of confinement" does not exceed sixteen hours a day, it is "insufficiently stringent" as a matter of law to effect a deprivation of liberty.[76]

For some, restrictions on a person's movement for up to 16 hours a day is an encroachment on individual freedom. However, the effect of these judicial rulings is significant: for the purposes of combating terrorism, such obligations are not denials of liberty to the degree that they are outlawed by the ECHR.

2 Article 6 of the ECHR: the right to a fair and public trial by an independent and unbiased tribunal

Concern was expressed previously about the "civil" nature of control orders, thus the "criminal" safeguards permitted by Articles 6(2) and (3) of the ECHR are excluded. But this issue has been examined and approved by the House of Lords. In *Secretary of State for the Home Department* v *MB, AF*,[77] Lord Bingham stated that Parliament had gone to some lengths to avoid a procedure which crossed the criminal boundary: with control orders there was no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence was provided for; the order made was preventative in purpose, not punitive or retributive; and the obligations imposed had to be no more restrictive than were judged necessary to achieve the preventative object of the order.[78] In addition, whilst the standard of proof for imposing a control order – reasonable suspicion – is low, notably, this, too, has not been found wanting by the House of Lords.

71 Amnesty International, *United Kingdom: Five years on*, n. 8 above, p. 16.

72 Liberty, *From "War" to Law*, n. 66 above.

73 [2007] UKHL 46, [2008] 1 AC 440.

74 [2007] UKHL 47, [2008] 1 AC 449.

75 [2007] UKHL 45, [2008] 1 AC 385.

76 Ibid. para. 108.

77 [2007] UKHL 46, [2008] 1 AC 440.

78 Ibid. para. 24.

In reference to the procedural protections afforded by the PTA itself, for all control orders there are independent judicial proceedings at an early stage of the process, as per ss. 3(4) and 3(10).[79] Whenever evidence is dealt with in open court, a controlee is represented by lawyers of their own choosing. In this case, the ECtHR in *A* v *United Kingdom*[80] said that an individual had been given an effective opportunity to challenge the state's suspicions about them.[81] If the evidence is too sensitive to be published in open court, then a special advocate is appointed to represent the interests of the suspect. On this issue, the ECtHR in *A* also said that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee.[82] In fact, the court said that it was only where the detention was based solely or to a decisive degree on closed material (or the open material consisted purely of general assertions) that the procedural requirements of the ECHR would not be satisfied.[83] But when the House of Lords in *Secretary of State for the Home Department* v *AF*[84] followed this element of the ECtHR's ruling in *A*, it did so with much reluctance. In holding that non-disclosure on the ground of national security of relevant material could not go so far as to deny a controlee knowledge of the essence of the case against him or her,[85] Lord Hoffman, for example, said: "I do so with very considerable regret, because I think that the decision [in *A*] . . . was wrong."[86] Academic commentators have expressed dismay about the ruling of the ECtHR, too. English suggests that "despite all the careful safeguards set in place in the SIAC system", the ECtHR "in their wisdom . . . has created an impossibly impractical standard for disclosure . . . and dragged the UK courts with it".[87] Are control orders, therefore, so awful in terms of procedural freedoms – especially when weighed against the obvious public benefits of preventing terrorism? Public protection is one of the reasons why Article 6(1) of the ECHR does not confer an absolute right on an individual to a fair trial.

3 Article 3 of the ECHR: the prohibition on torture and inhuman and degrading treatment and punishment

As regards to a control order's possible breach of Article 3 of the ECHR, the previous indefinite provisions under the ATCSA were found not to be in violation of the absolute ban on inhuman and degrading treatment by the ECtHR in *A*. Whilst recognising that the uncertainty and fear of indefinite detention had to have caused the applicants anxiety and distress, and it was probable that the stress had been sufficiently serious and enduring to affect the mental health of some of the applicants, the court said that it could not be said that the applicants had been without any prospect or hope of release.[88] In particular, they had been able to bring proceedings to challenge the legality of the detention scheme.[89] Furthermore, each detained applicant had also had at their disposal the remedies available to all prisoners under administrative and civil law to challenge conditions of detention,

79 But the standard upon which a controlee can challenge the imposition of control order before a court is high – see: Walker, *Blackstone's Guide*, n. 5 above, p.222.

80 (2009) 49 EHRR 29.

81 Ibid. para. 220.

82 Ibid.

83 Ibid.

84 [2009] UKHL 28, [2009] 3 WLR 74.

85 Ibid. para. 59.

86 Ibid. para. 70.

87 R English, "Case comment", UK Human Rights Blog, 12 June 2009: www.1cor.com/1315/?form_1105.

88 (2009) 49 EHRR 29, para. 130.

89 Ibid. para. 131.

including any alleged inadequacy of medical treatment.[90] Control orders are much less of an incursion into individual freedoms than the previous indefinite detention provisions under ATCSA. Since the ECtHR in *A* held that the latter were not in violation of Article 3, the same conclusions obviously can be drawn about control orders (subject, of course, to the earlier ruling of the Supreme Court in *AP (No 2)*,[91] in reference to the possible granting of anonymity to a controlee, to prevent racist reprisals).

4 Article 8 of the ECHR: the right to private and family life, home and correspondence

Unlike Article 3 of the ECHR, which is an absolute right, and therefore not permitting any limitations by the state, Article 8 is a qualified right where the courts apply the principle of proportionality. That is, they must weigh the private right of the controlee – the right to private and family life, home and correspondence, as per Article 8(1) – with the state's objective for infringing the right – in this case national security, as per Article 8(2) – making sure that that the infringement of the private right is in proportion to the state's objective. Reference was made above to the case of Secretary of State for the *Home Department* v *AP*.[92] Here the applicant, AP, was living in the Midlands, 200 miles away from the rest of his family in London. The Supreme Court did rule that the rights of the applicant were proportionately infringed for the purposes of protecting national security. It is likely therefore that (in most cases, at least) control orders, despite being infringements of Article 8(1) of the ECHR, are necessary in the legitimate interests of the state, as per Article 8(2).

In further consideration of the Article 8 implications of the control order scheme, reference can also be made to the Control Order Review Group (CORG). The creation of this body was recommended by the then independent reviewer of the PTA, Lord Carlile of Berriew QC, in 2008[93] (see more about Lord Carlile in the text below). CORG meets every three months with representation from law enforcement and intelligence agencies "to keep the obligations in every control order under regular and formal review and to facilitate a review of appropriate exit strategies".[94] Lord Carlile, who believes that the work of CORG is "well-organised and methodical",[95] states that a factor for bringing an order to an end is its impact on the individual's family, especially any children living with them.[96]

5 Other arguments supporting control orders

In addition to the judicial safeguards outlined above, as per s. 3 of the PTA, the legislation provides other protections against executive abuse. For example, strict time limits apply to control orders (a non-derogating control order lasts for 12 months, as per s. 2(4), but is renewable); the Home Secretary is obliged to report to Parliament every three months on the operation of the control order powers, as per s. 14(1); the legislation must be renewed

90 (2009) 49 EHRR 29, para. 133.

91 [2010] UKSC 26, [2010] 3 WLR 51.

92 Ibid.

93 Lord Carlile of Berriew QC, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 1 February 2008: http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/lord-carlile-third-report.html, para. 47.

94 Home Office, *Written Ministerial Statement on Control Orders: 11 June–10 September 2010*, 16 September 2010: www.homeoffice.gov.uk/publications/parliamentary-business/written-ministerial-statement/control-orders-sep2010-wms/.

95 Lord Carlile of Berriew QC, *Fifth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 1 February 2010: www.statewatch.org/news/2010/feb/uk-carlile-5th-report-on-terr-act-2005.pdf, para. 121.

96 Ibid. para. 119.

annually by Parliament, as per s. 13; and there is an annual review of the legislation by an independent reviewer, as per s. 14(2), a copy of which must be laid before Parliament, as per s. 14(6). In the opinion of the author, therefore, the nature of the scheme does not seem so draconian when these safeguards are taken into account. Indeed, other UK anti-terror initiatives, such as "deprivation of citizenship" orders, as per s. 40 of the British Nationality Act 1981, where some British citizens suspected of terrorism have had their passports confiscated while they were travelling abroad, are arguably far more intrusive of human rights than control orders,[97] but seem to be overlooked in the desire to attack the control order scheme. One could also compare the control order scheme with other anti-terror initiatives adopted by comparable democracies to the UK such as the USA. For example, in May 2011 America's US House of Representatives passed the National Defense Authorization Act which expands the President's military targeting power. It authorises, with no end date, the targeting of undefined forces "associated" with al-Qaeda and the Taliban and those "substantially supporting" those forces with no connection to the 9/11 attacks or to any armed conflict. Those accused of being part of this undefined group can be detained indefinitely without charge. They are entitled to only minimal review of their detention once a year (and a slightly broader review before a military panel only every three years). They are not entitled to have a lawyer to represent them or to be presented with all the evidence against them.[98]

On the issue of an annual independent review of the PTA, this was undertaken, as stated above, by Lord Carlile of Berriew QC (until February 2011 when he was replaced by David Anderson QC). In his fifth annual report, dated February 2010, Lord Carlile – as in previous reports[99] – believed that the control order system was "necessary"[100] and abandoning the regime entirely would have a "damaging effect on national security".[101] He says that he has considered whether control orders can or should be replaced by something else, or even re-named, but has been "unable to find, or devise, a suitable alternative".[102] He concludes, therefore, that there was "no better means of dealing with the serious and continuing risk posed by some individuals".[103]

In informing his conclusions, Lord Carlisle analysed the operation of the control order scheme in 2009. He studied all the current control order cases, looking at the same information about each individual that would have been shown to the Home Secretary. His report finds: "I would have reached the same decision as the Secretary of State in each case in which a control order has been made . . ."[104] In particular, three of the controlees whose case Lord Carlile examined have been the subject of orders for more than two years. In reference to the terror threat posed by these three individuals, Lord Carlile observes:

> There is significant and credible intelligence that [these individuals] continue to present actual or potential, and significant danger to national security and public safety. I agree with the assessment that the control order on each has substantially

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97 D Taylor, "British terror suspects banned from returning to UK", *The Guardian*, 27 January 2011: www.guardian.co.uk/law/2011/jan/27/british-terror-suspects-banned-return.

98 HRW, "US: House passes drastic detention measures in Defense Bill", 26 May 2011: www.hrw.org/en/news/2011/05/26/us-house-passes-drastic-detention-measures-defense-bill.

99 Lord Carlile, *Third Report*, n. 93 above, para. 47.

100 Lord Carlile, *Fifth Report*, n. 95 above, para. 85.

101 Ibid.

102 Ibid. para. 97.

103 Ibid. para. 85.

104 Ibid. para. 114.

> reduced the present danger that exceptionally they still present despite their having been subject to a control order for a significant period of time.[105]

Control orders have other noted defenders. Importantly, they are supported by the director general of the security service (MI5), Jonathan Evans, on the basis that "terrorist threats can still exist which the criminal justice system cannot reach".[106] Moreover, the Centre for Social Cohesion (CSC), which is a think-tank specialising in the study of radicalisation and extremism in the UK, also favours the scheme. The CSC argues that control orders are the "best option available" in the fight against terror.[107] It states that an overstretched security service is dealing with a large number of UK-based al-Qaeda sympathisers. Rather than weakening the current national security structure, politicians should be strengthening the state's ability to reduce the terrorist threat.[108]

One of the concerns raised about the control order scheme is the significant financial cost of the measures, especially when the numbers subject to control orders are very small. At the time of writing, there is considerable unease amongst public sector employees because of the Coalition government's intention to cut spending in order to reduce the annual public sector financial deficit. To this end, many civil servants and government ministers have been lobbying the Treasury to avoid large grant reductions to their departments, very often citing concerns about their department's continued ability to fight international terrorism. One such department concerned about cost reductions is the Ministry of Defence. Recently Air Marshal Timo Anderson, director general of the Military Aviation Authority, addressed MPs in a private talk, outlining the effects public sector spending cuts would have on state objectives, such as preventing terrorism. The RAF is expected to lose significant numbers of jet fighters in spending cuts of up to 10 per cent over four years. In response, Air Marshal Anderson said that the UK would be "unable to respond effectively to a 9/11-style terrorist attack from the air".[109] Of course, deploying fighter jets to intercept suspected planes not responding to calls from air traffic controllers is another anti-terror initiative by the state. But is it not the case that the ongoing costs of the control order scheme pale into insignificance compared to the possible retention of RAF fighter jets as another "prevent" measure?

6 Justifying control orders on the basis of Article 2 of the ECHR: the right to life

There is little doubt that the UK is at serious risk of terrorism, especially from Islamic terror groups which engage in acts of atrocity, such as suicide violence, with maximum effect. For example, in 2005, the 7 July suicide attacks on the London transport network killed 52 people and injured over 700;[110] again in 2005, were the four failed suicide attacks in London a fortnight later on 21 July;[111] in 2006, there was the "airline bomb plot", a plot to blow up

105 Lord Carlile, *Fifth Report*, n. 95 above, para. 43.

106 J Evans, "The threat to national security", 16 September 2010: www.mi5.gov.uk/output/the-threat-to-national-security.html, para. 11.

107 R Simcox, *Control Orders: Strengthening national security*, Centre for Social Cohesion, June 2010: www.socialcohesion.co.uk/files/1284130287_1.pdf, p. 8.

108 Ibid.

109 BBC News, "Cuts endanger UK, RAF's Timo Anderson warns", 13 October 2010: www.bbc.co.uk/news/uk-politics-11529330.

110 BBC News, "London attacks", 8 July 2005: http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm.

111 BBC News, "21 July attacks: arrests and charges", 27 January 2006: http://news.bbc.co.uk/1/hi/uk/4732361.stm.

planes, flying from London to America, with home-made explosive liquids;[112] and in 2007 there were car-bomb attacks in London and at Glasgow Airport.[113] In 2009, there was a co-ordinated terror arrest of 11 men in the north-west of England (Operation Pathway) who were suspected of planning to blow up the Arndale Shopping Centre in Manchester.[114] (Two of these suspects have since been named as conspirators in a plot to bomb the New York subway.)[115] Recently, an explosive device was found on a US-bound cargo plane at East Midlands Airport which could have been detonated over the UK.[116] There are also fears that London will be the site of a future terror attack because it is the host city of the Olympic games in 2012.[117] Indeed, it has recently been reported that Islamic terror groups are intent on acquiring chemical, biological, radiological and nuclear (CBRN) weapons for use against civilian targets.[118]

These atrocities point to a continuation of terror threats to the UK in the name of fundamentalist Islam. In fact, the director general of MI5, Jonathan Evans, has recently said that the UK continues to face a "serious risk of a lethal attack taking place" from al-Qaeda-related terrorism,[119] which is obviously compounded by the recent killing of the leader of al-Qaeda, Osama bin Laden, by US special forces in Pakistan.[120] In the author's opinion, this justifies the retention of the control order scheme as a measure to prevent further atrocity, especially by reference to the rights of individuals to be protected from terrorist violence. This justification may sit uneasily with liberals, for example, but the trumping of the rights of terror detainees by the rights of potential victims is well recognised,[121] especially at the heart of government. For example, in October 2008 when the state was wishing to increase the period of pre-charge detention of terror suspects from 28 days to 42 days, the then Home Secretary, Jacqui Smith, said:

> The provisions in this Bill have always been about protecting the British people – protecting them from the serious threat that we face from terrorism. My approach has always been to strike the right balance between protecting national security and safeguarding the liberty of the individual . . . *But, for me, there is no greater individual liberty than the liberty of individuals not to be blown up on British streets or in British skies.* (italics added)[122]

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112 BBC News, "Three guilty of airline bomb plot", 7 September 2009: http://news.bbc.co.uk/1/hi/uk/8242238.stm.

113 BBC News, "Bomb plot doctor jailed for life", 17 December 2008: http://news.bbc.co.uk/1/hi/uk/7786884.stm.

114 M Hughes and L Smith, "Suspects in Manchester bomb plot wanted in us over subway attack", *The Independent*, 8 July 2010: www.independent.co.uk/news/uk/crime/suspects-in-manchester-bomb-plot-wanted-in-us-over-subway-attack-2021221.html.

115 Ibid.

116 BBC News, "Air freight from Yemen and Somalia banned", 1 November 2010: http://www.bbc.co.uk/news/uk-11669636.

117 ANI, "Fears of terror threat to London Olympics as 10 Extremists Walk Free on UK streets", 13 June 2011: www.dailyindia.com/show/445002.php.

118 D Gardham, "Nuclear terror risk to Britain from Al-Qaeda", *The Telegraph*, 22 March 2010: www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/7500719/Nuclear-terror-risk-to-Britain-from-al-Qaeda.html.

119 Evans, "The threat", n. 106 above.

120 R Booth, "Osama bin Laden death prompts worldwide security alert", *The Guardian*, 2 May 2011: www.guardian.co.uk/world/2011/may/02/osama-bin-laden-death-security-alert.

