

NORTHERN IRELAND

LEGAL QUARTERLY

Tributes to Lord Lowry

Mapping Law (*William Twining*)

The U.S. Constitution, The Supreme Court and Capital Punishment
(*Carol Daugherty Rasnic*)

Constitutional Background to and Aspects of the
Good Friday Agreement (*Donal O'Donnell S.C.*)

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INTRODUCTION

1999 sees the publication of volume 50 of the Northern Ireland Legal Quarterly, which seems an appropriate moment to review the position of the journal in both the legal and intellectual sense. NILQ has always set out to be a generalist journal and to be of national interest, and is part of a proud tradition of intellectual scholarship. No journal can, however, afford to stand still, and in these increasingly time-pressurised days, there has to be a very good reason to give the NILQ the time it deserves.

We owe an immense debt of gratitude to Dr Peter Ingram, who has just relinquished the editorship, and has made such a valuable contribution to the development of the NILQ. It is the intention of the new editorial team to continue the balance between matters of exclusively Northern Ireland concern and matters of wider national and international interest.

NILQ will continue to be a generalist journal (of which there are increasingly few) but with specifically themed issues e.g. on criminal justice, the environment, human rights, and constitutional change. We welcome potential contributions, of whatever length, from sustained articles on topics of major interest to shorter pieces on important cases or legislation: our sole criterion is the quality of the contribution.

As we move into the new Millennium, we intend to take the NILQ into its second half century with a sense of renewal and optimism as a real contributor to lively intellectual legal discourse.

Professor Brigid Hadfield, Editor of the NILQ and Professor of Public Law at the Queen's University of Belfast

Miriam Dudley, Director, SLS Legal Publications (NI)

**THE FOLLOWING TRIBUTES TO LORD LOWRY WERE
DELIVERED AT A SPECIAL SITTING OF THE HIGH
COURT IN THE NISI PRIUS COURT ON
MONDAY 18 JANUARY 1999.**

***TRIBUTE PAID BY THE LORD CHIEF JUSTICE SIR
ROBERT CARSWELL TO THE RIGHT HONOURABLE
THE LORD LOWRY, LORD CHIEF JUSTICE OF
NORTHERN IRELAND 1971-88***

ROYAL COURTS OF JUSTICE, BELFAST, 18 JANUARY 1999

The court is sitting this morning to pay tribute to the memory of Robert Lynd Erskine, Baron Lowry, who died on 15 January 1999, and to express our sorrow at his loss. For most of the past three decades Lord Lowry was a pivotal part of the legal system of Northern Ireland, and it is hard to adjust our thoughts to the fact that he is no longer with us.

He was born on 30 January 1919, the only son of William Lowry, a practitioner of great flair and ability who was one of the founder members of the Bar of Northern Ireland, became a minister in the government and subsequently a High Court judge before his early death. Lord Lowry used to aver that his father was possessed of a much better intellect than his own: if that was true it put him in a very high bracket indeed.

He had the good fortune to be educated at The Royal Belfast Academical Institution, where he had a remarkably successful academic and sporting career. He won the major prizes, was Head of School, played a respectable game of rugby and for four seasons played cricket on the 1st XI, captaining it for his last two years. He won an open classical exhibition to Jesus College, Cambridge, of which he was later elected an honorary fellow, and there obtained first class honours in Parts I and II of the classical tripos.

At the outbreak of war Robert Lowry volunteered for service, but was instructed to complete his degree course. He did so in 1940 and was then called up for service in the Royal Inniskilling Fusiliers. In 1941 he was commissioned into the Royal Irish Fusiliers, becoming in due course adjutant of the 6th Battalion in succession to E.W. Jones. He served through the Tunisian and Italian campaigns and became Brigade Intelligence Officer of the 38th Irish Infantry Brigade. He was demobilised with the rank of major, and subsequently became Honorary Colonel of successively the 5th and 7th Battalions of the Royal Irish Fusiliers and the 5th Battalion of the Royal Irish Rangers.

Lord Lowry undertook a short but clearly effective course of legal studies - he was later known to say privately that it was possible to learn the law in a little less time than most universities allotted to their students for their law degrees - and was called to the Bar of Northern Ireland in 1947. At this time a number of returning servicemen were quickly establishing themselves as leaders of the junior Bar, among them James Brown, Ambrose McGonigal, Robbie Lowry and, pre-eminently, Teddy Jones. The Bar Library was then a much smaller body of people and they worked

with and against each other constantly and knew each other's strengths and weaknesses intimately. Facilities were rudimentary by modern standards, and earnings modest, but the pressure of life was easier, even for those with a good practice, and the survivors of that era look back on it with great affection.

Robbie Lowry became a pupil of F.A.L. Harrison (now Sir Frank), but required little formal tuition, for he seemed, like Athene, to spring into practice fully armed. He acquired a high-quality civil practice with great speed and when Frank Harrison took silk in 1948, Lowry succeeded him as junior counsel to the Attorney-General for Northern Ireland. From then until 1956, when he took silk, he was one of the foremost juniors and featured in many of the leading cases of the day. He acquired a large family of pupils, over whom he presided genially at the centre table in the Bar Library, and in whose success he always took great pleasure. In later life he amused himself by attempting to make up a family tree of his descendants in the law, but their number increased at such a speed that his genealogical efforts could not keep up with them. He was proud of the fact that for a period as Lord Chief Justice he had as colleagues on the Bench not only two former pupils, MacDermott and Nicholson, but also one "grandson", myself.

Robbie Lowry took silk in 1956 and very soon became one of the leading members of the Senior Bar. A complete advocate, whose practice covered a wide range of civil cases, he was a persistent and effective cross-examiner. His acute analytical mind fitted him particularly for appellate work and he was retained on one side or the other in almost every case which went to the House of Lords. It became increasingly clear that he was destined for the Bench, and it was no surprise to his colleagues when he was appointed a judge of the High Court in 1964 at the early age of 45. As a young judge he adopted standards of courtesy and patience which have set the pattern for succeeding judicial generations. They could be misleading: many an advocate thought that the attentive hearing which his argument had received meant that he had won his case, only to find that his opponent's submissions, equally well received and carefully probed, prevailed with the judge.

When the redoubtable Lord MacDermott retired in 1971, Robert Lowry was the natural choice as his successor as Lord Chief Justice. From an early stage he established his hegemony by the quality of his judicial work, allied with a fine diplomatic sense in his dealings with his colleagues, several of whom had been considerably senior to him in practice and on the Bench. His quiet courtesy in court was matched by an unruffled good humour off the Bench and although constantly pressed by administrative demands he always found time to give support and encouragement to younger judges finding their way in a new environment.

Sir Robert Lowry was pitchforked into a turbulent period in the affairs of the Province. Internment commenced the week after he took up office and the level of civil disturbance was at its height. Attacks upon the Security Forces and the destruction of property by bombs were incessant and the incidence of murder and maiming was distressingly high. Members of the judiciary did not escape. Five were murdered, another judge was seriously wounded and Lord Lowry himself narrowly escaped an assassination attempt when arriving to give a lecture at Queen's University (typically robust, he went ahead and gave the lecture as scheduled). For many years they lived under constant threat in siege conditions and their devotion to duty was severely tested. That they came through this period with their morale intact is very largely due to the example set by Lord Lowry and his fostering of an esprit de corps which sustained them.

Emergency legislation was introduced into Northern Ireland in 1973, when the ordinary criminal processes had come under intolerable strain, and Sir Robert Lowry and his fellow-judges had to undertake the operation of an

unfamiliar system of non-jury trial for terrorist offences. He determined that the inroads of emergency legislation into the historic edifice of the common law should be kept to a minimum, and he strove successfully with determined independence to preserve the traditional standards of justice from distortion or dilution. Under his leadership the judges preserved a reputation for impartiality and integrity by administering the potentially draconian powers entrusted to them with fairness and humanity, consistently interpreting them in a way which kept as close as possible to the long-established principles of the criminal law.

In 1975 Sir Robert Lowry was asked to become Chairman of the Northern Ireland Constitutional Convention, in which the representatives of political parties engaged in an attempt to agree upon a constitution for the Province, following the breakdown of the Assembly and Executive the previous year. The efforts proved fruitless after many months of sittings at Stormont, when the Convention broke up without agreement having been reached, in spite of Lowry's skilled and shrewd chairmanship. His fairness, patience and good humour won him the admiration and respect of a diverse range of politicians and his mastery of the procedural intricacies in a strange field was proof against the wiles of even the most astute campaigner.

In 1979 Lord Lowry became a life peer and frequently sat in appeals to the House of Lords, while carrying on with his work as Lord Chief Justice. In 1988 he was appointed a Lord of Appeal in Ordinary, and in this final phase of his career until retirement in 1994 he was engaged full-time in appeals to the House of Lords. His learning, acumen and great breadth of experience made him a valued member of a very strong court.

Throughout his long judicial life Lord Lowry produced a stream of judgments on an enormous variety of subjects, lucidly and succinctly expressed in elegant prose which owed much to his classical training. In an age in which the judicial work product has grown even longer and more diffuse, his beautifully crafted judgments were a welcome reminder that the standards set by Willes and Macnaghten a century ago could still be attained. At times his quest for perfection, together with the other calls on his time, may have delayed the production of reserved judgments rather longer than is now considered appropriate - lawyers familiar with the Book of Common Prayer were known to mutter the phrase from the *Urbs Fortitudinis* "Yea, in the way of thy judgements, O Lord, have we waited for thee" - but when they finally appeared they were so cogent in reasoning and clear in expression that little remained to be said, as tributes from the House of Lords testified.

Outside the law Lord Lowry was heavily involved with educational matters. He was a governor for 15 years of his old school, of which he was elected to the revived office of President of the Institution in 1996, the highest distinction which the school could confer upon him, and Chairman of the Board of Richmond Lodge School for 21 years. He served a term as Chairman of the Governing Bodies Association and gave valuable service as Visitor of the University of Ulster from 1989 until his death.

Sporting interests of all kinds were Lord Lowry's relaxation and safety valve in his busy life. He was an outstanding schoolboy cricketer and was selected for the Irish Schools XI. After the war he turned his energies to golf, at which he played off, and to, a low handicap for many years, with a compact, grooved swing which never seemed to vary. He was known widely as a highly competitive and effective match player, though one of the most sporting and chivalrous opponents. He was a member of the Malone Golf Club senior team which carried all before it in the 1950s and captained the team which won the Irish Senior Cup. He served as captain of that club in 1955, though how he juggled the demands of captaincy, playing on the senior team and his heavy junior practice was known only to himself and his pupils who dealt inventively with telephone calls from

solicitors seeking him like the Scarlet Pimpernel. He was President of Royal Portrush Golf Club from 1974 until his retirement in 1997, undertaking a very successful captaincy in the club's centenary year. His remarkably accurate and retentive memory made him an authority on cricket, rugby and golf history and he needed little prompting to reel off statistics from Wisden, the back line in an Irish XV of pre-war years or his own score stroke by stroke in a match played many years back. His family was devoted to showjumping, and he earlier supported them by driving a large horsebox all over the country - a labour of love, given his lack of interest in or ability with motorised transport or anything else mechanical. It was that which brought him into judging competitions. Typically, he mastered all the arcana of showjumping rules and became such an authority that he travelled the world as an international judge. Among his sporting friends, or in the company of his fellow-benchers of the Middle Temple, or our own Inn of Court, Robbie Lowry could relax the slightly austere persona which he presented to the world and revert to his own convivial self. As many of us present will well know, he greatly enjoyed such evenings, and he was never likely to be one of the first to depart.

Lord Lowry's family formed a haven and a secure background for his manifold activities in a busy life which he lived to the full. He was married in 1945 to Mary Martin, who gave him wonderful support during their long marriage until her death in 1987, and he was devoted to her and their three daughters. His marriage in 1994 to Barbara Calvert QC brought great happiness to his later years and one would wish that they could have had more time to enjoy his well-merited retirement. Our deepest sympathy goes to Barbara and to his daughters Sheila, Ann and Margie. They will of course miss him sadly. But so shall we who are present today, and so will the wider legal world. We, and they, will remember Robert Lynd Erskine Baron Lowry as a man of whom the phrase coined by Francis Bacon could most justly have been used, that integrity was his "portion and proper virtue". With him as our example we can strive to attain, in the words of Lord Coke, that other great master of the common law, "the stabilitie of fortitude and the soliditie of justice".

***TRIBUTE PAID BY BRIAN FEE Q.C. CHAIRMAN OF THE
BAR COUNCIL***

I am grateful to the Lord Chief Justice for granting me the opportunity and privilege of joining, on behalf of the Bar of Northern Ireland, in this tribute to the late Lord Lowry.

As you have already heard, Robbie Lowry was called to the Bar of Northern Ireland in 1947 following a brilliant academic career and distinguished service in the Forces during World War II. He quickly made his mark as a diligent and brilliant barrister and this was recognised in his appointment as junior Counsel for the Attorney General in 1948. In addition to those Crown duties he had a very extensive practice particularly, although not exclusively, as Defence Counsel.

He willing gave generously of his time to act as Master to a number of pupils and indeed he was always regarded as the epitome of what a Master should be. Happily a number of those former pupils still display today the Lowry trade marks in their work in the law.

In 1956 he took Silk and over the next eight years he became one of the most eminent Senior Counsel. He took part in many of the major cases of his day and I am told by those who practised with him that he was particularly adept at the art of cross-examination and won over many a jury against the odds.

Apart from his obvious quality as an advocate, Lord Lowry was a great participant in Bar life generally. His was a rounded personality and his talents were far from restricted to the legal field.

As a golfer of very considerable ability he was at the forefront of the formation and development of the Bar Golfing Society in the early 1950's, and of course proceeded to represent the Bar in golfing competitions on many occasions. His elevation to the Bench in 1944 was greeted with universal acclaim not only because of his quality as a lawyer but because of his popularity among his colleagues.

As he rose through the judicial ranks, becoming Lord Chief Justice in 1971, his qualities of integrity and fierce independence long recognised by his colleagues at the Bar stood him in good stead. He also greatly encouraged the independence and collegiality of the Bar in its attempts to avoid the unfortunate divisions and side-effects of the religious and political climate in Northern Ireland in the darkest days of the troubles.

As barristers, our view of a judge is always going to be influenced to a considerable degree by the manner in which counsel are treated in his or her court, and in that respect Lord Lowry was never less than pleasant to practitioners and witnesses. If the sharpness of his intellect was always evident, it was combined with a sense of fairness, courtesy and modesty which ensured that one left his court satisfied that there had been a full and fair hearing. Many junior Junior Counsel received handwritten notes of encouragement after their initial appearance in his court.

Notwithstanding the demands and pressures of Judicial Office he remained in close contact with the Bar. Even in his busiest days as Lord Chief Justice he found the time to lecture and tutor Bar students preparing for their Bar Finals, he chaired many legal committees and he rarely missed Bar social functions.

We were all proud of his appointment as a Law Lord in 1988 and he was assiduous in ensuring that his links with our Bar were maintained. Indeed he was to have been our guest at a Bar dinner later this month.

On behalf of the Bar I express our deep sympathy to his wife Barbara, his daughters Margaret, Anne and Sheila and extended family. The Bar has lost a good friend.

***TRIBUTE PAID BY ANTOINETTE CURRAN,
PAST PRESIDENT OF THE LAW SOCIETY OF
NORTHERN IRELAND***

In the unavoidable absence of our President Mrs Dixon I deem it a great privilege, to be asked to express the feelings of the Law Society on the death of Lord Lowry.

The Lord Chief Justice has comprehensively and in graphic terms outlined his outstanding career.

Our members knew Robbie Lowry - if I may be so bold - as Junior Counsel and later as Senior Counsel long before his elevation to the Bench. No solicitor could have failed both to be impressed by, and to learn, from him even at that early stage. As Puisne Judge and later as Lord Chief Justice he wore his learning lightly yet his judgments bear the hallmark of academic brilliance allied to careful crafting by a master of the English language.

In England and Wales, the Master of the Rolls admits solicitors and has general supervision over the Law Society of England and Wales. In Northern Ireland this function has been assigned to the Lord Chief Justice; when the Law Society makes new Regulations the Lord Chief Justice must concur. Lord Lowry did not simply concur with drafts submitted by the Law Society, he made many invaluable suggestions and frequently re-drafted them in a tighter and clearer form.

In official contacts with the Law Society he was both punctilious and generous with his time when the Council or an individual solicitor had an intractable problem.

It was always clear that the Bar of Northern Ireland was, and would remain, his first love, but let me acknowledge at once that he was never less than a friend to the The Law Society, even on those occasions when he differed from us on a matter of mutual concern.

“His yoke indeed was easy and his burden light”.

Solicitors instructing, on occasions, nervous Counsel in the Court of Appeal, could not help but notice the way in which Lord Lowry empathised with those struggling to present a case, to the best of their limited ability. He frequently, in those circumstances, politely enquired - “Is what you are really trying to say this” - whereupon he would transform an incoherent submission into something both felicitous in language and cogent in effect.

Outside his official duties he was a warm, intelligent, humorous, likeable and indeed loveable man.

If I might borrow two lines from Hamlet which I consider apt -

“He was a man, take him for all in all
I shall not look upon his like again”.

May I, in conclusion, on behalf of the Law Society express our deep sympathy to Lady Lowry, his daughters, family and friends.

**THE FOLLOWING TRIBUTE WAS PAID BY THE
RT. HON. SIR JOHN MACDERMOTT AT LORD LOWRY'S
FUNERAL IN CROSSGAR ON 19 JANUARY 1999.**

"ROBBIE" - CROSSGAR, JANUARY 1999

We are met to bid farewell to Robert Lynd Erskine Lowry - Lord Lowry of Crossgar: "Robbie" to everyone here today. By our presence today we seek to comfort and sustain his family in their time of sadness. We are also here to give thanks for a life of service to the community and for the manner in which he enriched the lives of all who were fortunate enough to have known him. We shall never see his like again.

We who have come from far and wide all have our shared and personal memories of this great man (and he was a great man) who has gone from among us. Even today I have much difficulty in accepting that he has gone: he was always so full of vitality, a seemingly ageless person. It was only a couple of months ago that he was attending to show-jumping business in Warsaw and Stuttgart; it is less than eight weeks since he and Barbara came to my retirement dinner in the Law Courts. On that occasion he was in great form - as sharp as ever - and, typically, he told no-one that he was to go into hospital on the following Monday. We are all sad but relieved that he has been spared the insufferable burden of prolonged ill-health. We are privileged to have been left with so many marvellous and lasting memories.

Today, within sight of his 80th birthday, we realise that in truth one man in his time can play many parts. So let us remind ourselves of some aspects of the life of this man who was both a public figure and a very private person. In him formality and informality walked hand in hand but there was always a proper time and place for each.

As we know he was a distinguished scholar at "Inst" and at Jesus College, Cambridge. After securing his "first" in both parts of the Classics Tripos, Robbie saw it to be his duty to join the army and the student soon developed into the well rounded man. His industry and intellect were identified and he became intelligence officer with the 38th Irish Brigade in North Africa. In later years he was Honorary Colonel of several Units - positions which gave him especial pleasure.

In 1944 when on leave he injured his back when riding. Part of his convalescence was spent playing chess with Eric Martin who was also convalescing but such occasions also gave Robbie the opportunity to continue his "pursuit" of Eric's sister, Mary. They became engaged and were married in 1945.

On discharge from the army Robbie had to set about getting himself qualified for call to the Bar and so follow his father into "the law". This involved living in London and taking the Bar Final course run by the well known "crammer" - Gibson and Weldon. He was, naturally, successful and was called to the Bar in 1947, entering into pupillage with Frank Harrison who, with Patricia, so much regrets not being able to be here today. Unnecessarily conscious of the limited nature of his formal legal education, Robbie would at times claim that he "knew no law". This, of course, was simply not so, and his legal knowledge and expertise rapidly developed through hard work and an instinctive "feel" for the fundamental principles of the law. Robbie had an infinite capacity for hard work: he never came to Court less than well prepared: he had the ability to define and grasp the real point in even the most complex case: he was a very well

organised and quietly effective (sometimes deadly) cross-examiner and he knew when to settle and when to fight. He was indeed a genuine all-rounder and a master of his craft.

He soon developed a substantial and broadly based practice and began to take his own pupils. We, who were his pupils, were indeed fortunate. Robbie took great care of us - he advised us and taught us by precept and example.

After our pupillage most of us continued to sit around Robbie at the Centre Table in the Bar Library. His advice and guidance were always readily available. It was a relationship which extended far beyond our shared workplace. Home hospitality was exchanged and sporting occasions enjoyed. To visit Lansdowne Road or Portmarnock, Murrayfield or Muirfield with Robbie was an enlivening experience and we were again and again reminded of the very human and very kind personality which was normally hidden behind the lawyer's reserve. Those days, and nights, of relaxation, of talk and some songs (for he could sing a bit) will long remain fresh in the memories of his many companions. Often he was last to bed but invariably he was first to breakfast, as always immaculately turned out: at times he may have come down a little more stooped than usual, but let us not forget that it was that stoop and his brisk gait which undoubtedly saved his life from the sniper's bullets.

A couple of days ago an equestrian friend told me, "Robbie taught me how to do a professional job but at the same time to have FUN". That is what he did for his pupils and many, many others.

Robbie took silk in 1956 and was appointed a High Court Judge in 1964. He was then only 45 but already well equipped for the judicial role which he discharged with such distinction for some 30 years - latterly as Lord Chief Justice of Northern Ireland, and then as a member of the Appellate Committee of the House of Lords. In the judgement of many of us, his appointment to the "Lords" came much too late in his legal career, though an earlier fulfillment of his destiny would have caused a void in the local judiciary - for he was very much our friend and leader. Life in London was, of course, a great change for him but he much enjoyed it - especially as he was so warmly embraced by the Benchers of Middle Temple.

To the Bar it was a delight to appear before him. Consideration, courtesy and patience were very much the "tools of his trade", as he sought, with the assistance of Counsel, to discover the right, the just, answer to each particular problem. At the Bar and as a Judge he was always approachable - his experience and his great common sense were readily available to all who needed help.

Robbie's judgments were always models of clarity, expressed in classically elegant language. He could deliver excellent *ex tempore* judgments, but much preferred to reserve and give further careful consideration to the cases before him. He would then craft a first class judgment, though his search for perfection might sometimes take time. Understandably, he was rarely reversed on appeal. He also had a marvellous ability to improve our draft judgments without causing the slightest offence.

We must never forget that his tenure of office as Lord Chief Justice coincided with the long years of terrorist violence. Throughout this period, he led not only his judicial colleagues, but the Bar and the Solicitors' profession, in fearlessly maintaining that the rule of law must always be upheld. Some of the excellent recent obituaries in the press have, rightly, highlighted this important aspect of his work. To him it was of fundamental importance that the independence of the Judiciary should never be compromised and that the law should be administered without fear or favour: sensibly and with understanding. And it must never be forgotten that he was a very humane Judge.

In Northern Ireland, the work of the Lord Chief Justice involves more than hearing cases and writing judgments. Much administration has to be discharged: correspondence (often complex) has to be carried on with the Lord Chancellor, with Government and with others, Dinners have to be attended, and speeches made. At times when hard pressed, Robbie would say, "Life would be easy if you had nothing to do but your own work". But it never was that way. Indeed, as so often is the case, it was this busy man who was asked to take on many additional tasks - thus he was a Governor of schools - Richmond Lodge and "Inst" - he was an active (never a token) member of many important Committees and Commissions. It is not without significance that it was Robbie who was turned to in 1975 when a Chairman was required for the Constitutional Convention which was to attempt the difficult task of deciding on the most acceptable form of Government for the Province. This was an enormously challenging task and though the Convention collapsed Robbie's work earned wide respect.

How then did Robbie manage to discharge his many and varied duties, and do so successfully and acceptably? Firstly, he was tough (really tough), both physically and mentally. He fulfilled the saying "When the going gets tough, the tough get going".

Secondly, he was able to "switch off", and to relax. Out of court and away from the law, he was refreshed by a legion of friends, and by exercise on the golf course. We know he was an excellent golfer. His well grooved swing was in the classic mode, and he was a tenacious competitor. I remember playing as his foursomes partner against distinguished opponents - on the 18th green I enquired if it would be diplomatic to miss a four foot putt, and so halve the match? "Play your own game" he growled, which I knew meant, "Don't be a fool: put it in the hole". At Malone he played with much success on Senior cup and Barton Shield teams - and that at times when such activity had to be fitted into, or around, the largest professional practice of the time. With no disrespect to the members of Malone and Royal County Down his spiritual golfing home was undoubtedly Royal Portrush - President for many years, and Captain twice, including the Club's Centenary year - an occasion long to be remembered. In his day he had been a good cricketer and greatly enjoyed his membership of the M.C.C. He had an encyclopaedic memory of sporting occasions and personalities. This was not confined to cricket - he was equally familiar with the facts and figures of rugby, golf, and show-jumping : his knowledge of the winners of the Derby once enabled him to "win" a "bookmakers" case.

For over 30 years he was deeply involved in equestrian affairs. When the girls became interested in and accomplished at show jumping, he and Mary gave them their full support and encouragement, greatly enjoying their successes. Robbie drove the horse box (a huge pantehnicon), across the length and breadth of Ireland : he familiarised himself with the Statutes, Rules and Regulations of show jumping : he rapidly mastered them, and later revised and translated them. He was deeply involved in the affairs of the International Equestrian Federation, being latterly Chairman of the Judicial Committee. He was an official International Judge, and on the Jury of Appeal at the Olympics in Atlanta. His activities on the Irish scene were equally important. Not only did he judge at all levels, but he worked ceaselessly to preserve amity among all branches of show-jumping in Ireland. I must confess that this aspect of his life was largely unknown to me, but it highlights how great was his capacity to master fresh challenges and form new and lasting friendships.

Thirdly, and most importantly, Mary, Sheila, Anne and Margie provided him with a home where he could relax in peace surrounded by their love and affection. In turn he was devoted to his family and took much pleasure at the arrival of his grandchildren and their development into his friends. From this secure base he could enjoy the activities that went on and the

company of the many people who came about the house - including his faithful police escorts. But, of course, by the end of each day the study reclaimed him.

In 1994 Barbara joined the family and devoted her many talents to looking after Robbie and guiding him into retirement. Over the past weeks hers has been a heavy burden - sustaining and comforting him as he lay seriously ill, yet able to produce the answer to some obscure clue in the Times crossword which was baffling his visitors. She encouraged him to fight towards recovery, which, of course, he did but in the end though the spirit remained strong the flesh became too weak and he died peacefully, early on Friday, 15 January in his 80th year. We grieve with and for his family and trust that at this time of much sadness they may be sustained and comforted.

I would end, by unashamedly repeating the words used by Robbie when concluding his tribute to my father, his predecessor as Lord Chief Justice. They apply in full measure to Robbie:

“Here was a man who could say with David “Judge me O Lord, for I have walked in mine integrity”. He was also a man whose example will shine before us, and whose memory we will treasure all our lives.

MAPPING LAW

THE MACDERMOTT LECTURE

*WILLIAM TWINING: Research Professor of Law,
University College London*

“He is no true town planner, but at best a too simple engineer, who sees only the similarity of cities.” (Patrick Geddes).

“Only the name of the airport changes.” (Italo Calvino).

Returning to Queen’s is always a pleasure. It is a special pleasure and a privilege to give this particular lecture. Whilst I was here, Lord MacDermott was a towering figure who seemed at once formidable, courteous and friendly. He took a great interest in the Law Faculty; he respected our autonomy, but he was always a reference point when we had important decisions to make. I was much impressed by his willingness to spare the time to come to Faculty events, not only public lectures and Law Society dinners, but also many less public functions. I particularly remember meetings of the Legal Advisory Committee where Lord MacDermott, Professors Sheridan and Newark, the University’s solicitor, and George Cowie, the Secretary to the University, argued learnedly and at length over the details of trust documents as if we were in the House of Lords. I stayed silent, but over time I became an expert in some of the more arcane points of the doctrine of cy-pres - a branch of learning which I have not since then had occasion to put to any practical use. I also had time to calculate the number of billable hours of high-powered free legal advice that the University was gaining from these lengthy seminars. It is worth remembering that from 1931-35 John MacDermott taught Jurisprudence at Queen’s an experience which probably contributed to his own legal education as well as to that of his students.¹ My subject today is jurisprudential: indeed it is close to the centre of legal theory. What is involved in picturing law in general and in depicting and understanding a single legal order?

This lecture is part of a series of explorations about the implications of globalisation for the discipline of law and for jurisprudence or legal theory as its general part.² My project is to explore the idea of, and possible

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▪ I am grateful for comments and suggestions by Terry Anderson, Oren Ben Dor, Peter Ingram, Frances Miller, Kim Economides, Avrom Sherr, John Stanton-Ife, Ian Ward and participants in seminars at the University of Miami, the School of Oriental and African Studies, and the University of Capetown. I am especially indebted to Michael Froomkin for introducing me to Calvino’s *Invisible Cities*.

¹ I have recently had the privilege of reading Lord MacDermott’s privately published memoirs *An Enriching Life* (1979) which unfortunately only go up to 1936, before his appointment to the Bench.

² Earlier essays in the sequence are “Reading Bentham” (1989) LXXV Procs. British Academy 97, esp. 129-38; “General and Particular Jurisprudence: Three Chapters in a Story” in *Law in Context: Enlarging a Discipline* (1997) Ch. 8 (hereafter *LIC*); “Globalization and Legal Theory: Some Local Implications” 49

agendas for, a revived general jurisprudence in a world characterised by conflicting tendencies of globalisation and fragmentation; of homogenisation and of emphasis on cultural diversity; of bureaucratic rationalism, on the one hand, and post-modern indeterminacy and other kinds of pluralism on the other.

The central question that I shall address is just one part of that agenda: what is involved in depicting law in the world as a whole, or single legal orders, or specific legal phenomena? This may be interpreted as one way of rephrasing the central question of traditional jurisprudence: what is law? I propose to approach this from the perspective of a rooted cosmopolitan,³ using the idea of mapping as a theme. I shall speak first of geographical maps, and then figuratively of mental maps and of mapping as a metaphor for one way of depicting that is interpreting, describing, evoking and explaining a subject-matter of study. The central thread of my argument will be drawn from Italo Calvino's wonderful fable *Invisible Cities*.⁴ This takes the form of an imaginary dialogue between the ageing Emperor Kublai Khan and his ambassador, the young Marco Polo. Kublai feels that he can only recover the ability to rule his empire if he can understand, and thus grasp, its underlying pattern; Marco Polo tries to assist by evoking cities he has visited. His accounts can be interpreted either as depictions of fifty-five different cities or fifty-five depictions of one city, Venice.⁵ Here, I shall lean towards the second interpretation.

The flavour of the work and the possibility of suggestive analogies between depictions of cities and legal orders can be illustrated by Marco Polo's account of Esmeralda:

“In Esmeralda, city of water, a network of canals and a network of streets span and intersect each other. To go from one place to another you have always the choice between land and boat: and since the shortest distance between two points in Esmeralda is not a straight line but a zigzag that ramifies in tortuous optional routes, the ways that open to each passerby are never two, but many, and they increase further for those who alternate a stretch by boat with one on dry land.

And so Esmeralda's inhabitants are spared the boredom of following the same streets every day. And that is not all: the network of routes is not arranged on one level, but follows instead an up-and-down course of steps, landings, cambered bridges, hanging streets. Combining segments of the various routes, elevated or on ground level, each inhabitant can enjoy

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Current Legal Problems, II 1 (M. Freeman (ed.), 1996) (hereafter GLT); “Comparative Law and Legal Theory”, Lecture SOAS, November 1997, (forthcoming hereafter CLLT); “Other People's Power, The Bad Man and Legal Positivism, 1897-97” 63 Brooklyn L. Rev. 189 (1997) (hereafter OPP).

³ GLT 1-2.

⁴ Italo Calvino, *Invisible Cities* (tr.. W. Weaver, 1974) (hereafter *IC*).

⁵ There is a third, more plausible, possibility that Marco Polo was using Venice as an implicit point of reference, almost as an ideal type, against which other cities are compared and contrasted:

“There is still one of which you never speak.”