121 See, for example, D McKeever, "The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?" (2010) *PL* 110, pp. 136–7.

122 J Smith: www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081013/debtext/81013-0017.htm.

The author of this article believes that the views of the then Home Secretary, Jacqui Smith, are particularly significant, especially the references to the liberty of individuals not to be blown up. Recently, the inquest into the deaths of the 52 people who died in the co-ordinated suicide attacks in London on 7 July 2005 was held. As per s. 11(5)(ii) of the Coroner's Act 1988 an inquest must decide how, when and where a deceased came by their death. It was reported that one of the victims, a 41-year-old tax inspector who was married with two children, had been standing opposite Shehzad Tanweer, one of the 7 July bombers. He was blown out of the carriage and his body was found face down on the track. One witness said this victim's clothes had been blown off by the force of the blast.[123] Reading the accounts about those who died in the 7/7 attacks, one cannot fail to sympathise with strategies, such as control orders, to prevent atrocities such as these, perhaps justified on the basis of the more important right to life of those who died.

Assuming there is a right to life argument justifying the imposition of control orders, perhaps this could be made out by reference to Article 2 of the ECHR? The state is, of course, not directly responsible for the deaths of UK citizens in atrocities such as 7/7, so the issue of the "negative" right not to be arbitrarily killed by the state contained in Article 2(2) of the ECHR – the situations in which the use of lethal force by state agents may be lawful – is not relevant. However, Article 2(1) of the ECHR, the "positive" or "substantive" obligation imposed on the state, may still be applicable. This states: "Everyone's right to life shall be protected by law." Is there not a "positive" duty on the UK authorities to avert a terror threat by imposing controls on a suspected terrorist, in pursuit of its more important obligation to protect British citizens from atrocity? Indeed, in the light of the recent discovery at East Midlands Airport of a "viable" explosive device on board a US-bound cargo plane, *The Telegraph* has opined:

> Our security must always come first. The most fundamental human right is the right to walk down the streets without threat of harm . . . [The] first duty of any government is to protect the safety of its citizens.[124]

The newspaper then goes on to support the control order scheme as a justifiable measure in maintaining security, otherwise "the only feasible alternative is to leave such people at liberty to plot further acts of terrorism".[125]

In considering the state's "positive" duty to protect life, and whether this may legitimise the control order scheme, first, there is no general obligation on the UK authorities to avert death: *R (Gentle)* v *Prime Minister*.[126] However, the positive obligation does oblige the UK to deter the taking of life in broad terms. For example, the ECtHR in *Osman* v *United Kingdom*[127] said:

> It is common ground that the State's obligation . . . extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.[128]

123 Smith, n. 122 above.

124 "Editorial: Our security must always come first", *The Telegraph*, 31 October 2010: www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8099274/Our-security-must-always-come-first.html.

125 Ibid.

126 [2008] UKHL 20, [2008] 1 AC 1356.

127 (2000) 29 EHRR 245.

128 Ibid. para. 115.

Of course, control orders are measures designed to deter the taking of human life, thus perhaps satisfying this element of the positive obligation. But because of the potentially serious human rights implications of obligations imposed on a controlee, the author suspects that the substantive duty contained in Article 2(1) does perhaps require a greater justification for the scheme. Indeed, the ECtHR in Osman did say that particular circumstances must have arisen before a state would be obliged to act to avert the loss of life:

> Where there is an allegation that the authorities have violated their positive obligation to protect the right to life . . . it must be established . . . that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party . . .[129]

To utilise the state's positive duty under Article 2(1) as a basis for legitimising control orders, there would therefore have to be more than a general risk to individuals from terrorism, but a specific threat to identifiable victims – and then this would have to constitute a real and immediate risk. The *Osman* principles have been applied in UK law by the House of Lords in, for example, *Van Colle* v *Chief Constable of the Hertfordshire Police*.[130] In *Van Colle*, the deceased, Giles Van Colle, was shot dead by a former employee, Daniel Brougham, just days before he was due to give evidence for the prosecution at Brougham's trial for theft. The House of Lords ruled that the Hertfordshire police were not in breach of Article 2(1) in failing to protect the life of Mr Van Colle. In reference to *Osman*'s requirement that a real and immediate risk to life should exist, Lord Brown said:

> The test set by the European Court of Human Rights in *Osman* . . . is clearly a stringent one which will not be easily satisfied . . . It is indeed some indication of the stringency of the test that even on the comparatively extreme facts of *Osman* itself . . . the Strasbourg court found it not to be satisfied.[131]

Of course, therefore, reaching the threshold for imposing liability on the state for failing to protect life will be difficult. But not insurmountable, and in fact the positive duty to protect the lives of the community in general from possible violations by terrorists was one of the concerns expressed by the ECtHR in *McCann* v *United Kingdom*.[132] There the Special Air Service (SAS) shot dead three suspected Irish Republican Army (IRA) terrorists in Gibraltar who were planning to detonate a car bomb. The UK authorities had followed the IRA bombers from Malaga in Spain and allowed them not only to cross the Spanish border into Gibraltar, but to prepare for the attack at the site of the proposed bombing. Although the police had knowingly done all of these things because of the belief that they had insufficient evidence to charge the suspects with a crime, the ECtHR said that they had still exposed the local population to possible danger:

> It may be questioned why the three suspects were not arrested at the border immediately on their arrival . . . and why the decision was taken not to prevent them from entering . . . if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. The danger to the population of Gibraltar – which is at the heart of the Government's submissions – in not preventing their entry must be considered . . . The decision

129 (2000) 29 EHRR 245, para. 116.

130 [2008] UKHL 50, [2009] 1 AC 225.

131 Ibid. para. 115.

132 (1995) 21 EHRR 97.

> not to stop the suspects from entering Gibraltar is thus a relevant factor to take into account.[133]

Assuming that there would have to be more than a general risk to individuals from terrorism, but a threat to identifiable victims, which then would have to constitute a real and immediate risk, is it not the case that the evidence required by the Home Secretary to justify the imposition of a control order largely suggests this to be so? For example, s. 2(1) of the PTA only allows the Secretary of State to make a control order against an individual if s/he (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) *considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism.*

If, however, s. 2(1)(b) of the PTA is not sufficiently exacting to warrant the imposition of a control order under Article 2(1) of the ECHR – that is, a risk of terrorism was too broad to encompass knowledge of a real and immediate risk to the life of an identified individual or individuals (or the standard of proof was too low, it being only a reasonable suspicion on the part of the minister) – the author believes that it should be. The threat, and manner of acts of terrorism over the past 10 years surely warrant such an interpretation under, for example, s. 3(1) of the HRA – the courts' obligation to interpret legislation, so far as it is possible to do so, in line with ECHR rights? Assuming the state had a duty to impose a control order on the basis of its positive obligation to protect life, this would not be enough, however: it must only act reasonably in averting death. For example, the ECtHR in *Osman* also said:

> [The positive] obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take . . . measures to prevent that risk from materialising.[134]

The true meaning of this substantive principle is arguably not to impose excessive obligations on the state in fulfilling its duties to prevent death. But could it also conceivably be interpreted as condoning control orders if this could be characterised as "reasonable" when, for example, the recognised alternative to the scheme – the 24-hour surveillance of controlees – is generally accepted as too expensive? It is estimated that teams of up to 30 trained observers would be required to watch one suspect around the clock.[135] In addition, are the measures also not reasonable when weighed against the hundreds who died and were injured in the 7/7 atrocities, and the subsequent threats to life since then, such as the planned Islamist bombing of Manchester's Arndale Shopping Centre in 2009?

This alleged plot to detonate a terrorist bomb in Manchester in 2009 is particularly significant. The suspected conspirators included Abid Naseer who was named as a potential suspect in the bomb plot to target the New York subway (see above). He fought his deportation from the UK to Pakistan before the SIAC: *Naseer, Khan, and Ur Rehman et al.* v *Secretary of State for the Home Department.*[136] One of the grounds for fighting his deportation was the likelihood that he would be tortured upon his return to Pakistan. Article 3(1) of the United Nations Convention Against Torture (UNCAT), which the UK has ratified, states:

> No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

133 (1995) 21 EHRR 97, para. 203.

134 (1995) 21 EHRR 97.

135 BBC News, "Control orders: the eight British suspects", 24 January 2011: www.bbc.co.uk/news/uk-12269236.

136 Appeal no: SC/77/80/81/82/83/09.

In international law, this rule, which is supported by the jurisprudence of the ECtHR and therefore directly applicable in UK law,[137] is referred to as the principle of "non-refoulement". In his "open" judgment, Mitting J said that Naseer was "an Al Qaeda operative who posed and still poses a serious threat to the national security of the United Kingdom" and that "it was conducive to the public good that he should be deported".[138] However, the judge did not order his return because:

> Despite the restoration of a democratically elected Parliament and government, after eight years of military rule, Pakistan remains a state dominated by its military and intelligence agencies. There is a long and well-documented history of disappearances, illegal detention and of the torture and ill-treatment of those detained, usually to produce information, a confession or compliance . . . Anyone, such as Naseer, suspected of belonging to [al-Qaida] would be at risk at the hands of the [Pakistani Security Services]. Legal controls are inadequate.[139]

Tellingly, therefore, Abid Naseer was not deported from the UK because, in all likelihood, his rights under the UNCAT would be infringed upon return to Pakistan. What therefore can the UK government reasonably be expected to do in this instance? Surely, it must not permit Abid Naseer (and others like him) unfettered liberty when an independent court has labelled him as an al-Qaida operative and a threat to national security (notwithstanding the state has insufficient evidence to convict him of a crime)? As Walker observes: "The meagre number of control orders is not for want of customers."[140] An article in *The Telegraph* has recently asked: "Control orders are not very British – but what's the alternative?" It continues:

> How would Mr Cameron [the Prime Minister] . . . or Nick Clegg, the Liberal Democrat Leader, explain to the families of those killed that the terrorist responsible had been under suspicion but the restrictions on his movements were removed because they were, you know, not the sort of thing we do in Britain.[141]

This article justifies the continuation of control orders primarily on the state's duty to protect life under Article 2(1) of the ECHR. Ironically, the scheme also honours the UK's domestic, European and international legal duties in not exposing a foreign terror suspect to a threat of torture (assuming, of course, a receiving state has not assured the UK that a deportee will be well-treated upon return). If the author has not made the case that control orders demand, for example, an Article 2(1) compliant interpretation of the legislation as per s. 3(1) of the HRA, or at the very least serious consideration, where does the debate proceed from here?

Earlier it was stated that upon forming a Coalition government with the Liberal Democrats in mid-2010, the Conservative Home Secretary, Theresa May, announced a review of Labour's many counter-terrorism measures, one of which was the control order scheme.[142] This review, which considered whether the measures should either be retained,

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137 See, for example, *Chahal* v *United Kingdom* (1996) 23 EHRR 413.

138 Appeal no: SC/77/80/81/82/83/09, at para. 16.

139 Appeal no: SC/77/80/81/82/83/09, at para. 16

140 Walker, "The threat of terrorism", n. 49 above, p. 5.

141 P Johnston, "Control orders are not very British – but what's the alternative?", *The Telegraph*, 1 November 2010: www.telegraph.co.uk/comment/columnists/philipjohnston/8103215/Control-orders-are-not-very-British-but-whats-the-alternative.html.

142 Home Office, *Rapid Review,* n. 6 above.

removed, reformed or replaced, has now been completed and published.[143] It accepted that for the foreseeable future there was very likely to be a small number of people who pose an immediate and significant terrorist threat but who can neither be prosecuted nor deported.[144] And while increased surveillance could form an important part of any arrangements replacing control orders, surveillance alone could not mitigate risk to the level of a control regime.[145] Moreover, the costs of surveillance exceed by a considerable margin the costs of control orders.[146] The review therefore recognised that an approach that introduced more precisely focused and targeted restrictions than the current control order scheme would mitigate risk while increasing civil liberties.[147]

In discussing the more precisely focused and targeted restrictions, which are going to be called Terrorism Prevention and Investigation Measures (TPIMs), the review acknowledged that limits on communications, association and movement will be required for the new regime to be effective.[148] But there will be greater freedom of communication and association than the existing arrangements, placing only limited restrictions on communications, including use of the internet, and on the freedom to associate.[149] Instead of curfews there will be an overnight residence requirement with some additional flexibilities (for example, in relation to overnight stays outside the residence).[150] Additional resources will be made available to complement the new regime.[151] There are also proposals to reform the Home Secretary's suspicion about a controlee's involvement in terrorism-related activity. Currently, a control order cannot be issued under s. 2(1) of the PTA 2005 unless the minister has reasonable grounds for the suspicion that a controlee is involved in terrorism. The review says that the threshold is to be raised to "reasonable belief".[152]

The report finds that the new system is neither a long-term nor an adequate alternative to prosecution, which remains the priority. These measures will be time limited to two years to emphasise that they are a short-term expedient not a long-term solution. They may be reimposed after two years only where there is new material to demonstrate that the person concerned poses a continued threat.[153] Interestingly, the report concludes that there may be exceptional circumstances where the government will seek parliamentary approval for additional restrictive measures. In the event of a very serious terrorist risk that cannot be managed by any other means, more stringent measures may be required. Such measures will include curfews and further restrictions on communications, association and movement. But they will only be allowed if the Secretary of State is satisfied on the balance of probabilities (an even higher threshold than reasonable belief) that the person is or has been involved in terrorism.[154] More information about these measures has been forthcoming with the publication of the Terrorism Prevention and Investigation Measures Bill 2011,

143 HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations*, CM 8004, January 2011: www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/review-findings-and-rec?view=Binary.

144 Ibid. p. 37.

145 Ibid.

146 Ibid.

147 Ibid. p. 39.

148 Ibid. p. 42.

149 Ibid.

150 Ibid.

151 Ibid.

152 Ibid. p. 40.

153 Ibid. pp. 41–2.

154 Ibid. p. 43.

which, at the time of writing, is currently being debated by Parliament. Notably, according to cl. 5(1), the maximum period of a TPIM in the first instance is now only one year rather than two years, though it can be extended for a further year, but only once, cl. 5(2). But a TPIM can be extended after the maximum two-year period if there is a reasonable belief that the individual has been engaged in terrorist activity during the currency of the order, as per cl. 3. Also, the government has since indicated that a person's relocation to another part of the country without that person's consent is not going to be permitted, since the only conditions that can be imposed on a person are found in Schedule 1 of the Bill.[155] TPIMs are not intended for implementation before 2012 at the earliest because MI5 needs to recruit and train more surveillance officers to cope with the change.[156]

Some of these proposals by the review have been recommended previously. Time-limiting a control order is nothing new. For example, Walker had suggested that there should be a maximum time limit of 12 months without renewal.[157] Then it would turn a control order into either a provisional charge detention or a provisional deportation detention – "either way the authorities would know they have to act decisively by collecting further evidence and not rely on control orders for what one Minister . . . called 'an indefinite, limited period'".[158] A maximum term for a control order was also supported by, for example, the JCHR in its 2009 report on the PTA.[159] But here the government is recommending limiting TPIMs to two years, rather than one year, and allowing them to continue after two years if they are necessary. However, arguments in favour of relaxing the conditions and the raising of the standard of proof from reasonable suspicion to reasonable belief, have been less common in academic and legal circles, in the author's opinion.

Conclusion

Control orders are seemingly an anathema to traditional British standards of decency and fairness. Since the HRA came into force in October 2000, convention rights of the ECHR, as per s. 1 of the statute, have been incorporated into domestic law. So, rights such as Article 3, freedom from torture and other forms of ill-treatment, Article 5, the right to liberty, Article 6, the right to a fair trial, and Article 8, the right to privacy, are all directly enforceable in UK law. Arguably, in the issuing of a control order, these Articles have all been infringed for the purposes of pursuing the state's aim of preventing terrorism. However, the courts have said that some obligations imposed on a controlee, such as curfew hours not exceeding 16 hours per day, are lawful. They have also upheld control orders where the essence of a case against an individual is revealed so that the detainee can give meaningful instructions to their special advocate before SIAC. They have also implied that the imposition of a control order, with the obvious anxiety and stress that follows from this, is, nonetheless, not ill-treatment for the purposes of Article 3 (subject, of course, to the ruling of the Supreme Court in *AP (No 2)*).

But what seems to have been lost in the debates about the legality of the control order scheme are the (overriding?) rights to life of ordinary citizens. And, when considering the

155 Home Office, "Terrorism Prevention and Investigation Measures Bill", 23 May 2011: www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill/.

156 D Gardham, "MI5 on recruitment drive to cope with new control orders", *The Telegraph*, 9 March 2011: www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8371804/MI5-on-recruitment-drive-to-cope-with-new-control-orders.html.

157 Walker, "The threat of terrorism", n. 49 above, p. 16.

158 C Walker, "Terrorism: Prevention of Terrorism Act 2005 ss. 2 and 3 – non-derogating control order – whether 'deprivation of liberty' under the European Convention on Human Rights Article 5" (2008) *Crim LR* 487, p. 502.

159 JCHR 2009, n. 31 above, para. 2.

risks posed by individual suspects (which have been verified by the former independent reviewer of the PTA, Lord Carlile, during the currency of the legislation, and the courts such as the SIAC in *Naseer*), surely the rights to life of the many must prevail over the freedoms of the few, the very small number of controlees?

Article 2(1) of the ECHR imposes a positive obligation on the state to protect life. The author has attempted to construct a right to life argument justifying the retention of the control order scheme. If he has been unsuccessful with this, then it must be remembered that debates about the threats certain people pose to society have happened in other contexts: for example, the Mental Health Act 2007 amends significantly the provisions of the Mental Health Act 1983 and, in particular, reforms s. 3(2) of the latter Act, the so-called "treatability requirement", which used to restrict the detention for treatment of individuals with a psychopathic disorder.[160] Indeed, if we wish to remain faithful to our international obligations in respect of Article 3(1) of the UNCAT, in circumstances where "diplomatic assurances" do not exist, how else are we to deal reasonably with foreign suspects who, without reservation, are determined to commit further acts of atrocity? And there are suspects who cannot be deported because of their British nationality status. It must be remembered, therefore, that, in defending the current control order scheme, the author is not calling for an extension to existing terror laws such as the reintroduction of the indefinite detention provisions, as per the ATCSA.

If the conclusion to be drawn from this piece was simply based on the weight to be attached to both sides of the control order argument, the balance probably falls on the side of those who oppose the measures (assuming, of course, the author has been unable to construct a credible argument in reference to Article 2(1) of the ECHR). But the aim here has not been to present a conclusion merely based on the number of words that the author could find to support or reject the continuation of the scheme. The intention has been to challenge the negative opinions expressed about the measures which appear to have taken centre stage in recent years, where the rights to life, for example, of ordinary individuals have seemingly been overlooked. The aim of this article has therefore been to present a genuine defence of control orders on the basis of the state's obligation to protect life. It is hoped that it has achieved this objective. If not, the new TPIMs may be a useful compromise, since duties imposed on a suspect are apparently going to be relaxed: the replacement of curfews with overnight residency requirements, thus reducing the maximum time a person is obliged to domicile at a particular residence, being an obvious example. But TPIMs are not a revolution in terms of individual freedoms. Proceedings are still going to be modelled on the SIAC system, as per Schedule 4 of the published Bill, which, for some individuals, means primarily, if not completely, closed hearings. And yes, while the threshold for imposing a control order is to be raised from reasonable suspicion to reasonable belief, as per cl. 3(1), this is not going to make much difference in practice. For example, Lord Carlile, the former independent reviewer of the PTA, in his latest, and final, sixth report, has said that the control orders currently in existence would have been granted on this standard of proof in any event (and "in most cases by some distance the full civil standard

160 The concern about the risk some individuals suffering from a psychopathic disorder posed to society, such as Christopher Clunis, Michael Stone, Anthony Hardy and others, is an underlying theme of the Mental Health Act 2007. For example, s. 1 amended the previous definition of mental disorder in s. 1 of the Mental Health Act 1983, broadening the scope of the state's compulsory powers over individuals suffering from a mental disorder; and s. 32 amends s. 17 of the Mental Health Act 1983, introducing for the first time compulsory treatment powers in the community ("supervised community treatment").

of balance of probabilities").[161] Moreover, TPIMs will not be subject to an annual renewal by Parliament,[162] which is the case with the existing control order regime. As much as the present Coalition government has portrayed TPIMs as a significant reform of the existing regime, other commentators have, instead, likened them to control orders in all but name.[163] It is for this reason that they are arguably an acceptable substitute for control orders since the important obligation of the state to protect the public from terrorism still seems to be the determining factor.

161 Lord Carlile of Berriew QC, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 3 February 2011: www.homeoffice.gov.uk/publications/counter-terrorism/independent-reviews/lord-carlile-sixth-report?view=Binary, p. 15.

162 House of Commons Library, Terrorism Prevention and Investigation Measures Bill: Bill 193 of 2010–11, Research Paper 11-46, 31 May 2011: www.parliament.uk/briefing-papers/RP11-46.pdf, p. 1.

163 J Kirkup and D Gardham, "Control orders to remain 'in all but name'", *The Telegraph*, 7 January 2001: www.telegraph.co.uk/news/politics/8246756/Control-orders-to-remain-in-all-but-name.html. This is one of the reasons why they have been criticised by interested groups such as Amnesty International and HRW: Amnesty International, "UK counter-terrorism review: some progress but concerns about right to fair trial remain says Amnesty", 26 January 2011: http://www.amnesty.org.uk/news_details.asp?NewsID=19203; and HRW, "UK: proposed counterterrorism reforms fall short", 11 February 2011: www.hrw.org/en/news/2011/02/11/uk-proposed-counterterrorism-reforms-fall-short.

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Modernising corporate objective debate towards a hybrid model

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Abstract

In the light of the increasing significance and vivid dynamism of corporate governance practices, a vast amount of literature has been dedicated to the development of modes of corporate governance. This subject deals with the rights and responsibilities of boards of directors, their shareholders and stakeholders, and the balancing of their individual interests with the economic goals of the organisation as well as the interests of society as a whole. A fundamental topic lies at the heart of corporate governance regimes: whose interests should corporations be serving? This article rethinks the shareholder and stakeholder theory debate, treating it as a contemporary topic worth reconsidering in the context of the current climate of corporate scandals and financial crisis. Learning from experience, the article offers some guidance on how to establish an efficient corporate governance model by adopting hybrid model principles for higher investor confidence, better corporation shape, more active involvement from shareholders and stakeholders and more considerations of the views and interests of stakeholder groups. Thus, this paper provides some thoughts on corporate objectives in the convergent corporate governance model in order to formulate a hybrid model mechanism and provide some guidance for directors in the carrying out of their function.

Key words: Shareholder value, stakeholders, corporate objective, corporate governance, hybrid model

1 Introduction

Corporate governance is concerned with the processes by which organisations are directed, controlled and held accountable. During the last decade, corporate governance has been a contested issue. In spite of decades of economic globalisation and intense financial globalisation, corporate governance patterns still continue to differ markedly across countries.[1] Ever since it was demonstrated that fundamental differences do exist in corporate governance models across countries, there has been a debate about which model works more efficiently globally. The central question is whether a particular national corporate governance model has a competitive advantage over all other models in terms of its practicability and, if so, should the other models begin to emulate it.

1 M F Guillen, "Corporate governance and globalization: is there convergence across countries" in T Clarke (ed.), *Theories of Corporate Governance: The philosophical foundations of corporate governance* (London: Routledge 2004), p. 223.

Academic views on corporate objectives can be divided into two schools:[2] the shareholder primacy norm[3] and the stakeholder theory.[4] Each model has a characteristic set of structural elements, ownership patterns and strengths and weakness.[5] The shareholder primacy norm is usually characterised in terms of financing through equity, dispersed ownership, active markets for corporate control, and flexible labour markets.[6] In this model, companies rely more on stock and bond markets for external financing. The model prevails in common law countries with an effective legal enforcement of shareholder rights. Corporate law provides relatively extensive protections for shareholders and courts are also relatively active in enforcing those protections.[7] In contrast, the stakeholder model is normally described in terms of long-term debt finance, ownership by large blockholders, weak markets for corporate control, and rigid labour markets.[8] The blockholder-based system relies on codified law and emphasises rules protecting stakeholders. Companies rely more on banks for external financing. Large companies generally have one bank – for example, the main bank in Japan,[9] and a universal bank in Germany[10] – which owns a certain amount of shares in the company.

Changes in ownership structure, financial regulation and corporate governance legislation towards another system are respectively therefore a strong sign of convergence.[11] It is argued by many American scholars in the fields of law, finance, economics, politics and sociology that cross-national patterns of corporate governance are converging or will converge towards the Anglo-American, capital market-driven model which implies a convergence of the whole system.[12] It is also argued that the market-dominated Anglo-American model is the most efficient corporate governance model in the sense that it represents production efficiency, increased investment opportunities and reduced

2 There are also academics who divide the corporate governance system into four models, namely the outsider system, the Rhineland or insider system, the Latin system and the Japanese system; see L Van Den Berghe, *Corporate Governance in a Globalising World: Convergence or divergence? A European perspective* (Boston: Kluwer Academic Publishers 2002), p. 1. Meanwhile, other academics think that apart from the shareholder-oriented model, there are manager-oriented, labour-oriented and state-oriented models of corporate law; see H Hansmann and R Kraakman, "The end of history for corporate law" (2001) 89 *Georgetown Law Journal* 439, p. 441.

3 Namely, the Anglo-American outsider "market-orientated" model.

4 Namely, the European and Japanese insider "network-orientated" model.

5 C A Williams and J M Conley, "An emerging third way? The erosion of the Anglo-American shareholder value construct" (2005) 38 *Cornell International Law Journal* 493.

6 R V Aguilera and G Jackson, "Corporate governance: dimensions and determinants" (2003) 28 *Academy of Management Review* 447, p. 447.

7 B H McDonnell, "Convergence in corporate governance – possible, but not desirable" (2002) 47 *Villanova Law Review* 341, p. 344.

8 Aguilera and Jackson, "Corporate governance", n. 6 above, p. 477.

9 In Japan, the main bank has a long-term relationship with a Japanese corporation. It provides loans, holds equity in the corporation and, as the most important secured creditor of the company, the bank always has priority rights in monitoring the company and joining in major decision-making of the company board.

10 In Germany, the universal bank provides a wide range of financial services including deposits, securities services, and dealing in real estate.

11 U C Braendle and J Noll, "On the convergence of national corporate governance system" (2006) 15 *Journal of Interdisciplinary Economics* 57, p. 59.

12 For example, see J C Coffee, "The future as history: the prospects for global convergence in corporate governance and its implications" (1999) *Northwestern University Law Review* 642; Hansmann and Kraakman, "The end of history", n. 2 above; J N Gordon, "Pathways to corporate governance? Two steps on the road to shareholders" (1999) 5 *Columbia Journal of European Law* 219, p. 219.

transaction costs.[13] The market-oriented model focuses on the process of harmonisation and convergence from a market perspective. Adherents to this model propose that the market is the only relevant factor in driving the corporate governance system to its most optimal format.[14]

However, with the Enron scandal, the failure of the NASDAQ and the financial crisis beginning in 2007, the advantages of the shareholder primacy model are less self-evident. Enron, a name now synonymous with corporate scandal, was previously ranked in the US Fortune Top 10 companies based on its turnover. It ended its glory days in one of the most shocking cases of insolvency in US history, and was instrumental in the collapse of Andersen, one of the big five global accounting firms.[15] The US government implemented a series of reforms in the aftermath of the scandal with revisions of the New York Stock Exchange's listing requirements for more responsible corporations and directors. Since then, companies are required to have an audit committee wholly comprised of independent directors and to publish a code of ethics for senior financial officers.[16] These scandals provided a dramatic object lesson in the perils of a management obsession with share price. Public opinion regarding the advantages of different corporate governance models appears to have shifted towards the opposite end. In the past few years, there have been an increasing number of voices arguing that the Anglo-American corporate governance system is converging towards the continental European system.[17] A number of changes in Anglo-American corporate governance practice, including an increase in societal practice by corporations and institutional investors, growing shareholding concentration and stakeholder-related information disclosure, have been taken as evidence of convergence towards the stakeholder model.

However, although some academics accept the notion of corporate governance convergence, they do not agree that such a global model will be an exact copy of the outsider model. As the result of convergence based on the most successful elements of different corporate governance models, a more reasonable, "hybrid corporate governance

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13 One of the arguments for the superiority of the Anglo-American regime is as follows: dispersed shareholdings mean that shareholders' wealth depends on more diversified portfolios of investments (held directly or through institutions such as pension funds and mutual funds) than is the case for shareholders in a closed regime with concentrated ownership. Since the risk of a diversified portfolio is lower than that of a concentrated one, shareholders require a lower return in relation to the risk; this in turn lowers the cost of obtaining capital for corporations, and makes capital for risky ventures more available. The argument holds particularly in the circumstances of global capital market integration. See R G Rajan and L Zingales, *The Great Reversals: The politics of financial development in the 20th century*, Working Paper W8178 (Cambridge: National Bureau of Economic Research 2001); V Errunza and E Losq, "International asset pricing under mild segmentation: theory and test" (1985) 40 *Journal of Finance* 105.

14 Hansmann and Kraakman, "The end of history", n. 2 above.

15 It changes the big five to the big four largest international accountancy and professional services firms comprising PricewaterhouseCoopers (PwC), Deloitte Touche Tohmatsu (Deloitte), Ernst & Young (EY) and KPMG.

16 For example, the Sarbanes–Oxley Act 2002 in the US; see also the earlier UK report *The Financial Aspects of Corporate Governance* (the Cadbury Report) (London: Committee on the Financial Aspects of Corporate Governance 1992).

17 See S Thomsen, "The convergence of corporate governance systems to European and Anglo-American standards" (2003) 4 *European Business Organization Law Review* 31; S Deakin and S J Konzelmann, "After Enron: an age of enlightenment?" (2003) 10 *Organization* 583; Williams and Conley, "An emerging third way?", n. 5 above; S. Deakin, "The coming transformation of shareholder value", (2005) 13 *Corporate Governance: An International Review* 11; C Strangberg, "The convergence of corporate governance and corporate social responsibility: thought – leaders study" (Strangberg Consulting 2005), available at www.corostrandberg.com.

model"[18] will be introduced.[19] The direction of corporate governance convergence, no matter whether it is toward a shareholder-oriented model or a hybrid model, is always determined by four factors. These are: board systems; the priorities placed on shareholder value or a combination of shareholder and stakeholder value; the relationship between control and ownership as well as the financial structure of the company; and the role of capital markets.

In this article, a justification for the convergence of corporate governance systems will be discussed, followed by the arguments for a hybrid model. In particular, the interests of stakeholders will be examined in different possible hybrid models.

2 Arguments for proceeding with convergence

The global nature of financial markets links companies and investors around the world. After recent corporate scandals (which have happened since the mid-1990s), it should come as no surprise to anyone that principles of good and effective corporate governance are converging while variations in national company law and practice remain.[20] Legislatively, the Organisation for Economic Co-operation and Development (OECD) developed principles[21] as a guide for governments worldwide to assist them in their efforts to improve their legal, institutional and regulatory frameworks for corporate governance. The internationalisation and globalisation of capital, capital markets, and trade are resulting in the convergence, confluence and homogenisation of internationalised corporate governance structures.[22] The convergence of corporate governance and pressures from the trend towards convergence will enable companies to reconfigure their governance structures and make them more efficient in order to promote the success of the company. International and cross-border companies in general compete globally and are free to alter their governance conventions because of the dynamic characteristics of corporate governance models.[23]

In practice, common features of corporate governance systems may be acquired through regulatory regime adjustments or, alternatively, obtained through firms' adaptations in the light of the successful governance practices of other companies with a competitive advantage. The first type of change is defined by Gilson as "formal convergence", which generally involves a political process of changing regulatory rules and complementary institutions;[24] the latter is considered a process of "functional convergence", in which existing governance institutions are elastic enough to respond to the demands of changed circumstances without transforming the formal characteristics of the governance system they reside in.[25]

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18 See R La Porta, A Shleifer, and R W Vishny, "Legal determinants of external finance' (1997) 52 *Journal of Finance* 1131.

19 Van Den Berghe, *Corporate Governance*, n. 2 above, p. 13.

20 S Maier, "How global is good corporate governance?", Research Briefing of Ethical Investment Research Services (2005): www.eiris.org/files/research%20publications/howglobalisgoodcorpgov05.pdf, p. 5.

21 For example, OECD, *OECD Principle of Corporate Governance 2004* (Paris: OECD 2004).

22 M Fukao, *Financial Integration, Corporate Governance, and the Performance of Multinational Companies* (Washington DC: Brookings Institution 1995).

23 M J Rubach and T C Sebora, "Comparative corporate governance: competitive implications of an emerging convergence" (1998) 32 *Journal of World Business* 167, p. 180.

24 R J Gilson, "Globalizing corporate governance: convergence of form or function" (2001) 49 *American Journal of Comparative Law* 329, p. 336.

25 Ibid. p. 336.

Comparatively, functional convergence takes a more flexible form and can occur at different levels: at the level of the firm, or at national or supranational levels. Formal convergence mostly takes place in the form of regulatory change at or above the national level. In business practice, we often witness the occurrence of functional convergence in a variety of forms without the adjustment of local laws.

Based on the consideration of both global competitive pressures and national path dependence persistence, Gilson concluded that corporate governance convergence would be most likely to be achieved in function first rather than in form.[26] By engaging in functional convergence, firms have the opportunity to choose and adapt various components to fit into their own systems; formal convergence indicates the fact that the whole system, including its complementary elements, has to be changed to converge with the configuration of the new regime. Since the hybrid model that will be put forward in this article is principle-based, with the requirement that each jurisdiction should create enforceable supplementary measures in implementing those principles, the author favours the trend towards functional convergence largely due to path dependence theory.