Marco Polo bowed his head.

“Venice,” the Khan said.

Marco Polo smiled. “What else do you believe I have been telling you about?”

Later he adds: “To distinguish other cities' qualities, I must speak of a first city that remains implicit. For me it is Venice.” (*IC* 86).

every day the pleasure of a new itinerary to reach the same places. The most fixed and calm lives in Esmeralda are spent without any repetition.

Secret and adventurous lives, here as elsewhere, are subject to greater restrictions. Esmeralda's cats, thieves, illicit lovers move along higher, discontinuous ways, dropping from a rooftop to a balcony, following gutterings with acrobats' steps. Below, the rats run in the darkness of the sewers, one behind the other's tail, along with conspirators and smugglers: they peep out of manholes and drainpipes, they slip through double bottoms and ditches, from one hiding-place to another they drag crusts of cheese, contraband goods, kegs of gunpowder, crossing the city's compactness pierced by the spokes of underground passages.

A map of Esmeralda should include, marked in different coloured inks, all these routes, solid and liquid, evident and hidden. It is more difficult to fix on the map the routes of swallows, who cut the air over the roofs, dropping long invisible parabolas with their still wings, darting to gulp a mosquito, spiraling upward, grazing a pinnacle, dominating from every point of their airy paths all the points of the city."⁶

Does not this look like an account of a users' perspective on a legal system?⁷

I have chosen today's topic for two particular reasons. The first is pure nostalgia. Thirty years ago, when I was at Queen's I toyed with the idea of mapping law in the world, but I was left quite dissatisfied with my efforts. So for me this is unfinished business. Second, it is often said that it is easier to see a legal order as a whole in a small jurisdiction than in a large one. Northern Ireland illustrates very clearly that this is a half-truth. The last thirty years have made all the complexities of human relations and local legal ordering more visible than in most places; this jurisdiction is also a clear example of legal pluralism. No legally interested person whether law student, practitioner, law teacher, judge, law-maker, Vice-Chancellor, or citizen can understand law in Northern Ireland by focusing only on Northern Ireland municipal law. Multiple legal orders are part of the local legal situation. Like it or not, United Kingdom law, the law of the Republic of Ireland, European Union Law, Public International Law, Human Rights Law, and developments in the common law world all bear directly on interpreting local legal issues. So too do different kinds of "non-state law", a contested idea which is open to several different interpretations. One consequence of globalisation is a tendency to loosen the association of the ideas of law, state, and nation and so to make more salient the multiplicity of legal orderings.⁸

For the purposes of this lecture, I shall assume rather than argue that law is concerned with relations between agents or persons (human, legal, unincorporated and otherwise) at a variety of levels, not just relations within a single nation state or society. One way of characterising such levels is essentially geographical:

⁶ IC 88-89.

⁷ OPP 208-13.

⁸ This is a central theme of Boaventura de Sousa Santos, *Toward a New Common Sense* (1995); see also, John Griffiths, "What is Legal Pluralism?" [1986] Jo. Legal Pluralism 24.

- global (as with some environmental issues, a possible *ius humanitatis* e.g. mineral rights on the moon and, by extension, intergalactic or space law);
- international (in the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law);
- regional (for example, the European Union, European Convention on Human Rights, and the Organisation of Africa Unity);
- transnational (for example, Islamic, Hindu, Jewish law, Gypsy law, transnational arbitration, a putative *lex mercatoria*, INTERNET law, and, more controversially, the internal governance of multi-national corporations, the Catholic Church, or institutions of organised crime);
- inter-communal (as in relations between religious communities, or Christian Churches, or different ethnic groups);
- territorial state (including the legal systems of nation states, and sub-national jurisdictions, such as Florida, Greenland, Quebec, and Northern Ireland);
- sub-state (e.g. subordinate legislation, such as bye-laws of the Borough of Camden) or religious law officially recognized for limited purposes in a plural legal system; and
- non-state (including laws of subordinated peoples, such as native North Americans, or Maoris, or gypsies⁹) or illegal legal orders such as Santos's Pasagarda law, the Southern People's Liberation Army's legal regime in Southern Sudan,¹⁰ and the "common law movement" of militias in the United States¹¹.

I shall not discuss in detail which regimes or orders or traditions one might include in a map of world law,¹² but I shall assume that any conception of law that is restricted to the municipal law of nation states and classical public international law is extremely narrow and probably misleading. Insofar as the primary role of the institutionalised discipline of law is advancing and disseminating understanding of the phenomena of law, one needs a conception of these phenomena that is reasonably inclusive. This categorisation of levels into global, regional, international, transnational, municipal and local is admittedly crude, but it will serve for present purposes. These different levels of relations with which law has to deal are not neatly nested in a single vertical hierarchy. So even this simple categorisation hints at the complexities of mapping law.

⁹ Recent studies of Gypsy law have been pioneered by Walter Weyrauch. See especially, Weyrauch and Bell, "Autonomous Lawmaking: The Case of the Gypsies" 103 *Yale L. J.* 323 (1993) and Symposium on Gypsy Law (Romaniya) 45 *Am. Jo. Comp. L.* No. 2 (Spring, 1997).

¹⁰ The Southern Peoples' Liberation Army has operated a system of courts dealing with both civil and criminal cases in areas which they occupy in the civil war in the Southern Sudan. Monyluak Alor Kuol, *Administration of Justice in the (SPLA/M) Liberated Areas: Court Cases in War-Torn Southern Sudan* (Oxford, Refugee Studies Programme, 1997).

¹¹ Susan Koniak, "When Law Risks Madness" 8 *Cardozo Stud. in Law and Literature* 65 (1996), "The Chosen People in our Wilderness" 95 *Michigan L. Rev.* 1761 (1997).

¹² On borderline candidates for the designation "legal orders" see n.131 below.

In order to proceed briskly to mapping, let me advance two further sets of assumptions by way of assertion. Both are controversial, but I have made the case for them elsewhere.

First, I consider jurisprudence to be the general part of law as a discipline.¹³ Jurisprudence can be viewed as a heritage, an ideology, and as the activity of theorising, that is posing, reposing, answering and arguing about general questions relating to the subject-matters of law as a discipline. As an activity, within the discipline of law theorising has several functions to perform: synthesising or constructing whole views or total pictures; constructing and refining concepts; developing middle order hypotheses and general working theories for participants; intellectual history; and, perhaps most important, critically examining the underlying assumptions of different kinds of discourse of and about law. Here we are mainly concerned with mapping as part of the synthesising function, but, as we shall see, all of the other tasks are relevant.

In this context, particular jurisprudence focuses on the general aspects of a single legal system or order and its constituent phenomena; general jurisprudence focuses on legal phenomena in more than one jurisdiction i.e. several, many or all legal systems or orders. Generality is a relative matter; general jurisprudence stretches from the relatively local (two or more orders within one region) to the fairly broad (e.g. the common law world or state legal systems in industrialised societies) to the universality claimed by classical natural law theory, Bentham's universal science of legislation, Kelsen's general theory of law and state, Llewellyn's law jobs theory, or macro-theoretical social theories of law. As these last examples illustrate, general jurisprudence can address empirical, analytical, normative and other questions or combinations of them. This is in short a pluralistic vision of legal theorising which includes a variety of perspectives and a multiplicity of levels of generality.

The second assumption that I shall make is that in an era of globalisation, there is a need for a rethinking of the nature and possible agendas of general jurisprudence.¹⁴ Asking basic questions about laws in general Bentham's phrase seems to have gone out of fashion in recent times.¹⁵ It is now commonplace to talk of American, Scandinavian, English or Anglo-American jurisprudence without distinguishing clearly between provenance, audience, focus, sources, perspectives and significance.¹⁶ This is curiously inappropriate at a point in history when talk of "globalisation" is intensely fashionable in the media, in the world of affairs and in many disciplines. We do not need to enter here into the debates between strong globalisers, such as Benjamin Barber, Boaventura de Sousa Santos, and Anthony Giddens¹⁷ and sceptics who, like Paul†Hirst, claim that

¹³ See especially, William Twining, "Some Jobs for Jurisprudence" (1974) 1 Brit. Jo. Law and Society 149; *LIC* 110-14.

¹⁴ *LIC* Ch. 8.

¹⁵ J. Bentham, *Of Laws in General*, ed. H. L. A. Hart (*Collected Works*, 1970). For a critique of Herbert Hart's flawed attempt in the Postscript to *The Concept of Law* (1994) to revive the distinction between general and particular jurisprudence as a means of reconciling his position with that of Ronald Dworkin, see *LIC* 169-77.

¹⁶ *OPP* at pp. 215-17.

¹⁷ Benjamin R. Barber, *Jihad vs. McWorld: How the Planet is Both Falling Apart and Coming Together and What This Means for Democracy* (1995); Santos (1995), *op. cit.*; on the much more complex views on globalisation of Giddens,

“globalising rhetoric” can be dangerously overblown.¹⁸ We can surely agree that the world is increasingly interdependent, that the significance of national boundaries and of nation states is changing rapidly, and that one cannot understand even local law by adopting a purely parochial perspective. Talk of a single global economy, a global communications system, or the global environment is now established, though contested, but the phrase “global jurisprudence” still sounds grandiose, naive and dubiously trendy. I think that there are good reasons for being cautious, but if law deals with the ordering of relations at local, national, regional, transnational, international and global levels, understanding law involves considering legal relations at all of these levels. In short, in an era of globalisation the time is ripe for a strong revival of general jurisprudence.

MAPPING¹⁹

A standard geographer’s definition of a “map” is “A representation, usually on a plane surface, of all or part of the earth or some other body showing a group of features in terms of their relative size or position”.²⁰ The idea of a map is also applied metaphorically to “the mental conception of the arrangement of something.”²¹ I shall be concerned here with both geographical and mental maps.

In considering physical maps one needs to bear in mind some elementary points: what constitutes a good map depends on its purposes, such as navigation or depicting spatial relations and distributions. Maps can serve ideological functions, as exemplified by Peter’s Projection²² or the exaggeration of the size of communist countries in some American maps during the Cold War period. Small scale maps depict vast areas using limited information highly selectively; large scale maps, such as local ordnance survey maps, contain more detailed information for smaller areas. Maps cannot be exact representations of reality. Indeed, as Santos puts it, they are “organised misreadings of territories that create credible illusions of correspondence.”²³ This is illustrated by Borges’ parable of the Emperor who futilely demanded an exact life-size map of his domains;²⁴ similarly, Harry Beck’s classic map of the London underground which

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see David Held and John B. Thompson (eds.) *Social theory of modern societies : Anthony Giddens and his critics* (1989).

¹⁸ Paul Hirst and Grahame Thompson, *Globalization in Question* (1996), cf. “Globalisation: Ten Frequently Asked Questions and Some Surprising Answers”, 4 *Soundings* 47 (Issue on The Public Good, 1996).

¹⁹ On cartography in general I have found the following particularly helpful: J.S. Keates, *Understanding Maps* (2nd ed., 1996), Norman J. W. Thrower, *Maps and Civilization* (1996); and Peter Whitfield, *The Image of the World: 20 Centuries of World Maps* (1994). By far the best discussion of legal cartography is Santos’ essay “Law A Map of Misreading...” reprinted in Santos op. cit., (1995) Ch. 7. Santos is mainly concerned with laws as mental maps; I am here concerned with mapping of law, both territorially and figuratively. However, Santos produces one chart of law in the world, id. at p. 275.

²⁰ Thrower (1996) op. cit. at p. 254.

²¹ The OED (2nd. edn., 1989) treats this as a “nonce use”, but the metaphor is almost a cliché in legal discourse.

²² In 1973 Arno Peters “reinvented” a form of cylindrical projection to counterbalance Eurocentric projections of Third World countries. For a critique see Thrower at p. 224.

²³ Santos (1995), at p. 458.

²⁴ Jorge Luis Borges, *Obras Completas* (1974).

deliberately involved distortion to help users of the system, but was nonetheless both accurate and reliable for its purposes. Modern technology has greatly increased the sophistication and possibilities of cartography, witness for example animated weather maps on television. But maps also have distinct limitations: space is privileged over time; geographical maps are concerned more with physical than social or other kinds of relations; and there are other, often better means of pictorially presenting complex data. It is widely assumed that law is one of the subjects least amenable to pictorial representation, perhaps because it is concerned with largely invisible ideas and social relations. Algorithms, flow charts, logical trees, videos, Wigmore charts and other devices have found their way into law and legal education, but in a televisual and computer-driven era we can expect huge advances in the pictorial presentation of complex ideas and data. Edmond Tufte has already shown some of the tantalizing possibilities in his books.²⁵

It used to be assumed that “Geography is about maps, but Biography is about chaps.”²⁶ This is an outdated image. Human geographers in particular tend to treat cartography as a rather primitive aspect of their discipline. In recent years, as Kim Economides has shown, their interests have converged with those of socio-legal scholars.²⁷ However, in this lecture I shall resist the temptation to chase such enticing hares as geojurisprudence or virtual reality constructions of law. Rather I want to explore some rather old-fashioned concerns about why even elementary mapping of law in the world is difficult. I shall concentrate mainly on the theoretical complexities that underlie constructing quite simple overviews of law in large geographical areas through either physical or mental maps.

GEOGRAPHICAL MAPS: KHARTOUM, 1958-61

In my first year of teaching, I was responsible for a course called “Introduction to Law” in the University of Khartoum. Ignorant of earlier precedents, and inspired by Karl Llewellyn’s precept “see it whole”, I decided to begin by setting the Sudan legal system in the context of a picture of law in the world.²⁸ Instinctively I chose a map as the means of depiction. I was quite conscious of history, but in this context space was privileged over time. I obtained a blank map of the whole world and used a palette of coloured chalks to characterise the legal systems of different countries. The map marked the borders of countries, that is nation-states and various forms of dependency. I do not recall the exact details, but I might have used blue chalk for the common law (deliberately avoiding imperial pink), brown for civilian or Romanist systems, red for Socialist countries, yellow for Islamic Law, and green for customary or traditional

²⁵ E. Tufte, *The Visual Display of Quantitative Information* (1983), *Envisioning Information* (1990), and *Visual Explanations* (1997).

²⁶ Edmund Clerihew Bentley, *Biography for Beginners* (1905).

²⁷ Kim Economides. “Law and Geography: New Frontiers” in Philip Thomas (ed.) *Legal Frontiers* (Dartmouth, 1996); cf. Chand Wije, “Applied Law and Applied Geography”, 8 *The Operational Geographer* 27 (1990); Nicholas K. Blomley and Gordon L. Clark, “Law, Theory and Geography”, 11 *Urban Geography* 433 (1990); Nicholas Blomley, *Law, Space and the Geographies of Power* (1994); Paul Wiles, “A Research Agenda for Analysing Crime in Cities”, 31 *Comp. L. Rev.* 23 (1997).

²⁸ On the use of “total pictures” as one form of context see William Twining, “Talk about Realism” 60 *N. Y. U. L. Rev.* 329, at 372-78 (1985); *LIC* at pp. 57, 298-99.

law. Countries with “plural” or mixed national legal systems were clumsily depicted by stripes in different colours.

This first attempt, though consciously crude, helped to make some useful points. First, there were discernible patterns some countries had relatively pure common law or civilian systems, some were mixed or plural, including countries in the Soviet bloc. Second, these patterns were intimately linked to colonisation and colonialism. Japan, Turkey and Ethiopia were held up as relatively exceptional instances of “voluntary” receptions.²⁹ Third, Sudan at the time was a clear example of a plural national legal system that conformed to British colonial patterns even though it had officially been a condominium until independence: imported or imposed “common law” in the form of off-the-peg statutes and “codes”, English precedents, a handful of reported local cases, and a catch-all reception clause. Both Mohammedan Law and customary law were recognised in limited spheres subject to various provisos.³⁰ Fourthly, the map communicated some simple patterns and yet hinted at some puzzling complexities, such as the relationship between official state law and “living law” in most of the country, especially in rural areas.³¹

At the time I felt that this map served my immediate purposes. It gave first year students some sense of a wider world and of Sudan’s place within it. It set an agenda both for studying Sudanese law as a “plural” system and for discussing issues about future “legal development” in a newly independent country. I continued to use it during my three years in Khartoum, but I was vaguely puzzled and dissatisfied. My first ground for dissatisfaction was quite mundane: how could I improve the colour scheme so as to incorporate Public International Law, different constitutional patterns, and a more refined picture of legal pluralism? Such questions are not trivial, but they only scratched the surface. In time I learned that many others had made similar attempts.

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²⁹ At the time I treated as exceptional Liberia, Siam and parts of the United States and I did not challenge the idea of a “voluntary” reception. See, for example, Robert Kidder in Barbara Harrell-Bond and Sandra Burman (eds.), *The Imposition of Law* (1979) Ch. 6.

³⁰ Civil Justice Ordinance s. 5 “Where in any suit or other proceeding in a Civil Court any question arises regarding succession, inheritance, legacies, gifts, marriage, family relations or the constitution of wakfs, the rule of decision shall be:

a any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience and has not been by this or any other enactment altered or abolished and has not been declared void by a decision of a competent court;

b the Mohammedan Law, in cases where the parties are Mohammedans, except in so far as that law has been modified as is above referred to.”

On the difficulties experienced by the courts in interpreting “custom” during the condominium period, see C. d’O Farran, *Matrimonial Laws of the Sudan* (1963) 88-91. A useful overview of the official legal system in the period is Zaki Mustafa “Sudan” in Anthony Allott, *Judicial and Legal Systems of Africa* (1st ed., 1962; 2nd ed., 1970); cf. Egon Guttmann, “A Survey of the Sudan Legal System” (1956) Sudan L. Jo. Reports 6; Akolda Tier, “The Legal System of the Sudan” in K. Redden (ed.), *6 Modern Legal Systems Cyclopaedia: Africa* (1985) ch. 12.

³¹ On the unrealities of teaching English Law in the Sudan, see *LIC* Ch.2 “The Camel in the Zoo”.

Later I discovered that John Henry Wigmore had devised a neat solution to my problem about colours. By using a quite simple mixture of letters and numbers he was able both to depict mixed systems and to give an indication of the Age and Duration of legal systems.³² But Wigmore's "solution" compounded my doubts, for his presentation seemed naive and simplistic. Wigmore was a committed populariser and his three volume *Panorama of the World's Legal Systems*³³ and his *Kaleidoscope of Justice* were both overtly directed at general audiences.³⁴ These two works are fairly characteristic of Wigmore's strange mixture of the folksy and the methodical: on the one hand he had an insatiable curiosity and fascination with the variety of things; but Wigmore was known as "the Colonel" and his simple military mind required that all phenomena, however complex, should be reduced to order and paraded in neat, simple patterns.³⁵ In *Invisible Cities* "Kublai Kahn had noticed that Marco Polo's cities resembled one another, as if the passage from one to another involved not a journey but a change of elements".³⁶ Wigmore compared the legal cultures of the world to a kaleidoscope: "When the Basic Pattern revolves, the Prisms Cause Variant Patterns in Different Communities; But the Latent Elements Remain the Same Throughout." He illustrated this cryptic statement with an incomprehensible picture without any serious attempt at explanation.³⁷

I was not alone in feeling uneasy about Wigmore's efforts. Indeed, he had been the butt of such mocking criticism by Plucknett and Goodhart in the *Harvard Law Review* and the *Yale Law Journal* that he had instructed his publishers, Little, Brown, not to submit any of his future publications for review in these journals.³⁸ In the eyes of some, armchair legal tourism in the style of *The National Geographic* was not academically respectable. This is just one example of a more general tendency to dismiss attempts to give a picture of law in the world as inevitably superficial.³⁹ My concern is to challenge this view.

³² J. H. Wigmore, *A Panorama of the World's Legal Systems* (3 vols., 1928; 2nd edn., 1 vol., 1936)).

³³ *id.*

³⁴ J. H. Wigmore, *A Kaleidoscope of Justice* (1941).

³⁵ William Twining, *Theories of Evidence: Bentham and Wigmore* (1985) 110-11.

³⁶ *IC* 43.

³⁷ *Kaleidoscope*, Frontispiece. While Wigmore's *Kaleidoscope* and *Panorama* each contains some useful tit-bits of information and occasional insights, they are in many respects naive, prejudiced and inaccurate. It would be rather like flogging a dead horse to subject them to detailed theoretical or scholarly criticism. They are probably best treated as curious period pieces.

³⁸ Wigmore also had his defenders, including W. Holdsworth and B.A. Wortley. For accounts of the episode see William R. Roalfe, *John Henry Wigmore: Scholar and Reformer* (1977) pp. 259-62, 331 and Twining, *Theories of Evidence*, *op. cit.*, (1985) at pp. 218-9, n. 3 (based in part on Wigmore's papers at Northwestern).

³⁹ It is no coincidence that Wigmore's chief critics were based in England. For the first half of the twentieth century was a period in which the intellectual climate was generally hostile to grand theory, historical jurisprudence was marginalised, and the first Professor of Comparative Law at Oxford, Harry Lawson, could say in his inaugural lecture: "... nowadays to be universal, is to be superficial". (F. H. Lawson, "The Field of Comparative Law" 61 *Juridical Rev.* 16 (1950)) In the United Kingdom micro-comparative studies have almost invariably been preferred to the Grands Systemes approach.

A second puzzlement about my map was more theoretical: in a reception what is received and who were the main agents of reception? My first venture into print as an academic was an attempt to answer such questions. Drawing on Weber and Llewellyn, I concluded that rules are not the only, nor even the main, phenomena that are transplanted; that the reception of “lawyers’ law” and legal techniques is less problematic than matters that are closely related to local *mores* or political issues of the day; and that the main agents of reception of law as technology are the legal *honoratiore*s, Weber’s ironic term for the dominant legal elite.⁴⁰ This might be interpreted today as an early and moderate version of Alan Watson’s famous transplants thesis.⁴¹

This may have been passable as a first effort, but it did not advance the topic very far either analytically or empirically. In retrospect, I think that I missed an opportunity. I might have developed the ideas much further if I had made issues raised by mapping and reception the focus of a research programme or as part of a final year course in Jurisprudence. The latter would almost certainly have provided a better basis for a theoretical understanding of law in the Sudan than rehearsing the ideas of a somewhat random selection of Western jurists. However, at this stage rather than pursue the matter further, I concentrated on the more “practical” task of developing local law reporting and thereby missed out on a career in legal cartography.⁴²

COMPARATIVE COMMON LAW: BELFAST 1967-72

I was left vaguely puzzled by this youthful effort, but during the next five years my attention was directed elsewhere. However, shortly after I moved to Belfast in 1966, I revived the idea as part of our LLM course in Comparative Common Law. A number of factors stimulated this enterprise apart from my African background: first, teaching in Northern Ireland made one acutely conscious that we were continuously involved in making more or less explicit comparisons with England and Wales, the Republic of Ireland, and more broadly with American and Commonwealth sources and literature. This presented a challenge to Harold Gutteridge’s dismissal of the idea of comparative common law.⁴³ I was also struck by stories about Montrose’s introductory lectures in which he had tried to place law in the context of a map of all learning.⁴⁴ This typically bold

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⁴⁰ William Twining, “Some Aspects of Reception”, (1957) *Sudan Law. Jo. and Rep.* 229.

⁴¹ Alan Watson, *Legal Transplants* (1974; 2nd edn., 1993). This has occasioned a great deal of controversy; for a balanced appraisal, see William Ewald, “The Logic of Legal Transplants: Comparative Jurisprudence Part II”, 43 *Am. Jo. Comp. L.* 489 (1995), Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences” 61 *M.L.R.* 11 (1998).

⁴² On law and geography see above n.27.

⁴³ “No special form of technique seems to be called for if the comparison is, for instance, between Australian and Canadian law or between English law and the law of the United States.” Preface to *Comparative Law* (1946). Gutteridge also doubted the value of comparing legal systems at different stages of development. (justifying his focus on differences between civil and common law systems).

⁴⁴ Some idea of the style and vision can be obtained from his “Address to Queen’s University Belfast Matriculation Students” published in J. L. Montrose, *Precedent in English Law and Other Essays* (Hanbury ed., 1968) Ch.2 (see also

vision had impressed many Queen's graduates, who reported that they had found it both memorable and way above their heads. Here was a recurrence of the mapping metaphor another attempt to set a broad context at the start of one's legal education.

Thus stimulated, I devised a group exercise for the postgraduates taking the course on "Comparative Common Law". I recently discovered the relevant handout among my papers. It is worth quoting from it at some length. Headed "Taxonomy: The Common Law World", the opening paragraphs read as follows:

"Your course takes "Comparative common law" as its organising concept. Presumably "common law" in this context is contrasted with "civil law", "Hindu Law", "Islamic Law", "African customary law" and so on. Presumably "common law" is *not* contrasted with "equity" or with "statute law". To what extent can we give a precise meaning to "common law" in this usage? To what extent can we make universal generalisations about "the common law world"? or broad generalisations, admitting of a few exceptions? What jurisdictions comprise "the common law world"? Are there useful distinctions to be made between "common law jurisdictions"? Are there distinctive features of some or all of the legal systems in "the common law world" which are not to be found outside it?

You are asked as a group to look into these and related questions. A possible, but not the only, way of approaching the subject would be to try to plan a map of "the common law world" within the general framework of a map of the world's legal systems. It is suggested that as a preliminary you need to give careful thought to such questions as: Is it possible to construct a working taxonomy of world legal systems? If so, how? If not, why not? Some of the factors that might be considered as possible bases for classification might be: historical factors (The British Empire? The Commonwealth? Voluntary importation of "common law", of "civil law"?); linguistic factors (does the common law operate anywhere in a language other than English?); values (does the common law have a necessary or regular association with certain ideals?); personnel (career judiciary? split profession? juries?); procedures (adversary v inquisitorial?); substantive doctrine (the doctrine of precedent? the trust concept? consideration in contracts?); methods... and so on. From detailed consideration of such factors (the above are only a sample) certain patterns may become apparent. Are these patterns sufficiently clear and sufficiently significant for it to be possible to construct a map, or a series of maps, based on a relatively precise taxonomy?"

In retrospect, this appears to me to be a rather demanding exercise in applied jurisprudence. Many of the questions are still worth asking. I have not kept the products of the group projects, but I do recall that discussions of these issues extended over several weeks and, at a general level, we did not get much further than some healthy, but essentially elementary, lessons of complexity: that a single "scientific" classification of legal systems is impossible even if one has a clear purpose and specified units of comparison; that elucidation of concepts, such as "legal system", "legal tradition", "common law", "reception", and "lawyers' law", is an essential

id., Ch.7); but I am told that his introductory lectures to first year law students were more expansive.

precondition to mapping;⁴⁵ and that generalisation is dangerous even within the common law “family”.⁴⁶ At least it legitimated the claim that “comparative common law” deserves recognition as a viable form of comparative law, but I was still left with a nagging sense of dissatisfaction, which was not helped by the existing literature.

At Khartoum I had proceeded largely by instinct. For the Queen’s seminar I was better prepared. There was a quite extensive literature on the spread of the common law, on receptions, on commonwealth and colonial law; and almost nothing on multi-lingual legal systems. There was some quite useful but uninspired writing about comparative law theory. The most immediately relevant literature concerned the “legal families” debate in comparative law. Since the latter is the most obvious precedent it is worth commenting on it briefly.

The classification of legal systems or legal orders into “families” has been one of the main concerns of macro comparative law exemplified by René David’s *Grands Systèmes de Droit Contemporains*, Derrett’s *An Introduction to Legal Systems*,⁴⁷ and Arminjon, Nolde and Wolff, *Traité de Droit Comparé*.⁴⁸ The debate has rumbled on for almost a century and continues today⁴⁹. Perhaps the most sophisticated discussion is that of Zweigert and Kötz who frame the issues as follows:

“Can we divide the vast number of legal systems into just a few large groups (legal families)? How can we decide what these groups should be? And, supposing we know what the groups should be, how do we decide whether a particular legal system belongs to one group rather than another?”⁵⁰

Comparative lawyers have struggled in vain to produce a neat taxonomy of “legal families” in response to such questions.⁵¹ Zweigert and Kötz

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⁴⁵ See below text at n.24-36.

⁴⁶ My views at the time are summarised in a review of J. D. M. Derrett (ed.) *An Introduction to Legal Systems* (1968) in 14 *J. African Law* 206 (1970).

⁴⁷ *op. cit.*

⁴⁸ P. Arminjon, B. Nolde, and M. Wolff, *Droit Compare* (3v., 1950-51).

⁴⁹ A recent example is Ugo Mattei, “Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems” 45 *Am. Jo. Comp. L.* 5 (1997). The debate about classification of legal systems has been taken more seriously in Continental Europe where the *Grands Systèmes* approach to Comparative Law has been quite influential especially in legal education. Most of the debate is rather tedious and repetitive: the main context is discussion of introductory courses on Comparative Law, and there seems to be a general consensus that legal systems are not susceptible to Linnean type scientific classification and any one of several possible schemes may be adequate for this modest purpose.

⁵⁰ K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn., trs. Tony Weir, 1997) 63-4.

⁵¹ Early attempts to classify by race or geography or solely by origin have generally been rejected by modern comparatists in favour of multiple criteria (e.g. Zweigert and Kötz, *op. cit.* Ch.5). Arminjon, Nolde and Wolff favoured “substance”, paying due regard to originality, derivation, and common elements. They produced a division into seven legal families, French, German, Scandinavian, Russian, Islamic, and Hindu. Eorsi constructed a Marxist classification in terms of relations of production, the major division being between socialist and capitalist, the latter being sub-divided into systems at different stages of evolution and different outcomes in the struggle between the

having rejected attempts to use race or geographical location or relations of production or ideology as the main criterion, limited the idea to the predominant *styles of legal thought* of contemporary living legal systems. On this basis, they identify five factors as central to the style of a legal family:

“(1) its historical background and development, (2) its predominant and characteristic mode of thought in legal matters, (3) especially distinctive legal institutions, (4) the kinds of legal sources it acknowledges and the way it handles them, (5) its ideology.”⁵²

Zweigert and Kötz, like other scholars, emphasise that there is no single right way of classifying systems. For the purpose of introducing “the great legal systems of the world” their multiple criteria lead to a seven-fold classification: (1) Romanistic family, (2) Germanic family, (3) Nordic family, (4) Common Law family, (5) Socialist family, (6) Far Eastern systems, (7) Islamic Systems, and (8) Hindu law.

Given that they acknowledge some of the difficulties and that there are many hybrids (which include the People’s Republic of China, Israel, South Africa, Louisiana, and Quebec), this classification probably serves their limited purpose as well as any other, but it is still deeply unsatisfying,⁵³ for if the enterprise of picturing law in the world is a necessary part of understanding law, it seems that something more intellectually ambitious is required.

bourgeoisie and the feudal class. G. Eorsi, *Comparative Civil (Private) Law* (1979) criticised by Kotz, *RabelsZ* 46 (1982); Rene David’s revised classification was into late Romano-Germanic, common law, Socialist and “other systems”, which included Jewish, Hindu, Far Eastern and African; cf. the subtle analysis of differences between East and West German doctrine before the fall of the Berlin Wall, which doubts the explanatory value of differences between “grand ideology”, Inga Markovits, “Hedgehogs or Foxes?” 34 *Am. Jo. Comp. L.* 113 (1986).

Other possible bases for classifying legal systems (but not traditions?) would include wealth (rich/poor countries), form of government (democratic/dictatorship/aristocratic etc.), language (anglophone, francophone, other), religious/secular, or climatic.

⁵² At 69-75.

⁵³ One obvious point is that the items on the list are not species of a single genus: (1)-(5) could refer to national state legal systems so could (6), but that raises questions about the reason for choosing this as a category; however, there is no single state whose legal system is today based mainly on Hindu Law. Similarly, Islamic Law has a much wider ambit than the few Islamic states. During the Cold War period it made sense to treat the Eastern bloc as a group, based on ideology and Soviet power, but mixed in with a strong civil law tradition. Since the collapse of the Soviet bloc the situation is more complex. “Far Eastern systems” refers to a geographical grouping of states which seems rather diverse in respect of style. “Common law” can refer to historical origin, or a legal culture (ideas and practices and possibly institutions), or tradition, or factors to do with colonialism on the one hand and the growth in importance of English as a world language on the other. Civil law, partly because of its perceived greater translatability, was received in a wider variety of historical situations. But there it is now widely acknowledged that in some respects there may be more important differences within “the civil law family” than between that family and “the common law”.