2.1 Institutional investors and convergence

Proponents of the globalised corporate governance model have concluded from the rise of foreign direct and portfolio investment that there is a trend towards convergence in corporate governance. Institutional investors, such as banks, insurance companies, pension funds, mutual funds, hedge funds, exchange-traded funds and other financial institutions, occupy an increasing percentage in the shareholder structure within companies, especially in multinational companies. The increase of investment funds will push the harmonisation in corporate governance still further.[27]

Taking the US as an example, institutional shareholders have been increasingly playing a leading role in the last decade:

> Latest available year-end 2005 data show that US institutional investors have since rebounded robustly to control $24.1 trillion in assets, up from a low of $17.3 million in 2002; institutional investor ownership of US corporations also rebounded during the post-2002 market break period and, in 2005, institutional investors held a record 61.2 per cent of total US equities, up from 51.4 per cent in 2000.[28]

In Japan, too, where *keiretsu* holdings are significant, institutional shareholders have become increasingly active in their involvement in corporate governance.[29] The distribution of share ownership changed greatly between 1950 and 2003. In terms of institutional shareholders, the percentage of bank and trust company shareholders grew from 12.6 per cent to 17.4 per cent; pension funds grew from 0 per cent to 4.5 per cent; insurance companies grew from 0 per cent to 8.0 per cent. In contrast, the proportion of shares owned by individual shareholders dropped from 61.3 per cent to 20.5 per cent.

26 Gilson, "Globalizing corporate governance", n. 24 above.

27 M Bradley, C A Schipani, A K Sundaram and J P Walsh, "The purposes and accountability of the corporation in contemporary society: corporate governance at a crossroads" (1999) 62 *Law and Contemporary Problems* 9, p. 67.

28 C K Brancato and S Rabimov, *The 2007 Institutional Investment Report*, No 1400 (New York: The Conference Board 2007).

29 T Seki, "Legal reform and shareholder activism by shareholder investors in Japan" (2005) 13 *Corporate Governance* 377, p. 382.

This trend is also present in the UK, where the percentage of institutional shareholders grew from 29 per cent in 1960 to 60 per cent in 1994.[30] Institutional investors controlled about 80 per cent of the UK equity market as of 31 December 2003.[31] In contrast, individual investors owned 54 per cent of the shares in 1963 but the proportion of shares owned by this group fell steadily until by 1989 it had dropped to 21 per cent. By 2006, the percentage of shares in the hands of individual shareholders had dropped to 13 per cent, even though there are reasons why individual share ownership had been encouraged during that time, such as the large privatisation issue which occurred in the UK in the early 1990s and, in more recent years, the demutualisation of some of the large building societies.[32] Holding 94 per cent of the European market's share ownership up to 31 December 2005, institutional investors conspicuously dominate and drive that market.[33]

Institutional investors, working together with advocacy organisations,[34] monitor corporate governance activities and provide voting advice. They will also collectively abstain or vote against management at annual general meetings, sending strong messages to company boards. Based on evidence from the shareholding structure modification in the last 20 years in the UK and the US, it is apparent that institutional shareholders are becoming increasingly important in the operation of the entire corporate governance system. The obvious growth of institutional investment has begun to influence the views of corporate governance worldwide via the rapid internationalisation of the capital market.[35] Institutional investors in the US, Europe and elsewhere seek to invest increasing amounts of capital throughout the world, which create pressure that "disturbs pre-existing factual and legal patterns of owner–manager relations within private firms" in different countries.[36]

Institutional investors insist that companies respect international norms of governance, especially in terms of the duties owed by directors to manage and control the shareholders in order to respect the minority shareholders and prove transparency and procedures for exerting corporate control.[37] Therefore, companies are always required and obliged to adapt their behaviour accordingly.

Institutional investors, in contrast to individual shareholders, will compare investment opportunities globally before investing. The directors, the chief executive officer (CEO), and the reputation and future of the corporation will all be included as factors to be considered, and will be judged not only against domestic companies and companies in neighbouring countries, but also against the companies worldwide. Instead of facing millions of anonymous shareholders, the directors of companies are in fact facing several thousand identifiable money managers. The institutional shareholders' managers are "much

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30 See P Davies, "Institutional investors as corporate monitors in the UK" in K J Hopt and E Wymeersch (eds), *Comparative Corporate Governance* (Berlin/New York: Walter de Gruyter 1997).

31 C Mallin, A Mullineux and C Wihlborg, "The financial sector and corporate governance: the UK case" (2005) 13 *Corporate Governance: An International Review* 532.

32 C A Mallin, *Corporate Governance* 3rd edn (Oxford: OUP 2010), p. 106.

33 European Social Investment Forum (Eurosif), *European SRI Study 2006* (Brussels: Eurosif 2006), p. 9.

34 Such as the Pensions Investment Research Consultants (PIPC) or Institutional Shareholder Services.

35 E W Orts, "The future of enterprise organization" (1996) *Michigan Law Review* 1947, p. 1964; for a more detailed account of the extent and cause of the internationalisation of capital markets in the last few decades see U Geiger, "The case for the harmonization of securities disclosure rules in the global market" (1997) *Columbia Business Law Review* 241, pp. 247–55.

36 R M Buxbaum, "Institutional owners and corporate manager: a comparative perspective" (1991) 57 *Brook Law Review* 1, p. 5.

37 S Nestor and J K Thompson, "Corporate governance patterns in OECD economies: is convergence under way": www.oecd.org/, p. 20.

more demanding and less patient than individual shareholders".[38] They "look for company competitiveness of corporations, and clamour for change when companies fall short".[39]

Cross-border institutional investors will set out corporate governance principles and put pressure on poorly performing companies to improve their corporate governance practices.[40] Companies all struggle to adopt and apply the best corporate governance principles with the intention of attracting and retaining institutional shareholders. The increasing proportion of institutional shareholders will lead to a focus on shareholder proposals that are generally applauded by commentators. The focus will also entail alteration to board structure to enhance its independence from management. The separation of management and control brought about by the increasing number of institutional shareholders in the stock markets in Japan and continental European countries will create pressure towards convergence to an outsider model of corporate governance. Besides, the increasing number of institutional investors will make the shareholder structure in jurisdictions with insider models more dispersed, rather than highly concentrated as was previously the case. This is further evidence that the insider corporate governance model is moving towards the outsider model.

On the other hand, in practice, many institutional shareholders are starting to monitor companies' performance, especially around issues concerning social and environmental factors that impact upon stakeholders.[41] Care and concern for stakeholders' interests are not just the result of philanthropic or ethical motives. The more motivating reason is based upon a perception that corporations which ignore stakeholders' concerns will always ultimately put the interests of shareholders at risk. Therefore, it is reasonable for the institutional shareholder in an outsider model to promote the stakeholders' interests and therefore the ethical responsibility of the company.

2.2 Integration and globalisation of economy and markets

The profound effect of economic integration – that is the openness and integration of national economies into the international economy through trade, foreign investment, capital flows, communication and modern technology – in facilitating the fast growth of common governance practice has been well recognised.[42] At the outset, the massive integration of financial markets, and in particular the dramatic increase in foreign exchange and portfolio capital flows, has advanced the expansion of international financial linkages and economic integration.[43]

The growing integration of financial markets is an important factor favouring convergence of corporate governance. An increasing number of investors agree that holding an international equity portfolio, rather than a purely domestic portfolio, will lead to a higher return and lower risk.[44] Therefore, it is a very common and modern phenomenon that many pension funds allocate a certain portion of their portfolios to international equities while a large number of specialised mutual funds have been developed

38 M Useem, "Corporate leadership in a globalizing equity market" (1998) 12 *Academy of Management Executive* 43, p. 45.

39 Ibid.

40 Davis, "Institutional investors", n. 30 above.

41 J Armour, S Deakin and S J Konzelmann, "Shareholder primacy and the trajectory of UK corporate governance" (2003) 41 *British Journal of Industrial Relations* 531, p. 545.

42 J Bhagwati, *In Defense of Globalisation* (New York: OUP 2004), p. 3.

43 T Clarke, *International Corporate Governance: A comparative approach* (Oxford: Routledge 2007), p. 3.

44 Nestor and Thompson, "Corporate governance", n. 37 above, p. 19.

to allow individuals to participate in foreign equity investment.[45] The phenomenon of international diversification is normal in countries with strong institutional shareholder communities. Therefore, similar diversification is expected to be generalised in other countries to succeed in developing institutional saving.[46]

Besides, foreign listings are also becoming an increasingly important strategic issue for companies and stock exchanges alike.[47] It is normally very beneficial for companies to access foreign capital markets via an equity listing as companies become global in their product market and investment strategies.[48] Global financial transactions have increased over recent years with more companies raising equity outside their home country.[49]

Moreover, the growing wish of both investors and issuers to operate in the international capital market requires a certain degree of acceptance of common values and standards.[50] Many companies, both domestic and multinational, have become involved in cross-border activities in the product and capital markets. Cross-border business activities highlight corporate diversity in financial reporting practice under different jurisdictions, each established according to its own political, legal, cultural and business environments. This may lead to a financial reporting system which lacks international comparability. However, it is argued that greater comparability in information will enable resources to be allocated more efficiently and will facilitate better investment decisions.[51]

As a result of rising international trade, the development of internationally comparable business practices and standards is becoming increasingly necessary.[52] The International Accounting Standards Committee (IASC) was formed in 1973 by professional accounting bodies from 10 countries and has worked to develop a core set of international accounting standards which could be employed in the presentation of financial statements worldwide. The IASC completed its task in 1999, and it is now up to the European Commission and its regulatory counterparts throughout the world to assess the acceptability of the International Accounting Standards (IAS).[53] The European Commission has regarded harmonisation as a key element in meeting the growing need for transparent corporate accounts and the need to compare financial statuses in order to streamline the process of convergence and the transparency of financial information from a global perspective. Therefore, the European Union decided to implement the international standards, already used by some EU businesses published by the International Accounting Standards Board (IASB). The application of the IAS in the EU is regulated by EU Regulation No 1606.02 with the objective of adopting and use of:

> IAS in the Community with a view to harmonising the financial information presented by the companies in order to ensure a high degree of transparency and

45 Nestor and Thompson, "Corporate governance", n. 37 above.

46 Ibid.

47 M Pagano, A A Roell and J Zechner, "The geography of equity listing: why do companies list abroad" (2002) 6 *The Journal of Finance* 2651, p. 2651.

48 Companies are able to collect funding abroad at a cheaper price, or they might find that capital is more easily available. Also by listing abroad, firms may improve the terms on which they can raise capital or on which their shareholders can sell existing securities.

49 P Walton and A Haller, *International Accounting* (London: International Thomson Business Press 1998).

50 Nestor and Thompson, "Corporate governance", n. 37 above, p. 20.

51 Braendle and Noll, "On the convergence", n. 11 above, pp. 67–8.

52 J Solomon, *Corporate Governance and Accountability* 3rd edn (Chichester: John Wiley & Sons Ltd 2010), p. 198.

53 C I Isaac (Commissioner Isaac C Hunt Jnr, US Securities and Exchange Commission), "International Accounting Standard: The Rules of the Game" (paper presented at the University of Texas School of Law 22nd Annual Conference on Securities Regulation and Business Law, 2000): www.sec.gov/news/speech/spch348.htm.

> comparability of financial statements and hence an efficient functioning of the Community capital market and of the Internal Market.[54]

The right of EU member states to allow or require the adoption of the IAS by EU-listed companies was included in the regulation, with reference to annual financial statements, and unlisted companies, with reference to annual and consolidated financial statements. Furthermore, the subsequent EC Regulation No 1725/03 completed the EC Regulation No 1606/02 and adopted all accounting standards issued by the IASB (except for IAS 32 and IAS 39), which must be complied with when preparing annual and consolidated financial statements.

Apart from accounting standards, the Security and Exchange Commission has also been working with the International Organisation of Securities Commissions to develop international standards for non-financial statement disclosure. Furthermore, the high concentration of corporate auditing work with the few remaining international auditing firms also enhances the convergence of corporate governance practice: those firms have mature systems to apply international standards when evaluating expertise and performance in corporate practice, thus further prompting the unification of good corporate practice.[55]

Additionally, the number of cross-border mergers has dramatically increased during the last two decades.[56] Intensified competition in the globalisation process further contributes to the convergence of corporate governance practice by heightening anxiety about firm expansion. To survive in the competitive global market, it is important for firms to attain sufficient size and market influence by concentrating capital through mergers and acquisitions.[57] This inevitably results in the unification of governance standards and practices of those merged or acquired firms. Mergers and acquisitions via cross-border deals underwent an explosive growth during the 1990s, increasing by 500 per cent. Cross-border mergers provide an alternative mechanism for contractual convergence, which occurs when firms change their own corporate governance practices by adopting a better regime, possibly because of unchangeable legal systems due to lack of flexibility or immutable law.[58] The target always adopts the disclosure practices, accounting standards and corporate governance structure of the acquirers in a cross-border merger.[59] The target company will always modify its corporate governance model towards the acquired model when it is acquired by a foreign company.

For example, the French company Vivendi acquired the Canadian firm Seagram in 1999, and the merged firm adopted French accounting systems. Similarly, the French tobacco company Seita was acquired by the Spanish Tabacalera, in establishing a new corporation named Altadis in 1999. The new company prepares its consolidated financial statements in

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54 Article 1, Regulation (EC) No 1606/2002 of the European Parliament and of the Council.

55 E Wymeersch, "Company law in turmoil and the way to 'global company practice'" (2003) *Journal of Corporate Law Studies* 283, p. 286. The current four largest accounting firms in the world are referred to as the big four, see n. 15 above.

56 D C Mueller, *The Corporation: Growth, diversification and mergers,* 2nd edn (London/New York: Routledge 2003).

57 C Lane, "Changes in corporate governance of German corporations: convergence to the Anglo-American model?" (2003) 7 *Competition and Change* 79, p. 87.

58 Contractual convergence is defined by Bris and Cabolis together with functional convergence (which occurs when institutions are flexible enough to respond to demands from market participants and no formal change in the rules is necessary) and formal convergence (which occurs when a change in the law forces the adoption of best practices). See A Bris and C Cabolis, "Corporate governance convergence by contract: evidence from cross-border mergers", Working Paper No 02-32 (New Haven: Yale ICF 2002); see also A Bris, N Brisley and C Cabolis, "Adopting better corporate governance: evidence from cross-border mergers" (2008) 14 *Journal of Corporate Finance* 224.

59 Bris and Cabolis, "Corporate governance convergence", n. 58 above, p. 3.

accordance with generally accepted accounting principles in Spain. Finally, Daimler Chrysler had to adopt the two-tier board structure required by German company law as the result of merger between a US and a German company. These examples demonstrate that mergers and acquisitions that happen globally will have an impact on the companies involved not only internally but also externally. This change could even be a complete transfer from one corporate governance model to another one.

In Europe, the creation of the single currency area within the EU (Euroland) seems to have boosted the development of a European corporate bond market. The rapid growth in the Euro-based corporate bond market will further reduce the role of bank loans as a source of corporate external finance which is a typical character of the insider corporate governance model in which banks are the dominant institutions providing both indirect and intermediate debt finance from the capital market. By eliminating exchange rate risk, European monetary union has eliminated a crucial obstacle to financial integration and opened up the possibility of a fully integrated continental financial market comparable to that of the United States.[60] Therefore, convergence can be expected to accelerate, at least from the perspective of Euroland.

2.3 Legal convergence

After discussing market convergence and standard convergence between corporate governance models, there is another crucial issue which needs to be explored in this context: the legal issue. The widely different systems and structures of corporate law and securities market regulations adopted in different countries have been regarded as a strong argument in support of divergence between national ownership and control environments. For example, there is an enormous equity market in the UK and the US, while Germany and France have much smaller markets. Hundreds of companies go public in the US each year while in Italy only a few dozen went public in a decade.

Academics make a distinction between two types of legal system, namely the common law and civil law systems. These two legal systems have different impacts on corporate governance.[61] Legal rules concerning protection of investors and the enforcement of these rules differs greatly and systematically across countries. Common law countries protect both shareholders and creditors the most, while French civil law offers the least protection; and German civil law falls somewhere in the middle. The main reason is because common law countries emphasise market discipline and private litigation while civil law countries put a stronger emphasis on state involvement. It is argued that private monitoring and contracting are more important than public enforcement of securities law, and it is concluded accordingly that these advantages of the common law tradition will be decisive for the superior quality of securities law and better protection for investors.[62]

However, the integration and globalisation of markets make the difference in legal systems of less importance in their interaction with corporate governance models. For example, convergence can occur at the level of securities regulation, even while convergence of corporate law has been largely frustrated.[63] Coffee thinks that this kind of "stealth" convergence is already on the doorstep.[64]

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60 T Jappelli and M Pagano, "Financial market integration under EMU", Economic Paper 312 (Brussels: European Commission 2008), p. 2.