BOSTON 1996

Two years ago, at the start of a seminar modestly entitled “Globalization and Legal Theory”, I set the students an exercise. I asked the class first, to draw a map of the main legal orders in the world, next to draw an historical chart of the rise and fall of the main legal cultures in the world, and then to consider the relationship between the two. This was a modification of the Queen’s exercise, but it was more explicitly linked to contemporary legal theory. At our second meeting the students asked for an extension. I granted this, subject to the proviso that their maps or pictures should include classical Roman Law and Islamic Law. At the next meeting, I granted a further extension, but added in the *lex mercatoria*, *ius humanitatis*, and Pasagarda Law that is the legal order of illegal squatter settlements in Brazil as depicted by Santos. Each time they asked for an extension, I added further candidates for inclusion. Around about the sixth week they gave up and we discussed why the exercise was problematic.

Rather than reconstruct our discussions, let me state my own position on the reasons why earlier attempts have been flawed, my own as well as those of Wigmore and the *Grands Systèmes* comparatists.

GEOGRAPHICAL MAPPING: A POST-MORTEM

I have now reported a sense of dissatisfaction with several previous attempts to present an overview of law in the world through maps. What are the main sources of this dissatisfaction? Can anything constructive be rescued from such exercises? Or is legal cartography as an enterprise doomed to failure? Each of the examples considered involves illuminating errors.

To start with my first effort in Khartoum. Aside from my conscious puzzlements, at the time I did not question a number of assumptions that I would now reject. Three in particular are significant:

First, I just assumed that what was to be mapped was the national legal systems of “countries” and that the starting-point for classification was national and state borders. My map included colonies, and subordinate jurisdictions, such as Canadian provinces, but did not provide for Public International Law or even for Islamic Law, except as a subordinate part of the law of secular states. It completely omitted candidates for the appellation “legal orders” at the global, regional, transnational, communal and local or sub-state levels. Most legal maps that I have come across make the same dubious assumption.⁵⁴

Second, I unconsciously privileged common law and civil law by depicting almost all national legal systems as belonging to one or other of these two “parent families”. Indeed, I used this to emphasise the importance of colonialism in the spread of law. This same assumption still dominates the study of comparative law today. From an historical perspective the idea of “parent” legal systems has some justification, even if it is patronising.⁵⁵ But the concept is past its sell-by date. For example, in 1998 who is the “parent” in matters legal as between Scotland and England, or the United States and the United Kingdom? Or between the

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⁵⁴ Santos, *op. cit.*, is a notable exception.

⁵⁵ Another standard justification is one of economy. The argument goes that “parent systems” can conveniently be treated as representative of their respective “families”. However, this argument too is becoming increasingly questionable.

international community and nation states in respect of bills of rights? If Alan Watson is even half-right in suggesting that imitation is the main engine of legal change, the interaction between legal systems today can hardly be characterised as being like that between parent and child.⁵⁶

Thirdly, in Khartoum I had glossed over the problem of taxonomy of legal systems. By the time I revived the idea in Belfast, I was familiar with debates among comparatists about legal families and they featured in our discussions about comparative common law. In raising questions about how far one can generalise across the common law world, we went beyond state legal systems to include the more elusive ideas of “culture” and “tradition” and we had a stab at exploring the relationship between law and language in multi-lingual societies still a seriously neglected topic.⁵⁷ All of this was an advance, but the focus was still on state law; for example “legal pluralism” was still conceived in the weak sense of pluralism within official legal systems rather than in the strong sense of a multiplicity of overlapping orders co-existing within the same territorial or social space.⁵⁸

We recognised that all the standard taxonomies, such as those of René David, or Arminjon, Nolde, and Wolff were unsatisfactory, but we did not get to the root of why this might be so. What is wrong with them? A satisfactory taxonomy needs to have a clearly defined purpose or purposes; clear units of comparison; precise and definite differentiae; and, ideally, non-overlapping species that exhaust their genus.⁵⁹ Within the legal families debate these conditions are generally not satisfied.

First, *purpose*. The most common use has been to introduce law in general or a particular legal system to beginning law students or as an introduction to comparative law or to a non-specialist readership. Most of the *Grands Systèmes* debate has taken place in the context of introductions to elementary courses on comparative law. Such *introductory mapping* can serve a very useful function in providing a general context for particular studies. My own modest effort to set the Sudan legal system in the context of a picture of law in the world had a similar aim. The tendency of comparatists is to move fairly smartly from macro- to micro- comparison, very sensibly given the difficulties. For such modest purposes a relatively crude overview is probably adequate; it can take many forms, and the relative merits of different taxonomies hardly deserve serious theoretical attention.

However, for the purposes of developing a modern general jurisprudence the approach to constructing total pictures of law in the world needs to be more systematic and rigorous. The more intellectually ambitious

⁵⁶ Watson, *Legal Transplants*, op. cit. n. 41.

⁵⁷ In many countries only a minority of the population speak the official language(s) of their state legal system. This is a neglected issue which is quite different from the much more discussed topic of the comprehensibility of legal language to ordinary speakers of that language. On the politics of official languages, see David Crystal, *English as a Global Language* (1997) and references there. The most extended account of language policy in relation to law is L. J. Mark Cooray, *Changing the Language of the Law: The Sri Lanka Experience* (1985).

⁵⁸ John Griffiths, “What is Legal Pluralism?”.(1986) op. cit. n. 8, Teubner (1998) op. cit. n.41.

⁵⁹ Max Black *Critical Thinking* (2nd edn., 1952). However, Black observes of the last requirement that “in practice this ideal is seldom attained” at p. 224.

enterprises of a Leibniz or Blackstone or Austin are designed to provide a conceptual basis for systematic enquiry.⁶⁰ Such *foundational mapping* is a more serious matter: for example, Duncan Kennedy in his critique of the structure of Blackstone's *Commentaries* argues that what purports to be a systematic presentation of an internally coherent system is really a justificatory apologia that masks the inherent contradictions of the common law.⁶¹ The general part of Austin's ideas, especially his agenda for jurisprudence and his command theory of law, have attracted the most criticism. His defenders may argue that these can be interpreted as little more than general prolegomena to the detailed analyses which represent his most worthwhile contribution. My own view is that some such prolegomena are not best treated as mere prefatory grace notes. In legal theory, as in political and social theory, elucidation of abstract concepts is a critically important task. It is particularly difficult to identify or construct concepts that transcend different cultures and, for this reason, the decline of general analytical jurisprudence at least in the English-speaking world is a matter for regret.

Second, *levels of comparison*. If one's list of candidates for mapping includes various kinds of non-state law as well as national and sub-national state systems, then it is difficult if not impossible to find a single basis for classifying them: Scots law, common law, New York law, Islamic law, Pasagarda law, and European Union Law are not species of a single genus. Many of the candidates for inclusion in a reasonably comprehensive map of world law do not respect national boundaries: Islamic Law, *lex mercatoria*, canon law, or Roman law for example; other candidates, such as European Union Law and Public International Law transcend state boundaries but are intimately related to sovereign states; some, such as Mississippi law or Dinka or Maori law, are confined within national boundaries.⁶² To depict legal orders dealing with global, international, transnational, regional, and local relations, as well as national, requires some differentiation of levels of classification. Each level will require its own differentiae. Most standard taxonomies are confined to one level, that of municipal law.⁶³

Third, even assuming that the focus is on state law, it is unclear whether the *units of comparison*, what is being compared, is systems, orders, cultures or traditions. Sometimes these are run together so that the

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⁶⁰ Below p. 32.

⁶¹ Duncan Kennedy, "The Structure of Blackstone's Commentaries" 28 Buffalo L. Rev. 205 (1979)

⁶² In the case of the Dinka, their traditional law has in practice had a much wider scope than that recognised by the state: indeed, the scope of Dinka law depends upon one's standpoint: it has a very limited scope in the national legal system of the Republic of the Sudan, a very wide scope in the life of the Dinka people, and an intermediate position in the areas occupied by the Sudan People's Liberation Army. See further the discussions of administration of justice in the Southern Sudan and the "common law movement" in the United States above n. 10 and 11. For a sceptical interpretation of the notion of "customary law" in colonial settings, see Martin Chanock, *Law, Custom and Social Order* (1985).

⁶³ But see, for example, R. Dehousse, "Comparing National EU Law: The Problem of Level of Analysis", 42 Am. Jo. Comp. L. 761 (1994); a more sceptical view is being developed by Ian Ward, e.g., "The Limits of Comparativism: Lessons from UK-EC Integration", 2 Maastricht Jo. of European and Comparative Law 23 (1995). See further below p. 30-31.

classification does not consist of species of a single genus. In other words it is by no means clear what legal families are families of.⁶⁴

The most common is “legal system”. Most comparatists either explicitly or implicitly treat “legal systems” as the unit of comparison.⁶⁵ but this is used ambiguously: German law, Islamic law and African law are “legal systems” in quite different senses.⁶⁶ For example, Zweigert and Kotz divided legal families into eight groups: Romanistic, Germanic, Nordic, Common Law, Socialist, Far Eastern Systems, Islamic Systems, and Hindu Law. Some schemes include African Law and Chinese Law. Whilst some of these categories could be interpreted as families of municipal or state legal systems, this is not the case with Islamic, Hindu or African law. Hindu law can be interpreted as a system of concepts and principles, but not as a state legal system anywhere; while there are a few officially Islamic states, Islamic Law is surely not confined to them.⁶⁷ Similar considerations apply to other bodies of “religious law” such as Jewish or Buddhist law or stateless cultures or traditions such as “Gypsy Law”. Socialist law or socialist legal systems refers to national legal orders strongly influenced by a particular political ideology at a particular phase in history. Even before the “collapse of socialism” this was an uneasy category. The term “African Law” was originally coined to refer to traditional or customary law of African peoples; it is hardly ever used to refer to the national legal systems of modern sovereign states in Africa.⁶⁸

Fourth: part of the legal families debate has centred on the *differentiae* of classification. There are almost as many ways of classifying legal systems or orders as there are for cities and countries. Race, language, stage of

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⁶⁴ See, for example, Pierre Legrand, “Comparative Legal Studies and Commitment to Theory” 58 M. L. R. 262 (1995) at p. 267.

⁶⁵ e.g. Ake Malmstrom, “The System of Legal Systems” 13 Scandinavian Stud. in Law 129 (1969); Arminjon et al., op. cit. David, op. cit. Zweigert and Kötz, op. cit., Ch. 5, de Cruz, op. cit., entitles his Chapter 2 “The Classification of Legal Systems into Families”.

⁶⁶ If “legal system” is used in a precise sense, for example the state legal systems of all members of the United Nations or, more broadly, those legal orders that satisfy some recognizable juristic criteria for the existence of a legal system, such as those of Hart or Kelsen, then it is not possible to accommodate some of the standard candidates such as Islamic, Hindu, or African law. If one substitutes “tradition” or “culture”, the terms are so vague as to raise serious doubts of their being used for any precise or useful system of classification. See the discussions in David Nelken (ed) *Comparing Legal Cultures* (1997) esp. Ch. 1-4.

⁶⁷ One can view Islamic law from a variety of perspectives: for example, as a system of norms, or as a body of ideas, or as a culture involving practices and interpretive styles as well as ideas, or as a tradition which involves change or development over time in respect of all of these even in a system decreed by God. If one looks at Islamic law in Saudi Arabia or Sudan or Iraq or England, in order to understand it one will need to consider local history, institutions, personnel, and practices as well as norms and ideas and culture.

⁶⁸ While there is a body of legal theory providing criteria for identifying the legal systems of sovereign states or parts thereof, the same is not true for the vaguer “legal traditions” and “legal cultures”. For the legal systems of nation states there are identifiable units, one can count the members of the United Nations or the number of legal orders that satisfy Hart’s or Kelsen’s or some other mainstream jurist’s criteria for the existence of a legal system. There will of course be a few borderline cases.

economic development, ideology, historical origin, substantive concepts and “institutions” and even climate are among the factors that have been suggested.⁶⁹ The more sophisticated attempts at constructing a taxonomy of legal families have insisted on multiple criteria of classification, for example, Zweigert and Kötz, in respect of styles.

While the emphasis on history and factors in addition to substantive doctrine is welcome there is a danger of reductionism in this approach. For example, the idea that there is a single characteristic or predominant⁷⁰ mode of thought in the English legal profession assumes that the profession is monolithic and that all that English lawyers think about is questions of law.⁷¹

Similarly, when comparative lawyers contrast the characteristic “styles” of thought or “mentalities” of civilians and common lawyers, they seem to make the big assumption that differences between common law and civil styles are more significant than differences within a given legal culture or tradition. But an equally plausible alternative hypothesis is that within most legal cultures there is a constant tension between formal and substantive, literal and purposive, and other more nuanced contrasts that one finds within our own tradition.⁷²

This Cook’s Tour of some previous attempts to use geographical maps to depict legal phenomena suggests a number of lessons, including the following:

First, if one accepts that there are different levels of legal relations and legal ordering, the phenomena of law are probably too complex to be depicted on a single map or picture. At the very least one would need something more like a historical atlas, with a series of different kinds of maps and charts, using different projections, scales, time frames and “classificatory” categories. Some maps could use countries or nation states as an important unit of analysis, some would be better to ignore national boundaries. In *Invisible Cities*, Kublai Khan in his search for order and patterns has an atlas that depicts continents, sea routes, and particular cities that Marco Polo has visited or heard described. It also reveals possible cities that do not yet have a form or name.⁷³ “In the last pages of the atlas there is an outpouring of networks without beginning or end, cities in the shape of Los Angeles, in the shape of Kyoto-Osaka, without shape.”⁷⁴

⁶⁹ de Cruz 34; Zweigert and Kötz 63-9. One could turn to classifications used in other disciplines, such as economics, politics, and geography. Comparatists often use the term “institutions” to refer to concepts such as contract and trust, rather than in a broader sociological sense.

⁷⁰ de Cruz talks of the “predominance principle” in relation to styles or mentalities, op. cit. at 33-4.

⁷¹ On reductionism in respect of “the lawyer”, “the legal mind”, “legal method”, and “skills” in the United States see *LIC* Ch. 16 and 17.

⁷² *Ibid.*

⁷³ *IC* 137-9.

⁷⁴ *IC* 139. It has been pointed out that Kublai Khan’s atlas does not produce a single overall order: “There is no global map, only a sheaf of insets of hypothetical cities in an atlas whose order is either unknown or fanciful;” Albert H. Carter III, *Italo Calvino: Metamorphoses of Fantasy* (1987) at pp. 120-21.

“I think you recognize the cities better on the atlas than when you visit them in person,” the Emperor says to Marco Polo, snapping the volume shut.

And Polo answers: “Traveling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents. Your atlas preserves differences intact: that assortment of qualities which are like letters in a name.”⁷⁵

A second lesson of my tour has been that geographical maps are just one means of depicting “mainly spatial” relations. They have their uses; indeed, a reasonably sophisticated historical atlas of law in the world could be quite illuminating and I know of serious scholars who have contemplated such a project. But maps mainly depict physical relations and distribution and, as such, they have a restricted application to legal phenomena.⁷⁶

After nearly a century of unsatisfactory debates, it is natural to ask two questions: are all attempts at a systematic classification of legal systems or legal families doomed to fail? If so, does it matter?

The *Grands Systèmes* approach of macro-comparison has sometimes been dismissed as superficial or unscholarly or of little or no utility.⁷⁷ Such criticism may be valid when applied to poorly executed examples or to very general treatments that never get down to concrete details. However, there are good reasons for taking the enterprise of mapping the phenomena of law in the world quite seriously.

First, setting the local in the context of the global serves the values of any form of contextual study for example, maintaining a sense of scale and proportion; avoiding the dangers of parochialism; establishing the relationship of the subject of study to others. For example, my attempt to get Sudanese students to see their national legal system as part of a broader world picture had a worthy aim, even if the execution was faulty.

Second, micro-comparison presupposes macro-comparison; they are complementary rather than alternatives. In so far as legal systems or cultures are organic, it is necessary to set even the most detailed object of study, an institution like the ombudsman, or local contract doctrine, or even a single rule, in the context of some larger whole. Even the most narrow formalist wishes to see a particular rule as part of a system of rules or rules-and-principles; seeing whole legal systems in a broader world picture is taking the process one stage further.

Thirdly, if one task of jurisprudence is to construct a coherent “total picture” of law, one job for general jurisprudence should be to construct such a picture for legal phenomena in the world as a whole. This is not just an exercise in abstract theorising. A skewed vision of law can have all sorts of practical implications witness, for example, the incredibly delayed response of our systems of legal education and training to human rights law and membership of the European Community; the confusion created

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⁷⁵ id. 137. This passage might give comfort to both convergence and *differance* theorists, on which see Richard Hyland, “Comparative Law” in Dennis Patterson (ed) *A Companion to Legal Philosophy and Legal Theory* (1996) Ch. 11.

⁷⁶ But see above n.27.

⁷⁷ e.g. Watson, *Transplants*, Ch. 1; cf. Basil Markesinis, *Foreign Law and Comparative Methodology* (1997) Ch.1.

by ad hoc responses to quite predictable aspects of the internationalisation of legal practice; and the naivety of some attempts at harmonisation of laws.

It is interesting that the debate about “families” and mapping world law has taken place largely within comparative law with almost no help from legal theory. Yet the problems of mapping law are essentially jurisprudential. The difficulties that face anyone trying to construct a map of law in the world are familiar problems of legal theory: what is the subject of our study? On what basis does one decide to draw a line between “legal” and “non-legal” phenomena? How can legal phenomena be classified? and so on. The key point is that geographical maps presuppose mental maps. That is to say they are means of presenting pre-existing concepts and data. The main weakness of my own early attempts and those of Wigmore and others,⁷⁸ is that they were jurisprudentially naive. The problems underlying the “legal families” debate are almost entirely conceptual; the debate brings out the point that there are questions and doubts about purposes, levels, units of comparison, differentiae, and over-generalisation that need to be addressed before one can produce a satisfactory overview of law in the world. This seems to me to be a neglected job of analytical jurisprudence. So we need to proceed from geographical to mental mapping.

MENTAL MAPPING

The metaphorical use of “map” as “a mental conception of the arrangement of something” is quite common in legal theory. For example, Leibniz talked of a *theatrum legale mundi*.⁷⁹ Blackstone⁸⁰ and Austin⁸¹ used mapping as a metaphor for providing general overviews of English law. More recently post-modernists, such as Santos and Goodrich, have used the metaphor in more complex ways. Perhaps the most important example is Santos’ well-known essay “Law a Map of Misreading”⁸² in which laws themselves are presented as maps that both distort and construct social relations. Mainstream theories of law, such as those of

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⁷⁸ Above p.19-22.

⁷⁹ Leibniz, *Nova methodus discendae docendaeque jurisprudentiae* (1667); *Theatrum legale* (1675); Patrick Riley, *Leibniz’ Universal jurisprudence: Justice as the Charity of the Wise* (1996).

⁸⁰ W. Blackstone, *Commentaries on the Law of England* (1st ed., 1765) I.1.35. Blackstone’s concern was to present English law, especially the common law, in a systematic or scientific fashion by identifying the basic principles that gave it coherence. The most germane passage is worth quoting: “[The academical expounder] should consider his course as a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet.”

⁸¹ J. Austin “The Uses of the Study of Jurisprudence” in *The Province of Jurisprudence Determined Etc.* (Hart ed., 1954) 379. Austin began his lecture series with this lecture, but it was not published until 1863. Interestingly, like Blackstone, Austin used this not in relation to general jurisprudence, but rather to the need of the student for a map of English law, in order to have an overview of basic concepts and principles as a system or organic whole.

⁸² “Law: A Map of Misreading. Toward a Post-modern Conception of Law”, 14 *Jo Law and Society* 279 (1987), now reprinted in *Toward a New Commonsense*, op. cit. Santos also presents an interesting chart of laws in the world at id., p. 275.

Kelsen, Hart, Llewellyn or even Dworkin, can be interpreted as attempts to construct one kind of mental map of state legal systems.

In an earlier lecture I began to explore how far mainstream theories that have focused on municipal legal systems and that treat societies as enclosed units can be adapted to apply to other levels of legal ordering and deal with the complexities of the phenomena of legal pluralism.⁸³ There is much more to be said about mainstream legal theory as mental mapping, but here I shall confine myself to some less obvious examples: global statistics; the increasingly fashionable use of rankings at global, national and other levels; and some different ways of profiling a legal system or order. What these have in common is that they are examples of mental maps.

GLOBAL STATISTICS AND RANKINGS

Almanacs, encyclopaedias, and world surveys are a long-established phenomenon. The first edition of the *Encyclopaedia Britannica* was published in 1768-71.⁸⁴ In the last twenty years there has been a striking increase in the production of data, mainly but not entirely statistical, presented in standardised forms that provide, or purport to provide, a basis for world-wide comparison. Tabulated information is widely used in fields such as population, economics, health, and education. Well-respected examples include the *Britannica Yearbook*, *The World in Figures* (published by the Economist) and reports by United Nations agencies, the World Bank and IMF. Some of the best-known are very general, but there are, of course, many more specialised publications dealing in greater detail with narrower areas.⁸⁵

Someone might ask: what has this to do with law? A survey of this general literature brings out a number of related points: first, these kinds of data are almost totally absent from the literature of mainstream comparative

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⁸³ GLT 36-39.

⁸⁴ *Whitaker's Almanack* dates from the late 1860s, the 1997 edition is the 129th Annual volume; the *World Almanac and Book of Facts* (formerly *World*) can be traced back to 1860.

⁸⁵ The trend is towards not only greater sophistication and standardisation, but also an increase in the range of producers. While the great majority of such data is based on official statistics, with their own particular criteria for selection and biases, governments do not have a monopoly on the production of global data. Non-governmental organisations, corporations and commercial publishers have contributed to the trend. With the communications revolution the range of producers is proliferating, exemplified by the range of conventionally published reference works now on the market, especially in the United States. Some of these are addressed to the general public, others are aimed at quite specific commercial, educational, and professional audiences. One of the main publishers in this area, Facts on File, explicitly targets secondary schools and public libraries. The variety of such works is illustrated by their titles. Atlases include *The Macmillan World Reference Atlas* (1994); *The State of the World Atlas* (1995) and a great variety of specialised atlases. I have only found one explicitly legal atlas, *The Legal Atlas of the United States* (1996), but I am told that others exist (e.g. Galgano (ed) *Atlante di diritto comparato* (1992) I am grateful to Giovanni Sartor for this reference, but I have not had access to a copy. See further *The World Map Directory: A Practical Guide to U.S. and International Maps* (1992-3).

law;⁸⁶ conversely, law is strikingly absent as a significant category from most of the general statistical literature. With one major exception, crime statistics, law as such is hardly treated as a significant category. To take a fairly representative example: *The Britannica Yearbook* uses over 20 categories for organising its presentation of global data, including agriculture and population, language, religion, employment and labour, manufacturing industries, communications, trade, housing and construction, household budgets, health services, and education. The only explicit mention of a legal category is crime, which is one of three sub-categories of social protection and defence services along with welfare and security forces. It takes up less than 2% of the volume for 1997.⁸⁷ There are international statistics for crimes, police and prisons and a few more items can be extracted from tables of “social indicators” and the like.⁸⁸

It might be objected that law is a cultural phenomenon of a kind which is less prone to statistical analysis than areas such as economics, health and education. Indeed cultural and legal relativists, including some leading members of the new generation of comparative lawyers, who wish to emphasise *differance*, may argue that most legal statistical data is likely to be unhelpful, misleading or just meaningless.⁸⁹ They can point, with some justification, to the unhappy history of attempts to subject legal institutions and processes to allegedly “scientific” quantitative analysis, from the Johns Hopkins Institute in the 1920s through to the abortive Stanford Studies in Law and Development of the 1970s that tried to produce Legal and Social Indicators for Comparative Study in Latin America and in Mediterranean Europe.⁹⁰ I shall not enter here into the debate in

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⁸⁶ CLLT. Two exceptions are the intelligent use of statistics by Basil Markesenis, *Foreign Law and Comparative Methodology* (1997) Ch. 20 (on “litigation mania”) and Inga Markovits in her studies of East and West Germany before the transition, e.g. “Hedgehogs or Foxes?” 34 *Am. Jo. Comp. L.* 113 (1986).

⁸⁷ Other examples include *The Sourcebook of Global Statistics* (1998) which draws on over 200 sources, only about 1-2% of which are explicitly legal, mainly in respect of crime.

⁸⁸ It might be objected that this downplaying of law is mainly a matter of taxonomy; a great deal of data can be extracted from these sources about legal activities, institutions, processes and personnel. After all, since law is a generally pervasive feature of most aspects of social life many statistics about accidents, divorce, employment, housing, homelessness, immigration, the police and so on are more or less directly “legally relevant”. However, even international crime statistics are less developed than most of these other fields and fundamental questions about the comparability of legal phenomena across nations and cultures need to be addressed.

⁸⁹ Eg L. Zedner, “In pursuit of the vernacular: comparing law and order discourse in Britain and Germany”, 4 *Social and Legal Studies* 517(1995). cf. Pierre Legrand’s scepticism about the use of economic analysis as a basis for comparative law on the grounds that it excludes or underplays the importance of history and culture, review of Ugo Mattei, *Comparative Law and Economics* (Ann Arbor, 1997) in [1997] *C. L. J.* 638; Richard Hyland, “Comparative Law” *op. cit.* n. 75.

⁹⁰ On the generally sad story of such studies in the United States see J. H. Schlegel, *American Legal Realism and Empirical Social Science* (1995). A rather striking example in comparative law is J. H. Merryman, D. Clark, and L. Friedman, *Law and Social Change in Mediterranean Europe and Latin America: A Handbook of Legal and Social Indicators for Comparative Study* (1979). This was an unsuccessful attempt by distinguished legal scholars at Stanford to break away

comparative law between universalists and difference theorists, that is to say those who emphasise the unique aspects of each legal system and culture.⁹¹ Questions of cultural relativism of law are central to contemporary jurisprudence.⁹² So too are questions about the extent to which legal institutions and practices are susceptible to economic or other kinds of quantitative analysis.

Such questions need to be addressed as preliminaries to the compilation of meaningful global statistics about law. However, these kinds of data are in fact already becoming increasingly important in policy formation and other decision-making at local, regional, international, transnational and global levels. Comparators and standards for assessing the health of aspects of legal systems exist and are being used either explicitly or implicitly for all sorts of purposes. A few well-established standards or comparators do exist in law but they tend to be fragmented: for example, Amnesty International, the International Committee on Human Rights and numerous other bodies assess the human rights record of different nation states and regimes by reference to general human rights norms.⁹³ The World Bank, the IMF, and donor states and agencies subject potential recipients to notional standards implied by the phrase “democracy, good governance and human rights”. “Democratic audit” is becoming a fashionable phrase.⁹⁴ Recently, Transparency International has developed a quite sophisticated methodology for analysing the extent of corruption in a given country and for constructing “national integrity systems”.⁹⁵ At a national level, courts and legal services are becoming increasingly subject to bureaucratic evaluation.⁹⁶ Educational institutions, including law

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from the unempirical approaches that had characterised “Law and Development” studies by providing “quantitative descriptions of legal systems”. Collections of statistical tables, devoid of any context or commentary and without discussion of issues of comparability and concepts, proved to be singularly unilluminating and the project appears to have been sunk almost without trace. See also, Heinz Schaffer and Attila Racz (eds) *Quantitative Analysis of Law: A Comparative Empirical Study* (1990). This Budapest-based project involves a quantitative comparative analysis of “sources of law in Eastern and Western Europe”, mainly in relation to “normative acts” of different kinds.

⁹¹ Richard Hyland, *op. cit.* n.75.

⁹² *LIC* Ch. 8; Richard A. Wilson (ed.) *Human Rights, Culture and Context* (1997).

⁹³ For example, Amnesty International, Annual Reports; Freedom House, *Freedom in the World: The Annual Survey of Political Rights and Civil Liberties* (1978-); US Department of State, *Country Reports on Human Rights Practices* (annual) regularly reviewed by Lawyers Committee for Human Rights in *Critique* (1978-); Charles Humana, *World Human Rights Guide* (3rd edn., 1992). For general discussions of this literature see J. C. McCrudden and G. Chambers, *Individual Rights and the Law in Britain* (Oxford, 1994) Ch. 16; Youcef Bouandel, *Human Rights and Comparative Politics* (1997); Franseca Klug, Keir Starmer and Stuart Weir, *Three Pillars of Liberty* (1996).

⁹⁴ e.g. F. Klug, K. Starmer, and S. Weir (1996), *op. cit.*, D. Beetham, *Auditing Democracy in Britain* (Democratic Audit Paper No. 1, 1993).

⁹⁵ Jeremy Pope, *The TI Source Book* (Berlin 1996), TI annual reports.

⁹⁶ Probably the most developed in respect of courts is the US National Center for State Courts, *Trial Court Performance Standards* (1990); cf. publications of the New South Wales Bureau of Crime, Statistics and Research. In England there has been significant recent work in respect of franchising legal aid, e.g. Richard Moorehead, Avrom Sherr, and Alan Paterson, “Judging on results? Outcome

schools, are also becoming aware of the uses and misuses to which performance indicators and other external criteria of evaluation can be put on which more later. Some agencies have formulated performance indicators for different sectors of a legal system, not all of which are published.⁹⁷ Some of the formulated standards are explicitly qualitative; some are based on carefully constructed statistics; some are artificially or dubiously quantified.⁹⁸ Other standards for evaluation are left implicit, which may be even more dangerous. Like it or not, most public institutions are now part of a performance culture. We have to live with such evaluations, whether explicit or implicit. We need to assess their uses, limitations and dangers and to examine critically their intellectual foundations. So far as law is concerned, the underlying jurisprudential assumptions need careful scrutiny.

RANKINGS

A relatively new phenomenon, rankings, has grown up on the back of the increasing standardisation of statistical data. A familiar example is educational "league tables", such as the notorious *US News and World Report* rankings of graduate (mainly professional) schools,⁹⁹ the Norrington Table in Oxford and, the more recent, and only slightly less controversial, the London Times *Good University Guide*.¹⁰⁰

Educational rankings are only one small part of the rapidly expanding rankings game. The American passion for statistics linked to the relative easiness of standardising data relating to the 50 states makes the United States the clear leader in the field. For example, the *Gale State Rankings Reporter* for 1994 features over 300 tables comparing the 50 states, with no less than 5200 specific sets of rankings.

Under American leadership the rankings game has spread to largely popular attempts to produce global rankings with titles like *The New Book of World Rankings* or *World Facts and Figures*.¹⁰¹ At present the lack of

measures: quality, strategy and the search for objectivity" 1 Int. Jo. Legal Profession 191 (1994).

⁹⁷ A general example is Roberto Mosse and Leigh Ellen Sontheimer, *Performance Monitoring Indicators Handbook* (World Bank Technical Paper No. 334, 1996).

⁹⁸ cf. David Braybrooke's "Scale of Scientificity", *Philosophy of Social Science* (1987) 43-6.

⁹⁹ The *US News and Report 1998 Annual Guide* covered Business, Law, Medicine, Health, Education, Engineering and Public Affairs (March 2, 1998). This is, of course, only one salient example from a very extensive and controversial literature.

¹⁰⁰ John O'Leary (ed), *The Times Good University Guide* (1998) is subtitled *For Students Entering University in 1999*.