61 La Porta et al., "Legal determinants", n. 18 above.

62 R La Porta, F Lopez-de-Silanes, A Sheifer and R Vishny, "The quality of government" (1999) *Journal of Law, Economics and Organization* 222, p. 261.

63 Coffee, "The future as history", n. 12 above, p. 666.

64 Ibid.

It also seems to be the case that legislation concerning corporate governance has been converging over the last few years. In the case of continental European countries, one of the major recent objectives of German economic policymakers has been the promotion of a shareholding culture among German citizens.[65] It is emphasised that stock market channels should be developed for equity finance, in order to get rid of the hindrance resulting from the bank-centred finance model. In Germany, the corporate governance debate first found its way into legislation in 1996, with the introduction of the law on control and transparency in business which is known as KonTraG.[66] The Government Commission on Corporate Governance was appointed in September 2001 by the Federal Ministry of Justice, and its work was published in the draft code of December 2001; the final version was then adopted as the German Corporate Governance Code on 26 February 2002.[67] Creating transparency is the key function of the code in order to enhance companies' credibility, especially as far as consolidation is concerned. Similarly, the "Draghi" law drastically increased shareholders' rights in Italy in 1997.

At the other end of the spectrum, there is a trend towards independence of supervisory bodies in the outsider model, where the roles of non-executive directors are emphasised.[68] Furthermore, the US Securities and Exchange Commission is becoming more tolerant of "relationship investors" and is willing to grant "safe harbours" for consultations between them and company managements.[69] Additionally, directors' duties towards the interests of stakeholders through the enlightened shareholder value principle in the UK can also be regarded as a result of convergence.

2.4 The establishment of the European company as a sign of convergence

The status of European Company, the so-called Societas Europaea, was finally adopted by the Council of the EU on 8 October 2001.[70] This means that all companies in EU member states are allowed to incorporate as a Societas Europaea and they will be entitled to choose between a one-tier and a two-tier board model. The legislative foundation of the Societas Europaea can be found both in Regulation 2157/2001 of the European Council and in the Council Directive 2001/86, supplementing the status for a European company with regard to the involvement and participation of its employees.[71]

This legislation will create a brand new legal form of corporation, which will exist under the regulations both of European law and domestic law. The distinct differences between the social and cultural issues in each member state make it impossible to achieve the original objective of establishing an integrative legal form which is independent of national legislation. A general technique of renvoi was adopted, as the result of political compromise in order to match the new integrated legal form. The renvoi technique means that Societas Europaea will be directly regulated by relevant European regulations, while still referring

65 Gordon, "Pathways", n. 12 above, p. 220.

66 KonTraG means *Gesetz zur Kontrolle und Transparenz im Unternehmensbereich.*

67 G Cromme, "Corporate governance in German and the German corporate governance code" (2005) 13 *Corporate Governance: An International Review* 362, p. 364.

68 See M Sweeney-Baird, "The role of the non-executive in modern corporate governance" (2006) 27 *Company Lawyer* 67; T Long, V Dulewicz and K Gay, "The role of the non executive directors: findings of an empirical investigation into the differences between listed and unlisted UK boards" (2005) 13 *Corporate Governance: An International Review* 667.

69 Nestor and Thompson, "Corporate governance", n. 37 above, p. 22.

70 U Braendle and J Noll, "The Societas Europaea – a step towards convergence of corporate governance systems" (2007) 4 *Corporate Ownership and Control* 11, p. 14.

71 S Lombardo, "The 'Societas Europaea': a network economics approach", Working Paper in Law No 19/2004 (Brussels: European Corporate Governance Institute January 2004).

certain other aspects of the company to domestic legislation. Taking the UK as an example, the European Public Limited Liability Company Regulations 2004 were introduced by Parliament to clarify how to implement the rules for the Societas Europaea in the UK.[72] For the first time, companies registered in the UK were able choose between a one-tier board and a two-tier board. Moreover, for the first time, British plcs were confronted with employee representation at board level.[73] However, issues such as the method for choosing the employee representatives, seen as particularly important in the UK, are left to member states.

With the emergence and gradual adoption of the Societas Europaea, corporate governance models, at least within the scope of the EU, are becoming closer. The separation of the roles of CEO and chair of the board as well as the introduction of audit committees are signs of modification and movement from the one-tier to the two-tier board model. The legal status of the Societas Europaea illustrates the floating nature of the boundaries between signs and drivers of convergence in corporate governance. The distinctions between each system in the European Union are becoming less distinct, and the introduction of the Societas Europaea definitely enhances corporate governance convergence within EU member states.

3 Two optimal "standard school" models for convergence[74]

Comparative corporate governance is an area where the descriptive, the normative and the plain wishful thinking often coalesce.[75] The idea of using comparativism as a tool for of law reform via the process of legal transplantation has great allure in this field.[76] Comparative corporate scholarship will provide guidance on the following two issues: (1) whether the interests of stakeholders other than shareholders should be considered by directors in corporate governance models; and (2) how and why two particular ownership patterns for publicly traded corporations, either of widely dispersed shareholders or concentrated shareholding, developed in certain countries, and whether one pattern of ownership will eventually prevail.[77] The standard school believes that globalisation of the economy will lead to convergence of corporate governance towards one standard model. The detailed description of this standard model is not straightforward. However, the two main variants are the shareholder primacy model and a hybrid model based on the most successful elements of the two archetype models.

3.1 Corporate governance convergence and the shareholder primacy model

In the early 1990s, debate centred mainly around improving US economic performance by learning from governance mechanisms in other jurisdictions, such as Germany and Japan. However, by the mid- to late 1990s, with the US economy buoyant and the globalisation debate in full swing,[78] the flavour of comparative corporate governance changed

72 European Public Limited Liability Company Regulations 2004, SI 2004/2326.

73 Braendle and Noll, "The Societas Europaea", n. 70 above, p. 18.

74 Of course, classic stakeholder theory can also be regarded as a model of convergence. However, the arguments in this article on possible convergence models are limited to possible optimal convergent models from the "standard school" which is limited to two variants: the market-oriented model and the hybrid model.

75 O Kahn-Freund, "On uses and misuses of comparative law" (1974) 37 *Modern Law Review* 1.

76 See E Rock, "America's shifting fascination with comparative corporate governance" (1996) 74 *Washington University Law Quarterly* 367, p. 368, in which Professor Rock thinks the temptation of comparative studies is "to try to get something for nothing or at least a discount".

77 A R Pinto, "Globalization and the study of comparative corporate governance" (2005) 23 *Wisconsin International Law Journal* 477, p. 477.

78 Ibid. pp. 485–6.

significantly. It was no longer concerned with the idea of grafting foreign governance mechanisms into US law, but rather about the export of US-style corporate governance principles internationally.

3.1.1 The shareholder primacy norm on a convergence basis

The academic literature on international comparative governance research also has a tendency to combine the salient features of American and British capitalism into a single shareholder primacy model.[79] The model is characterised by "long term financing through equality and corporate bond markets".[80] The model is also characterised by a legal and regulatory approach, which is in favour of employing the public capital market and is designed to build confidence among non-controlling investors.[81]

The outsider model emphasises a number of features including: the primacy of shareholders as beneficiaries of fiduciary duties; the importance of equity financing; dispersed ownership as the predominant ownership structure, referring to the cash flow rights as well as the controlling rights of ownership;[82] active markets for corporate control as a mechanism of managerial accountability; and flexible labour markets and a one-tier board structure in which the executive and non-executive directors are integrated.[83] Convergence optimists have tended towards the market-oriented model, focusing on the evolutionary pressures of competitive international capital markets, and on the tendency of firms seeking to achieve a global scale of operation to opt into high-quality securities market regulatory regimes in order to promote transparency, accountability and shareholder fiduciary protection.[84] The pressure from market forces drives the existing system with the shareholder at the centre. Therefore, the outsider model will lead to higher wealth for all parties involved since capital markets have played a central role in the development of firms and countries.[85]

3.1.2 The interests of the stakeholders in the convergent shareholder primacy norm

It is believed by adherents to the shareholder primacy norm as the convergent standard model that law should sanction the axiom that corporations should be run in the interests of their shareholders exclusively. Instead of protecting stakeholders' interests through corporate law, the most efficient legal mechanisms to protect the interests of non-shareholder constituencies lie outside corporate law.

However, while some progressive scholars and reformers have attempted to protect stakeholders by changing corporate law, others have looked to other legal regimes to regulate corporate behaviour. Directors would be required by laws outside corporate law to consider the legal rights of various stakeholders. Corporate governance requirements are practices typically influenced by an array of legal domains, such as securities regulation, accounting and auditing standards, tax law, contract law, employment law, environment law, consumer protection law and insolvency law.[86] For example, in the US, from securities and

79 S Toms and M Wright, "Divergence and convergence within the Anglo-American corporate governance system: evidence from the US and UK, 1950–2000" (2005) 47 *Business History* 267, p. 267.

80 Van Den Berghe, *Corporate Governance*, n. 2 above, p. 9.

81 Nestor and Thompson, "Corporate governance", n. 37 above, p. 7.

82 Braendle and Noll, "On the convergence", n. 11 above, p. 58.

83 See ch. 10, "Varieties of corporate governance: comparing Germany and the UK", P A Hall and D Soskice, *Varieties of Capitalism: The institutional foundations of comparative advantage* (Oxford: OUP 2001).

84 Gordon, "Pathways", n. 12 above, p. 219.

85 Van Den Berghe, *Corporate Governance*, n. 2 above, p. 14.

86 OECD, *Principle*, n. 21 above, p. 2.

labour law reforms in the New Deal to the social welfare laws of the 1960s and 1970s, progressives have advocated a diverse and broad array of mandatory legal rules designed to limit corporate conduct which is perceived to be harmful to non-shareholder constituencies.[87] In fact, the influences of this legal protection for various stakeholders from sources outside corporate law are powerful forces in directing the decisions of directors. All these decisions are made under the mandatory legal rules embodied in employment law, workplace safety law, environmental law, consumer protection law, pension law, taxation law and bankruptcy law.[88] Those duties towards various stakeholders are fiduciary duties of company directors and are inseparable from corporate law and corporate governance. As a result, directors will, when they manage a corporation, find "their decision tree considerably trimmed and their discretion decidedly diminished by mandatory legal rules enacted in the name of protecting stakeholders".[89]

With regards to the convergent shareholder primacy model, the claims of victory for shareholders over stakeholders depend on an artificially narrow view of the law affecting corporate management.[90] The entity of corporate governance is not exclusively shaped by corporate law.[91] "Stakeholders exert their voice through legal mechanisms adopted largely outside of corporate law", and "stakeholder success outside of corporate law indicates the limited significance of any claimed victory of shareholders over stakeholders within corporate law".[92] The victory of the shareholder primacy model within the corporate law area does not equate to victory in the wider debate over corporate social responsibility (CSR), stakeholder protection and even the stakeholder theory itself. In the broader arena of business law in which battle extends to other areas, such as employment law and environmental law, the market-oriented model is a far from accurate description of the law of business or, more practically, of corporate practice. The norm will simply "exist in corporate law alongside the many other areas of the law of business that do interfere with the free market and restrain corporate management in the interests of corporate stakeholders".[93]

3.1.3 Objections to the "end of history" story

In 2001, Hansmann and Kraakman argued strongly for the belief that the shareholder primacy model will become the dominant normative consensus as a result of pressure from the capital market and listed companies. They boldly argued that not only is the shareholder-oriented model both desirable and inevitable, but also that, de facto, corporate governance systems in various jurisdictions have already largely converged to that kind of model. They famously and controversially pronounced that the triumph of the shareholder primacy model over its principal competitors is now assured,[94] a pronouncement that assumes that

87 A Winkler, "Corporate law or the law of business? Stakeholders and corporate governance at the end of history" (2004) 67 *Law and Contemporary Problems* 109, pp. 110–11.

88 Term used in US law which is equal to the insolvency law employed in the UK or Australia.

89 Winkler, "Corporate law", n. 87 above, p. 111.

90 Ibid. p. 111.

91 For example, Robert Thompson and Hillary Sale have argued that "the most visible means of regulating corporate governance" is federal securities law rather than corporate law; see R B Thompson and H A Sale, "Securities fraud as corporate governance: reflections upon federalism" (2003) 56 *Vanderbilt Law Review* 859, p. 860; Steven Bank argues that one often overlooked influence on corporate governance is federal tax law; see S A Bank, "Tax, corporate governance, and norms" (2004) 61 *Washington and Lee Law Review* 1159; see also M E Kornhauser, "Corporate regulations and the origin of the corporate income tax" (1990) 66 *Indiana Law Journal* 53.

92 Winkler, "Corporate law", n. 87 above, p. 111.

93 Ibid. p. 112.

94 Hansmann and Kraakman, "The end of history", n. 2 above, p. 468.

convergence is virtually a fait accompli. They believed that an adoption of the model would lead to higher wealth for all parties involved, since capital markets have played a central role in the development of corporations and countries. They especially noted the similar characteristics of global large-scale corporations at the end of the nineteenth century, including: the full legal personality of the corporation; the limited liability of directors and shareholders; shared ownership; delegated management under a board structure; and transferability of shares.[95]

They tried to justify the supremacy of the model by force of logic, example and competition.[96] In their logical argument, they pointed out that the interests of equity investors in the firm (the firm's residual claimants) cannot be adequately protected by contract. Therefore, they must be given the right to control the firm.[97] However, even under the shareholder primacy model, shareholders do not have any direct rights in controlling the company. These rights are all in the hands of the board of directors rather than with the shareholders themselves. Therefore, this logical argument is not entirely correct.[98]

The second reason given by Hansmann and Kraakman is that, if the control rights granted to the firm's equity-holders are exclusive and strong, they will have powerful incentives to maximise the value of the firm. This is simply a repeat of the narrative argument in favour of the model, which cannot be used as grounds for argument in debating the topic itself. Besides, according to the model, the equity-holders do not own direct controlling rights in the corporation. Furthermore, employees' incentives to work efficiently for the company, customers' incentives in purchasing products from the company, suppliers' incentives to establish a sound supply-chain, and creditors' incentives to provide the company with reliable and sufficient funding are all critical in maximising the long-term value of the firm.

They also argued that other company stakeholders have already been given substantial protection by contract and regulation, and implementing the stakeholder model in the company will create more difficulties than it solves, even if contractual and regulatory devices offer only imperfect protection.[99] Hansmann and Kraakman did not enumerate any legislative facts or evidence in arguing the sufficiency of "substantial protection". If the protection is as substantial as they believed, why do they also make their initial assumption about imperfect protection? Furthermore, they did not explain in detail what they mean by the creation of "more difficulties". Does this mean that directors will have too many unexpected discretions in balancing the interests of the shareholders and stakeholders or anything else? The terms need to be redefined. Even if the directors do have too much discretion, this cannot be regarded as a justification for not considering the interests of stakeholders and not being socially responsible to the local communities, the environment or even to the government.[100]

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95 Hansmann and Kraakman, "The end of history", n. 2 above, p. 468.

96 Ibid. p. 449.

97 Ibid.

98 This is why certain academics think that the model of corporate governance adopted in certain countries should more accurately be described as "director primacy" rather than "shareholder primacy". See L A Stout, "Bad and not-so-bad arguments for shareholder primacy" (2002) 75 *South California Law Review* 1189; L A Stout, "New thinking on 'shareholder primacy'", unpublished: www.law.ucla.edu/docs/bus.sloan-stout.pdf; S M Bainbridge, "Director primacy: the means and ends of corporate governance' (2003) 97 *Northwestern University Law Review* 547; S M Bainbridge, "The creeping federalization of corporate law" (2003) 26 *Regulation* 32; S M Bainbridge, "Director v shareholder primacy in the convergence debate" (2002) 16 *Transnational Law* 45.

99 See Hansmann and Kraakman, "The end of history", n. 2 above.

100 Ibid.

In addition, it is argued by proponents of the "end of history" argument that convergence towards the shareholder model largely depends on the theory that shareholders are owners of the company. However, it is clear that what shareholders actually own is merely some proportion of the company's shares. They consist of many thousands and millions of pension funds or insurance policies, managed by financial directors who are paid and trained to manage a portfolio of shares.[101] Some of the shareholders have barely seen any tangible part of what would usually be understood and regarded as the corporation. Legally defining the company as the property of these parties who are not even aware where their shares are held simply does not make any sense.[102]

Apart from the arguments mentioned above regarding the "end of history" theory, it is also argued that firms following the market-oriented model "have the upper hand"[103] in competitions and "can be expected to have important competitive advantages".[104] These advantages include: access to capital at a lower cost; a "stronger incentive" to reorganise in ways that are "managerially coherent"; and the ability to abandon "inefficient investment" more quickly.[105] It is obvious that this list of competitive advantages relates not to the economy as a whole but to the ability of the corporation to maximise shareholder advantages.[106] This makes the structure of the agreement tautological: the market-oriented model is superior because it is better at maximising shareholders' welfare. The argument by Hansmann and Kraakman only proves that shareholder-oriented companies will win if the measuring stick for the competition is shareholder advantage.[107] However, their argument does not prove that shareholder-oriented firms are better on any other basis. They cannot justify the claim that shareholder supremacy is always beneficial to corporations, since serving shareholder interests may not maximise the value of the firm, even in economic terms.[108]

Based on the justifications above, the arguments presented by Hansmann and Kraakman seem inaccurate and inadequate. Their bold argument for the end of the history of corporate law does not really terminate the debate on corporate objectives. The long battle between the conservative, private, shareholder-wealth-maximisation school and the progressive, public, stakeholder-protection and social-responsibility school is not over.[109] The objection to "the end of the history" was also admitted by Hansmann and Kraakman in the underlying thesis of *The Anatomy of Corporate Law*[110] where they argued that, in every jurisdiction, the central issue for corporate law is how to mediate three different kinds of "agency conflicts": those between managers and shareholders; those between majority and minority shareholders; and those between the firm and the corporation's other constituencies, including creditors and

101 J Williamson, "A trade union congress perspective on the company law review and corporate governance reform since 1997" (2003) 41(3) *British Journal of Industrial Relations* 511, p. 514.