¹⁰¹ Examples include *The New Book of World Rankings* by George Thomas Kurian, now in its third edition, (1991) and Victor Showers, *World Facts and Figures* (3rd edn., 1989); cf. IBRD, *The Development Data Book: a guide to social and economic statistics* (World Bank, Washington D.C. 1995) and UNESCO *Statistical Digests* (annual). An example of compiling international rank orders for scholarly purposes is Muller (op. cit., 1998) who states: "One of the three principal purposes for which this compendium has been prepared is the analysis of *international rank orders*. International rank orders are the result of *differences* with regard to national participation in *highly valued scarce goods* such as military strength, national wealth, or human capital. This means that *international rank orders* are much more than theoretical

availability and standardisation of statistics make such tabulations much cruder and less detailed than those confined to the United States, but no doubt that will change over time.

Global legal rankings do exist in a number of fields. There have been a few published league tables in respect of human rights, corruption, and various kinds of democratic audit. For example, those produced by Charles Humana and Freedom House on national human rights performance,¹⁰² Transparency International's Corruption Perception Index,¹⁰³ and various organisations' reports on crime trends.¹⁰⁴

One is tempted to dismiss such rankings as ridiculous and not worth the attention of serious academics. That was my first reaction. But I have changed my mind for three reasons: first, even the cruder ones are not entirely meaningless; second, rankings are becoming increasingly influential in many types of practical decision-making; and third, they are often used or misused for purposes quite other than those for which they were intended.

The first point can be illustrated by an example that is at first sight quite absurd. I recently came across an American book entitled *Where We Stand, the sub-title of which is Can America Make it in the Global Race for Wealth, Health and Happiness?*¹⁰⁵ The opening words of this bizarre publication are: "America is as competitive as a Chevrolet." It produces a series of league tables centred around seven themes: Who is the wealthiest? Who is the smartest, healthiest, busiest, freest? Who are the best lovers? Who has the best home? The bottom line, a combination of all factors into a single index, concludes that the United States is only the sixteenth "most habitable" country and that "THE WINNER IS JAPAN".¹⁰⁶

At first sight this looks like no more than a piece of enjoyable nonsense. The style is breezy, iconoclastic and tongue in cheek. The book seems to be designed to shock American readers out of a sense of complacency about their society by banging them over the head with figures about gun ownership, murder, oil spills, clean air, teachers' salaries, and over one

constructions. They constitute *social stratifications* of national societies which are relevant for these societies in terms of their collective fears and aspirations. This stratified nature of the world system has led us to focus the contents of the compendium on research questions of the following kind:

- What is the shape of the stratification pyramid of a given rank order?
- Which are the nations belonging to a given stratum of the international system?
- Are certain strata or groups of nations more mobile than others and what are the reasons for this mobility?" (id. 15. Italics in the original). Note that the basic unit of comparison is assumed to be the nation-state.

¹⁰² op.cit. n.93. Amnesty International and the US Department of State provide some contextual information and avoid some of the cruder pitfalls by not producing "league tables"; but they nevertheless use implicit comparators with all the problems of comparability and potential bias that these entail.

¹⁰³ op. cit. n.95.

¹⁰⁴ E.g. United Nations, Trends in Crime and Criminal Justice 1970-85, in the Context of Socio-Economic Change (1992); Crime Trends and Criminal Justice Operations at the Regional and International Levels (1993).

¹⁰⁵ Michael Wolff, *Where We Stand: Can America Make it in the Global Race for Wealth, Health and Happiness?* (1992).

¹⁰⁶ id.

hundred other matters. Interestingly, and perhaps worryingly, it is actually quite informative: the sources are generally the best available, the rankings are fairly plausible, and some of the findings are quite surprising. The final composite index is blatantly subjective in its weightings of different variables, but at least readers are given the opportunity to give their own weightings to different factors.

Where we Stand is not nearly as silly as it looks. Read with the more sophisticated American books of rankings it suggests what might be achieved if a greater amount of reliable international data were available in relatively standardised form, as has already happened in some fields. With the rapid increase of international and global standardisation we are not far off reaching such a situation.

So let us look briefly at one law-related example. Transparency International (TI) is a non-profit non-governmental organisation established in 1993. Its mission is to combat corruption world-wide.¹⁰⁷ TI publishes an annual Corruption Perception Index, based on the perceptions of multi-national firms and institutions.¹⁰⁸ Although this is only a small part of TI's many activities, it is by far the best known, largely through highly condensed reports in newspapers and other media.¹⁰⁹ On closer examination one finds that TI is a small, but highly professional organisation that concentrates largely on specific issues in particular countries. It uses sophisticated and seemingly effective techniques for analysing a local situation,¹¹⁰ devising tailor-made strategies for reducing corruption, and mobilising practical support for the effort. The simplistic composite league tables, as reported in the press, mask the professionalism of the organisation.¹¹¹ The TI indexes have provoked protests and have had some unintended political consequences. Although vulnerable to many of the standard objections to league tables, these eye-catching publicity "gimmicks"/devices seem to have served several useful functions

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¹⁰⁷ Its purpose is "To curb corruption by mobilising a global coalition to promote and strengthen international and national integrity systems" ; Transparency International, (TI) Mission statement 1997. "Corruption" is broadly defined as "the misuse of public power for private profit". Jeremy Pope, *The TI Source Book* (1997) Ch. 1.

¹⁰⁸ The methodology is discussed at length in *The TI Source Book* Ch. 6, which emphasises that this is an index of perceptions based on a poll of polls. The popularity of the index has surprised those responsible who are investigating ways of refining it.

¹⁰⁹ In 1996 Nigeria came first (out of 54 countries) on the index as the country perceived to be the most corrupt, and New Zealand came bottom of the league at 54th. Britain at 43rd was rated as being thought to be less corrupt than the United States, Austria, and Germany, but fared worse than Ireland, Austria and the Netherlands. It may come as no surprise that Nigeria or Pakistan or Venezuela fared worse than New Zealand and the Scandinavian countries, but it is difficult to take seriously the idea that within Scandinavia Denmark, Sweden, Finland and Norway can be precisely ranked, and that, in football league terms, only the first three are candidates for relegation from the Premier Corruption League.

¹¹⁰ Part A of *The TI Source Book* outlines a general analytical framework, which draws heavily on a wide range of sources and, as far as I can tell, is the most sophisticated attempt to establish a method for analysing and constructing a "national integrity system".

¹¹¹ E.g. *The Wall Street Journal Europe* Fri-Sat 3-4 Jan, 1997 (one of the most substantial press reports).

in generating public awareness about corruption issues, in raising the profile of the organisation, and in putting pressure, both directly and indirectly, on governments, organisations, and individuals in countries that have fared badly in the ratings. They have also had a number of unintended consequences, such as being used in election campaigns. Publicity, as Jeremy Bentham repeatedly proclaimed, is the most potent tool for controlling the abuse of power. League tables are crude, but they can also be effective attention-getting tools for publicity and shame.¹¹²

The question arises: would it be possible to produce a theoretically sound source book of global legal statistics or a book of rankings of the health of national legal systems of the world that could be of real value? A short answer is that there is a mass of data already available, but they are patchy and scattered and most are not standardised. Even international criminal statistics are far less sophisticated than in other cognate fields. There are some areas, for example judicial statistics, delay, legal services, levels of compensation for personal injuries, lawyers' earnings, most of which raise difficult questions of comparability. But before contemplating such a possibility one would need to address some fundamental theoretical questions, such as: What might be acceptable indicators of the health of a legal system analogous to social or economic indicators? To what extent is it possible to standardise such comparators in a meaningful way? What might be the uses, abuses, limitations and dangers of such indicators? These seem to be significant theoretical questions that need to be addressed by legal theorists and comparative lawyers. It is beyond the scope of this paper to address such questions in detail, but it is worth pausing to consider briefly one familiar example which may serve as a cautionary tale.

THE LAW SCHOOL RANKINGS CONTROVERSY¹¹³

To illustrate the methodological problems let us look at a familiar, reasonably developed and highly controversial area: national law school rankings in the United States.

The first *US News* rankings of law schools were published in 1987, but the present series started in 1990. There is a longer history of educational rankings, but what is relatively new is the phenomenon of national journals publishing rankings that claim to be methodologically sound. A prolonged, often heated controversy, has been stimulated by these league tables in many disciplines.

Among the many objections to *US News and Report* law school league tables, five are particularly significant in the present context.¹¹⁴

¹¹² For an excellent account see Philip Schofield, "Jeremy Bentham on Political Corruption" 49 *Current Legal Problems* Part. 2, 295 (M. Freeman ed., 1996).

¹¹³ I have been asked about the relevance of this section to the theme of the lecture. The answer is that law school rankings are a familiar example of the problems and dangers of this increasingly common kind of metaphorical mapping.

¹¹⁴ From the extensive literature I have learned most from an unpublished paper by Richard Lempert and a series of short articles in the *National Law Journal*, 1997-98, and various contributions on the Internet, mainly discussing the relative merits of the *US News* and Leiter methods of ranking. On the latter see Brian Leiter, *The Legal Gourmet Report, 1997-8, Ranking of Law School by Educational Quality* on the website of the University of Texas Law School and *Press Release* by Leiter on New Educational Quality Ranking of U. S. Law Schools for 1998-99 (bleiter@mail.law.utexas.edu); see also Leiter, "Why U.

(i) More emphasis is given to simple data that are easily quantified and standardised such as Law School Admission Test (LSAT) scores rather than to more complex or qualitative measures. Hard variables tend to push out soft variables.¹¹⁵ A striking example of an omission is that *US News* does not include quality of teaching as an indicator.

(ii) The choice of indicators and the weighting given to each is arbitrary, so that composite scores are at least biased,¹¹⁶ at worst meaningless or positively misleading.

(iii) Detailed league rankings involve false precision¹¹⁷: to say that Harvard, Stanford, Yale and Chicago are near the top of the Premier League is not news; to say that Yale or Stanford is better than or “beats” Harvard is newsworthy but almost meaningless. Unfortunately it is just these close calls that may be the most important. For example, in the United Kingdom a potential applicant might be unduly influenced by meaningless small gradations in choosing between the three leading London law schools or between say Sheffield, Warwick and Leicester, three quite different institutions ranked 8th, 9th and 10th by the Times in 1998.¹¹⁸

(iv) The tables are full of insidious hidden assumptions: for example, that all law schools have identical missions and functions;¹¹⁹ that full-time first degree students are the only significant beneficiaries of legal education; that the quality of entrants and their immediate employability is more important than the quality of their educational experience or the “value added” factor, or longer-term benefits or research record.

(v) Perhaps the most important point is the danger that league tables prepared for one purpose are used or misused for other quite different purposes. *US News* justifies its rankings as does the *Times Good*

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S. News Makes State Law Schools Angry”, 19 Nat. Law. Jo., March 24 A24 (1997); David E. Rovella id v. 19 n. 40 June 2 A1 col 3. A useful survey of five leading sets of US law school rankings is found in ABAJ, March 1998, at 50.

¹¹⁵ The most influential variable is LSAT scores; opinions of peers and of the legal profession are given a place, but weigh less heavily. The biggest single difference between *US News* and Leiter’s rankings is that the latter gives greater weight to assessment of the quality of the faculty and of teaching.

¹¹⁶ *US News* is said to be biased in favour of small, private schools and those oriented to success in bar examinations., see Leiter, op. cit. n.114.

¹¹⁷ Lempert, op cit., n.114.

¹¹⁸ *Times Good University Guide* (1998) at 42. In the same table Queen’s is sandwiched between the Law Department at SOAS and East Anglia School of Law - an even more motley trio.

¹¹⁹ Professor Martin Harris, Chairman of the Committee of Vice-Chancellors and Principals commented as follows: “Naturally these students demand more information about the range of universities in this country and what they can offer. The *Times Good University Guide* goes some way towards meeting this demand. But vice-chancellors believe that single “super” league tables, attempting to cram all universities into one mould, cannot do justice to the needs of such a wide variety of students, and to what we can justifiably boast is one of the world’s most diverse higher education providers.” (The Times May 11th 1998). On the plurality and multi-functionalism of law schools, see *Blackstone’s Tower*, op. cit., Ch. 3 and “Thinking About Law Schools: Rutland Reviewed”, 25 Jo. Law and Soc. 1 (1998).

University Guide on the grounds that they are meeting a genuine need in providing a guide to potential applicants in making important choices.¹²⁰ But the League Tables are said to have a disproportionate influence on alumni, university administrators, employers, fund-raisers, donors, and even faculty. Rankings can affect policies on such matters as admissions, library, curriculum, preparation for bar examinations and activities that do not count for the purpose of ranking, such as postgraduate work, continuing legal education, or contributions to the local community.¹²¹

US News, it is said, conscientiously tries to listen to criticism and improve its methodology; but it is caught in two dilemmas: as its methodology changes the validity of comparisons over time is undermined; and, more important, *US News* is a business and its rankings issue is one of its best-sellers. There is an apparently insatiable demand for simplistic, composite rankings that are the modern substitute for the mixed metaphor.¹²² The weakest aspect, the composite table, is the most popular.

There is a need to explore further possible analogies between law school rankings and other legal rankings such as those produced by Freedom House¹²³ and Transparency International.¹²⁴ The debate on law school rankings deserves attention because of its detail and relative sophistication. Here, I shall confine myself to two points:

First, the phenomenon is not entirely unhealthy. The febrile *US News* debate has at least stimulated systematic collection and construction of data, sophisticated discussion of methodology and alternative schemes for evaluating and comparing US law schools. Whilst crude league tables have sometimes distorted policy, they have also provoked critical reappraisal of some institutional arrangements that to an outsider seem to be locked into rigid and often self-stultifying sets of practices and

¹²⁰ Clearly applicants need guidance and rounded works like the *Times Good University Guide* are helpful, if imperfect. In a recent *Times* survey only 11% of sixth formers in 1998 gave league tables as their main source of advice in choosing a university. (*Times*, May 12th, 1998). In practice, few applicants would rely on only one source.

¹²¹ *The National Law Journal* (May 11, 1998) reported that during the academic year 1997-8 no less than seven law school deans had been squeezed out of office and it has been suggested that a major factor was *US News* ratings: "These days quality is not the only measure of success. Many law school deans are expected to share tuition revenues and donations with the university, while accounting for every little expense. At the same time, thanks in part to *US News and World Report*, law schools must compete publicly on the basis of very raw criteria: LSAT scores and grade point averages." To an outsider one of the puzzles is why such a simplistic measure should have so much influence upon informed insiders.

¹²² League tables invite sporting metaphors. Criticism of the Research Assessment Exercises in the United Kingdom is sometimes expressed in terms that suggest that the goal posts keep moving, the system of scoring is kept secret from the players, and the prizes and penalties are determined after the event. Insofar as law schools have different missions, functions, situations etc., ranking them in a single league is more akin to popularity contests in which footballers, cricketers, swimmers, politicians, and pop stars compete for "personality of the year".

¹²³ *op. cit.*

¹²⁴ *op. cit.*

assumptions.¹²⁵ They have have increased self-criticism and public accountability, but at a price.¹²⁶ Similarly, a reflective approach to evaluating the health of national legal systems, other legal orders or parts thereof may be stimulated by even the cruder efforts at producing national rankings. What is involved in seriously evaluating a legal system or order, a national criminal justice system, or any particular legal institution is a neglected job of jurisprudence.

The second point is more worrying. The rankings phenomenon tends to make explicit, often in simplistic and sensational form, what has been going on implicitly in arcane ways that may be equally crude. In a recent review of secondary and tertiary literature about comparative law, I concluded that one of the most striking omissions has been hardly any discussion of comparators, that is standards or measures for comparison.¹²⁷ On one standard model of “comparing” that is analysing similarities and differences between comparable phenomena analysis requires both clear conceptions of comparability and standards or indices for comparison. Such indices may in first instance be descriptive, such as a tape measure or weighing scale or an index for measuring mortality rates; they may be explicitly evaluative, such as a marking system, or performance indicators, or international human rights norms; more often than not they are a combination of the two or implicitly evaluative, such as indexes of infant mortality or GNP. We use comparators not only to compare two or more objects, but also to describe individual phenomena. When one describes a city or a legal system in terms of its salient features one is more or less explicitly comparing it to some general norm or standard or ideal type. Any description involves selection and comparators are the main, but not the only, criteria for selection.¹²⁸

One reason why I have dwelt on the phenomenon of rankings is that they dramatise the use and difficulties associated with comparators in law as elsewhere. The controversy about American law school rankings raises fundamental questions about the comparability of law schools as institutions, their nature and functions, and what are possible criteria for the evaluation and comparison of the health of such institutions, if indeed they all belong to a single genus. Similar problems arise about the description, comparison, and evaluation of legal systems or indeed of any legal phenomena. Legal institutions and practices are increasingly subject to the kinds of analysis and evaluation associated with management consultants what might be called “bureaucratic rationalism”.¹²⁹ Like it or not, they are increasingly important and the methodological problems and the underlying assumptions need to be examined critically. Within the discipline of law these problems are primarily jurisprudential because they

¹²⁵ W. Twining, “Rethinking Law Schools: A Response to Schlegel”, 21 *Law and Social Inquiry* 1007 (1996).

¹²⁶ However, league tables confirm part of the orthodoxy, for example that only those reading for first degrees in law count as “law students”. American law schools have long had to take internal and external evaluation seriously, but the main standards set by the ABA have been criticised as being cosy and self-serving. On the history of ABA accreditation, see Robert Stevens, *Law School* (1983).

¹²⁷ CLLT.

¹²⁸ cf. Charles Taylor, “Comparison, History, Truth” in *Philosophical Arguments* (1995).

¹²⁹ W. Twining, “Bureaucratic Rationalism and *The Quiet (R)evolution*” 7 *Legal Ed. Rev.* 291 (1996)

raise issues about abstract concepts and general assumptions and presuppositions.

I have suggested that geographical maps involve selection from pre-existing data that themselves presuppose conceptual schemes and taxonomies. In this context such maps are little more than one technique for visual presentation of, typically simple, data.¹³⁰ Statistical tables are similarly just one kind of mental or metaphorical map, which have similar presuppositions. Rankings are just one, usually crude, form of pseudo-statistical mapping that help to dramatise some of the underlying theoretical problems. Statistical tables and ranking involve comparison; but comparison in turn assumes description or at least giving an account of salient characteristics or differentiae. Questions about comparing and evaluating legal orders and other phenomena presuppose answers to questions about what is involved in giving an account of one such system or phenomenon.

PROFILING

So let us move from ranking and comparison to profiling. My argument suggests that even a description of a single system or other phenomenon typically involves the use of comparators that may be explicit or implicit. So, what is involved in depicting (i.e. interpreting, describing and explaining) a single legal system or order? It is to such questions that a substantial part of our vast heritage of jurisprudential writing is ostensibly addressed. Most of our mainstream jurists Kelsen, Hart, Llewellyn, and Dworkin, for example purport to give accounts of the nature of law and legal systems.

So is not my question the central question addressed by general theories of law? Up to a point the answer is "Yes". I have from time to time in teaching jurisprudence set an exercise in which a motley team of jurists are planning an expedition to Xanadu a mythical country, more like that of Coleridge or Calvino than the real place in order to construct an account of its legal system for a new Encyclopaedia of Comparative Law. They are behind a veil of ignorance about Xanadu and they are discussing how they should go about their task. The exercise usually leads to the conclusion that each jurist would ask somewhat different questions, and that for the most part they would complement rather than conflict with each other. In short, they would bring different conceptual schemes to bear. Hart, Kelsen and Fuller might on investigation differ as to whether Xanadu has a legal system at all;¹³¹ or, if it satisfies each's criteria for the existence of a legal system, they might give different accounts of its salient features: a

¹³⁰ On modern methods of increasing data density in presentation of information, including on maps, see Tufte (1983), (1990) (1997) op. cit., n.25.

¹³¹ In teaching, these exercises raise familiar questions about the definition or, better, the boundaries of the concept of law. In this context I have generally not had great difficulty in persuading a class that for the purposes of the enterprise of understanding law there will always be some borderline cases, but that if one wishes to understand law in Brazil one is going to miss a great deal if one omits or overlooks the institutionalised orders of the squatter settlements which affect the property and other day to day relations of many thousands of people. In 1970, "Pasagarda", one of the squatter settlements outside Rio de Janeiro, had an estimated population of 50,000 (Santos, 158). A jurisprudential basis for this view can be found in the ideas of Llewellyn and Honore: "The first question in descriptive legal theory is then not 'What is a rule?' but 'What is a group?'" A. Honore, *Making Law Bind* (1987) 33.

disciple of Hart and Kelsen might describe, with slight variations, the basic form and structure and criteria of validity of a system of rules or norms. A Fullerite might assess how far the norms satisfy his principles for the internal morality of law;¹³² a Dworkinian would try to divine the fundamental principles of political morality the ideology in a non-pejorative sense that give the legal order coherence or integrity. She might also provide an account of the modes of reasoning in adjudication (and interpretation generally).¹³³ A follower of Karl Llewellyn would try to find out empirically how the law-jobs were in fact done through asking about actual disputes and how they were in fact handled;¹³⁴ if there were judges, the Llewellynite would ask questions about their styles of justification perhaps coming up with not very different answers from Dworkin.

Each of these general theories might provide a basis (or at least a starting-point) for giving a particular account of the legal order in question. In our discussions, we usually conclude that far from providing rival or radically different interpretations, a richer account of legal ordering in Xanadu might emerge through subjecting it to such multiple perspectives. We also sometimes come to other, less banal, conclusions. First, on their own, these general theories are too abstract to give much guidance on the handling of detail. Kelsen and Hart would end up with rather thin descriptions of form and structure. Llewellyn would point to thicker and more realistic accounts, but his law-jobs theory and his extended case-method are suggestive ideas that need to be refined and fleshed out to provide an adequate methodology.¹³⁵ How far Ronald Dworkin's theory of law is applicable to different kinds of legal orders and cultures is still largely unexplored.¹³⁶

This exercise also brings out the point that most standard accounts of actual legal systems do not draw explicitly on our stock of legal theories. Rather such accounts tend to be conventional and pragmatic, based on generally unarticulated and not very coherent or precise assumptions about law students' or foreigners' needs at the start of their studies. For example, standard introductory accounts of "The English Legal System" rarely articulate their basic assumptions or any criteria of selection; they do not talk of basic norms or rules of recognition or interpretive concepts or "law jobs", nor do they pause to clarify what is meant by a legal system, an institution, a process, a dispute, a court, or a profession.¹³⁷ Writers of such

¹³² L. Fuller, *The Morality of Law* (1964) Ch.2.

¹³³ I have suggested elsewhere that Dworkin's "theory of adjudication" is better characterised as a theory of interpretation, because it can apply to non-judicial interpreters and potentially might be applied to legal orders without courts and legal traditions such as Islam (*LIC* 165-77). For an extension to the European Union, see J. Bengoetxea, *The legal reasoning of the European Court of Justice: Towards a European Jurisprudence* (1993).

¹³⁴ Karl Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (1941).

¹³⁵ A classic discussion is A. L. Epstein (ed), *The Craft of Social Anthropology* (1967); cf. Twining, "The Idea of Juristic Method: A Tribute to Karl Llewellyn" 48 *U. Miami L. Rev.* 119 (1993).

¹³⁶ *LIC* Ch. 8.

¹³⁷ GLT pp.24-25. Even a more theoretically informed text, such as Fiona Cownie and Anthony Bradney's *English Legal System in Context* (1996), which explicitly espouses legal pluralism, makes so many concessions to traditional syllabuses, especially in respect of providing basic (i.e. orthodox) information, that its coherence and originality seem to me to be artificially restricted. A

works do not draw much more directly on legal theory than writers of guide books refer to the literature of urban sociology. Similarly the *International Encyclopaedia of Comparative Law* (and similar less scholarly works) has a standard format which is based more on common sense and the conventions of comparatists than on explicit theory.¹³⁸ In short, there appears to be only a tenuous connection between our stock of general theories and standard accounts of actual legal systems.¹³⁹

A quite different perspective on the institutions of a municipal legal system is to be found in the context of foreign aid. Development agencies, foreign donors, and institutions such as the World Bank often employ techniques of institutional analysis that are much more systematic than those used in accounts of legal systems by academic lawyers. Some of the basic ideas of institutional appraisal appear to be inspired by management consultancy perspectives, with a strong tendency to bureaucratic rationality. In my experience they tend in practice to be stronger on prescription than diagnosis, but they do pose illuminating questions about goals, structures, “stakeholders and beneficiaries”, outcomes, performance indicators and costs. There is much that could be said about what might be termed “the Jurisprudence of the World Bank”. In the present context, the relevant point is that such perspectives and methodologies when applied to legal institutions contrast quite sharply with orthodox academic accounts of “legal systems”. There are, of course, many other perspectives human rights “auditing”, economic, anthropological, linguistic, historical, evocative, for example that can be employed in depicting a legal system or order.

Detailed analysis of particular examples must await another occasion. Instead, I wish to conclude by suggesting that depicting a legal system or order is closely analogous to depicting a city. If one is about to visit Venice or Oxford or Hong Kong for the first time and wants to do some reading in advance, there are many different kinds of literature to choose from. One might start with a map of the country and of the city. One might move on to a tourist guide Rough for the economically disadvantaged; Blue for culture vultures or gastronomes. For setting a tone, one might turn to evocative works that report personal impressions by a Jan Morris or a Bill Bryson or some more orthodox travel writer. Depending on one’s purposes or interests one might proceed to histories, or novels, or

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similar point is made in a review of the book by Julian Webb, 32 *The Law Teacher* 344 (1998).

¹³⁸ The nearest thing to an attempt at theorisation is the Introduction by René David in vol. II of the *International Encyclopedia: The Legal Systems of the World: Their Comparison and Unification* which is mainly concerned with problems of internal division and classification of legal doctrine.

¹³⁹ Moreover, such accounts make very little use of either maps or available statistical data. For example, *The Legal Atlas of United States* (1996) contains substantially different information from standard descriptions. Compare for example two very different attempts to introduce their own legal systems to foreigners, E. Allan Farnsworth, *An Introduction to the Legal System of the United States* (1963) and E. Blankenburg and F. Bruinsma, *Dutch Legal Culture* (2nd ed., 1994). Only exceptionally are statistics used in a systematic way as part of a profile of a national legal system. A partial exception is Michael Zander, *Cases and Materials on the English Legal System* (London, 7th ed., 1996) which makes quite extensive use of statistical data. Combine these sources and one will have quite different, mainly complementary, accounts.

specialist works on politics or economics or transport or architecture or folklore or drains or even law.

I suggested earlier that Calvino's *Invisible Cities* could be interpreted as fifty-five accounts of Venice; it would not be difficult for an avid reader to find more than fifty-five different treatments of Venice or Oxford or Belfast.¹⁴⁰ Some of the accounts might be thicker and overlap more than Calvino's spare evocations; but the outcome would be similar a complex, multi-layered cumulation of accounts, built up from multiple perspectives. This is the opposite of reductionism.

Cities attract metaphors. Calvino uses labyrinth, maze, chessboards, bridges, canals as symbols of aspects of invisible cities. A legal order, like a city, is typically a human construct, but not the work of a single mind¹⁴¹; rather it reflects the beliefs, decisions and practices of generations of its inhabitants. Both are complexes of muddle and order.¹⁴²

There are some suggestive parallels between debates and divisions within urban sociology and within the discipline of law.¹⁴³

- For example, a central theme of talk about cities is that they are all similar and yet all unique. Sir Patrick Geddes wrote: "Though the woof of each city's life be unique, and this may be increasingly with each throw of the shuttle, the main warp of life is broadly similar from city to city."¹⁴⁴ One could substitute legal order for city without changing the rest of the wording.

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¹⁴⁰ This is a very modest assessment. According to Peter Ackroyd there have been more than 25,000 printed works on London's history (Book review, London Times 13 August 1998, at p. 35).

¹⁴¹ Contrast the insistence of the arch-planner, Jeremy Bentham that "each code should be drafted by a single individual" so that it would systematically conform to the principle of utility and responsibility for it should be clearly located, on which see Philip Schofield, "Jeremy Bentham: Legislator of the World" (115 (1998) Current Legal Problems). Bentham did, of course, allow for participation in discussing drafts.

¹⁴² As Weis puts it: "Calvino regards the city as a 'complex symbol' which allows him to express 'the tension between geometric rationality and the entanglements of human lives' (*Six Memos* 71). In fact, in order to understand fully his interest in cities and their evolution and decline, one must see them as representative symbols of human behavior. Going back to the beginning of civilization, since their designs and disposition are never arbitrary, cities reflect the doctrine and practices of the society which creates and maintains them." Beno Weis, *Understanding Italo Calvino* (1993) 156-7; cf Brian Simpson on the common law being more like a muddle than a system, "The common law and legal theory" in Simpson (ed.) *Oxford Essays in Jurisprudence*, 2nd series, (1973).

¹⁴³ Describing cities is a good metaphor for mental topography. We are comparing the problems of depicting cities and legal orders, not the objects of depiction. Calvino reminds us that a city is not its description; the idea of a city is abstract and a map of a city is a higher level of abstraction. Albert H. Carter, *op. cit.* (1987) pp. 120-21.

¹⁴⁴ Geddes: "He is no true town planner, but at best a too simple engineer, who sees only the similarity of cities, their common network of roads and communications." Even a sound engineer, doing work to endure, let alone an artist in his work must know the city indeed, and have entered its soul." cf.

- Classical writers have been criticised for presenting top-down perspectives and for neglecting the points of view of the inhabitants and users.¹⁴⁵
- There is much debate about whether cities are “systems”; so too with law: Brian Simpson has memorably characterised the common law as more a muddle than a system.¹⁴⁶
- Urban literature is characterised by deep ambivalences, with strong strains of extreme pro- and anti-urban views; leading theorists, such as George Simmel take centrist and ambivalent positions. There is also pervasive ambivalence about the costs and benefits of a well-ordered and efficient urban system.¹⁴⁷ Similarly in law the natural law tradition and its successors idealise our subject and present aspirational perspectives, some theorists emphasise the benefits of efficiency and order, whereas Marxists, realists and others point to the repressive, problematic, or seamy side of actual legal orders.
- According to Langer, four images of the city have dominated the literature of urban sociology: the city as bazaar, jungle, organism, and machine.¹⁴⁸ All four of these metaphors can be illuminatingly applied to accounts of legal orders.¹⁴⁹

Calvino’s book depicts invisible cities. Legal orders, too, are largely invisible, that is only a few aspects are susceptible to geographic mapping, pictures or videos or even to statistical analysis. Law is not particularly photogenic, although watching trials on television reminds one that the common law is more telegenic than the civil law. Legal orders are made up of complexes of social relations, ideas, ideologies, norms, concepts, institutions, people, techniques and traditions. Calvino’s concern is “to portray the diversity and at the same time universality of human experience.”¹⁵⁰ He captures brilliantly what is involved in describing and understanding a city the elusive mixture of patterns and complexity and arbitrariness and the capacity and the limitations of the human mind to grasp these realities.¹⁵¹ The dialogue between Kublai Khan and Marco Polo revolves around how and whether the diverse cities of his empire can be mentally reduced to order. The great Khan hopes to master the invisible order by learning the rules as if they are like chess. His is a reductionist temperament.¹⁵² Marco Polo emphasises hidden complexities, exceptions,

Patrick Geddes, *Cities in Evolution* (rev. edn., 1969); cf. Calvino, “Only the name of the airport changes”, *IC* 128.

¹⁴⁵ OPP 208ff.

¹⁴⁶ op. cit. n.142 above; cf. Charles Sampford, *The Disorder of Law* (1989).

¹⁴⁷ Andrew Lees, *Cities Perceived* (1985).

¹⁴⁸ Peter Langer, “Sociology Four Images of Organized Diversity” in Lloyd Rodwin and Robert M. Hollister (eds) *Cities of the Mind* (1984) Ch. 6.

¹⁴⁹ I have discussed all four images elsewhere, especially “The Great Juristic Bazaar” 14 *JSPTL* (N.S.) 185 (1978); Holmes’ Bad Man and the legal jungle, OPP 204 ff; functionalist and technological views of law, “The Idea of Juristic Method” (1993) op. cit..

¹⁵⁰ Sara M. Adler, *Calvino : The Writer as Fablemaker* (1979) at 49

¹⁵¹ Albert H. Carter, op. cit. (1987) 123-4.