102 Ibid. pp. 514–15.

103 Hansmann and Kraakman, "The end of history", n. 2 above, fn. 2.

104 Ibid.

105 Ibid. pp. 450–1.

106 K Greenfield, "September 11th and the end of history" (2002) 76 *Tulane Law Review* 1409, p. 1426.

107 Ibid.

108 K Greenfield, "The place of workers in corporate law" (1998) 39 *Boston College Law Review* 283.

109 Winkler, "Corporate law", n. 87 above; see also A Reberioux, "The End of History in Corporate Governance? A Critical Appraisal" (paper presented at Inaugural Workshop, Amsterdam Research Centre for Corporate Governance Regulation 2004): www.arccgor.nl/uploads/File/Reberioux%20Amsterdam%202.pdf; M Aglietta and A Reberioux, *Corporate Governance Adrift: A critique of shareholder value* (Cheltenham and Northampton: Edward Elgar 2005).

110 R R Kraakman, P Davies, H Hansmann, G Hertig, K J Hopt, H Kanda and E B Rock (eds), *The Anatomy of Corporate Law: A comparative and functional approach* (New York: OUP 2004).

employees.[111] They argued that the overall objective of corporate law is presumably to "serve the interests of society as a whole". More particularly:

> the appropriate goal of corporate law is to advance the aggregate welfare of a firm's shareholders, employees, suppliers, and customers without undue sacrifice – and, if possible, with benefit – to third parties such as local communities and beneficiaries of the natural environment.

3.2 Hybrid model

Sceptics of shareholder primacy convergence theory have focused on the embeddedness of governance systems in national political structures, which tends to protect both entrenched insider interests and non-shareholder constituencies against the incursions of Anglo-American governance agendas.[112] With increasing financial and legal globalisation, an improved model system is taking shape in the corporate governance debating arena. This hybrid model stream of the standard school suggests that the reason for the convergence is global competition between the corporate governance systems. Just as US states competed during most of the twentieth century for franchise tax revenues by offering the best terms for incorporation,[113] nations can now compete for firms and resources by creating the most efficient corporate governance environment.[114] It is believed that, instead of converging to a market-oriented model, the two main competing systems should borrow the best practice from one another. This borrowing will result in a "hybrid model" with the "right mix"[115] of market discipline, corporate regulation and power of corporate stakeholders.[116]

However, the hybrid model of corporate governance is based on the cross-reference hypothesis, which presupposes that corporate governance models are divisible.[117] This means that one model's components are able to be detached and adapted for use in another model without significant frictions or adverse effects.[118] A particular feature or innovation must be detachable from one model and adaptable to another.[119] The cross-reference hypothesis will only be robust if the systems in each country are de facto divisible. Indeed, the hybrid model is very likely to occur because of the globalisation of the product and capital markets.

3.2.1 Justifications for the hybrid model

The arguments in favour of the hybrid corporate governance system are based on theoretical, historical and logical analyses.

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111 R R Kraakman and H Hansmann, "What is corporate law?", in Kraakman et al., *The Anatomy*, n. 110 above, p. 2.

112 Gordon, "Pathways", n. 12 above, p. 219; see also L A Bebchuk and M J Roe, "A theory of path dependence in corporate ownership and governance" (1999–2000) 52 *Stanford Law Review* 127.

113 See F H Easterbrook, and D R Fischel, "The incorporation debate and state anti-takeover statutes" in F H Easterbrook and D R Fischel (eds), *Economic Structure and Corporate Law* (London/Cambridge MA: Harvard UP 1991); R Romano, *The Genius of American Corporate Law* (Washington DC: AEI Press 1993).

114 T Khanna, J Kogan and K Palepu, "Globalization and similarities in corporate governance: a cross-country analysis" (2006) 88 *The Review of Economics and Statistics* 69, p. 72.

115 The term "right mix" will be further defined in this article when arguing the optimal hybrid model.

116 D Plihon, J Ponssard and P Zarlowski, "Towards a convergence of the shareholder and stakeholder model" (2005) 2 *Corporate Ownership and Control* 11, pp. 11–13.

117 W W Bratton and J A McCahery, "Comparative corporate governance and theory of firm: the case against global cross reference" (1999) *Columbia Journal of Transnational Law* 216, p. 242.

118 W C Kester, "Governance, contracting, and investment horizons: a look at Japan and Germany", in D H Chew (ed.), *Studies in International Corporate Finance and Governance Systems* (Oxford: OUP 1997), p. 227.

119 See S Berger and R P Dore (eds), *National Diversity and Global Capitalism*, Cornell Studies in Political Economy (Ithaca NY: Cornell UP 1996).

A Theoretical analysis

When corporate governance is increasingly driven by ethical norms and the need for accountability, and with CSR adapting to prevailing business practice, there will be a convergence between two separate sets of corporate governance mechanisms, one dealing with "hard-core" corporate decision-making and the other with "soft and people-friendly" business strategies. This will lead to a more hybridised, synthesised body of laws and norms to regulate corporate practices.[120] Research offers a theoretical background for how the two models have begun to converge towards a hybrid model, relying on directors' fiduciary duties,[121] stakeholder engagement[122] and economic analysis of management incentives to engage in CSR.[123]

The most convincing theoretical argument for the hybrid corporate governance model is global competition.[124] It is believed that the two archetype corporate governance models possess equal competitive fitness, so that they will merge into a single hybrid model.[125] Some features of certain national systems will be recognised as possessing problem-solving advantages and will therefore be widely adopted.[126] Global competition means a bigger market calling for larger capital-intensive but specialised producers, and necessitating cross-border collaboration among existing production organisations.[127] Like capital, innovative production technologies will rapidly diffuse to firms worldwide: the same should follow for corporate governance.[128] In a closely connected international market, it seems certain that the two major systems will attempt to assimilate their mutual advantages and the globalisation of the entire corporation model. Gradually, each corporate governance model will learn new things from the other system in order to perfect its own model.

The outsider model shifted its emphasis to a greater concentration on shareholding in order to be able to rely on more stable longer-term commitments from shareholders while the insider model relies more on the market to regulate its corporate governance model.[129] The potential failures of the market-oriented model could be prevented or at least ameliorated, by concentrated share ownership devices from the network-oriented system. By the same token, certain devices from the market-oriented model could be adopted by the network-oriented model in order to benefit from their advantages. The models' mutual improvement processes should lead ultimately to a hybrid corporate governance model.

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120 A Gill, "Corporate governance as social reasonability: a research agenda" (2008) 26 *Berkeley Journal of International Law* 452, p. 463.

121 See L Johnson and D Million, "Recalling why corporate officers are fiduciaries" (2005) 46 *William and Mary Law Review* 1597; M M Blair and L A Stout, "A team production theory of corporate law" (1999) 85 *Virginia Law Review* 247.

122 See L E Mitchell, "The board as a path toward corporate social responsibility" in D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate social responsibility and the law*, (Cambridge: CUP 2007), p. 279.

123 See C Mackenzie, "Boards, incentives and corporate social responsibility: the case for a change of emphasis" (2007) *Corporate Governance: An International Review* 935; J S Johnston, "Signaling social responsibility: on the law and economics of market incentives for corporate environmental performance", Research Paper No 05-16 (Philadelphia: Institute for Law and Economics, University of Pennsylvania Law School 2005).

124 Van Den Berghe, *Corporate Governance*, n. 2 above, p. 15.

125 La Porta et al., "Legal determinants", n. 18 above.

126 Bratton and McCahery, "Comparative corporate governance and theory of firm", n. 117 above, p. 219.

127 R. Boyer, "The convergence hypothesis revisited: globalization but still the century of nations?" in S Berger and R Dore (eds), *National Diversity and Global Capitalism* (Ithaca: Cornell UP), p. 47.

128 C J Milhaupt, "Property rights in firms" (1998) 84 *Virginia Law Review* 1145, pp. 1186–7.

129 Van Den Berghe, *Corporate Governance*, n. 2 above, p. 16.

Notwithstanding the shift towards more ethical and accountable companies, large proportions of the public discourse and academic literature surrounding corporate governance focus on the goals of boards to increase profits for shareholders.[130] These discourses suggest that ultimately shareholders will be better off if directors are allowed to pursue long-term objectives. In the new economy, the increasing influence of information and communications technology and the emphasis on information and disclosure will prompt increased accountability and responsibility in the business world. As a result, the interests of various stakeholders will need to be considered by the directors in order to promote the accountability and responsibility of their corporations. Human capital and social capital will play a significant role in the new economy era for the purpose of promoting the competitiveness of the company and its shareholders.

B Historical evidence

The two models have always referred to each other. Adherents of the Anglo-American model think that continental European countries and Japan look to the corporate governance institutions of the United States and Britain to improve the quality of boardroom operations and enhance the depth and liquidity of their trading markets.[131] For example, Japan has removed both process restrictions that inhibited shareholder derivative actions, and legal restrictions on share issuance that prevented issuers from including stock options in management compensation arrangements.[132] The Italian government promulgated a package of securities and corporate governance law reform in 1998, in imitation of security regulations in the US.[133] Also, in Germany, various changes and modifications have transformed the German corporate governance model since the middle of the 1990s, bringing it closer to the Anglo-American model. Large and internationally oriented companies are affected, and the way strategic decisions are made in German firms has been changed in areas such as employment participation, shareholding structure, board structure and so on.[134]

On the other hand, in the 1980s, the shortcomings and disadvantages of the market-oriented model operating in the US and the UK were becoming clear. It was claimed that the shareholder primacy model unduly favoured the short-term "shareholder value" for instant maximisation of shareholder interests while deterring long-term investment in production processes.[135] Conversely, Japanese and German corporations had comparative advantages due to the fact that they invested more in searching for growth opportunities and the long-term interests of the company. Widespread hostile takeover activities in the UK and the US[136] in the 1980s and early 1990s were thought to be the result of the

130 See B Black, B Cheffins and M Klausner, "Outside director liability" (2006) *Stanford Law Review* 1055, p. 1089; R J Gilson, "Controlling shareholder and corporate governance: complicating the comparative taxonomy" (2006) 119 *Harvard Law Review* 1641.

131 K Lannoo, "A European perspective on corporate governance" (1999) 37 *Journal of Common Market Studies* 269.

132 Milhaupt, "Property rights in firms", n. 128 above, pp. 1188–9.

133 Coffee, "The future as history", n. 12 above, pp. 665–6.

134 See C Lane, "Changes in corporate governance of German corporations: convergence to Anglo-American model?" (2003) 7 *Competition and Change* 79.

135 W W Bratton and J A McCahery, "Comparative corporate governance and barriers to global cross reference" in J A McCahery, P Moerland, T Raaijmakers and L Renneboog (eds), *Corporate Governance Regimes: Convergence and diversity* (Oxford: OUP 2002), p. 31.

136 See P S Sudarsanam, "The role of defensive strategies and ownership structure of target firms: evidence from UK hostile takeover bids" (1995) *European Financial Management* 223; M S Weisbach, "Corporate governance and hostile takeover" (1993) 16 *Journal of Accounting and Economics* 199; A Shivdasani, "Board composition, ownership structure, and hostile takeover" (1993) 16 *Journal of Accounting and Economics* 167.

encouragement and legitimisation of short-termism[137] from the shareholder primacy model. In the early 1990s in the US, new legal controls constrained takeovers, simultaneously depriving the corporate governance system of a principal disciplinary device.[138] It was argued that the corporate governance model needed improvement and reform by learning from the stakeholder model, whose firms seemed to be beating American firms in the market and which had not evolved to rely on takeovers as an additional means of agency cost control and to re-establish a competitive position. The stakeholder model in bank monitoring, cross-holding and concentrated blockholding was regarded as a simultaneously corrective to conquer short-term investment objections as well as takeover decline.

If the debate on the shareholder and stakeholder approach is viewed historically, a cyclical pattern of dominance between the shareholder and stakeholder models has run in parallel with fashions in corporate governance over the years.[139] The corporate governance model that dominates at any time can only be understood as a set of responses to the separation of ownership and control at that time. It cannot be regarded as a permanent prescription for constantly changing markets and economic situations.

In the US, most of the corporations came in the form of quasi-public companies – for instance, charitable organisations, municipalities, public utilities and banks – in order to fulfil specific public policy goals in the early nineteenth century.[140] To a great degree, the directors of these corporations focused on the social welfare and interests of stakeholders of the company, since they were always created and supported by the state and were used as an instrument to discharge social responsibilities. However, in the late nineteenth century, motivated by the development of security and capital markets and the growing private business environment, earlier corporate concerns for stakeholders' benefits gave way to the pursuit of private wealth, specifically the wealth of shareholders. This trend was reflected in laws at that time, which also clearly indicated that corporations were supposed to be run for the benefit of the stockholders.[141]

Conversely, after the severe stock market crash and the Great Depression between 1929 and 1938, the shareholder theory lost its appeal for its supporters. It was criticised on the grounds that the overemphasis on shareholder profit maximisation had led to sightless production and uncontrolled markets, which further led to a severe economic depression in Western countries. As a consequence, stakeholder concerns started to gain ground again.[142] Many state-owned companies emerged and, until the 1970s, the focus of legislative tools swung away from capital investors to include the welfare of other corporate participants in

137 W Hutton, *The State We're In* (London: Jonathan Cape 1995).

138 Bratton and McCahery, "Comparative corporate governance and barriers to global cross reference", n. 135 above, p. 31.

139 Armour et al., "Shareholder primacy", n. 41 above, p. 535.

140 See J Hurst, *The Legitimacy of the Business Corporation in Law of the United States*, 1780–1970 (Charlottesville: University of Virginia Press 1970), pp. 58–66; see also A A Berle and G C Means, *The Modern Corporation and Private Property* (with a New Introduction by Murray L Weidenbaum and Mark Jensen) (London: Transaction Publisher 1991).

141 See *Report of the Committee Appointed Pursuant to House Resolution 429 and 504 to Investigate the Concentration of Control of Money and Credit,* House Report 1593, 62d Cong. 3d sess. (Washington DC: Government Printing Office 1913).

142 See A K Sundaram and A C Inkpen, "The corporate objective revisited" (2004) 15 *Organization Science* 350, p. 351; M E Dodd, "For whom are corporate managers trustees" (1932) 45 *Harvard Law Review* 1145–63.

corporations: "The three-decade burst of pro-shareholder sentiment during the early part of the twentieth century had been replaced by four decades of pro-stakeholder sentiment."[143]

After the 1970s, the corporate governance model swung back to the shareholder-centred view. This was mainly attributed to an upswing of the market for control and hostile takeovers during the last two decades of the twentieth century.[144] From the 1980s to the 1990s, when the American corporate governance system made reference to the continental European and Japanese system and corporations in stakeholder model jurisdictions were performing better, the stakeholder model was regarded as the model that should be internationally adopted.[145]

However, during the last decade and up to the present day, when the German, Japanese and other continental European countries often reference the shareholder primacy model, academics have begun once again to argue against the network-oriented model of corporate governance. It is argued that the one constituency whose claims remain completely wiped out in all the recent corporate failures is the shareholder.[146] Although almost all stakeholders' interests were undermined, most of them could get something back either by way of the bankruptcy process (e.g. suppliers and creditors) or by switching to other available services (e.g. customers).[147] The primacy of shareholder value has been re-emphasised to restore market confidence and to attract more investment to prompt business regrowth.

To make a bold guess, perhaps in the next 10 years, the network-oriented model will come back into fashion with the extensive analysis on the ongoing financial crisis since 1997 and the increasing importance of CSR. The dominant model of corporate governance at any given time is based on a wide variety of factors:[148] the dominance of one model could be simply "an accident of temporary good luck" .[149] Therefore, in the author's opinion, a formation of a hybrid corporate governance system will be the direction and trend in a convergence of corporate governance systems, since the two models will continuously and ceaselessly reference the advantages of the other in order ultimately to establish a best model. Although it is difficult to foresee exactly when this convergence will take place,

143 Sundaram and Inkpen, "The corporate objective revisited", n. 142 above, p. 351.

144 Ibid. p. 352; Hutton, *The State We're in*, n. 137 above.

145 See J C Coffee, "Unstable coalitions: corporate governance as a multi-player game" (1990) 78 *Georgetown Law Journal* 1495; J C Coffee, "Shareholder versus managers: the strain in the corporate web" 1986) 85 *Michigan Law Review* 1; K Lehn and A Poulsen, "Leveraged buyouts: wealth created or wealth redistributed?" in M Weidenbaum and K Chilton (eds.), *Public Policy toward Corporate Takeover* (New Brunswick, NJ: Transition Books 1988), p. 46; W S W Leung, "The inadequacy of shareholder primacy: a proposed corporate regime that recognizes non-shareholder interests" (1997) 30 *Columbia Journal of Law an Social Problems* 587; M E DeBow and D R Lee, "Shareholders, nonshareholders and corporate law: communitarians and resource allocation" (1993) 18 *Delaware Journal of Corporate Law* 393; M Jensen, "Eclipse of the public corporation" (1989) *Harvard Business Review* 61; M A O'Connor, "Restructuring the corporations' nexus of contracts: recognizing a fiduciary duty to protect displaced workers" (1991) 69 *North Carolina Law Review* 1189; A A Sommer, "Whom should the corporation serve?: The Berle-debate revisited sixty years later" (1991) *Delaware Journal of Corporate Law* 33; L Johnson, "New approaches to corporate law" (1993) 50 *Washington and Lee Law Journal* 1713.

146 Sundaram and Inkpen, "The corporate objective revisited", n. 142 above, p. 358.

147 Ibid.

148 A D Garrett, "Themes and variations: the convergence of corporate governance practices in major world markets" (2004) 32 *Denver Journal of International Law and Policy* 149; it is claimed that both internal and external factors influence companies to establish a good governance practice. Many different factors, such as philosophical approach, market forces, political forces, and the cooperation of various global entities, have played a role in the progress towards convergence; see also A Y Seita, "Globalization and the convergence of values" (1997) 30 *Cornell International Law Journal* 429.

149 B H McDonnell, "Convergence in corporate governance – possible, but not desirable" (2002) 47 *Villanova Law Review* 341, pp. 370–1.

arguments in favour of the hybrid corporate governance model seem very logical, convincing and possible.

C Factual evidence

It is easy and logical to assume that corporate governance models differ markedly between Anglo-American countries and continental European countries, given the intensity of debate about the two systems in this area. However, "recent events and market forces are leading toward increased harmonisation of corporate governance on each side of the Atlantic".[150] The interests of various stakeholders are widely considered by directors in the UK and the US.[151] The growth of large national corporations in the first decade of the twentieth century made it evident that the impact of directors' decisions drives corporate stakeholders, including consumers and the larger communities dependent upon industry.[152] Companies in the US and the UK are recruiting the services of CSR consultancies to produce CSR codes, write or verify CSR reports, train staff in CSR and market their CSR credentials.[153] In a worldwide business survey in December 2005, among 4238 executives surveyed, 84 per cent thought that high returns had to be balanced with contributions to the broader public good, while only 6 per cent of the executives agreed with Friedman's view that the sole purpose of business is to produce high returns for the shareholder.[154]

The political programmes of many governments throughout Europe focus on a third way. In the UK, under the terms of the Companies Act 2006, directors are required by law to consider the interests of stakeholders in order to promote the success of the company.[155] Apart from the UK, the active welfare state in Belgium,[156] the Polder model in the Netherlands and the Neue Mitte in Germany also suggest a hybrid model in corporate governance, relying on a number of common mechanisms such as independent boards of directors, information disclosure, accountability, and so on.[157]

Philanthropic responsibilities, at the top of the corporate responsibilities pyramid above economic, legal and ethical considerations,[158] are frequently taken into account in corporate strategies in the US and the UK, promoting good corporate citizenship by contributing resources to the public and improving quality of life, although there has been periodic discussion over whether corporations do, or should, have power by management decision or majority shareholder vote to make philanthropic gifts.[159] This is a part of voluntary

150 A Payne, "Corporate governance in the USA and Europe: they are closer than you might think" (2006) 6(1) *Corporate Governance: International Journal of Effective Board Performance* 69, p. 70.

151 Ibid.

152 Winkler, "Corporate law", n. 87 above, p. 115.

153 D McBarnet, "Corporate social responsibility beyond law, through law, for law: the new corporate accountability" in McBarnet et al., *The New Corporate Accountability*, n. 122 above, p. 11.

154 "McKinsey global survey of business executives: business and society" (2006) 2 *McKinsey Quarterly* 33.

155 Ibid.

156 D Whitfield, *Public Services or Corporate Welfare: Rethinking the nation state in the global economy* (London: Pluto Press 2001).

157 Van Den Berghe, *Corporate Governance*, n. 2 above, p. 17.

158 A B Carroll, "The pyramid of corporate social responsibility: toward the moral management of organizational stakeholders' (1991) 34 *Business Horizons* 39, pp. 40–1.

159 V V Brudney and A Ferrel, "Corporate charitable giving" (2002) *University of Chicago Law Review* 1, pp. 2–3. See also M A Eisenberg, "Corporate philanthropy symposium: corporate conduct that does not maximize shareholder gain: legal conduct, ethical conduct, the penumbra effect, reciprocity, the prisoner's dilemma, sheep's clothing, social conduct and disclosure" (1998) 28 *Stetson Law Review* 1; M M Blair, "A contractual defense of corporate philanthropy" (1998) 28 *Stetson Law Review* 27; D H Saiia, A B Carroll and A K Buchholtz, "Philanthropy as strategy: when corporate charity 'begins at home'" (2003) 42 *Business and Society* 169; J Mullen, "Performance-based corporate philanthropy: how 'giving smart' can further corporate

"corporate self-regulation"[160] that seeks to engender investor accountability and stakeholder engagement. The directors consider their stewardship interests and place a higher value on altruism in order to realise their collective responsibility.[161]

Academics argue that spending by corporations on charity is clever marketing or well-managed public relations. Apart from a close relationship with shareholder wealth maximisation in line with the long-term interests of the company, corporate charity will obviously help other corporate constituencies. Currently, in the US, taking Delaware corporate law as an example, the law imposes a ceiling established by a "reasonableness test".[162] The court in *Kahn* v *Sullivan*[163] held that contributions are reasonable if the amount of the donation agreed by the directors can be deducted under s. 170 of the Internal Revenue Code, which allows a contribution of up to 10 per cent of pre-tax profits.[164] However, if we logically consider the purpose of legally fixing a limit on charitable giving and placing limitations on the directors' discretion, the court still regards philanthropic ventures as a corporate strategy management policy with the purpose of benefiting stakeholders.

The converging hybrid model can also be justified from the perspective of cross-border investment and finance. Corporations are no longer solely subject to the priorities of performance criteria from their country of origin and registration.[165] Increasing numbers of corporations from the network-oriented system raise their capital in the securities markets in Britain and the US. Consequently, they have to conform to stricter accounting standards.[166] For example, Sony of Japan, Daimler Chrysler of Germany, and Schneider of France, together with a host of other internationalised corporations, have to perform in accordance with the expectations of Anglo-American institutional investors, the main suppliers of funds, if they want access to international capital.[167] Obviously, these firms will be required to apply the corporate governance standards of the outsider model.

Furthermore, it is argued that the separation between ownership and control has been reduced since the beginning of the 1980s, as a result of the ownership and profit incentives of officers and directors of US and UK corporations which were realised by means of stock ownership and an explosive growth in the use of stock opinion.[168] Therefore, the ownership structures in these countries have become more concentrated and the proportion

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[n. 159 cont.] goals" (1997) (summer) *Public Relations Quarterly* 42; M Wulfson, "The ethics of corporate social responsibility and philanthropic ventures" (2001) 29 *Journal of Business Ethics* 135. For the case of the UK, see C J Cowton, "Corporate philanthropy in the United Kingdom" (1987) *Journal of Business Ethics* 553; S Brammer and A Millington, "The development of corporate charitable contributions in the UK: a stakeholder analysis" (2004) *Journal of Management Studies* 1411.

160 C Parker, *The Open Corporation: Effective self-regulation and democracy* (Cambridge: CUP 2002); N Gunningham and J Rees, "Industry self-regulation: an industrial perspective" (1997) 19 *Law and Policy* 363.

161 R V Aguilera, D Rupp, C Williams and J Ganapathi, "Putting the S back in CSR: a multi-level theory of social change in organizations" (2007) 32 *Academy of Management Review* 836.

162 See *Kahn* v *Sullivan* 594 A 2d 48 (Del 1991) in which the court holds the idea that federal tax law guides the determination of whether corporate charitable contributions are "reasonable".

163 *Kahn* v *Sullivan* 594 A 2d 48 (Del 1991).

164 S. 170(b)(2) Internal Revenue Code, 25 USC.

165 R H Carlsson, *Ownership and Value Creation: Strategic corporate governance in the new economy* (Chichester: John Wiley & Sons 2001), p. 95.

166 A Licht, "Regulatory arbitrage for real: international securities regulation in a world of interacting securities markets" (1998) 38 *Virginia Journal of International Law* 563, p. 566.

167 Carlsson, Ownership, n. 165 above, pp. 95–6.

168 Thomsen, "The Convergence of corporate governance systems", n. 17 above, p. 39; see also K J Murphy, "Executive compensation" in O Ashenfelter and D Card (eds), *Handbook of Labour Economics* vol. 3 (Amsterdam: North Holland 2000).

of insider ownership has increased substantially. This fact can be regarded as evidence supporting an increasing trend towards a long-term insider model in the UK and the US.[169]

From the theoretical, historical and factual evidence and arguments above, a hybrid corporate governance model would seem to be the right option for a convergent corporate governance system. However, a hybrid corporate governance model is not simply a chimera formed from half the insider model and half the outsider model. In the next section, the hybrid model will be divided into two possible alternatives.

3.2.2 Two types of hybrid corporate governance model

Hybrid models, based on an analysis of the process of transforming, can be divided into two categories: referencing combinative hybrid models; and developing combinative hybrid models. Although the adoption of each model will still be based on the traditions, culture and history of individual countries, the establishment and formation of the model will share the same process in each kind.

In the referencing hybrid model, governments will devise hybrid models that combine elements of both their own traditional models and a model at the opposite extreme. This kind of hybrid model will be adopted by countries that already have a solid corporate governance system which has been controlling and regulating corporations for a long time through corporate law legislation. The hybrid model is adopted in these countries mainly because of the pressures of Europeanization and globalisation, the increasingly important position of CSR in corporate strategy and the requirements of a new knowledge-based economy. In contrast, in the developing combinative model, governments are required to devise hybrid models that combine elements of both the shareholder primacy model and the stakeholder model, with the characteristics of their own country provided by path dependence justifications including traditions, history, culture, and stage of economic development. This kind of hybrid model should be adopted by countries that are still in a stage of establishing a sound model for their economic development. The existing corporate law and related legislation are always immature with underdeveloped capital and financial markets. In the author's opinion, hybrid models established in developing countries, such as the Chinese model, always belong to the developing hybrid model, while developed countries, in which a well-established legal system has already been dominant for some time, always establish hybrid models falling into the reference hybrid category.

4 Implication and enforcement of a hybrid model

After clarifying the relationship between a few key terms in an ideal hybrid corporate governance model, it is important to examine the implications and enforceability of this approach, especially in traditional shareholder-centred corporate governance, since the difficulties in practice of enforcing the duty of stakeholder consideration seriously challenge the practical effectiveness of any hybrid model. Six stages should be adopted by directors when executing their duties towards stakeholders, namely: "mapping stakeholder relationships, mapping stakeholder coalitions, assessing the nature of each stakeholder interest, assessing the nature of each stakeholder's power, constructing a matrix of stakeholder priorities and monitoring shifting coalitions".[170] Regarding the mapping of stakeholder relationships, directors are required to realise who the current and potential stakeholders are, and their relationships with the company. In addition, directors are

169 Thomsen, "The Convergence of corporate governance systems", n. 17 above, pp. 38–9.

170 See J E Post, W C Frederick, A T Lawrence and J Weber, *Business and Society: Corporate strategy, public policy, ethics* 8th edn (New York: McGrawHill 1996); see also W C Frederick, K Davis and J E Post, *Business and Society* 6th edn (New York: McGrawHill 1988).

required to understand external variables and their impact on both company and stakeholders. Next, when mapping stakeholder coalitions, the directors must analyse the stakeholders based on step one and categorise them into groups according to different criteria: primary or secondary stakeholders, external or internal stakeholders, and those with economic or political power. It is necessary to understand thoroughly the unique stakeholder group classifications in each company before it is possible to take their interests into consideration in strategic management policies.

Following on from steps one and two, directors should assess the nature of each stakeholder's interests and power (including voting power, political power and economic power) in order to understand the importance each stakeholder places on these interests before prioritising activities and focusing the available resources. After a mental map has been constructed concerning the level of each stakeholder's power and interests, directors are encouraged to build a matrix of stakeholders' priorities along the strategic dimensions of stakeholder theory. Distinctions should be made between highly strategic stakeholders, who are crucial and can affect the very survival or existence of the business organisation, and stakeholders whose interests have to be dealt with according to basic legal or institutional conditions through explicit or implicit contracts. Finally, based on full analysis of stakeholders' relationships, coalitions, nature and priorities, a matrix of corporate responsibility towards various stakeholders (including shareholders) should be constructed based on the corporate responsibility pyramid, from economic to voluntary (or philanthropic) responsibility. Figure 1 (p. 386) can be used as a guide for directors when enforcing their duties towards stakeholders in a hybrid corporate governance model.

5 Effectiveness of enforcement

Different countries have also evolved their own forms of enforcement measures on hybrid corporate governance models, if they tend to adopt such a model. There are numerous regulations and guidelines pertinent to stakeholders to ensure the enforcement of the hybrid model. In addition to the array of geographical jurisdictions from which such guidelines emanate, the scope of core legislations, regulations and guidelines ranges from human rights, sustainable deployment and employee practice to supply chain management.[171] Unlike the enforcement of shareholders' interests, broad legal supports are always necessary to best serve the stakeholders' interests, because the market can be subverted by purely strategic considerations.[172] Legal requirements will play an increasingly important role in enforcing voluntary corporate policies. New legal developments are directly or indirectly fostering voluntary stakeholder policies and market pressure to make what businesses have perceived as being voluntary, or beyond the law, in fact legally enforceable.[173] Legal doctrines and processes are employed by corporations as part of their strategy, and market forces are stimulated and facilitated by legal measures.[174]

Four levels at which "stakeholding principles are established in order to be effective" were defined by Stoney and Winstanley.[175] Adherents of stakeholder theory advocate the adoption of the principles at various levels of stakeholder intervention including: the

171 A L Friedman and S Miles, *Stakeholder: Theory and practice* (Oxford: OUP 2006), p. 243.

172 D M Nuti, "Democracy and economy: what role for stakeholder" (1997) 8 *Business Strategy Review* 14.

173 McBarnet, "Corporate social responsibility beyond law", n. 153 above, p. 31.

174 Ibid.

175 C Stoney and D Winstanley, "Stakeholding: confusion or utopia? Mapping the conceptual terrain" (2001) 38 *Journal of Management Studies* 603, p. 621.