¹⁵² Kublai Khan, the pessimist, sees his chessboard as a reduction to nothingness; Marco Polo, by contrast, treats each square as a starting-point for seeing a multiplicity of things in a little piece of smooth and empty wood, for example: “Your chessboard, sire, is inlaid with two woods: ebony and maple. The square on which your enlightened gaze is fixed was cut from the ring of a trunk that

contradictions, the elusiveness of hidden orders. He accepts that there are patterns, but they are too complex to capture from a single perspective. He even acknowledges that a basic design exists, but it is too elusive to be understood through the logic of a game, even one as complex as chess. Rather, the order that structures human attributes and relationships ought to be compared to the logic and structure of dreams:

“With cities it is as with dreams: everything imaginable can be dreamed, but even the most unexpected dream is a rebus that conceals a desire, or its reverse a fear. Cities, like dreams, are made of desires and fears, even if the thread of their logic is secret, their rules are absurd, their perspectives deceitful, and everything conceals something else.”¹⁵³

A similar tension between geometric rationality and the messy complexities of human relations runs through our discourses about law. In jurisprudence we have our Kublai Khans and our Marco Polos. Like Calvino, I side with Marco Polo. Calvino is sometimes identified as a “post-modernist”. If that label implies disregard for facts, or extreme subjectivity or indeterminacy in interpretation, or that all patterns are merely constructed by the reader, I think that this is a mis-reading. Calvino, while emphasising complexity, paradox, the elusiveness of reality, agrees that there is a “hidden ‘filigree of design’ upon which all human experience is built.”¹⁵⁴ The idea of a city is a good metaphor for mental topography in general and for law in particular. Like Calvino, we need many mental maps of our invisible cities.¹⁵⁵

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grew in a year of drought: you see how its fibres are arranged? Here a barely hinted knot can be made out: a bud tried to burgeon on a premature spring day, but the night’s frost forced it to desist.” *IC* 130-1.

¹⁵³ *IC* 44.

¹⁵⁴ Adler (1979) 51-2; *IC* 5-6, 43-44.

¹⁵⁵ “The Great Khan owns an atlas whose drawings depict the terrestrial globe all at once and continent by continent, the borders of the most distant realms, the ships’ routes, the coastlines, the maps of the most illustrious metropolises and of the most opulent ports. He leafs through the maps before Marco Polo’s eyes to put his knowledge to the test.” (136) After Polo has given accounts of cities he has seen, cities he knows by hearsay, and possible cities that he does not know whether they exist or where they are, the Great Khan says:

“I think you recognize cities better on the atlas than when you visit them in person.” And Polo answers: “Travelling, you realize that differences are lost: each city takes to resembling all cities, places exchange their form, order, distances, a shapeless dust cloud invades the continents. Your atlas preserves the differences intact: that assortment of qualities which are like the letters in a name.” (137) *Vive la différence!* cf. Richard Hyland on “difference theorists” in comparative law in Dennis Patterson op. cit. (1996) Ch.11.

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THE U.S. CONSTITUTION, THE SUPREME COURT AND CAPITAL PUNISHMENT: SHOULD THE U.S.A. PUT THE DEATH PENALTY TO DEATH?

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“The question of capital punishment has been the subject of endless discussion and will probably never be settled as long as men believe in punishment.... [Such questions] are not settled by reason...[but by] prejudices and sentiments or by emotion.”

Clarence Darrow, CRIME, ITS CAUSES AND TREATMENT 166 (1922)

INTRODUCTION

The United Kingdom Home Secretary, Mr Jack Straw, on 27 January 1999 signed the Sixth Protocol on the European Convention on Human Rights, a consequence of its inclusion in section 1(1)(c) of the Human Rights Act 1998. The Sixth Protocol provides for the abolition of the death penalty, other than with regard to any provision which might hereafter be made for it in time of war or imminent threat of war. The death penalty for murder has not been a part of domestic law for some time, and the Crime and Disorder Act 1998 abolished the death penalty for treason and for piracy throughout the United Kingdom. The practical effect of section 1(1)(c) of the Human Rights Act, therefore, is to render it impossible for Parliament to reintroduce the death penalty - and, therefore, also largely futile for it to debate the topic. This article therefore presents arguments both upholding and condemning capital punishment in the context of a markedly differently worded constitutional provision in another cultural setting (The United States of America).

The United States is the last bastion of its kind which still legitimizes the death penalty for heinous crimes. Although by early 1996, 93 countries and/or territories had capital punishment laws¹, this figure is deceptive. The vast majority are African, island, eastern European, Asian, or former Soviet Union Republics, rather than developed westernized ones, such as is the U.S.A.²

Thirty-eight of the fifty American states currently have capital punishment statutes.³ This number very nearly became thirty-nine in autumn, 1997, when the Massachusetts state legislature narrowly failed to pass a bill which would have instituted the death penalty. Shortly before the vote, one member of the legislature who had planned to vote in favour of the

¹ Ariane M. Schreiber, “States That Kill: Discretion and the Death Penalty - a Worldwide Perspective”, 29 Cornell International Law Journal 262, at n. 5 (1996), citing Amnesty International, The Death Penalty: List of Abolitionist and Retention Countries 5 (Dec. 1995).

² Id. at 263 n. 30, again citing Amnesty International.

³ The remaining non-death penalty states are Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, North Dakota, South Dakota, Vermont, West Virginia and Washington.

bill, changed his mind and cast a “no” vote. This altered what would have been 81-79 to result in an 80-80 tie.⁴

Polls consistently indicate that a substantial majority of Americans advocate executions of felons convicted of egregious crimes. Results of a 1981 Gallup Poll indicated that two thirds of Americans approved the death penalty. In 1985, the approval rate rose to 72%; in 1991, to 76%; and in 1994, to 80%.⁵

The predominant American support of capital punishment was labelled as hypocritical by NEWSWEEK magazine, reporting on the public outrage in the U.S.A. over the Singapore government’s caning⁶ of an 18-year-old American visiting his father in 1994. He had been sentenced to six lashes with the cane (in addition to a \$2200 fine and four months in prison) for having participated in the vandalizing of 50 automobiles.⁷ Contrasting the virtual nationwide concern over a punishment deemed inhumane by a majority of those Americans polled with the solid approval for the death penalty, the article noted that “[m]ost Americans may balk at caning people, but from the president on down, they don’t mind killing them.”⁸

The 1991 Gallup poll also asked whether the alternative of life imprisonment without possibility of parole would temper the respondents’ approval of the death penalty, and, in such a case, found that the 76%-in-support figure decreased to 53%.⁹ Yet, while supranational organizations have ascribed to conventions and protocols denouncing its use,¹⁰ the U.S.A. adheres to its uncompromising and persistent stance retaining the use of capital punishment. In doing so, she finds herself in the company of “strange bedfellows” such as China, India, Iran, Iraq, and Japan, among

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⁴ Representative John Slattery cast this deciding vote, having changed his mind after a Massachusetts jury found English au pair Louise Woodward guilty of second degree murder in the death of her charge, 10-month old Matthew Eapin. Slattery felt this had been an erroneous conviction, and he reasoned that other juries might well err in convicting and sentencing to death defendants if the bill became law. See Au pair case altered vote, *Richmond Times-Dispatch*, Nov. 8, 1997, at A-3, col. 1-2.

⁵ See Michael L. Radelet and Ronald L. Akers, “Deterrence and the Death Penalty: the Views of the Experts”, 87 *The Journal of Criminal Law & Criminology* 1, n. 1, citing David W. Moore, Majority Advocates Death Penalty for Teenage Killers, *Gallup Poll Monthly*, Sept. 1994, at 5.

⁶ “Caning” is punishment by severe lashes on the buttocks with a reed or cane, inflicted so strongly that the subject’s skin is deeply pierced, he bleeds profusely, and scars remain for life.

⁷ Michael Elliott, *Crime and Punishment*, *Newsweek*, Apr. 18, 1994, at 18.

⁸ *Id.* at 22.

⁹ See Alec Gallup and Frank Newport, *Death Penalty Support Remains Strong*, *Gallup Poll Monthly*, June, 1991, at 40. At any rate, supporters constitute a clear majority among Americans.

¹⁰ See, e.g., European Convention on Human Rights of 1950, European Treaty Series (ETS) No. 5, articles 2 and 3 and Protocol 6; Universal Declaration of Human Rights (which limits, rather prohibits, use of the death penalty); United Nations Covenant on Civil and Political Rights of 1966, Annex to UN General Assembly Res. 2200 (XXII) of 16. Dec. 1966, in 6 *International Legal Materials (ILM)* 368 (1967), ratified as of 1991 by 93 parties, not including the U.S.A. See generally, Christoph Schreuer, *Capital Punishment and Human Rights, Recht Zwischen Umbruch Und Bewahrung; Volkerrecht, Europarecht, Staatsrecht: Festschrift fur Rudolf Bernhard* (1995) at 563-566.

those more powerful countries which retain capital punishment statutes. For example, the United Kingdom issued a 5-year moratorium on executions in 1965 and abolished capital punishment for murder by legislation in 1969.¹¹ The death penalty is constitutionally prohibited in Germany.¹² Indeed, in western Europe only Belgium has retained its death penalty statute, but it is de facto inoperative, since there have been no executions there for decades. With the exception of the U.S.A., worldwide trends continue to be the abolishment of the measure completely.¹³

This paper does not attempt to explain why the positions of the U.S.A. *vis a vis* the world at large are so diametrically opposite. Rather, it addresses the provisions of the American constitution and judicial interpretations which have justified the use of capital punishment by those states which have chosen to make it lawful.

The first section will explain the 1972-1976 division of Supreme Court decisions on the constitutionality of capital punishment per se, and the Court's post-1976 decisions on some of the more controversial issues. Secondly, a collateral constitutional issue is explored, that of whether a particular means of execution might be so slow and painful as arguably to violate the constitution. Thirdly, because this question is essentially about the people affected - both the prisoners involved and the victims of their crimes - it is significant to humanize the issue and to tell about some of the more publicized recent executions, with a primary focus on those in the author's state, Virginia. The final section is a commentary upon the most recurring underlying reasons for the respective positions of both advocates and abolitionists.

I. 1972, 1976 AND BEYOND

The U.S. Supreme Court announced opinions in two companion cases in 1972, holding unconstitutional the death penalty statute in both states involved, Georgia and Texas. Since all other state death penalty legislation was drafted in the same fashion as were the laws in these two states, this decision effectively invalidated all current capital punishment laws. The result was that death sentences for all 629 people then on death row nationwide were vacated.¹⁴

A. THE 1972 DECISIONS: *FURMAN V. GEORGIA*¹⁵

Furman involved three death row inmates, two in Georgia and one in Texas, all black men. The first Georgia defendant, Furman, while

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¹¹ See also introductory note above.

¹² Article 102 Grundgesetz.

¹³ See Schreuer, *supra* note 10 at 575. Professor Schreuer is Professor of International Law at the University of Salzburg, Austria, and Edward B. Burling Professor of International Law and Organizations, The Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, Washington, D.C., U.S.A. He projects that in the near future there will be a rejection of capital punishment universally, comparable to the general prohibition of torture in the official administration of justice in civilized nations. *Id.* at 578.

¹⁴ Jack Greenberg, *Capital Punishment as a System*, 91 *Yale L.J.* 903, 915, n. 39 (1982).

¹⁵ 408 U.S. 238 (1972).

attempting to burgle a home, had shot and killed the owner. The gun had been fired through a door, killing the father of five. At the time of the crime, the defendant was 26-years old and had completed only the third grade in school. He was diagnosed as mild to moderately mentally deficient, and he suffered from psychotic episodes. His insanity defence had not been successful, and the jury returned a combined verdict of guilty and sentenced him to death after only 1 and a half hours deliberation.

The second Georgia defendant had robbed his victim's home together with an accomplice. He had raped her, while holding scissors to her throat.

The defendant in the Texas case was classified as "borderline mentally deficient." He had previously been convicted of felonious theft when he entered the home of a 65-year-old widow and raped her with his arm at her throat. He was sentenced to die for the latter crime.

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment,¹⁶ and it is this provision which traditionally provides the basic constitutional argument for death penalty abolitionists. However, the Court in *Furman* did not base its decision on whether the death penalty in principle violates the Eighth Amendment. Rather, it looked to the process through which these particular defendants had been sentenced to die in its voiding of the laws. Both the Georgia and Texas statutes vested in the judge or jury full discretion as to whether the death penalty would be imposed.

Furman is indeed a lawyer's nightmare, for each of the nine justices wrote a separate opinion, and the official reported decision is 230 pages long. One legal reporter referred to it as "not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."¹⁷ It is germane that both Justices Stewart and White emphasized that retribution as a reason for imposing the penalty of death is not necessarily an illogical or unconstitutional reason.¹⁸

The constitutional difficulty with the Georgia and Texas laws was the capricious and arbitrary manner in which this ultimate sentence was meted out. There were no systematic guidelines or regulatory standards to determine in which instances and for what crimes a convicted defendant would be sentenced to die. Justice Stewart designated these sentences as "cruel and unusual in the same way that being struck by lightning is cruel and unusual." He noted that from among the many persons convicted of reprehensible crimes during 1967 and 1968 (the years of these three convictions) only a "capriciously selected random handful" had received the sentence of capital punishment. Ironically, both Stewart and White remarked that it was therefore "unusual" by reason of its having been so rarely imposed. This infers that the death penalty was more likely to meet constitutional muster if the execution sentence is meted out more regularly than had been the case in Texas and Georgia.

¹⁶ Constitution Of The United States Of America Amendment VIII.

¹⁷ Weisberg, *Deregulating Death*, 1983 Sup.Ct.Rev. 305, 315.

¹⁸ Justice Stewart wrote that he "cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment," and Justice White, that "...[although] the imposition of the death penalty [is] obviously cruel in the dictionary sense...[it] has not been considered cruel and unusual...in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Justice Brennan's opinion was predictive as to his probable stance on the death penalty in principle. He posed four standards which determined whether a particular punishment was contrary to the Eighth Amendment: (1) it must not be "so severe as to be degrading to the dignity of human beings," (2) the government must not inflict any severe punishment arbitrarily, (3) any severe punishment must not be "unacceptable to contemporary society,"¹⁹ and (4) a punishment which is severe must not be "excessive." It is difficult to imagine a punishment more "excessive" than the termination of the prisoner's life.

In contrast to Brennan's mere hint as to a basic unlawfulness of capital punishment in all cases, Justice Marshall made clear his position that the death sentence violates the Eighth Amendment in all cases as a matter of principle. He stated two reasons: (1) it is both excessive and serves no legislative purpose which is a valid one; and (2) it is "abhorrent to currently existing moral values."

There were four dissents (Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist). The common rationale among them was the preference for the courts to defer to the legislatures in the respective states to make the determinations of which punishments are appropriate for which crimes and that the majority had trodden on traditionally legislative turf by voiding these statutes.

B. 1976: RENEWED EFFORTS TO REVIVE THE DEATH PENALTY

Responses to *Furman* from state legislatures took either of two directions. Some states adopted statutes making capital punishment mandatory for designated crimes, and others took the route of listing crimes for which it might be imposed, but retaining some discretion in the jury, but a discretion which the revised laws refined by listing rules to guide the decision.²⁰ This guidance generally took the form of stated aggravating circumstances necessary for the imposition of the death sentence, as well as mitigating factors which must be considered which possibly might reduce the sentence.

1. Guided discretion

These two forms were tested by the Court in five opinions handed down on the same day in 1976. Three states' statutes - Georgia,²¹ Texas,²² and Florida²³ - had taken the second approach, and these efforts were held constitutional.

¹⁹ Justice Brennan's use of the word "contemporary" indicated that he would not be influenced by any argument which referred to punishments used in general in 1791 when the Eighth Amendment was adopted.

²⁰ Greenberg, *supra* note 14, at 908.

²¹ *Gregg v Georgia*, 428 U.S. 153 (1976), involving the robbery and murder of two men by the defendant.

²² *Jurek v Texas*, 428 U.S. 262 (1976), in which a 22-year old had been sentenced to die for the abduction, attempted rape, and strangulation of a 10-year-old girl, whose body he had subsequently thrown into a river.

²³ *Proffitt v Florida*, 428 U.S. 242 (1976), involving a defendant who had burgled the home of a couple during early morning hours, stabbed the man when he awoke and while his wife was watching, and beat the wife before he fled.

The new Georgia statute listed murder and five other crimes for which capital punishment might be imposed. Further, it listed ten aggravating circumstances, requiring that the jury find at least one before it might impose the death penalty. Moreover, the trial was bifurcated - that is, the verdict of guilty or not guilty was rendered first. If the former, the jury was to return to hear entirely different evidence in its determination of the appropriate punishment. Review by the Georgia Supreme Court of all death sentences was automatic

The Texas law also permitted capital punishment in five categories of murders, and required the jury to respond affirmatively to all three of the following questions: (1) was the crime deliberately committed with the reasonable expectation that death would occur? (2) was it probable that the defendant posed a continuing threat to society? and (3) had he unreasonably responded to any possible provocation from his victim?

Florida's statute provided a bifurcated trial, and the jury's sentencing verdict was advisory only, with the judge making the ultimate decision.²⁴ All death sentences were automatically appealed to the state supreme court.

Notably, these decisions were by votes of 7-2, with Justices Marshall and Brennan dissenting on the ground that capital punishment always violates the Eighth Amendment.

2. Mandatory death sentences

The statutes which had mandated death for conviction of certain crimes were held unconstitutional. The states involved were North Carolina²⁵ and Louisiana.²⁶ The North Carolina law required the death penalty for convictions of first degree murder, permitting no consideration of the defendant's character or prior record or of the circumstances involved. Louisiana's statute was similar to that of North Carolina, except that it required the jury to be instructed on lesser charges, even if there was no evidence which would justify a conviction of a lesser charge.

These were 5-4 decisions, with Justices Stewart, Powell and Stevens joining the two now consistent opponents of capital punishment in general, Justices Brennan and Marshall. The majority more narrowly rejected mandatory death penalty sentences as "unduly harsh and unworkably rigid," without permitting particularized circumstances of each case to be regarded by the jury.

A synthesis of the 1976 decisions outlines the Court's requirements for constitutionality:

(1) a death sentence cannot be mandatory under any circumstances, but the judge or jury must be vested with some discretion; (2) in exercising this discretion, the judge or jury must be given sufficient guidance; and (3) review by the highest appellate court in the state must be assured.

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²⁴ Some years later, the Court held in a case from Florida that the Constitution does not forbid the judge from imposing the death penalty after a recommendation of life imprisonment from the jury. *Spaziano v Florida*, 104 S.Ct. 3154 (1984).

²⁵ *Woodson v North Carolina*, 428 U.S. 280 (1976).

²⁶ *Roberts v Louisiana*, 428 U.S. 325 (1976).

By the end of 1997, more than 3000 persons waited on America's death rows.²⁷ Texas, with 144 executions from 1976 to the end of 1997, is clearly the front runner. Virginia, with 46 state killings during that time, is second, and Florida, with 39, is third.²⁸

1997 also saw the largest annual number of executions nationwide (74) during any year since the 1976 decisions. Texas' 37 killings during 1997 made it the leader for that year.²⁹

C. THE COURT'S POSITION ON OTHER ISSUES:

1. For which crimes is the death penalty constitutional?

The seminal case on whether state killings should be reserved for convictions of murder is *Coker v Georgia*,³⁰ in which a defendant was sentenced to die for the crime of rape. He had earlier been convicted of motor vehicle theft, armed robbery, rape, kidnapping, and escape while he was serving time both for the rape and stabbing to death of a young woman, and for the kidnap, rape, and fatally beating of a 16-year old woman just eight months after the first murder. Subsequent to his escape and while still at large, he raped another 16-year-old in the presence of her husband, kidnapped her and threatened her with death. It was for the latter crime that the jury had issued the death sentence.

In a 7-2 decision, the Court vacated the sentence, holding that capital punishment is a disproportionate punishment for the crime of rape. Writing for the majority, Justice White conceded that rape is a serious and reprehensible crime which deserves a serious punishment, but that to execute the defendant would be too severe a punishment because the victim had not lost her life. Interestingly, one of the seven voting with the majority concurred (Justice Powell) writing that he would not hold that capital punishment is always unconstitutional for the crime of rape. A more heinous factual situation than the one in *Coker* is difficult to imagine, and Powell's position is thus a curious one. Only Chief Justice Burger and Justice Rehnquist dissented. As usual, Justices Brennan and Marshall concurred with the majority, affirming again their position that capital punishment is unconstitutional under all circumstances.

If *Coker* implies that the U.S. sanctions the death penalty only for the crime of murder, it is relevant to analyze how a particular state defines murder. In *Tison v Arizona*,³¹ the death sentences of two brothers who had not actually participated in the robbery, abduction, and murder of a family of four, nonetheless were upheld by the Court. The state of Arizona had adopted a felony murder rule regarding a killing committed during a robbery or kidnapping which made each participant in the robbery or kidnapping guilty also of capital murder. The defendants had assisted their imprisoned father and another convict in their escape from prison, after which they all abducted and robbed the four victims. The brothers only watched, but made no attempt to stop, the others' murder of all four. Thereafter, the two convicts and the brothers fled together in the victims' car. Justice O'Connor wrote for a 5-4 Court that their involvement throughout the kidnapping and robbery, their physical

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²⁷ "Executions in USA at 42-year high; figure likely will rise", NW Florida Daily, Dec. 28, 1997, at F-A, col. 1-6.

²⁸ Id.

²⁹ Id.

³⁰ 433 U.S. 584 (1977).

³¹ 481 U.S. 137 (1987).

presence during the killings, and their immediate flight with the actual murderers were sufficient to implicate them also in the killings, even absent evidence of intent to kill.

The Court distinguished *Tison* on its facts from *Enmund v Florida*,³² decided only five years earlier. Another 5-4 decision, *Enmund* involved a defendant who had remained in a parked car while the co-defendants had entered a farmhouse to rob an elderly couple. His role had been to help them to escape after the robbery. When one of the victims resisted, a co-defendant killed both. Although Florida law rendered the defendant a principal in the murder because he had constructively aided and abetted the others, the Court reversed his death sentence. Justice White wrote for the majority that the Eighth Amendment forbids the death penalty for one who neither killed, intended to kill, nor to use lethal force. Justice O'Connor was among the dissenters, writing that the majority did not show that "contemporary standard" precluded capital punishment as a sentence for "accomplice murder."

Coker, then, clearly infers that in the U.S.A. capital punishment for crimes other than murder is unconstitutional. However, *Tison* is illustrative of the flexibility of this rule when the state's definition of murder is a broad one.

2. Execution of persons who were minors when the crime was committed: how young is "too young"?

a. In *Thompson v Oklahoma*³³ the Court considered the constitutionality of the death penalty for one who was under the age of 16 at the time of the crime for which he was convicted. The Court concluded 5-3³⁴ that "indicators of contemporary standards of human decency" clearly manifest that the "conscience of the community" regarded imposing the death penalty upon a 15-year-old offender as unconstitutionally "cruel and unusual."

The Court based the decision on three rationales. First, although statutes in twenty of the states in which capital punishment is authorized did not expressly address a minimum age, the remaining seventeen all established sixteen as the youngest age limit. Moreover, among the 1393 persons sentenced to death between 1982 and 1986, only five -including this defendant - had been under the age of 16 years at the time of their crimes. Moreover, the last execution of anyone under the age of 16 years when the crime had been committed had occurred in 1948.³⁵ Secondly, any deterrent effect is highly suspect, since an offender so young lacks the intellectual maturity to have analyzed the possibility of execution prior to committing a crime. Finally, the retribution factor fails, since the juvenile is generally regarded as being less culpable for his acts and as having the capacity for growth and change which society is obligated to provide him.

Among the five-member majority, Justice O'Connor's concurring opinion is particularly prophetic regarding her views on the issue. While she agreed with the national-consensus conclusion, she would not have gone so far as to hold execution of one aged 15 or younger to be constitutionally prohibited under all circumstances. It is important to recall that at that

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³² 458 U.S. 782 (1982).

³³ 108 S. Ct. 2687 (1988).

³⁴ Justice Kennedy did not participate.

³⁵ William B. Lockhart, Yale Kamisar, Jesse H. Choper, Steven H. Shiffrin, *Constitutional Law, The American Constitution, Constitutional Rights And Liberties* 153 (6th ed., 1989 Supp.), reporting on *Thompson*.

time the review of any capital punishment case would always result in at least two votes - those of Justices Brennan and Marshall - to reverse the sentence on grounds of principle.

The dissenting opinion by Justice Scalia³⁶ disputed the consensus argument, reasoning that using those states with minimum ages for execution was faulty, since each state is at liberty to determine the situations and minimum ages for which juvenile court jurisdiction might be waived and the juvenile be tried as an adult. Scalia further credited the “only-five-among-1393” argument with being proof only that executions of persons aged 15 and younger are - and should be - rare. He compared this with the relatively few number of women executed as contrasted with their male counterparts. A conclusion that state killing of women is consequently unconstitutional is clearly untenable. Scalia stressed that there was no distinction when the rarity of such sentences involves minor defendants.

b. Only one year later, the Court was asked to broaden the scope of applicability of the rule in *Thompson* in two companion cases, *Stanford v Kentucky*, and *Wilkins v Missouri*,³⁷ involving defendants who had been ages 17 years 4 months and 16 years 6 months, respectively at the time of the crimes for which they had been sentenced to die.

The Kentucky defendant had been convicted on counts of receiving stolen property, robbery, sodomy, rape, and murder of a 20-year-old gas station attendant. After he had raped and sodomized her, he drove her into nearby woods and killed her by shooting her in the face.

In the Missouri case, the defendant had pleaded guilty to the murder of a 26-year-old mother of two at the convenience store where she worked. While his companion held her, he stabbed her four times in the chest while she begged for her life. He responded by stabbing her four more times in the neck, opening her carotid artery, and leaving her to bleed to death.

This time Justice Kennedy was a part of the decision, and Justice O'Connor joined the five-member majority which held both sentences to be constitutional. Writing for the Court, Justice Scalia noted that in 1791 when the Eighth Amendment was adopted, executions indisputably were not regarded as “cruel and unusual.” Moreover, he stressed that the common law presumption of incapacity to commit a criminal act between the ages of seven and 14 is rebuttable. Using the statistics he had impugned only a year previously in *Thompson*, he emphasized that within the U.S.A. 281 persons under the age of 18 when they had committed the crimes - 126 of these being under 17 - had been executed. By that time, only 11 of the capital punishment states prohibited the death penalty for 17-year-olds, and only 15, for 16-year-olds.

Scalia refused to draw any analogy with the fact that age 18 is the legal age to vote and/or to drink alcoholic beverages. These laws, he reminded, operated in gross and not as a gauge of individual levels of maturity. On the other hand, a juvenile court views the circumstance of the particular minor charged with commission of a felony when opting whether to waive jurisdiction and try a juvenile as an adult. It is, he wrote, these particularized laws rather than the generalized ones which reflect any views of society at large. It was also germane to the Court that both the

³⁶ Scalia was joined by Chief Justice Rehnquist and Justice White.

³⁷ 492 U.S. 361 (1989).

Kentucky and Missouri statutes expressly listed age as a possible mitigating factor in the sentencing phase.

Neither *Thompson* nor *Stanford/Wilkins* has been overruled. Consequently, the current minimum constitutional age at the time of the crime in order for the death penalty to be imposed is 16 years.

3. Execution of the mentally unaware or mentally retarded

a. *Mentally unaware*

The Court held in *Ford v Wainwright*³⁸ that in order for one to be executed, he must at that time comprehend both the fact that he has been sentenced to die, and the reasons for that decision.

This issue was poignantly controversial in a 1991 Arkansas execution in which then-Governor Bill Clinton refused to intervene. The prisoner was Rickey Ray Rector, an obese black man who had been convicted of robbery and murder of one person, and murder of the policeman who had responded to his pleas for help when he decided to “give myself up.” The latter had become a helpmate of sorts to Rector, who had been in prior trouble with the authorities and who, according to Rector’s mother, was the “only one he would trust.”³⁹ When the policeman came to Rector’s home after the robbery-murder in order to befriend him, Rector suddenly killed the man whom he had always trusted, using the same gun he had used to kill the robbery victim. Immediately thereafter, Rector ran outside and shot himself in the temple. Although surgery saved his life, much of his frontal brain tissue had been destroyed. Nonetheless, he was tried, convicted, sentenced to death, and in later hearings held competent under the *Ford* rule.

Whether or not to commute Rector’s sentence to life imprisonment came at a politically inopportune time for Clinton. Then running for his party’s nomination for President, he had publicly apologized for his earlier pardons of 70 sentences during his first term as Arkansas governor. The timing of Rector’s scheduled execution also was a critical factor, since evidence of Clinton’s alleged extra-marital affair with Gennifer Flowers had just erupted, and he was rapidly dropping in the polls. Subsequent to the execution, Clinton was lauded for being “tough on crime,” since he “had someone put to death who had only part of a brain. You can’t find them any tougher than that.”⁴⁰

The Rector situation is illustrative of good judicial theory which, it is submitted, was badly applied. The extent of Rector’s comprehension was a question of fact, not provable by a mathematical formula. His testimony and appearance had simply not convinced the psychiatrist who testified for the prosecution that he failed to meet the *Ford* standard, and his political timing during his governor’s concerted effort to persuade the public of his tenacity on the issue of crime, in the words of one of his attorneys, “just happened to be real bad.”⁴¹

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³⁸ 477 U.S. 391 (1986).

³⁹ Marshall Frady, *Death in Arkansas*, Feb. 22, 1993, *New Yorker* 105, 109.

⁴⁰ *Id.* at 132, quoting New York politician David Garth.

⁴¹ *Id.* at 108.

b. Mentally retarded

In 1989, the Court held in *Penry v Lynaugh*⁴² that the Eighth Amendment does not categorically prohibit the execution of a mentally retarded person. The defendant in this seminal case out of Texas was a 22-year-old with an IQ between 50 and 63, described as mild to moderately retarded. Despite the testimony at trial of a psychologist that he had the mind of a six and a half year old and the social maturity and functional abilities of a 9-10 year old, the jury nonetheless found him competent to stand trial. This had necessitated their finding that he had realized the wrongness of his conduct and that he had had the capacity at the time to act in accordance with the law.

Justice O'Connor wrote for the 5-4 Court that his mental retardation was irrelevant, since he had been afforded constitutional protections through the availability of the modern insanity defence which abrogated the common law irrebuttable presumption that "idiots" could not be held responsible for their criminal acts. The opinion noted that only one state had forbidden the death penalty for the mentally retarded. Although the Court overturned the sentence on other grounds, holding that his mental retardation and background of childhood abuse had wrongly been withheld from the jury during the sentencing phase for possible mitigation purposes, the holding is a critical one in the development of U.S. death penalty law.

Note that *Ford* addressed the mental state of the defendant at the time of the scheduled execution, whereas *Penry* spoke to the defendant's mentality at the time of commission of the crime. The Court seemed to view the *Penry* defendant's appeal as an attempt to relitigate the jury's finding that he had been mentally competent when he acted unlawfully.

4. Disproportionate imposition on black defendants

Another 5-4 decision determined racial disparity in the imposition of the death penalty not to be contrary to the Eighth Amendment. In *McCleskey v Kemp*⁴³ the Court was asked to accept a 1983 statistical study⁴⁴ as a basis upon which to hold that the disproportionate number of blacks sentenced to death was constitutionally flawed.

The analysts in this report had used data from Georgia during the 1970s. Using facts from their research, they concluded that of the more than 2,000 murder convictions in the state during that decade, defendants charged with the murder of white people had been more than four times more likely to be sentenced to die than those charged with killing blacks. Further, this report reached the conclusion, based on past statistics, that black defendants in general were substantially more likely to receive the death penalty than were white defendants. These numbers became even more pronounced when black defendants had been convicted of the murder of whites.

The majority rejected these results as coincidental, holding that the procedural safeguards contained in the Georgia statute and the assurance of the fairness of each trial provided the requisite constitutional standards.

⁴² 109 S.Ct. 1934 (1989).