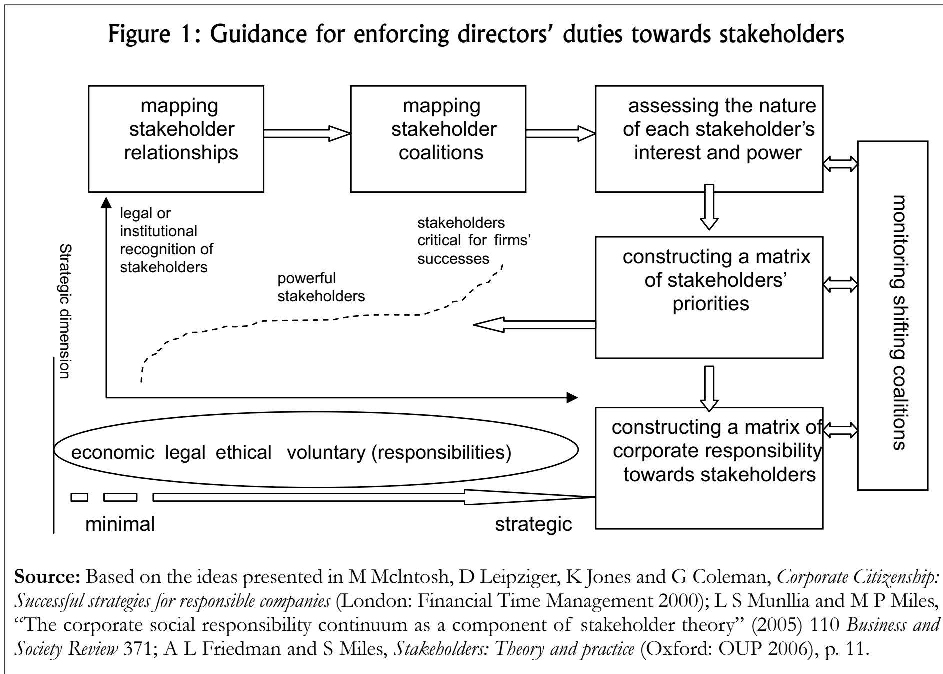


Figure 1: Guidance for enforcing directors' duties towards stakeholders

Source: Based on the ideas presented in M Mclntosh, D Leipziger, K Jones and G Coleman, *Corporate Citizenship: Successful strategies for responsible companies* (London: Financial Time Management 2000); L S Munllia and M P Miles, "The corporate social responsibility continuum as a component of stakeholder theory" (2005) 110 *Business and Society Review* 371; A L Friedman and S Miles, *Stakeholders: Theory and practice* (Oxford: OUP 2006), p. 11.

establishment of individual right;[176] the development of a more inclusive framework of corporate governance;[177] and reformation of national public policy[178] and international institutional regulations.[179] These wide-ranging levels stand within the stakeholder debate as a discrete framework that allows us to focus on specific areas within the overall debate with the purpose of transforming stakeholder principles into practice.[180]

The dimension of stakeholder theory enforcement is "intended to capture the extent to which the stakeholder model is formally acknowledged and institutionalised within organisations and society".[181] "Coercion" lies at one extreme, enforcing stakeholders' rights through legal entrenchment, while "voluntarism" is at the opposite end of the spectrum, driven solely by an ethos or internal morality to do the right and just thing.[182] These two polar opposites can be regarded as enforcement measures, providing a theory and moral basis for directors' duties towards stakeholders in the hybrid model. In the hybrid model, the social and legal means of enforcement cannot be seen as exclusive alternatives for furthering corporate responsibility; instead they can be viewed as "complementary controls in a new style of corporate accountability that involves both legal and ethical standards".[183]

176 See R E Freeman, *Strategic Management: A stakeholder approach* (Boston and London: Pitman 1984); J W Weiss, *Business Ethics: A stakeholder and issue management approach* 3rd edn (Mason OH: Thomson South-Western 2003).

177 See K E Goodpaster, "Business ethics and stakeholder analysis" (1991) *Business Ethics Quarterly* 53; D Winstanley, J Woodall and E Heery, "Business ethics and human resource management: themes and issues" (1996) 25 *Personal Review* 5.

178 A Gamble and G Kelly, "Shareholder value and the stakeholder debate in the UK" (2001) 9 *Corporate Governance* 110.

179 Hutton, *The State We're In*, n. 137 above; C Stoney and N Aylott, "Tomorrow's company' (1994) 4 *Renewal* 56.

180 Stoney and Winstanley, "Stakeholding", n. 175 above, p. 621.

181 Friedman and Miles, *Stakeholder*, n. 171 above, p. 247.

182 Stoney and Winstanley, "Stakeholding", n. 175 above, pp. 619–21.

183 McBarnet, "Corporate social responsibility beyond law", n. 153 above, p. 55

From the most ethical and voluntary end, inclusiveness is a state of mind, spirit or ethos which, if cultivated, will encourage stakeholder philosophy and practice to emerge both in organisations and in wider society.[184] Other proponents of the voluntary approach support a range of options including exhortation and the establishment of an inclusive model of best practice.

It is argued by Donaldson and Preston that stakeholder theory can be differentiated into descriptive,[185] instrumental and normative approaches.[186] The instrumental (or strategic) approach is concerned with the impact stakeholders may have in terms of corporate effectiveness. This approach appeals to the company in terms of how it can achieve corporate goals by being responsible. The approach is placed lower down the enforcement ladder since it relies on exhortation and social leadership. The instrumental approach establishes a framework for examining the *ceteris paribus* connection, if any exists, between the practice of stakeholder management and the achievement of various corporate performance goals.[187] This approach rests at the level of business organisation governance, since directors are required to interconnect various stakeholders' interests in the formation of a strategic management policy. Finally, the normative approach is concerned with the requirement that corporations should take stakeholders' interests into account even in the absence of any obvious benefits. This approach focuses on what companies ought to do and it is placed at the level of "best practice" which transgresses basic social norms. As for the level of intervention, this approach focuses on individual stakeholder's rights rather than corporate objectives and is placed in the category of "individual rights".

The map (Figure 2) is designed to offer a platform for considering the effectiveness of enforcement in the stakeholder approach. There are positions in the diagram corresponding to both archetype models and to newly enforced hybrid models, such as enlightened shareholder value principle, depending on the arguments on the traditional shareholder primacy model, the classic stakeholder theory model and enlightened shareholder value principle in the UK.

6 Conclusion: an ideal hybrid corporate governance model and enforcement of the model

The ultimate hybrid model, a final convergence, will be based on adaptations within each model. As a result, the new model will combine the best practice of the two archetype models. However, the term "best practice"[188] is based on the criteria of the efficiency and promotion of success of the company. When considering the issue of the ideal hybrid model, it is necessary to avoid discounting the significance of any of the following four dimensions: social expectations; investor expectations; government expectation regarding statutes and regulations; and theoretical-cum-academic expectations, although these "in principle" expectations of the academic community carry the least weight.[189]

On the stakeholder model's side, it is important to increase and promote the effectiveness of markets (primarily capital and takeover markets) by increasing their

184 Stoney and Winstanley, "Stakeholding", n. 175 above, p. 622.

185 The related arguments on descriptive stakeholder approaches are clarified in the sections on "Justifications for the hybrid model" (3.2.1 above) and "An ideal hybrid corporate governance model" (6 below).

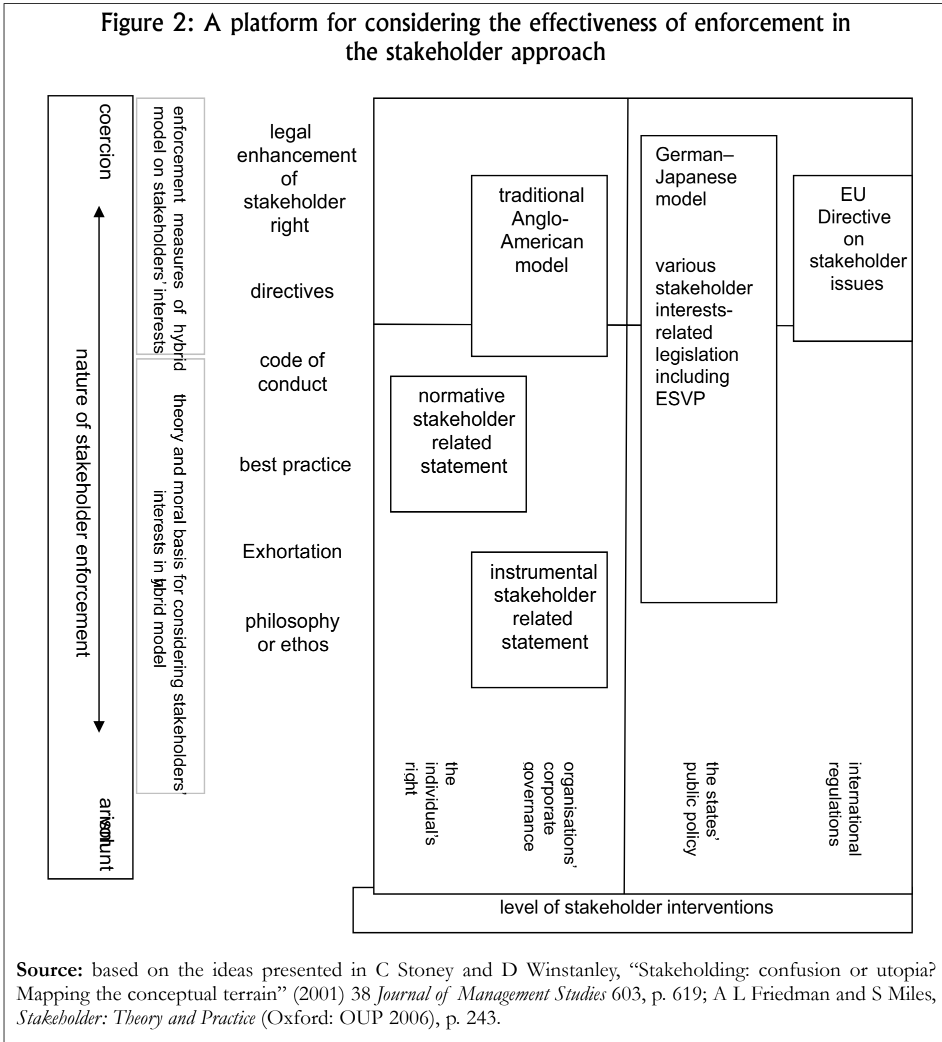
186 T Donaldson and L E Preston, "The stakeholder theory of the corporation: concept, evidence, and implications" (1995) 20 *Academy of Management Review* 65.

187 Friedman and Miles, *Stakeholder*, n. 171 above, p. 29.

188 Or the "right mix" which is also mentioned in this article.

189 C Parker, "Meta-regulation: legal accountability for corporate social responsibility" in McBarnet et al., *The New Corporate Accountability*, n. 122 above, pp. 215–16.

Figure 2: A platform for considering the effectiveness of enforcement in the stakeholder approach



Source: based on the ideas presented in C Stoney and D Winstanley, "Stakeholding: confusion or utopia? Mapping the conceptual terrain" (2001) 38 *Journal of Management Studies* 603, p. 619; A L Friedman and S Miles, *Stakeholder: Theory and Practice* (Oxford: OUP 2006), p. 243.

liquidity, with more listed companies and an increased volume of equity transaction. In the case of the shareholder primacy model, a move should be initiated towards more concentrated holding, to provide monitoring through institutional holding, or via specialised companies that make investments in order to monitor and, where necessary, engage in the management of companies in which they invest.[190] Moreover, in the German–Japanese governance context, it is important to emphasise shareholders' interests in order to attract more investments, especially from overseas institutional investors; from the Anglo-American side, stakeholders' interests should be redefined in corporate law in order to promote long-term interests for corporations.[191]

190 See P J N Halpern, "Systemic perspectives on corporate governance systems" in S S Cohen and G Boyd, *Corporate Governance and Globalization: Long range planning issues* (Cheltenham: Edward Elgar 2000), p. 37.

191 J Zhao, "New economy and stakeholder theory: promoting the competitiveness of companies in the 21st century", FEEM CRS Working Paper (2007): www.feem.it/Feem/Pub/Publications/CSRPapers/default.htm.

Although it is logical for various jurisdictions to share common rules and common policies on corporate governance, it is still hard to believe that complete convergence will ever occur,[192] because of the path dependence theory which argues that various factors determine the efficiency of corporate performance and arrangements must change in each jurisdiction because of their particular culture, politics and traditions.[193] In this case, a limited diversity in regulation can sometimes serve as a useful economic end in the sense of promoting innovation and competition without necessarily leading to a race to the bottom.[194] Although it is hard to find a single optimal solution, constructive adoptions and a convergence of two basic corporate governance models can "serve as a foundation for renewed growth and prosperity among the world's leading economic powers and as a model for emerging markets".[195] Convergence towards a hybrid model will stay within the constraints of principle rather than focus on detailed implemental measures which will largely depend on the unique situation of each state due to path dependence theory.

The term to define the best hybrid model is as important as its basic principles, which can be primarily adopted by each state to draw up a hybrid corporate governance model blueprint. The central tendency of hybrid models can be predicted based on the relative importance of the following requirements:

- It is necessary for the directors to realise the possibility of simultaneously meeting their duties to both shareholders and stakeholders.[196] Directors can seek to minimise costs to stakeholders while increasing shareholder wealth.[197]
- Regarding the purpose of entity maximisation and the fostering of entity wealth, directors should endeavour to increase the overall long-term market value of the company as a whole, taking into account the investments made by various people and groups.[198]
- Company directors should maximise shareholders' gains while minimising stakeholders' losses, and the entire process should be socially responsible because statutes enable directors to eliminate or mitigate losses to other constituencies for the purpose of assuring that a transaction in fact produces net gains in social wealth.[199]
- The ultimate purpose of establishing corporations is to promote the long-term success of the company. The purpose of corporate decisions should be consistent with fundamental corporate governance principles of fairness, accountability, transparency, and responsibility presented by the OECD.[200]

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192 Halpern, "Systemic perspectives", n. 190 above, p. 37.

193 See Bebchuk and Roe, "A theory of path dependence", n. 112 above, p. 69; see also R H Schmidt and G Spindler, "Path dependence and complementarity in corporate governance" in J N Gordon and M J Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge: CUP 2004), p. 114.

194 J A Grundfest, "Internationalization of the world's securities markets: economic causes and regulatory consequences" (1990) 4 *Journal of Financial Service Research* 349, pp. 371–3.

195 Payne, "Corporate governance in the USA and Europe", n. 150 above, p. 70.

196 W S W Leung, "The inadequacy of shareholder primacy: a proposed corporate regime that recognizes non-shareholder interests" (1997) 30 *Columbia Journal of Law and Social Problems* 587, p. 623.

197 See Coffee, "Unstable Coalitions", n. 145 above, p. 1548; see also L E Mitchell, "A theoretical and practical framework for enforcing constituency statues" (1992) 70 *Texas Law Review* 579, p. 635.

198 A Keay, "Ascertaining the corporate objective: a maximisation and sustainability model" (2008) 71 *Modern Law Review* 663, p. 685.

199 This actually also derives objective standards for interpreting constituencies statues in realising a dual goal in the US; see M McDaniel, "Stockholders and stakeholders" (1991) 21 *Stetson Law Review* 121, pp. 161–2.

200 OECD, Principle, n. 21 above.

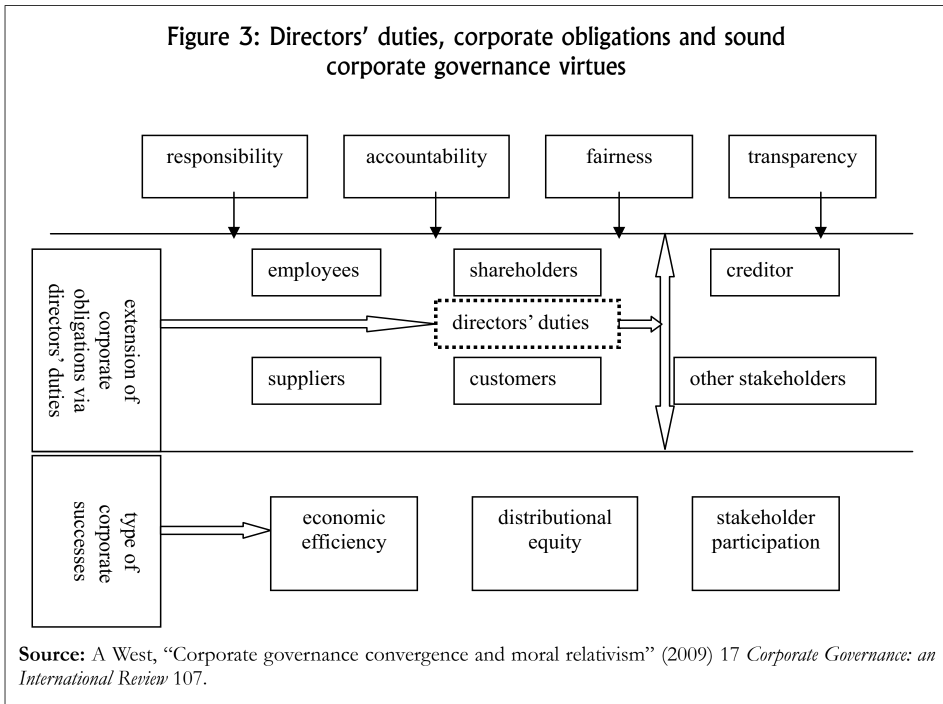

Figure 3: Directors' duties, corporate obligations and sound corporate governance virtues

Source: A West, "Corporate governance convergence and moral relativism" (2009) 17 *Corporate Governance: an International Review* 107.

- Stakeholders' legitimate positions, apart from protection provided by employment law, consumer protection law and environmental law, should be valid in corporate law to strengthen their position in corporations;
- Each country should create enforceable supplementary measures to implement these principles in order to protect the interests of stakeholders; at the corporate level, every company should set its own goals and corporate strategy through its board.
- The market for corporate control should encourage rather than penalise companies with long-term growth potential.

In an ideal hybrid corporate governance model, the relationship between directors' duties, corporate obligations, the four good corporate governance virtues, and different criteria for corporate success (referring particularly towards the goals of efficiency, equity and participation)[201] are further clarified in Figure 3.

201 B H McDonnell, "Convergence in corporate governance – possible, but not desirable" (2002) 47 *Villanova Law Review* 341, pp. 350–4.