⁴³ 481 U.S. 279 (1987).

⁴⁴ Baldus, Pulaski, and Woodworth, "Comparative Review of Death Sentences: an Empirical Study of the Georgia Experience", 74 *Journal of Criminal Law & Criminology* 661 (1983).

Justice Powell's majority opinion stated that the Court "decline[d] to assume that what is unexplained is invidious."

McCleskey is essentially a general affirmation of the American jury system. The Court refused to draw inferences from an inexplicable ratio of blacks to whites in the issuance of the death penalty in the absence of a showing that there had been a denial of constitutional procedural or substantive rights on a class basis.

II. MIGHT A PARTICULAR METHOD OF EXECUTION BE "CRUEL AND UNUSUAL"?

American states currently sanction as means of execution five means: hanging; electrocution; firing squad; lethal gas (gas chamber); and lethal injection. Even some who do not challenge the constitutionality of capital punishment in principle have joined many abolitionists in arguing that one (or more) of these means violates the Eighth Amendment. Generally, this conclusion is based on the perception that the particular method is a painful and/or prolonged process.

A. HANGING

At present, three states - Delaware, Montana and Washington state - have statutes authorizing execution by hanging.⁴⁵ The last hangings prior to the 1972 hiatus of executions were those of two American soldiers in Kansas in 1965. Their convictions were for the murders of four family members in their rural home, randomly selected by the prisoners simply to experience the feeling of killing. These murders were the subject of Truman Capote's non-fiction work, *In Cold Blood*, later made into a motion picture. The most recent hangings in the U.S.A. were in Washington state (1993) and Delaware (1995).

Hanging, when correctly carried out, kills by asphyxiation. The argument opposing hanging arises from the possibility of decapitation if the length of the rope is not precisely calculated to conform with the prisoner's weight. Moreover, there are reported cases in which the prisoner hanged had survived for as long as ten minutes before dying. Witnesses report that before he or she is unconscious, the face turns purple, the eyes bulge, and the tongue hangs out.⁴⁶

The method was challenged in *Campbell v Wood*,⁴⁷ but was held not to be "cruel and unusual" despite the chance that the prisoner might be beheaded in the process. The court found that the risk of decapitation is minimized by prison protocol so as to be highly unlikely.

The *Campbell* appellant also argued that the small number of states which utilize hanging makes it "unusual", and therefore unconstitutional. The court did not accept this position, holding that "[w]e cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice."

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⁴⁵ The total number of various methods used is 55, although only 38 states are death penalty jurisdictions. This is because many states provide for more than one method of killing and permit the prisoner to choose from between (or among) them.

⁴⁶ Steven Trombley, *The Execution Protocol: Inside America's Capital Punishment Industry* 11 (Crown Publishers, Inc., 1992).

⁴⁷ U.S. Ct. of Appeals, 9th Cir., No. 89-35210, decided Feb. 8, 1994.

In this same case, the appellant had further contended that the state's requirement that he choose from between alternate means of death was contrary to his religious beliefs and thus in violation of the First Amendment freedom of religion. The court also rejected this argument.

B. ELECTRIC CHAIR

Thirteen states use the electrocution method.⁴⁸ The first state statute so providing was the 1888 New York law, and the first to be electrocuted was William Kemmler in 1890 in New York. Kemmler, who had been convicted of murdering his mistress with the blunt edge of an axe, challenged the constitutionality of this method.⁴⁹

After having competed with George Westinghouse, Thomas Edison was granted the contract with the state of New York to produce the system used to operate the electric chair. Edison himself testified for the state at Kemmler's trial that one electric current of 1,000 volts "should kill instantly and painlessly every time."⁵⁰ The state successfully defended the constitutional challenge.⁵¹

However, Kemmler's execution required two volts, his face bled, and the electrodes on his head and spine singed.⁵² Other cases have also been contrary to Edison's assurances: a Florida execution in 1979 (Spinkelink) required three jolts, and death did come until five minutes had passed;⁵³ for one in 1983 (Evans in Georgia), three jolts and 14 minutes;⁵⁴ one in 1985 (Vandiver in Indiana), five jolts and 17 minutes;⁵⁵ and for one in 1990 (Tafero in Florida), four surges.⁵⁶

One horrifying electrocution was that of 16-year-old Willie Francis, executed in 1946 in Louisiana for the murder of a druggist. The chair had malfunctioned during the first attempt, he was removed, and another date was set. Later it was learned that the two men connecting the cables had actually done so improperly because they had been drunk at the time.⁵⁷

An Alabama prisoner sentenced to die by electrocution in 1990 had requested a stay pending the installation of a new chair because the then-current one had twice malfunctioned in 1989. The court denied his plea,

⁴⁸ See Deann Glamsner, Opponents move to block Washington hanging, USA TODAY, international edition, Jan. 5, 1993, at 3A, col. 2-3, listing the various methods state-by-state.

⁴⁹ NOTE, "The Madness of the Method: the Use of Electrocution and the Death Penalty", 70 Texas Law Review 1039, 1042 (1992), hereinafter "Madness."

⁵⁰ Id. at 1043.

⁵¹ In re Kemmler, 136 U.S. 436, 449 (1890).

⁵² Madness, supra note 49, at n. 36.

⁵³ Id. at 1056.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id. at 1051.

⁵⁷ Arthur S. Miller & Jeffrey H. Bowman, *Death By Installments* 7, 9, and 10 (1988). See *Louisiana ex rel. Francis v Resweber*, 329 U.S. 459, 462-64 (1947) for the 5-4 decision that a second such effort to execute the prisoner would not be cruel and unusual, since there had been no "purpose to inflict unnecessary pain [in the first attempt] nor any unnecessary pain involved in the proposed execution."

the court holding that the possibility that it would recur a third time was too remote.⁵⁸

After having been strapped into a crude wooden chair with a curtain between the prisoner and the witnesses,⁵⁹ a hood is placed over his head, and the curtain is then opened. Witnesses have stated that the prisoner's skin turns bright red; smoke, sparks and flames sometimes leap out from the body; the first surge causes the body to surge forward against the straps; and some prisoners vomit blood before being pronounced dead. Because the smell of burning flesh is so sickening, all electrocution chambers are equipped with bags for witnesses who regurgitate.⁶⁰

C. FIRING SQUAD

Only five states - Alabama, Arizona, Arkansas, Idaho, and Utah - still authorize firing squads for state killings. The procedure is to use a five-member squad, each instructed to aim for the prisoner's heart so as to kill instantly. One of the five weapons contains a blank ammunition, so that none of the five can be certain that he/she is the one who fired the fatal shot. In the opinion of experts, the most expeditious method of killing is to fire at close range a single shot into the head, as is the sole method used in China.⁶¹ The first person executed subsequent to the 1976 decisions, Gary Gilmore in Utah, was by firing squad.⁶²

This method is not fool-proof. In 1951, a Utah prisoner (Mares), had been exceptionally well-liked by prison guards and personnel. Thus, none of the five members of the firing squad wanted to be the one who caused his death. Accordingly, all - although not in a conspiratory fashion - aimed away from his heart. The result was that none of the shots killed the prisoner, who then slowly bled to death.⁶³

D. LETHAL INJECTION

More than twenty of the 38 capital punishment states employ lethal injection as an execution method.⁶⁴ Texas was the first actually to kill by injection, in 1982, but Oklahoma had been the first officially to adopt it by statute in 1977.⁶⁵ The perception is that this means carries the least risk of inducing a slow and/or painful demise.

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⁵⁸ *Thomas v Jones*, 742 F.Supp. 598, 606 (S.D. Ala. 1990).

⁵⁹ Prison regulations in each state provide for a number of official witnesses for each execution, by whatever method. For example, in Virginia, there are usually 10-20 witnesses. See Nancy D. Joyner, "The Death Penalty in Virginia: Its History and Prospects", Vol. 50 No. 10 University of Virginia Newsletter 38 (June 15, 1974). The official required number is six. See Wynne Woolley, "Witnesses May Have Seen Last Death In Chair", Richmond Times-Dispatch, Mar. 4, 1994, at B-8, col. 5-6.

⁶⁰ See Robert Johnson, *Death Work: A Study Of The Modern Execution Process* 20 (1990).

⁶¹ See Trombley, *supra* note 46 at 10.

⁶² See Lockhart et al., *supra* note 35, at 576, and Franklin E. Zimring & Michael Laurence, *Death Penalty 1, Crime File*, National Institute of Justice, U.S. Department of Justice, 1988.

⁶³ Trombley, *supra* note 46 at 11.

⁶⁴ See Glamser, *USA Today*, *supra* note 48.

⁶⁵ Trombley, *supra* note 46 at 73.

A padded operating room gurney with arm rests, located in the same room as is the electric chair, is hidden from witnesses by the usual curtain. The inmate is led into the room, strapped onto the gurney behind the curtain, and is given the opportunity to speak for a final time to his lawyer and spiritual advisor. An intravenous strap is placed upon his arm, and he is strapped into the chair. Behind the curtains are a heart monitor and corrections workers, overseen by a physician. The curtain is opened, and the workers are signalled to introduce sodium pentathal for the brain, pavloon for the lungs, and potassium chloride for the heart. The physician confirms the death once it has occurred, and the prison warden announces time of death to witnesses.⁶⁶ The killing usually takes six to seven minutes.⁶⁷

However, carrying out a killing by lethal injection also can go awry. In a 1989 Texas case (McCoy), the lethal drugs had been incorrectly mixed, causing the prisoner to heave and choke from the time of the injection until his death.⁶⁸

Another Texas prisoner (White), executed in 1992, had been a former drug user. This created such difficulty for the phlebotomist to locate a vein, that it took 47 minutes for him to insert the needle, and that had required the help of the prisoner himself. After this, his actual death did not occur until nine minutes later.⁶⁹

The intravenous line in a 1988 Texas execution (Landry) sprang a leak, causing the poisonous drugs to spray over all the witnesses and attending physicians. This necessitated the room to be evacuated and quickly antiseptically cleaned and fumigated, although the prisoner was at this point half dead, half alive. When the tube was reinserted, the death process lasted another 24 minutes.⁷⁰

E. LETHAL GAS

This method was invented in 1924.⁷¹ Currently, only three states - Maryland, Mississippi, and North Carolina - have gas chambers.

The process is to place the prisoner in a small room or chamber, seated in a chair designed in the same manner as is the electric chair and strapped in similarly. After he is hooded, and the curtain separating the witnesses is removed, lethal pellets are dropped into the room. Experts have described these killings as first causing panic, followed by headache, chest pains, and inability to breathe. The eyes pop out, the tongue thickens, the victim drools, and the skin turns purple.⁷²

The prisoner in a 1983 gas chamber execution in Mississippi (Gray) convulsed for some eight minutes, gasped eleven times, and banged his head on the pole extending from the back of the chair after the pellets had been dropped.⁷³

⁶⁶ Frank Green, "Virginia prepares for execution by injection", *Richmond Times-Dispatch*, Dec. 26, 1994, at A-1, col. 2-5.

⁶⁷ Wes Allison, Frank Green, and John Hoke, "Execution altering tradition", *Richmond Times-Dispatch*, Jan. 24, 1995, at B-6, col. 5.

⁶⁸ Trombley, *supra* note 46, at 74.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 12.

⁷² *Id.*

⁷³ *Id.* at 13.

In 1996, this method was declared unconstitutional in the Ninth Circuit,⁷⁴ nullifying its legality in states within that geographical circuit. This rendered the gas chamber unlawful in the two Ninth Circuit states which had formerly used it, Arizona and California.

III. PERSONALIZING THE PROCESS: A LOOK AT THE APPEAL PROCEDURE AND SOME SELECTED RECENT CASES

Some comments upon the procedure involved in the appeal process are helpful in comprehending in part the day-to-day existence of one on death row. In particular, the focus will be on those in Virginia, the author's home state. Since executions resumed after the 1976 decisions, Virginia's total of 46 has been second only to Texas, which has had 144 executions. Florida is third, with a total of 39. Virginia's all-time high year was 1997, with nine executions. In 1996, Virginia actually led the nation, with eight.

Virginia employed hanging until 1908, when the electric chair replaced that method because it was deemed more humane. A black woman convicted of murder and executed in 1912 was the only woman ever put to death in Virginia. Both the youngest (age 16 when executed) and the oldest (age 83) persons who have been executed in the state died in 1916.⁷⁵

In general, the appellate procedure in a capital murder case consists of three basic levels: (1) direct automatic review through the state court system; (2) state court post-conviction relief, or collateral review (the state habeas corpus stage), when the defendant is permitted to raise issues not appropriate on direct appeal (such as inadequate or ineffective counsel, due process violations, or newly discovered evidence); and (3) habeas corpus review through the federal courts. In this third phase, the defendant can raise issues of violation of federal law and/or the U.S. Constitution which had already been presented to the state court in phase 2.⁷⁶ After these avenues have been exhausted, an execution date is scheduled. Last-minute petitions to the U.S. Supreme Court are typically filed, some alleging newly discovered evidence which might have influenced the jury's guilty verdict, and some again contending that there had been procedural error. The final possibility is reprieve by the state's governor, either in the form of clemency (granting complete freedom) or, more often, commutation (reducing the sentence from death to life imprisonment).

The average time a Virginia death row inmate spends awaiting execution is 8.6 years, a shorter period than the national average of 9.5 years.⁷⁷ The longest in modern Virginia history, was 15 post-conviction years for Willie Lloyd Turner, convicted of robbery and murder of an unarmed jeweler. Turner finally was executed on May 25, 1995, for the crime he had committed on July 12, 1978. At the end of 1997, 47 persons were on

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⁷⁴ *Fierro v Gomez*, 865 F.Supp. 1387 (N.D. Cal. 1994), aff'd 77 F.3d 301 (9th Cir., 1996).

⁷⁵ Joyner, supra note 59, at 37.

⁷⁶ Mark Hansen, "From Death's Door", American Bar Association Journal June, 1996, at 58, 60.

⁷⁷ Frank Green, "Can death penalty survive?" Richmond Times-Dispatch, May 5, 1995, at A-1, col. 3.

Virginia's death row, a population which peaked in July, 1995, with 58 persons.⁷⁸

Indeed, the American Civil Liberties Union (ACLU) unabashedly implemented several additional and novel grounds for appeal, which some feel were for the purpose of intentionally prolonging the process. As the usual time therefore increased, the ACLU has adopted the position that a system which keeps one on death row so indefinitely is innately cruel and unusual. In the Willie Lloyd Turner case, the prisoner had been scheduled to die four times before he finally was executed. He had said at one point, "If they were going to kill me, they should have killed me right from the get-go," rather than "over and over tell me I'm going to die...and then say, 'wait a minute, we want you to suffer some more. We're going to kill you later on.' That's worse than death itself."⁷⁹ Kent Willis, executive director of the Virginia Branch of the ACLU then commented on the Turner case that the lengthy appeal process had created a "paradox, where in order to serve justice it takes so long that the sentence [a prisoner has already served between conviction and execution] becomes cruel and unusual."⁸⁰

For many reasons, death row tenure is becoming considerably shorter. First, the appeals process itself is accelerating in Virginia. A law effective from July 1, 1995, required state habeas corpus petitions to be filed with the Supreme Court of Virginia, no longer with the circuit (trial) court, from which appeal then was to the Supreme Court. Also, these petitions must now be filed within 60 days from the end of the direct appeal process. Circuit courts' crowded trial dockets often led to protracted scheduling, but the Supreme Court traditionally hears and determines these petitions relatively expeditiously. Virginia is generally accepted as "by far the most expeditious state" in putting its death row inmates to death. Indeed, the relatively high rate of execution is a "source of pride" to prosecution lawyers in the state's Capital Litigation Unit.⁸¹

Secondly, since a Virginia law providing for life sentences for crimes committed on or after January 1, 1995, to be "true life" - i.e., without possibility of parole - fewer juries are rendering the death penalty, opting instead for life imprisonment.

Finally, the federal appeal process itself has been shortened. The net result is the reduction of time consumed in the yet lengthy appeal proceedings.⁸²

There are some procedural rules designed to speed up this time which can indeed operate inequitably. For example, Texas' rule that no new evidence might be brought forward after the 30 days for appeal from the conviction preempted a death row inmate on at least one occasion from having a court hear and decide upon compelling evidence that his now deceased brother had actually committed the murder for which he had been convicted. This evidence did not emerge until several years after the trial, but the rule's preclusion of such proof left him without recourse⁸³

⁷⁸ Frank Green, "Virginia could see major drop in death row population", Richmond Times-Dispatch, Nov. 3, 1997, at A-1, col. 3-6.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Greg Weatherford, "Rule of Law", Style Weekly (Richmond, Virginia), Apr. 1, 1997, at 16, 17.

⁸² Id.

⁸³ "Don't make it easier to execute the innocent", USA Today, Jan. 27, 1993, at 5-A, col. 1-2.

and Virginia's 21-day rule⁸⁴ similarly prohibits consideration by any court of evidence discovered more than 21 days after conviction.⁸⁵

One highly publicized electric chair execution was that of Charles Stamper on January 19, 1993. Stamper had been convicted of the murder of three co-workers in a restaurant where he had worked. He had suffered spinal cord injuries in a prison brawl and had since been confined to a wheelchair. Stamper maintained that his dignity required that he be allowed to walk without assistance to the chair, with the use of crutches and a walker, but his request was denied. Instead, two prison guards held him by the shoulders and partially dragged him to the apparatus. The controversy generated by Stamper's case was led by arguments that he should be spared because his injury prevented his ever being a threat to society. Interestingly, disabled advocates disagreed, insisting that he should be afforded no special consideration because of this and should be made to "pay the price."⁸⁶

Timothy Spencer, executed on April 27, 1994, in Virginia's electric chair, was the first person in the U.S.A. to be convicted on DNA evidence.⁸⁷ Spencer, the so-called "Southside strangler", raped and strangled four Virginia women, three in the Southside area of Richmond, and was the inspiration for Virginian Patricia Cornwell's best-selling novel, *Postmortem*.⁸⁸

Dana Ray Edmonds became the first person to die by lethal injection in Virginia. Effective from January 1, 1995, the General Assembly had approved this as a method the prisoner might choose rather than the electric chair. Edmonds had been convicted of robbing a grocery store and murdering the 62-year-old owner by stabbing him in the neck after he had smashed his head with a brick. His last statement was, "No one can take me from this earth and I forgive everyone here."⁸⁹

Larry Allen Stout died in Virginia's lethal injection chamber on December 10, 1996. Ironically, his execution date was his mother's birthday, as well as International Human Rights Day.⁹⁰

Lem Tuggle, executed for rape and murder on December 12, 1996, was the last death of six Virginia death row escapers in late May-early June,

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⁸⁴ Rule 1.1 of the Supreme Court of Virginia.

⁸⁵ See Carrie Johnson, "Rethinking the Death Penalty", Richmond Times-Dispatch, Sept. 23, 1996, at B-1, col. 5. This article described the visit to Richmond of Sister Helen Prejean to argue for repeal of this rule. Sister Prejean was the spiritual counsellor to a young man executed by lethal injection in Louisiana, which became a topic of her book, later the subject of the motion picture, "Dead Man Walking."

⁸⁶ "Man lamed in jail fight executed for 3 murders", Stars & Stripes, Jan. 21, 1993, at 6A, col. 2-3, quoting Peggy Bendrick, a wheelchair-user and lobbyist on behalf of the disabled at the Virginia General Assembly.

⁸⁷ Frank Green, Mike Allen, and Bob Piazza, "Spencer, killer of four, is executed", Richmond Times-Dispatch, Apr. 28, 1994, at A-1, col. 5-6.

⁸⁸ Frank Green and Mike Allen, "Execution of Spencer set tonight", Richmond Times-Dispatch, Apr. 27, 1994, at A-1, col. 4-5.

⁸⁹ Frank Green and Bob Piazza, "Killer of grocer executed", Richmond Times-Dispatch, Jan. 25, 1996, at B-1, col. 6.

⁹⁰ Frank Green, "Stout executed for 1987 slaying", Richmond Times-Dispatch, Dec. 11, 1996, at B-1, col. 5-6.

1984. The six were found in Vermont after the largest death row escape in U.S. history.⁹¹

Thomas H. Beavers, convicted of larceny, rape, murder, and arson, died by lethal injection on December 11, 1997. His distinction lies in being the ninth person executed in Virginia in 1997, and he officially broke the state record for any one year.⁹²

Joseph Roger O'Dell had become a notable figure among Virginia's death row inmates at the time of his execution on July 25, 1997, for the rape and murder of a Virginia Beach woman. The substantive grounds for his appeal had been (a) the DNA test revealing that a jacket he had worn the night of the crime matched neither his own nor the victim's (blood from his shirt, however, matched both), and (b) he contended that a later Supreme Court ruling that a jury must be told at the sentencing phase if a defendant would not be eligible for parole must be retroactively applied. O'Dell's position was that his jury might well not have decided upon capital punishment had they been informed that his prior criminal record made him a recidivist ineligible for parole after this conviction. The Supreme Court issued a stay of execution while it determined the latter issue,⁹³ but ultimately determined that the decision would not have retroactive application. Prior to this, O'Dell had written the governor requesting that, if executed, his body be stuffed by a taxidermist and permanently exhibited for deterrent purposes.⁹⁴ His many press conferences garnered extraordinary support, and a contingent from the Italian legislature traveled to Washington, D.C. to meet with Governor Allen to plead for O'Dell's life. Others in Italy picketed the U.S. Embassy in Rome for the same purpose.⁹⁵ Pope John Paul II sent a request for mercy to President Clinton.⁹⁶ Six days after his execution, O'Dell's widow (whom he had married only a few hours prior to his death) and Sister Helen Prejean attended his burial in Italy at a Sicilian cemetery for victims of the Mafia.⁹⁷

On November 7, 1996, Joseph Patrick Payne became the first of only two death row prisoners for whom Virginia's then-Governor George Allen granted a commutation. A victim of Virginia's 21-day rule, new evidence cast strong doubts as to whether the main witness who had testified against him had been truthful, and four of the twelve jurors who convicted him expressed feelings that he had in fact not been guilty.⁹⁸ His death sentence had been for a prison murder while serving time for another murder, this time the splashing of a flammable liquid into the cell of another inmate

⁹¹ Frank Green, "Tuggle: Born to die", *Richmond Times-Dispatch*, Dec. 12, 1996, at A-1, col. 1-3, and "Tuggle is executed in '83 rape, slaying", *Richmond Times-Dispatch*, Dec. 13, 1996, at A-1, col. 4-5.

⁹² Frank Green, "Beavers executed for 1990 rape, murder of widow", *Richmond Times-Dispatch*, Dec. 12, 1997, at B-1, col. 1-2.

⁹³ Frank Green, "Supreme Court spares O'Dell", *Richmond Times-Dispatch*, Dec. 18, 1996, at A-1, col. 1.

⁹⁴ Frank Green, "Two on death row offer organs", *Richmond Times-Dispatch*, Apr. 1, 1994, at B-1, col. 2-5.

⁹⁵ *Id.*

⁹⁶ "Clinton gets Pope's plea", *Richmond Times-Dispatch* (Associated Press), Dec. 15, 1996, at A-12, col. 3.

⁹⁷ "Palermo officials confirm O'Dell will be buried there tomorrow", *Richmond Times-Dispatch*, July 30, 1997, at B-3, col. 1-2.

⁹⁸ Frank Green, "Law gives Allen latitude on clemency", *Richmond Times-Dispatch*, Nov. 7, 1996, at B-1, col. 2-5.

and tossing in a lighted match. Allen's phone call came just three hours prior to the scheduled execution, and was a commutation to life without parole. The governor's action was a Pyrrhic victory of sorts for Payne, since had the second conviction not occurred, he would have been eligible for parole shortly after the date scheduled for his execution.⁹⁹

Allen commuted one more sentence during his four-year term, that of William Ira Saunders. This was not due to any doubt as to Saunders' guilt of the crime of which he had been convicted, but rather Allen's deference to the clemency requests from those involved in the trial. The commonwealth attorney, the investigating policeman, and the trial judge all had asked the governor to commute. Each felt the death sentence too harsh, one which had been imposed by the jury after a delay between the guilty verdict and the sentencing phase. During the interim, Saunders had been involved in a prison brawl with two other inmates which plausibly had affected the jury's assessment that he could not be rehabilitated.¹⁰⁰

A few non-Virginians merit mentioning because of some distinctive features of the cases. Larry Lonchar petitioned the U.S. Supreme Court to defer his scheduled execution in Georgia in order to determine whether he might die by lethal injection and donate his organs, specifically his kidney, to the policeman who had been the primary investigator in his case.¹⁰¹ The state of Georgia objected, but the Court stayed the execution to determine the question.¹⁰²

Arguably the most publicized defendant sentenced to death in the U.S.A. is Timothy McVeigh, ordered to die on June 13, 1997, for having bombed a federal building in Oklahoma City, Oklahoma in May, 1995, killing 168 people.¹⁰³ McVeigh's appeals are as of yet in the early stages.

Finally, there is Karla Faye Tucker, the Texas born-again Christian who had been convicted of the brutal axe murder of a man and a woman during a drug-spree with an acquaintance. Her callousness at the time of the murders was reflected in her statement to the jury that every time she had swung the axe, she experienced an orgasm.¹⁰⁴ Opposition to Tucker's death voiced two reasons: (1) her Christianity had made her a different person, and she had attempted to use her conversion constructively to persuade others not to follow her course; and (2) she is a woman, and capital punishment rarely is imposed upon women.¹⁰⁵

It is submitted that Tucker would have had a much more tenable and plausible constitutional argument had she been not only a non-Christian

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⁹⁹ Frank Green, "Clemency came with promises", *Richmond Times-Dispatch*, Nov. 9, 1996, at B-1, col. 1-4.

¹⁰⁰ Frank Green, "Death Sentence Commuted", *Richmond Times-Dispatch*, Sept. 16, 1997, at B-1, col. 4-5.

¹⁰¹ Mark Curriden, "Inmate's Last Wish is to Donate Kidney", *American Bar Association Journal*, June, 1996, at 26.

¹⁰² *Lonchar v Thomas*, 116 S.Ct. 1293 (1996).

¹⁰³ Hermi Amerger, 3000 warten in Todeszellen (translation from the German: 3000 wait on death row), *Innsbruck (Austria) Kurier*, June 25, 1997, at 4, col. 1-5.

¹⁰⁴ Joanna Coles, "A few hours to live", *The Guardian*, Feb. 3, 1998, at 2.

¹⁰⁵ Prior to Tucker, the last woman executed in the U.S.A. was Velma Barfield, who died by lethal injection in North Carolina in 1984 for having poisoned her lover. In Texas, no woman had been executed since the Civil War, which ended in 1865. *Id.*

(or at least a person who had not made known her religion, if any), but also a man. The former point relates to the First Amendment which prohibits the federal government from respecting the establishment of religion. Any preference given her because of her Christianity would patently violate the Constitution.¹⁰⁶

Moreover, the Fourteenth Amendment's Equal Protection Clause assures that no state shall deny any person the equal protection of the laws. Although such statistics have not been effective in arguments by black defendants that they are disproportionately represented on death row, the mere fact that the death sentence is so rare for women convicted of capital crimes at least arguably might indicate inequality contrary to the Fourteenth Amendment. The gender argument would be a plea denouncing such unequal treatment.¹⁰⁷ At any rate, Texas Governor, George Bush did not grant clemency or commute her sentence, and she died on February 3, 1998.¹⁰⁸

IV. ARGUMENTS PRO AND CON

Interpretations of the U.S. Constitution are generally arcane and neither fully comprehensible nor germane to most lay people. Reasons given by both advocates for and opponents of capital punishment usually are founded not on legal principles, but rather on grounds which are pragmatic, economic, sociological, moral and/or spiritual.

The best selling book of all time - The Bible - offers resourceful guidance for those on both sides. Advocates look to Leviticus 24:20, 21b: "Breach for breach, eye for eye, tooth for tooth... and he that killeth a man he shall be put to death."¹⁰⁹

Opponents also find Biblical support for their position. For example, Exodus 20: 13 is among the listing of the Ten Commandments: "Thou shalt not kill."¹¹⁰ In the New Testament is found "Love your enemies, bless them that curse you, do good to them that hate you and pray for them which despitefully use you, and persecute you," Matthew 5:44, and the

¹⁰⁶ Syndicated political columnist William F. Buckley, Jr., asked what the American Civil Liberties Union (ACLU), an activist group which litigates on First Amendment issues and is vocally opposed to capital punishment, would do if her sentence were commuted. His assessment was that it would do nothing. However, Buckley's response to his following query as to what the ACLU would think pointed out the First Amendment violation. See William F. Buckley, Jr., "Hottest of Potatoes in Texas: Do We Put Women to Death?", Richmond Times-Dispatch (Universal Press Syndicate), Dec. 25, 1997, at A-15, col. 1-4.

¹⁰⁷ But see Justice Scalia's dissenting opinion in *Thompson* supra note 33.

¹⁰⁸ On March 30, 1998, another woman was executed in the U.S.A., this time in Florida's electric chair. Judy Buenoano had been dubbed the "Black Widow" since, similar to the infamous spider which kills her mate, she had been convicted of causing her husband's death through poisoning. In addition, she had been convicted of attempting to kill her fiance by explosion and of having drowned her paralyzed son. Poignantly, Buenoano's execution was on the birthday of the son she had murdered 'Black widow' executed, Belfast News Letter Mar. 31, 1998, at 6, col. 2.

¹⁰⁹ The Bible, King James Version.

¹¹⁰ Id.

words of Our Lord on the cross, "Father, forgive them, for they know not what they do." Luke 23:34a.¹¹¹

None of the foregoing bears any probative weight in an American courtroom, however. The First Amendment to the U.S. Constitution contains not only the free exercise (of religion) clause, but also the establishment clause, which prohibits the government from recognizing any establishment of religion. The judiciary has interpreted the scope of what constitutes an establishment of religion fairly broadly. For example, the Supreme Court held in 1992 that a traditional invocation and benediction at a public high school graduation violated the establishment clause.¹¹² Consequently, a judge who instructs the jury to adhere to Biblical extracts or permitted such to be admitted as evidence would clearly be preferring Judaeo-Christian concepts, which is constitutionally forbidden.

A potential anomaly which the author has observed is that a great many Americans who staunchly approve of abortion on demand also denounce capital punishment. The converse is also true: many who oppose abortion without restriction are strong advocates for the death penalty.¹¹³ The rationale usually offered by the pro-capital punishment, anti-abortion camp is that the former is punishing the guilty criminal, whereas the latter is the killing of an innocent infant. Nonetheless, if the basic contention of abolitionists of capital punishment is the sanctity of human life, it seems paradoxical that they have no such pangs of conscience when the life of an unborn child is terminated. Similarly, the inviolability-of-life basis for opposing unrestricted abortions appears clearly at odds with the strong support for capital punishment from the same persons.

Generally, there are four arguments in favour of retention of the death penalty, and four arguments for abolition. Each side presents one position that must be conceded. To clarify, these two will be preceded by an asterisk.

PROPONENTS OF CAPITAL PUNISHMENT:

Advocates cite the following: (1) cost of life imprisonment (i.e., housing, feeding, and provision of security for a lifetime criminal, which would be the alternative to state killing); *(2) preventive measure (i.e., prohibiting this particular criminal from committing the same, or any other, crime in the future); (3) deterrent effect (instilling the fear of death in others, which, it is argued, will preclude many from committing heinous crimes); and (4) retribution, deserved punishment for an atrocious crime.

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¹¹¹ Id.

¹¹² *Lee v Weisman*, 112 S.Ct. 2649 (1992).

¹¹³ See, e.g., editorial position of Richmond (Virginia) Times-Dispatch on (1) abortions: the "prudent middle class backs abortion only for the most powerful reasons.... [T]rends are running against widespread use of abortion...[which should be used] only [in cases of] incest, rape, or possibility of serious harm to the mother." Ross MacKenzie (editorial page editor), "Are We Arrived at 'the Abortion Middle?'" Jan. 22, 1998, at A-15, col. 1-3; and (2) death penalty, in an editorial by the same author, published shortly after the execution of Karla Faye Tucker, praising Texas Governor George Bush's refusal to commute, and concluding, "[j]ustice was served." *Conversion*, Feb. 8, 1998, at F-6, col. 1.

With regard to any deterrence, most studies have concluded that the death penalty has no deterring effect.¹¹⁴

Nonetheless, one nationally acclaimed economist, Isaac Ehrlich, authored a persuasive article in 1975, which reasoned that the possibility of being put to death for one's criminal activity was a powerful deterrent.¹¹⁵ At this point, the "jury is still out" on the question of whether capital punishment has in fact any deterring qualities.

OPPONENTS OF CAPITAL PUNISHMENT:

The following four reasons are most commonly offered for abolitionists: (1) the cost of the protracted appeal process for every prisoner on death row (i.e., lawyers' fees, court time, etc.);¹¹⁶ (2) the possibility of error is irreversible;¹¹⁷ (3) disproportionality of blacks, poor, and ignorant among those who receive death sentences;¹¹⁸ and (4) it is morally and spiritually wrong to purposely take the life of another.

The disproportionality argument in particular is frequently raised, despite the Court's holding that statistics have not proven racial bias.¹¹⁹ Objectors point out that racial disparity is reflected both with respect to the defendant himself and also the victim. Recently, a British journalist maligned the American system in this regard, noting that past decisions reveal that a killer of a white victim has been anywhere from four to eleven times (depending upon which state is used as a base) more likely to be given a death sentence than was one convicted of killing a black person.¹²⁰ Even U.S. Department of Justice publications have commented upon these racial imbalances.¹²¹

¹¹⁴ See, e.g., Zeisel, "The Deterrent Effect of the Death Penalty: Facts and Faith", 1976 Sup. Ct. Rev. 327.

¹¹⁵ Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: a Question of Life and Death", 65 American Economics Review 397 (1975).

¹¹⁶ See supra Part III, notes 76-82 and accompanying text. Interestingly, both sides cite cost as a factor.

¹¹⁷ It is submitted that there is a miniscule number of cases where a prisoner has been proven innocent while on death row. (This is assumed to distinguish between innocent [i.e., one who actually did not commit the crime for which he was convicted] and not guilty [i.e., not proven guilty under the applicable rules of evidence].) Some projections of persons currently awaiting executions who actually did not commit the crime are indeed opinion, rather than fact. For a statement to this effect, see Terry Carter, "Numbers tell the Story", American Bar Association Journal, Oct., 1997, at 20, quoting Richard Deeter, executive director of Death Penalty Information Center.

It is perhaps the lengthy and thorough American appeal process and meticulous judicial scrutiny in capital punishment litigation which virtually insures against such errors. See also Innocent Dead Men Walking, National Law Journal, May 20, 1996, at A-1, expressing the view that some on death row actually did not commit the crimes for which they had been convicted.

¹¹⁸ See McCleskey, supra note 43, and *Perry v Lyngaugh*, supra note 42, respectively, for the Supreme Court's rejection of this argument.

¹¹⁹ Id.

¹²⁰ Bill Bryson, "Notes from a Big Country", 'Night and Day' section, The Mail N Sunday Review, Mar. 22, 1998, at 3.

¹²¹ See Zimring & Laurence, supra note 62, at 3, where the authors note that in 1988, blacks constituted only 12% of the population of the U.S.A. as a whole,

This author submits that those on each side are ultimately committed to their positions by reason of only one of these listed factors. It is not reasonable to believe that the cost element is significant when dealing with a human life.

The author's personal experience from speaking with perceptive and clear-thinking persons on both sides has indicated that proponents of state killing are essentially persuaded by the retribution aspect - i.e., one "gets what he or she deserves," and "you do the deed, you pay the price." Karla Faye Tucker's attorney, David Botsford, stated only one week before her execution, in emphasizing her remorse and embrace of Christianity since the double murder of which she had been convicted, "She may be the same physical person she was when the case was tried, but she is certainly not the same person. She is totally rehabilitated, and her prison record supports that. Her death would not serve any purpose other than pure capital vengeance."¹²² Mr. Botsford has concluded the obvious. The essential purpose of capital punishment is vengeance and retribution.

Opponents, it is submitted, are fundamentally motivated by feelings that such killing is simply morally wrong. The author is reminded of a friend's story from her childhood. At about eight years of age, in Ohio, where she was reared, she recalled hearing the words, "...was pronounced dead at five minutes before midnight" on the radio. Thereupon, she asked her father, "Daddy, who died?"⁵ to which he replied, "Oh, just somebody the state put to death." Her reaction was a shock, and she asked, "On purpose?" She remembered her dad replying, almost apologetically, "Yes, child - on purpose."

The plea for vengeance, on the other hand, is a realistic one. People will not be dissuaded from a principle which is an innately moral one. This position is founded on the belief that the only proper response to a vile and heinous murder is the most severe possible punishment. The Biblical "eye-for-an-eye" mandate, according to this view, requires that a killer's life be the price he pays for his killing of another, in order to maintain a societal moral balance.¹²³

Mr. Darrow's remarks quoted at the beginning of this paper will likely stand the test of time.

CONCLUSION

The U.S.A. is curiously isolated among the world's developed westernized nations in its enduring sanction of capital punishment. Those who advocate discontinuation of executions deem them barbaric, macabre, cruel, and morally indefensible. However, the U.S. Supreme Court has repeatedly held that such state killings are not in principle "cruel and unusual punishment" which is forbidden under the constitution, and public

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but made up about 42% of death row inmates. It is germane, however, that they did not note the percentage of blacks convicted of, or even charged with, capital felonies. If blacks constitute a great portion of those tried for, and thus convicted of, such crimes, the greater percentage of blacks on death row would be understandable. The percentage of blacks as compared with whites in the population at large would be irrelevant, since this figure would include also law-abiding persons.

¹²² Coles, *supra* note 104, at 2.

¹²³ See Zimring & Laurance, *supra* note 62 at 2.

support for retention of states' death penalty laws has remained consistently strong.

Absent a dramatic reversal of public opinion, a metamorphosis of the Supreme Court's construction of the Eighth Amendment, or a constitutional amendment, the status quo is not expected to change. Amending the constitution in order to outlaw capital punishment is highly unlikely, since any alteration of the U.S. Constitution requires first, a two-thirds vote in both the Senate and House of Representatives, and second, the ratification by the legislatures of three-quarters of the states.¹²⁴ The three-quarters requirement numerically is 38 states, precisely the number in which executions are currently lawful. These same bodies would not ratify an amendment which essentially would repeal their own enacted statutes.

America's death penalty appears to be live and well, with the prognosis for a long life expectancy.

¹²⁴ Constitution Of The United States Article V.

CONSTITUTIONAL BACKGROUND TO AND ASPECTS OF THE GOOD FRIDAY AGREEMENT - A REPUBLIC OF IRELAND PERSPECTIVE¹

Donal O'Donnell, SC

As is well known, the proposal contained in the 19th Amendment to the Constitution Bill was approved by the people on the 22 May 1998 by a margin of 1,442,583 votes to 85,748. It was promulgated by the President as a Law pursuant to Article 46.5 of the Constitution on the 3 June 1998. Since that date, we are in a unique constitutional position where the original Articles 2 and 3 remain in the Constitution but Article 29 has been amended. That amendment contains within it new Articles 2 and 3 which on the happening of a certain event - the declaration by the Government that the State has become obliged pursuant to the Agreement to give effect to the amendment of the Constitution, then those new Articles 2 and 3 which are contained in the capsule of Article 29 sub-section 7 will slip into place displacing the old Articles 2 and 3. If the declaration is not made within 12 months of the 3 June 1998, or such longer period as may be provided for by law, the new Article 29 will itself fall out of the Constitution. Whichever is the outcome, we find ourselves now in a constitutional position where the perspective is unique and which provides a particularly interesting vantage point to consider the constitutional changes which have occurred and are due to occur. There are, I think, three different aspects of the amendment which I would like to address briefly under the following headings:-

- (i) Mechanics;
- (ii) Institutional provisions;
- (iii) Substantive amendments of Articles 2 and 3.

MECHANICS

The amendment is a conditional one, which by its terms, provides that when the Government makes the requisite declaration then *"notwithstanding Article 46 hereof, this Constitution shall be amended as follows"*.

In other words, the amendments to Articles 2 and 3, if and when they take place, will occur not by the mechanism created by Article 46 but rather under a mechanism approved by the people in an amendment which itself complied with Article 46.

This raises an interesting point. Is there any limit to the amending power of the Constitution? Are there provisions of the Constitution beyond the amending power, and if so, is Article 46 one of those provisions? Given the constitutional history, this is not an unstatable argument. The Irish Free State Constitution was originally intended to be capable of amendment by ordinary legislation for a limited time. However, that provision was used to amend the amending power itself and extend indefinitely the power to make amendments by ordinary legislation. This

¹ This paper was originally given at the Joint Bar Conference organised by SLS for the Bar Council of Ireland and the Bar Council of Northern Ireland in Dublin on 30th January 1999.

is widely regarded as one of the weaknesses of the 1922 Constitution. *The State (Ryan) v Lennon* [1935] IR 170 is a well known case concerning the drastic amendment of the 1922 Constitution by the insertion of a new Article 2A. It is also well known for the passionate dissent by Chief Justice Hugh Kennedy, one of the foremost drafters of the 1922 Constitution. In its tone and approach, the dissent is much closer to the more modern approach to constitutional interpretation and, indeed, it has been argued that in many ways, the Chief Justice's dissent is now the law. Because of the concentration on the natural law flavour of his dissent, it is often forgotten that one of the central points of his judgment was the contention that the amending power was not capable of amendment. It is noteworthy that the transitory provisions of the 1937 Constitution provide by Article 51 that power to amend the Constitution by ordinary legislation during the three years of its life does *not* apply to Article 46.

This argument was available but never really explored in the litigation commenced by Mr Denis Riordan and decided by the High Court on the 20 May 1998 and substantially by the Supreme Court on the 19 November 1998 (in the judgment of Barrington J). It might have been argued that the correct theoretical response was that while there was nothing to prevent the 19th Amendment to the Constitution, nevertheless, there may be some limitation on the amending power in that certain fundamental provisions or the fundamental structure of the Constitution could not validly be altered under guise of an amendment. This is an argument which has succeeded in India.² I must say, I do not agree, but in any event, I think the High and Supreme Courts were absolutely correct not to explore the theory and instead to give such a clear unambiguous and peremptory response which will presumably discourage further attempts to challenge or interfere with referenda. There is something unnerving when the court proceedings themselves become an actor in the political drama, such as for example, when the *McKenna* judgment emerged shortly before the Divorce Referendum and itself became part of the debate and its effect measured by opinion polls. It is too tempting for participants or would be participants in Referendum campaigns to seek some advantage and/or publicity by court challenge. In reality, such challenges are, I think, inconsistent with the primacy of the role of the people in a Referendum and such forays should, I think, be firmly discouraged.

INSTITUTIONAL PROVISIONS

There are two provisions in the amendment dealing with institutional matters. Article 29.7.2 contains the following provision:

“Any institution established by or under the Agreement, may exercise the powers and functions thereby conferred on it in respect of all or any part of the Island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of state appointed under or created or established by or under this Constitution. Any power or function conferred on such an institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person as aforesaid”.

² (See Whelan - Constitutional Amendments in Ireland: *The Competing Claims of Democracy in Justice and Legal Theory in Ireland* (ed Quinn, Ingram and Livingstone); and see also Kelly, *The Irish Constitution*, (3rd Edition), 683 and *Kesavananda's Case* (1973) ASC 1461.

Sub-section 2 of the proposed Article 3 contains the following provision:-

“Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the Island”.

There is clearly an element of duplication here. This may be attributable simply to a process of drafting by incorporating suggestions and text from different sources. However, a number of observations might be made. First, it is clear that Article 29.7.2 relates to institutions “established by or under the Agreement” i.e. the British/Irish Agreement to which the State may consent to be bound by virtue of Article 29.7.1. On the other hand, there is no such qualification in the proposed Article 3.2 which permits at any stage and pursuant to any agreement the establishment of “institutions with executive powers and functions that are shared between those jurisdictions”. The reference to “those jurisdictions” refers back to the provision of the new Article 3(1), which refers to the majority of people “... in both jurisdictions in the Island”. This is as close as the Constitution comes to referring to Northern Ireland. There is one further thing to be noted in respect of Article 29.7.2. The cumbersome language is designed to ensure that powers and functions conferred by the Constitution on certain persons or organs may, pursuant to the Agreement, be conferred on other persons or organs. If this interpretation is correct, then it seems to permit the exercise of legislative/executive and judicial powers by institutions created “by or under the Agreement”. The most significant matter to be observed, however, from these provisions is, I think, somewhat different. As was observed by Barrington J at paragraph 7 of his judgment in the *Riordan* case:-³

“Cross Border Bodies contemplated by the Belfast Agreement would exercise some of the powers formerly exercised by institutions established by the Constitution and that therefore, an amendment to the Constitution to authorise the Government to become bound by and to implement the Belfast Agreement was necessary”.

It was, I think, popularly assumed that the only constitutional amendment necessary was the amendments of Articles 2 and 3. However, the working of the Good Friday Agreement requires something more. While cross border bodies were widely referred to as exercising powers within Northern Ireland (and criticised or welcomed, according to the perspective of the speaker), what this amendment makes clear is that any such exercise of power and consequent subtraction from the administrative independence of Northern Ireland, only occurs in the context of an equal and opposite interference with or subtraction from the administrative independence of the Republic. This is, I think, from a Northern Nationalist perspective, both impressive and somewhat humbling. In her book, *In search of a State: Catholics in Northern Ireland*⁴ Fionnuala O'Connor records the mutual disenchantment between Northern Nationalists and the South, but these provisions of the Constitution show that when it came to a decision, the Administration in the Republic overwhelmingly endorsed by its people, was prepared, not only to shoulder the burden of becoming involved in the affairs of Northern Ireland, but to permit participation from the North in the affairs of the Republic.

³ Unreported 19 November 1998.

⁴ Blackstaff Press 1993.

SUBSTANTIVE AMENDMENTS OF ARTICLES 2 AND 3.

As I have already observed, we are now in a unique constitutional position where Articles 2 and 3 remain in the Constitution but their successors are also in the Constitution. Barrington J put it, "in the form of an escrow".⁵ As the title of this talk suggests, to understand the constitutional changes, it is necessary, I think, also to understand the constitutional background.

Articles 2 and 3 are, I suspect, reasonably unique in that they were probably more discussed outside the jurisdiction than within it. When I came to read Articles 2 and 3 and then subsequently to study them, they were something of a disappointment to me. They could never live up to the advance billing provided for them by their Unionist critics. If they are looked at solely as law calling for legal interpretation, then I think they make dispiriting reading for lawyers, because of the difficulty of coming to grips with them. In this respect, I do not think that I am alone. In fact, I would suggest that of all the articles of the Constitution which have been subjected to sustained judicial analysis, the cases on Articles 2 and 3 have the dubious distinction of being the least satisfactory.

It is well known that unlike the 1922 Constitution, the 1937 Constitution was not drafted by lawyers. Its principal architect was Eamon de Valera himself, and it is a work of impressive subtlety. De Valera was, I think, fully aware that this was a document which would have legal consequences and would be subjected to subsequent legal analysis and application, something he regarded as an undesirable though unavoidable consequence of the enactment of the Constitution.

Its origins show that the Constitution is a document which is political in the sense that it expresses political philosophy but is also intended to have legal effect. In my view, however, that does not mean that it is a legal document like any other and that we should apply the same principles to it as we do to the interpretations of say, contracts or leases. To properly and sensitively interpret the Constitution, I think that we must be alive to its political origins - by that I mean origins in political philosophy - and that it is something quite different from an ordinary legal document. Despite the common criticism of lawyers and legalese, I think that in most cases, lawyers want to draft documents to achieve supremely practical results: to seek to lay out as clearly as possible the intention of the parties and the practical consequences which are designed to follow a series of foreseeable events and to do so by reference to a prediction of how a court will apply the provisions in fact. The Constitution is, I think, significantly different. It certainly seeks to express common intention which must be discerned by the technique of the constitutional interpretation, but it is not particularly or primarily intended to predict or determine in advance, how certain events will be dealt with. In some sense, a Constitution is therefore less and at the same time, much more than another legal document. It is an unremarkable insight to suggest that Constitutions are different but I would suggest that sometimes lawyers and judges do not always approach the Irish Constitution with a consciousness of this difference. In many cases, we readily see the law and do not always see or appreciate the political philosophy or the social science. There are, I think, a number of reasons for this. Apart from the predisposition of lawyers to apply familiar techniques to the task of interpretation, there are also historical considerations. For the early years of its life, the Constitution was virtually ignored as an instrument capable of having legal effect. It was regarded as all political philosophy and no law. That

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⁵ *Riordan v An Taoiseach Bertie Ahern*, unreported 18 November 1998.

misapprehension has been comprehensively dispelled, but there is, I think, a danger, discernible in the cases of Articles 2 and 3, of overcorrection, and a implicit assumption that the Constitution is *only* law.

First, I would suggest that Articles 2 and 3 are not addressed primarily, or at all, to the people in the North. Instead, I suggest that they were principally directed towards a Southern audience, although undoubtedly heard and having some quite considerable effect in the North. Professor Tom Garvin's book, *1922 The Birth of Irish Democracy*⁶, studies different aspects of a momentous year when somewhat like today, there was a sense of fluidity, possibility and unpredictability. He suggests at one point⁷ that the differences between the sides which ultimately became the civil war protagonists, can be described as a difference between "republican moralism" on the one hand and "nationalist pragmatism" on the other. In a very real sense, the different sides spoke mutually incomprehensible languages leading to a contemptuous dismissal of the views of the other side. Significantly, as Professor Garvin observes - "de Valera could speak both of these political languages". I would tentatively suggest that Mr de Valera was doing just this when he came to draft Articles 2 and 3. Articles 2 and 3 sound like pure republican moralism but when one looks at the business end of the articles, the aspect which is intended to have some legal effect, they are pure nationalist pragmatism: the laws enacted by the Dail are to have the same area and extent of application as the laws of Saorstát Eireann. To the mathematician's mind to say thirty two minus six is to say precisely the same as twenty six, but Mr De Valera may not have cared, or more possibly quite liked, the fact that people when confronting that calculation, focused on and heard the reference to thirty two. I would also suggest that De Valera did not see the rhetorical aspects of Articles 2 and 3, the republican moralist parts, as intended to have future *legal* consequences. They were not the first word, but rather the final word. From his point of view, I think, they were happy and subtle reconciliation of his constituency of republican moralists with the demands he was facing of nationalist pragmatism.

In fact, Articles 2 and 3 were, in one sense, the last word for some considerable time and were not subjected to any significant legal analysis until the 1970s and 80s when three cases made their way to the Supreme Court arising out of the Sunningdale and Anglo Irish Agreements respectively. The first was *Boland v An Taoiseach*.⁸ In those proceedings, the plaintiff sought a declaration that the signing of any formal or informal agreement in the terms of the Sunningdale communiqué would be repugnant to the Constitution of Ireland and sought an injunction restraining the Government from implementing any part of the communiqué or entering into any agreement which would limit the exercise of sovereignty over any portion of the national territory or which would prejudice the right of the Parliament and Government of Ireland to exercise jurisdiction over the whole of the national territory. This focused attention directly on the second clause of Article 3: "without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory". The answer the Supreme Court gave to this challenge was not entirely satisfactory, that is, that the Sunningdale Declaration was an exercise of executive power and could not be reviewed. The Chief Justice, Fitzgerald J observed:-

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⁶ Gill & McMillan 1996.

⁷ p 145.

⁸ [1974] IR 338.

“Consequently in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise of the Government of its executive functions unless the circumstances are such to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution”.

This of course, as the late Professor Kelly observed, really avoided the question, since the plaintiff’s claim was that the exercise by the Government of its powers was precisely a “clear disregard by it of its powers and duties conferred upon it by the Constitution”. However, I sympathise with the instinct of the Court in that case to avoid, if at all possible, becoming involved in a political controversy and I think that instinct is itself noteworthy.

More significant, for our current purposes, is the judgment of the then President of the High Court, O’Keeffe J. Just as the Chief Justice has been critical of Counsel for the plaintiff, O’Keeffe J’s judgment expresses some impatience with Counsel for the State, saying:

“During the course of the argument, I sought to obtain from Counsel for the Defendant, some expression of view as to what it [i.e. the *communiqué*] meant, but Counsel gave the Court no assistance as to how the Court should construe it”.

I think that on rereading this judgment, it struck me how differently one reads judgments as a practitioner than as a law student. Counsel for the State, was the late T.K. Liston SC and the cat and mouse exercise described here would, I think, have made fascinating viewing. Mr Liston’s position was not simply obtuse; it was instead, I think, a careful and intelligent tactic. This was a matter of enormous political sensitivity. Faced with an unpredictable court, anything said could have had unforeseen consequences. The only sensible course was to circle the wagons and wait for the storm to blow itself out. There is, I think, a hint of judicial frustration in the next sentence where O’Keeffe J expresses his own view:-

“An acknowledgement that the Government of the State does not claim to be entitled as of right to jurisdiction over Northern Ireland would, in my opinion, be clearly not within the competence of the Government having regard to the terms of the Constitution”.

It is not so much the content of this sentence but rather the fact that it was delivered at all, with its hint that the Government might be about to make such acknowledgements that contains, I think, an element of republican moralism revisited.

However, a significantly different view was expressed by the Supreme Court in an Article 26 reference on the terms of The Criminal Law (Jurisdiction) Bill, 1975⁹ which was enacted in order to give effect to part of the Sunningdale Agreement. The argument of Counsel assigned by the Court (Colm Condon SC, Donal Barrington SC and Hugh O’Flaherty BL), was ingenious. The State could not legislate for offences occurring in Northern Ireland because, although it had asserted a general right under Article 3, it had expressly withdrawn from that right by the terms of Article 3 “*pending the reintegration of the national territory*”. Counsel for the Bill, the then Attorney General, Declan Costello SC, Rory

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⁹ *In Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129.

O'Hanlon SC and John Cooke BL (as they all then were), implicitly accepted this argument, but contended that the right to legislate came, not from the second Clause of Article 3 but from the final clause, that the laws enacted by the Parliament would have the like extra-territorial effect as the laws of Saorstát Eireann. If it was possible for Saorstát Eireann to legislate with extra-territorial effect, then it was also possible for the Dail. This argument was accepted but the Supreme Court¹⁰ also took the opportunity of advancing a subtle interpretation of Articles 2 and 3 in a passage commencing with the words:-

“Articles 2 and 3 can only be understood if their background of law and political theory is appreciated”

The court went on:-

“One of the theories held in 1937 by a substantial number of citizens was that a nation, as distinct from a state, had rights: that the Irish people living in, what is now called the Republic of Ireland and in Northern Ireland, together form the Irish Nation; that a nation has the right to unity of territory in some form, be that as a unitary or federal state; and that the Government of Ireland Act, 1920, though legally binding, was a violation of that national unity which was superior to positive law”.

Significantly, in my view, the Supreme Court went on then to state:-

“The National claim to unity exists not in the legal but in the political order and is one of the rights which are envisaged in Article 2; it is expressly saved by Article 3 which states the area to which the laws enacted by the Parliament established by the Constitution apply. The effect of Article 3 is that, until the division of the Island of Ireland has ended, the laws enacted by the Parliament established by the Constitution are to apply to the same area and have the same effect of application as the laws of Saorstát Eireann had. The area to which the laws of Saorstát Eireann applied was, having regard to the Articles of Agreement of 1921 and the Act of 1925 is unquestionably the area now known as the Republic of Ireland”.

The significant sentence there was the one which identified the national claim to unity as existing “*not in the legal but in the political order*”. This was a theme taken up by a member of that Court, speaking extra judicially, when delivering the MacDermott Lecture in Queen's University, Belfast on the 9 November 1978¹¹. Mr Justice Kenny's topic was the advantages of a written Constitution incorporating a bill of rights, but he also took the opportunity of expressing his views on what he described as a controversial matter. He stated that to understand Articles 2 and 3, it was necessary to deal with the “*political (but not legal) concept of a nation and the political doctrines of Irish Nationalism*”. He described nationalism as:-

“Essentially a doctrine of the heart and not of the intellect. Those who hold it, brush aside all intellectual arguments against it. Because it is a doctrine of the heart and is therefore passionately held, adherents do not think it is important that they find considerable difficulty in answering questions as to how one becomes a member of the nation and how and when one ceases to do so”.

¹⁰ O'Higgins CJ, Finlay P, Griffin, Kenny and Parke JJ.

¹¹ 1979 (30) NILQ, 189.

Mr Justice Kenny set out what he described as four of the fundamental doctrines of Irish Nationalism, repeating the analysis of the Criminal Law Jurisdiction Bill judgment and went on:-

“I want to emphasise that these beliefs are in the political and not in the legal order. Article 3 was intended to be and is a statement of political belief and not of law: the right of the Parliament established by the Constitution to exercise jurisdiction over the whole of the island which is referred to in article 3, is not a claim to a legal right to do this. It is the expression of a right which has its sole origin in the political doctrine of Irish nationalism. When the people enacted the Constitution, they did not make a legal claim that the Parliament and Government established by the Constitution had any legal powers under international or national law to exercise any power over Northern Ireland”.

This theme was taken up in a speech of great subtlety and interest, given by the (by then) Mr Justice Donal Barrington in 1988 as part of the Thomas Davis Lectures on RTE¹². He referred to *the Criminal Law Jurisdiction Bill* case (although perhaps significantly, not to *Boland v An Taoiseach*) and to Mr Justice Kenny’s paper. He stated:-

“the point is that while these doctrines of political nationalism are reflected in article 2 of the Constitution, the Constitution is primarily concerned with the establishment of a parliament and system of Government, and that that parliament, whatever the creeds of Irish nationalism, is expressly prohibited from attempting to legislate for Northern Ireland until such time as the partition problem has been resolved”.

He also made the important point that the Constitution does not purport to be a treaty or a document of international law. He identified as particularly significant the terms of Article 29 of the Constitution which had hitherto been ignored in the context of Articles 2 and 3. It was, as he said, of some significance that in 1936 when the Constitution was being drafted, Mr de Valera was President of the League of Nations and the language of Article 29 is clearly derived from the covenant of the League of Nations, in particular, Article 29.2 which reads:-

“Ireland affirms its adherence to the principle of the Pacific settlement of international disputes by international arbitration or judicial determination”.

Under this analysis, it is entirely appropriate, therefore, that Article 29 is the vehicle chosen to hold the proposed new Article 29.

As Barrington J pointed out, the 1925 Boundary Agreement was a treaty registered with the League of Nations. Accordingly, if the Constitution was to be viewed as a claim to be settled by international arbitration, it would not be difficult to predict the outcome of such an international arbitration, he went on to observe:-

“It is for these reasons that I suggest that the national claim made in article 2 is, for all purposes, of domestic and international law, withdrawn in article 3 until such time as the unity of our country is restored. The formula contained in Articles 2 and 3 is, I suggest, a subtle one in which

¹² Barrington, *The North and the Constitution in de Valera’s Constitution and Ours*. Ed Brian Farrell - Gill & MacMillan.

Mr De Valera has combined nationalist ideals with common sense and political caution in a manner not untypical of the man”.

Barrington J suggested that in fact, the Constitution committed the State to seek a peaceful method of reunification of the country. He concluded his lecture by suggesting that the formulation of policy in relation to any possible solution to the Northern Ireland problem, is “*under our Constitution a matter for the Government*”. There is nothing in Articles 2 or 3 he suggested:-

“To inhibit the Government in its quest for an interim solution, provided that the aim of ultimate national unity is preserved. If at any time the question of setting up any form of All Ireland Body exercising executive, legislative or judicial powers should arise, a Constitutional Referendum would be necessary, but if that were to happen, we would be on the road to an ultimate solution”.

There the matter lay, until the Anglo Irish Agreement of the 15 November 1985. The Agreement was challenged in the Irish Courts by Christopher and Michael McGimpsey. One of the arguments they made (although not the best argument) was that the Government’s recognition that the status of Northern Ireland could only be changed with the consent of the majority of the population of Northern Ireland, was contrary to the provisions of the Constitution of Ireland, 1937. They contended that to recognise the present status of Northern Ireland violated Articles 2 and 3 of the Constitution. This was, I think, their political argument. Their better legal argument was that the Secretariat established restricted the Government’s exercise of the external relation powers of the State and required a constitutional amendment.¹³

As luck would have it, the matter was heard in the High Court by none other than Barrington J. As bad luck would have it, both sides contended that Articles 2 and 3 amounted to a claim as of legal right, to jurisdiction to legislate with effect for Northern Ireland. Barrington J, however, took the opportunity of advancing the analysis developed in his lecture and that of Kenny J and derived ultimately from the decision in the *Criminal Law Jurisdiction Bill, 1977*, and which after all, was the then authoritative view of the Supreme Court. He rejected the plaintiff’s claim and the matter was appealed to the Supreme Court. Before the Supreme Court appeal was heard, Mr Justice Costello decided *McGlinchey v Ireland and the A.G. (No. 2)*¹⁴ and repeated and endorsed the construction of the Articles first advanced in the *Criminal Law Jurisdiction Bill* case observing - “*this claim to unity exists in the political and not in the legal order*”. There was thus an impressive, line of authority on this point by the time the Supreme Court decided the appeal in *McGimpsey*.

The Supreme Court¹⁵ upheld the decision of the High Court but adopted a significantly different analysis. The judgment of Finlay J was joined by Walsh, Griffin and Hederman JJ. In one sense, the simple answer to this aspect of the case was that given by both Barrington J and Finlay J in their respective judgments, that is, that an agreement recognising that the change in the status of Northern Ireland was something that requires the consent of the majority of the people of Northern Ireland, was not only not inconsistent with the Constitution but was compatible with the obligations

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¹³ Relying on *Crotty v An Taoiseach* [1987] IR 713.

¹⁴ [1990] IR 220.

¹⁵ Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ.

undertaken by the State in Article 29 Sections 1 and 2, whereby Ireland affirmed its adherence to the principles of pacific settlement of international disputes.

However, Finlay J went on to deal with the theoretical argument as to the status of the claim to unity. He stated:-

“I am not satisfied that the statement that this national claim to unity exists not in the legal but political order and is one of the rights which are envisaged in Article 2, necessarily means that the claim to the entire national territory is not a claim of legal right”

He declined to follow the decision in the *Criminal Law Jurisdiction Bill* case and set out that the true interpretation of the Constitutional provisions was as follows:-

- (i) The reintegration of the national territory is a constitutional imperative quoting Hederman J's (dissenting) judgment in *Russell v Fanning*;¹⁶
- (ii) Article 2 of the Constitution consists of a Declaration of the extent of the national territory as a claim of legal right;
- (iii) Article 3 of the Constitution prohibits, pending the reintegration of the national territory, the enactment of laws of any greater extent than that of the laws of Saorstát Éireann;
- (iv) The restriction imposed by Article 3 in no way derogates from the claim as a legal right to the entire national territory.

The arguments so carefully elaborated from the decision of the Supreme Court in the *Criminal Law Jurisdiction Bill* is here dismantled quite peremptorily. It is possible, I think, to suggest that the *McGimpsey* judgment in this regard, is an example of the weakness that I have referred to earlier. The Constitution is treated as a purely legal document. I understand, I think, the argument that since Article 3 refers to the “right” of Parliament to exercise jurisdiction, that that right must be a “legal right” since the Constitution is a “law”. Equally, I think it can be said that it does not really matter whether it is a claim of “legal” or “political” right, since it is probably as offensive to those who wish to be offended however it is characterised. Nevertheless, it is, I think, important to look closely at the question raised and apparently determined in *McGimpsey*, as to the nature of the claim made in Articles 2 and 3.

The phrases “constitutional imperative” and “claim of legal right” are impressive rhetorical soundbites, but it is not entirely clear what they mean, particularly as a matter of law. What is a “claim of legal right” and to what court or tribunal is that claim directed? The Constitution is not a pleading, nor is it indeed a document of international law. There is, in the phrase, a sense that the claim to national unity is something that some hypothetical court might grant.

The Chief Justice's reasoning, I think, reflects the difficulty lawyers have with Articles 2 and 3 and particularly when the matter is treated as one of pure legal interpretation. The Chief Justice went on to say that the phrase in Article 3 “without prejudice to the right of the Parliament etc ...” was:-

“an express denial and disclaimer made to the community of nations of acquiescence to any claim that, pending the reintegration of the national

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¹⁶ [1988] IR 505.

territory, the frontier at present existing between the State of Northern Ireland, is or can be accepted as conclusive of the matter or that there can be any prescriptive title thereby created and an assertion that there be no estoppel created by the restriction in Article 3 on the application of the laws of the State in Northern Ireland”.

This reasoning and language is familiar to a lawyer, but it is the very struggle to make sense of the text which is significant. There is something unconvincing about an analysis which treats Articles 2 and 3 as a pleading in some sort of large scale constitutional boundary and right of way dispute. In what circumstances and in what tribunal could it be that the claim to national reunification could be defeated by a counterclaim relying on acquiescence, prescription and estoppel ?

I suggest that a close reading of the clause as a “claim of legal right” means nothing more substantial than a claim of “political right”, although of course, it sounds and was understood to be much more significant. The whole progression is, I think, a demonstration of the difficulty lawyers have with these aspects of the constitutional text, particularly when they are viewed solely as matters of law to be compared with other provisions and analysed by reference to the concepts such as estoppel or prescription.

The assertion that the Articles amount to a claim of legal right has a certain attractive robust simplicity to it. The argument is, I think, that there is a claim of a “right” which must be a legal right, since the Constitution is a law. By the same token, the contrary argument, that the claim is one which lies essentially in the political realm, is easily dismissed as an attempt to depart from the plain words of the text. But as I have attempted to show, in my view, the true legal interpretation of the Constitution is that it is not just a legal but also a political document in the sense that it expresses not just a matter of legal right, but also political philosophy.

That view, which holds that most of Article 2 and 3 is in essence, a matter of political philosophy, would I think, gain important support from the law in the United States which of course, was significantly influential in the development of constitutional law here. The United States Supreme Court has developed a *political question doctrine* which holds that there are certain limited provisions of the Constitution which are simply not susceptible to judicial decision making. The doctrine is associated, in part, with Judge Felix Frankfurter and to some extent suffered when his reputation temporarily declined. However, it remains part of the constitutional jurisprudence of the United States. A classic example of this doctrine is the guarantee clause in Article IV paragraph 4 which provides that:-

“The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against Invasion ...”

This has been held not to be a:-

“Repository of judicially manageable standards which a court could utilise independently in order to identify a States lawful Government”¹⁷

This language could, I think, be applied with benefit to some of the more unmanageable provisions of Articles 2 and 3. Professor Alexander Bickel

¹⁷ *Baker v Carr* (1962) 369 US 186223.

in his famous book, *“The Least Dangerous Branch”* 1962, advanced a rationale for the political question doctrine. He argued:-

“Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court’s sense of lack of capacity compounded in unequal parts of:-

- (a) the strangeness of the issue and its intractability to principled resolution;
- (b) the sheer momentousness of it, which tends to unbalance judicial judgment;
- (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;
- (d) finally, the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from”.

Not all of this is directly applicable in Ireland¹⁸ but these are ideas that could, I think, profitably be reflected on in the light of the Irish cases on Articles 2 and 3. These Articles present to the lawyer strange issues which are intractable to principled resolution. They are, nevertheless, momentous issues which can unbalance judicial judgment. The judicial judgment on such issues, is after all, the judgment of persons whose undoubted expertise lies in matters of law and not political philosophy, but nevertheless, produce judgments which are given much more importance in the general political world that they perhaps deserve on their own merits. One modest suggestion I would make, therefore, is that there may still be a place for a political question doctrine as a principled tool in constitutional analysis in this jurisdiction.

It is useful, given that background, I think, to look now to the proposed changes in Articles 2 and 3. Like the clauses they are intended to replace, it appears that they were not drafted principally by lawyers and are not thought of primarily as a legal text. Instead, they operate, successfully, in my view, at the level of political philosophy. However, the Constitution is law, will be sought to be invoked in court and, therefore, these phrases, having performed their task at the level of political rhetoric, will remain to be scrutinised by the more pedestrian and pragmatic turn of mind that lawyers adopt when approaching any text which requires interpretation.

Approached in this way, then just like the original Articles 2 and 3, I suspect that they would be off-putting to any lawyer seeking a clear answer to a client’s problem. The solution the Articles propose to the political problem posed by the current Article 2 and 3 is, I think, both

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¹⁸ The fact that judicial review is not explicitly provided for by the US Constitution and the fact that the bulk of Supreme Court cases are by way of petition for certiorari where the Court has a discretion to hear or refuse to hear the case, have contributed to an approach emphasising judicial restraint. see e.g. Hand, *“The Bill of Rights”*: “Since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer”. See, however, the opposite view put by Herbert Wechsler: *“Towards Neutral Principles of Constitutional Law”*, 73 Harv.L.Rev.1:

clearly discernible and clever. The definition of nation by reference to territory is abandoned and instead the focus is on the people. It is then possible to express the aspiration of the people to unity by peaceful means and only with the consent of the majority in Northern Ireland democratically expressed.

If we apply a more mechanical legal analysis, some interesting aspects emerge. The new Articles 2 and 3 will slot into an existing document and use terminology which is used elsewhere in the text. The new Article 2 asserts in ringing terms:-

“The entitlement and birthright of every person born in the Island of Ireland which includes its islands and seas, to be part of the Irish Nation”.

Article 3 goes on to speak for and express the firm will of the Irish Nation. The concept of “Nation” and “national” are concepts which appear elsewhere in the Constitution. For example, Article 6 identifies the right of the people to designate the rulers of the State and “in final appeal, to decide all questions of National policy”. Articles 7 and 8 refer to the national flag and language. Article 13.7.1 refers to the President’s right to address the people on “matters of national importance”. Articles 16 to 27 refer to and identify the powers of the “National Parliament”. However, the most significant provision in relation to the Nation is Article 1 which reads:-

“The Irish Nation hereby affirms its inalienable, indefeasible and sovereign right to choose its own form of Government, to determine its relations with other nations and to develop its life, political, economic and cultural in accordance with its own genius and traditions”.

This is the nation to which the new Article 2 asserts it is the right and birthright of every person in Ireland to belong.

In Fionnuala O’Connor’s book referred to above (*In search of a State: Catholics in Northern Ireland*), two incidents are described which still have the capacity to raise the blood pressure. In 1925, as the Boundary Commission was being debated, a deputation of Northern Nationalists requested permission to address the assembled Dail. The matter was left to the Dail to decide. Both Messrs McGilligan and Cosgrave objected even to the question of procedure being debated. Mr Cosgrave said:-

“An occasion may arise in future in which some of our own citizens for whom we have a direct responsibility may have a case if a precedent has been made in respect of those for whom we only act as trustees”.

The deputation was sent away unheard.

In 1951, four Northern anti-partition league MPs and two nationalist Senators at Stormont sought admission to the Dail as elected representatives of part of the national territory. In the terms of the new Articles 2 and 3, here were members and representatives of the nation seeking the entitlement to participate in the national parliament. Again, they were sent away.

In recent days, this issue has arisen again in the political sphere, but I do not think that the claim has been advanced as a constitutional entitlement. I do not know how any such claim, if made, would have been resolved under the Constitution before the recent amendment. The strong terms of the new Article 2 may make some difference. It becomes, at a minimum, difficult, I think, to explain in a satisfactory and constitutional way, why someone in Northern Ireland who has accepted their birthright as part of the Irish nation can or should be excluded from, for example, referenda where the Irish nation chooses its form of government, develops its political life and resolves in final appeal, questions of national importance. It is not inconceivable that the Supreme Court may yet have reason to

revisit the political question doctrine and find new merit in the idea that these guarantees operate at a political rather than legal level: because after all, one thing the Good Friday Agreement triumphantly demonstrates is that these matters are most satisfactorily dealt with by the People.

CAN ROSES SURVIVE ON REGISTERED LAND?

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The decisions in the two *Re Rose* cases¹ will shortly celebrate their fiftieth birthdays. Both are well known. In *Re Rose*² the question for the Court of Appeal was whether estate duty was payable following transfers by the registered owner of shares in a company. Liability to duty depended on whether the shares could be said to have been transferred before 10 April 1943. If the shares had been transferred before that date, no liability would exist. If they had not, duty would be payable. The problem was that while the instruments of transfer were dated 30 March 1943, the transfers were not recorded in the company's books until 30 June 1943. The court held that no duty was payable, on the basis that by executing the transfers and handing over the share certificates the registered owner had constituted the transferee beneficial owner of the shares. Evershed MR did not see *Milroy v Lord*³ as preventing the view that the donor was, by the necessary effect of his own deed, a trustee of the legal estate for the donee, pending registration.⁴ Jenkins LJ explained:

“the [transferor] had . . . done all he could, in appropriate form, to transfer the whole of his interest, but so far as the legal title was concerned, it was not in his power himself to effect the actual transfer of that, inasmuch as it only could be conferred on the transferees in its perfect form by registration of the transfers.”⁵

The same conclusion had been reached by the learned judge in the earlier *Re Rose* case.⁶ The question there for Jenkins J, as he then was, was whether a testator had made an *inter vivos* gift of his shares in a company. The testator had executed the necessary transfer, but the transfer had not been registered at the time of the testator's death. The court held that as the testator had done everything in his power to divest himself of the shares the gift was effective *inter vivos* so that the shares did not form part of the testator's estate.

The decisions in the *Re Rose* cases have been the subject of discussion and strong criticism.⁷ It is not the purpose of this note to recross well-trodden ground, but rather to consider how the decisions in the *Re Rose* cases apply to transfers of registered land.⁸ As in the case of the transfer of

¹ *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] Ch 78; *Re Rose, Rose v IRC* [1952] Ch 499.

² [1952] Ch 499.

³ (1862) 4 De G F & J 264.

⁴ [1952] Ch 499, 512.

⁵ *Ibid*, 515.

⁶ [1949] Ch 78.

⁷ See *eg* the different views expressed by Sheridan, 'Informal gifts of choses in action' (1955) 33 Can Bar Rev 284 and McKay, 'Share transfers and the complete and perfect rule' (1976) 40 Conv (NS) 139.

⁸ Although in *Pilewska v Haduch* (1962) 184 EG 11 Wilberforce J noted that there was little authority on the question whether transfers of registered land

shares in a company, transfer of land, the title to which is registered at the Land Registry, takes the form of execution of a transfer by the registered owner followed some time later by the registration of that transfer in the Registry. The system of registration of title having been modelled upon the existing registration systems by which stock or shipping could be transferred, it would not be surprising to find the principles upon which the decisions in the *Rose* cases are based being applied to the transfer of registered land. The implications of the decisions and their application in this context are however uncertain.

ENGLISH AUTHORITIES

The first occasion⁹ in which a problem similar to that in the *Rose* cases came before the courts here in relation to registered land appears to be *Pilewska v Haduch*¹⁰ in which the plaintiff sought a declaration that she was entitled to a share in a house by reason of a transfer of the property by the registered proprietor. The defendant argued that the transfer was an incomplete gift, and ineffective. Wilberforce J held first, that the transfer could not be regarded as a voluntary transfer,¹¹ but secondly, that on consideration of the relevant provisions of the Land Registration Act 1925 it was not correct to say the document was incomplete. While noting that under the Act a registered estate does not pass until registration,¹² Wilberforce J went on to point out that the Act allows for the creation of minor interests.¹³ His Lordship held that the deed was effective to transfer an equitable interest in half the proceeds of sale of the property, and granted a declaration to that effect.

*Harden v Thompson*¹⁴ is another first instance decision concerning a voluntary transfer which was not registered. Shortly after the transfer was executed the registered proprietor (the plaintiff) and the transferee had a row which resulted in the plaintiff instructing his solicitors that he had changed his mind about the transfer. The transferee argued on the basis of *Re Rose*¹⁵ that the plaintiff had done all that was required of him to perfect the gift, and that the transferee was accordingly entitled to be registered as proprietor. Plowman J decided the case however in favour of the plaintiff on the basis that the plaintiff's purpose in making the gift had failed, and

should be treated in the same way as transfers of shares, there is nothing in the later cases to suggest that the principles in the *Rose* cases do not apply to registered land.

⁹ See however *Smith v Express Dairy Co Ltd* [1954] JPL 45 and *Lever Finance Ltd v Needleman's Trustee* [1956] Ch 375 which raise different questions as to the position of the transferee.

¹⁰(1962) 184 EG 11.

¹¹ As the transfer contained a covenant by the plaintiff to pay half the instalments of the mortgage on the property. In *Re Rose* [1952] Ch 499 Evershed MR noted that the transfer to Mrs Rose contained what was in effect a covenant by her, to accept the shares on the conditions imposed on shareholders in the company, thereby relieving the transferor of his liability as corporator. Nonetheless his Lordship found it unnecessary to pursue the question of consideration ([1952] Ch 499, 513).

¹² Land Registration Act 1925, s19; cf. Land Registration Act (NI) 1970, s34(3).

¹³ See Land Registration Act 1925, s101.

¹⁴ (1969) 212 EG 1364.

¹⁵ [1952] Ch 499.

that the beneficial interest in the property was accordingly held by the plaintiff.¹⁶

The *Rose* decisions were however the basis for the decision of the Court of Appeal in *Mascall v Mascall*.¹⁷ This again came to court as the result of a quarrel between the parties to a transfer, following which the registered proprietor (the plaintiff) had changed his mind about the transaction. In an action for a declaration that the transfer was of no effect, the Court of Appeal applied the *Rose* decisions with the result that the plaintiff's action failed. According to Lawton LJ, the plaintiff:

“had done everything in his power to transfer the house to the defendant. He had intended to do it. He had handed over the land certificate. He had executed the transfer and all that remained was for the defendant, in the ordinary course of conveyancing, to submit the transfer for stamping and then to ask the Land Registry to register his title.”¹⁸

The argument, based on section 18 of the Land Registration Act 1925, that the plaintiff could have done more, by himself presenting the transfer for registration, was rejected, as in the ordinary course of events this would be a matter for the transferee.

The latest of the authorities in which the *Rose* cases have been called in aid to determine questions arising from the execution but not registration of a transfer of registered land is *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd*.¹⁹ Here a registered lease contained a provision entitling the lessee to determine the lease at a specified date. A further provision stated that this right of termination was personal to the lessee and would cease to have effect upon the assignment of the lease by the lessee. The lessee executed a transfer of the registered leasehold estate in favour of its parent company. This transfer was not however presented for registration. Some time later the lessee gave notice terminating the lease pursuant to the provision noted. The question for the court was whether this notice was valid.

At first instance²⁰ Judge Paul Baker QC, having reviewed the *Rose* cases, held that the notice was not valid:

“The way I would put it is this. I accept, in effect, the defendant's submissions, that, where it is necessary to fix a date on which the assignment takes place, that date, in my judgment, is the date on which it is completed. The tenant/assignor gives up the property on that date; he has no control over the stamping of the transfer, or its submission to the Land Registry. He becomes a bare trustee for the assignee as regards the legal title. The landlord, a fortiori, has no such control. There is no ground for suggesting that either the assignor or the landlord can compel the assignee to submit the transfer for registration.”²¹

¹⁶ The case is noteworthy also for Plowman J's discussion of the admissibility of evidence, foreshadowing *Tinsley v Milligan* [1993] 3 WLR 126.

¹⁷ (1984) 50 P & CR 119.

¹⁸ *Ibid*, 125.

¹⁹ (1997) 75 P & CR 223.

²⁰ [1996] Ch 51.

²¹ *Ibid*, 67.

On appeal, the Court of Appeal held that the notice was valid and accordingly that the lease had been determined. The critical question, according to Mummery LJ, was whether there had been an assignment of the lease, and if so, when that event occurred. *Gentle v Faulkner*²² was taken as authority that as between lessors and lessees 'assignment' meant assignment of the legal estate, which would take place only if and when registration took place.

Leaving aside questions of construction and the application of *Gentle v Faulkner*, the judgment of Mummery LJ illustrates one of the problems which are inherent in the *Rose* decisions. His Lordship made it clear that the question for determination in *Brown & Root* involved a different relationship, and different considerations, to that in the *Rose* cases. His Lordship explained:

“This case is not a matter of beneficial ownership between parties to the transfer of the lease: the issue of assignment or no assignment affects the legal position of a third party, the lessors, who have given their licence to assign but are not a party to the transfer. As was observed by Jenkins LJ in *Re Rose* it is necessary to keep clear and distinct the position between the transferor and the transferee and the position of a third party. Transfer of the beneficial title is not, in this context, relevant to the legal relationship between the lessees and the lessors. The issue is not what rights [the assignor] and [the assignee] have against each other, but what rights [the assignor] and [the landlord] have against each other. That is a question of legal, not equitable, rights.”²³

The fact that for some purposes a gift may on the principles in the *Rose* cases be regarded as complete, while for other purposes it is incomplete is just one of the difficulties. Other questions requiring determination are, more fundamentally, should anything short of registration suffice for any purposes, and if so, what acts are necessary if the unregistered transfer is to have effect.

COMMONWEALTH AUTHORITIES

It is not surprising to discover that Commonwealth jurisdictions where systems of registration of title have long been in place have encountered the difficulties under consideration.²⁴

Anning v Anning

Differing opinions on the effect of an unregistered voluntary transfer of registered land go back as far as *Anning v Anning*²⁵ in which Griffith CJ considered that if all that remains to be done to complete the transaction could be done by the donee himself, so that he does not need the

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²² [1900] 2 QB 267.

²³ (1997) 75 P & CR 223, 230.

²⁴ For other relevant authorities, not however involving registered land, see *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9; *Olsson v Dyson* (1969) 120 CLR 365; *Taylor v Deputy Federal Commissioner of Taxation* (1969) 123 CLR 206. See also Zines, *Equitable assignments: when will Equity assist a volunteer?* (1965) 38 ALJ 337; Seddon, *“Imperfect gifts of Torrens title land”* (1974) 48 ALJ 13.

²⁵ (1907) 4 CLR 1049.

assistance of the court, the gift will be regarded as complete.²⁶ In the same case however Isaacs J took the opposite view, saying that if for any reason, including want of registration, the transfer of the legal title is incomplete equity will regard the gift as still imperfect and will not enforce it.²⁷ "In such a case," his Honour continued, "the fact that the assignor has done all that he could be required to do is not applicable."²⁸ The same view appears to be the basis upon which the Alberta Supreme Court held in *Smith v Smith*²⁹ that an unregistered voluntary transfer had been validly revoked even though the donor had handed the transfer and the certificate of title to the donee. The third member of the court in *Anning v Anning*, Higgins J, appears to have taken the view that what is required is that the donor must have done everything which could have been done, either by the transferor or by the transferee, to perfect the gift, emphasising that "[w]hat the courts look at is what the donor might have done."³⁰ This view has not however proven popular.³¹

Brunker v Perpetual Trustee Co (Ltd)

Although taking different views, each of the members of the court in *Anning v Anning* was concerned to see how an unregistered transfer would be seen in Equity. The maxims that "equity will not assist a volunteer" and "equity will not perfect an imperfect gift" are well known. The judgments in *Anning* differ in how these principles should operate. A different proposition was put forward by Dixon J in *Brunker v Perpetual Trustee Co (Ltd)*.³² His Honour considered that difficulties of reconciling the maxims with holding a donor bound by a voluntary unregistered transfer could be circumvented if the transferee were seen as having a statutory right to have himself registered as owner.³³ Such a right would not depend on the doctrines of equity, and would avoid the need to explain how a transferee could hold an equitable estate in the face of other provisions of the legislation³⁴ providing that until registration no dealing would be effective to pass any estate or interest to the transferee. The relevant question, according to Dixon J, is whether by his acts the donor has placed the donee in such a position that under the statute the donee has an indefeasible right to have the transfer registered.³⁵

²⁶ *Ibid*, 1057.

²⁷ *Ibid*, 1069. See also the view of Herdman J in *Scoones v Galvin* [1934] NZLR 1004, 1022, that bearing in mind the policy of the relevant New Zealand legislation it was 'very difficult to escape the view that a gift such as was proposed in the present case is never complete until registration of a transfer is actually effected.'

²⁸ *Ibid*.

²⁹ (1915) 21 DLR 861.

³⁰ (1907) 4 CLR 1049, 1082. For interpretation of the view of Higgins J see Cullity and Ford, 'Gifts of future income from choses in action' (1966) 30 Conv (NS) 286, 293 and McKay, 'Share transfers and the complete and perfect rule' (1976) 40 Conv (NS) 139, 140 and 142.

³¹ See *Corin v Patton* (1990) 169 CLR 540; Seddon, 'Imperfect gifts of Torrens title land' (1974) 48 ALJ 13; McKay, 'Share transfers and the complete and perfect rule' (1976) 40 Conv (NS) 139; the view of Higgins J appears to be the same as that rejected in *Mascall v Mascall* (1984) 50 P & CR 119.

³² (1937) 57 CLR 555.

³³ *Ibid*, 599.

³⁴ Real Property Act 1900 (NSW), s41.

³⁵ (1937) 57 CLR 555, 602.

The proposition that the donee under a voluntary transfer has a statutory right to registration, and that this would provide a satisfactory basis upon which the unregistered transfer cases could be determined, was accepted by Brennan J in *Corin v Patton*.³⁶ Other members of the court in the same case however were critical of the proposition. Mason CJ and McHugh J thought that later cases had not endorsed Dixon J's view, which "no longer represent[ed] a correct statement of the law in this area."³⁷ Deane J found it difficult to discern the reasons by which Dixon J rejected the view that the donee had an equitable estate, if the donor had done what was necessary to make the donee's right to registration indefeasible.³⁸ The judgment of Dixon J should be seen, Deane J explained, not as establishing a new kind of statutory right, but as identifying the test for determining whether the stage has been reached when a gift is complete and effective in equity.³⁹

Corin v Patton

The relevant test, according to Deane J in *Corin v Patton*,⁴⁰ is whether the donor has done all that is necessary to place the vesting of the legal title within the control of the donee and beyond the recall or intervention of the donor.⁴¹ Once that stage has been reached the equitable interest in the land vests in the donee, and the donor is bound in conscience to hold the property as trustee for the donee pending registration. Mason CJ and McHugh J stated the principle to be that if an intending donor has done everything that is necessary to effect a transfer of legal title, then equity will recognise the gift.⁴² The question is whether what the donor has done is sufficient to enable the legal transfer to be effected without further action on his part.⁴³ If he has, an equity arises enabling the donee to procure the vesting of the legal title in himself.⁴⁴ The other members of the court took different approaches. As we have seen, Brennan J accepted the view of Dixon J in *Brunker v Perpetual Trustee Co (Ltd)* that the donee has a statutory right to registration which conferred no equitable estate on the donee. Accordingly, on the death of the donor without registration having taken place, the donee had nothing which could prevail against a surviving joint tenant. For the final member of the court, Toohy J, the relevant issue was simply that the transfer from the donor had not been registered at the time the donor died.⁴⁵

SATISFYING THE TEST

If it is accepted that actions falling short of registration of the donee should suffice for a donee to be regarded as owner of the property

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³⁶ (1990) 169 CLR 540, 570. See also *Stefanovic v Petrovic* 1989 NSW LEXIS 11052.

³⁷ *Ibid.*, 556.

³⁸ *Ibid.*, 581.

³⁹ *Ibid.*, 582.

⁴⁰ (1990) 169 CLR 540; Rossiter, 'Corin v Patton in the High Court; the status of a volunteer with respect to Torrens title land before registration' (1990) 64 ALJ 727.

⁴¹ *Ibid.*

⁴² *Ibid.*, 559.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 560. See also *Edwards v Sir Moses Montefiore Jewish Home* 1990 NSW LEXIS 10387.

⁴⁵ *Ibid.*, 593.

transferred, the question becomes what actions will be sufficient. Some principles can be stated with reasonable certainty; other matters present problems. Execution by the donor and delivery of an instrument of transfer in the appropriate form are essential.⁴⁶ The fact that some other matter, such as clearing off the name of a deceased joint owner, has to be attended to before the transferee can be registered, does not prevent the gift from being complete.⁴⁷ As we have seen, the better view appears to be that the fact that the donor could procure registration of the transfer does not prevent the gift being seen as complete.⁴⁸ In *Cope v Keen*⁴⁹ Kitto J held that what is involved is:

“at least that the memorandum of transfer should be delivered to the [transferee] by or on behalf of the [transferor] with the intention on his part of then and there parting with it and with the property in it⁵⁰ so that the [transferee] should be entitled as against him to cause the instrument to be registered”.

A more difficult issue arises in connection with the land certificate relating to the property. The question is whether a gift can be regarded as complete if the donor hands over an executed transfer but retains possession of the land certificate. In *Scoones v Galvin*⁵¹ the New Zealand Court of Appeal considered that in such a case the donor has not done all that is necessary for him to do, and so could revoke the gift. Although Taylor J in *Cope v Keen*⁵² expressed uncertainty as to this requirement under the relevant New South Wales legislation,⁵³ the view in *Scoones v Galvin* was accepted by the Australian High Court in *Corin v Patton*.⁵⁴ *Corin v Patton* itself illustrates the problems which can occur with the apparently straightforward requirement that the certificate be produced. There the transferor was one of two joint tenants of land which was mortgaged to a bank. The transferor executed a transfer of her interest in the land to a third party who in turn executed a deed of trust declaring that he held the property on trust for the transferor. The intention was to effect severance of the jointure so that the transferor could leave her share in the land by will. Before the transfer was registered the transferor died. The question for the court was whether the jointure had been severed by the transfer. The court was unanimous in its decision that it had not, though the various members of the court arrived at this decision by different routes. The majority of the court considered that the failure of the donor to take steps to secure the production of the land certificate was decisive.

AUTHORISATION OR ACTUAL DELIVERY?

Where the land certificate is not in the hands of the donor, the position becomes more difficult. By definition it is not possible for the donor to

⁴⁶ See *Brunker v Perpetual Trustee Co (Ltd)* (1937) 57 CLR 555; *Mascall v Mascall* (1984) 50 P & CR 119.

⁴⁷ *Edwards v Sir Moses Montefiore Jewish Home* 1990 NSW LEXIS 10387.

⁴⁸ *Mascall v Mascall* (1984) 50 P & CR 119.

⁴⁹ (1968) 118 CLR 1, 7.

⁵⁰ As to the donor's intention, see also *Harden v Thompson* (1969) 212 EG 1364; *Djokovic v Petrovic* 1988 NSW LEXIS 9721.

⁵¹ [1934] NZLR 1004.

⁵² (1968) 118 CLR 1. See also *Brunker v Perpetual Trustee Co (Ltd)* (1937) 57 CLR 555.

⁵³ See also *Brunker v Perpetual Trustee Co (Ltd)* (1937) 57 CLR 555, 593.

⁵⁴ (1990) 169 CLR 540.

hand the certificate over. Short of retrieving the certificate from the third party, all the donor can do is to authorise the third party to produce the certificate. The question is whether such authorisation is enough to make the gift complete, or whether actual production is required. Typically the problem will arise where the property is subject to a mortgage, as in *Corin v Patton*, but the situation can equally arise where the certificate is in the hands of a third party simply for safekeeping. Assuming that the third party would be compellable to produce the certificate for registration of the transfer, will authorisation by the donor suffice for the gift to be regarded as complete?

Different views may be found in the authorities. In *Pilewska v Haduch*⁵⁵ Wilberforce J held the gift complete notwithstanding that the land certificate was held by a mortgagee. The judgment does not indicate what steps, if any, had been taken to secure production of the certificate. In *Re Ward*⁵⁶ Neville J held that a gift had been completed where the donor had authorised the release of the land certificate by his solicitors. Authorisation alone was however held in *Costin v Costin*⁵⁷ to be insufficient to satisfy the test. There a father and son were joint tenants of land. The father executed a voluntary transfer of his share in the property to another son. The land certificate was in the hands of a firm of solicitors, and the father signed an authority to the solicitors to produce the certificate to the Land Titles Office to enable the transfer to be registered. The solicitors informed the father that they required authorisation also from the other joint tenant of the land. In the event this was not forthcoming. The question was whether in these circumstances the gift by the father was effective. At first instance Santow J held it was. On appeal however the New South Wales Court of Appeal held that the test had not been satisfied. Brownie AJA explained that though the donor intended to perfect his gift, he had failed to achieve that aim before changing his intention. According to Sheller JA, although the father had given authorisation for the land certificate to be released, until such time as that authority was acted upon, the authority could be revoked.⁵⁸

If this is correct, the test whether or not a gift is complete depends not on whether the donor has done all that is required of him, but rather on whether he has put the matter beyond his recall. So long as he can countermand his instruction to release the land certificate, the gift is not complete. On one view, this is acceptable enough: the donor's action in making the gift is voluntary, and until the last minute he should be free to change his mind. On another view however, the effectiveness of the gift depends on the vagaries of if and when the party in possession of the land certificate carries out the donor's instruction to hand it over. So far as the the actions of the donor remain relevant, it is his failure to act (*ie* the absence of any countermanding of his instruction) rather than the positive steps he has taken that is being considered.

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⁵⁵ (1962) 184 EG 11.

⁵⁶ [1968] WAR 33; (1968) 42 ALJR 226.

⁵⁷ 1997 NSW LEXIS 261.

⁵⁸ *Cf Re Anderson* [1956] NZLR 661, where in treating the question whether the estate of a deceased testatrix had been finally distributed as the same as whether the trustee of the estate had made an effective gift, McGregor J pointed out that the documents which had been delivered to the beneficiary's solicitors to enable the beneficiary to be registered could not be recalled by the trustee. See also *Brunker v Perpetual Trustee Co (Ltd)* (1937) 57 CLR 555, 609 (McTiernan J).

If production of the land certificate rather than authorisation is essential for a gift to be regarded as complete, it is not beyond imagination that a third party who carries out the donor's instructions promptly will bring about the success of a gift while if he had acted less expeditiously the gift could have failed, either by the donor having countermanded his instruction, or dying before the instruction is carried out.⁵⁹ Whether the disappointed donee would have any remedy in the latter case on the basis of *White v Jones*⁶⁰ may have to be considered if the courts here adopt the view expressed in *Costin v Costin*.

JOINT PROPRIETORS

Another difficulty arises where the land is jointly owned by the donor and another registered proprietor, as in *Corin v Patton* and *Costin v Costin*. As was pointed out by Toohey J in *Corin v Patton*,⁶¹ no one of the joint proprietors has an individual land certificate relating to his own interest, "[a]nd so to encompass delivery of the certificate in the steps required of a joint tenant seeking to sever the joint tenancy may be to make a somewhat unreal demand".⁶² In *Costin v Costin* Sheller JA opined that the land certificate could not have been handed over without the authority of the other joint tenant. The question in these circumstances is whether such other joint tenant could frustrate the intentions of the transferor by refusing to allow the certificate to be lodged for registration of the transfer. If so, severance could clearly not be effected.⁶³ This aspect of the difficulty arising from the decision in *Costin* was considered in *Motor Auction Pty Ltd v John Joyce Wholesale Cars Pty Ltd*.⁶⁴ Here again an unregistered transfer failed for want of evidence that the transferor had authorised release of the land certificate to enable registration to take place. In relation to the question of authorisation of the release of the land certificate where there are joint proprietors, Santow J held that it was arguable that all the joint tenants must join in the request to lodge the certificate, but that a joint tenant directed by the putative donor to produce the certificate of title would not be permitted to frustrate registration by refusing to produce or cause production of the certificate. On the basis of *Costin v Costin*, however, the fact that a third party such as a joint proprietor may be compellable to produce the land certificate may be small consolation for a donee if the donor has, during the time the land certificate is not produced, changed his mind.

ORDERS FOR PRODUCTION

The Land Registration Act 1925 requires production of the land certificate when a dealing is registered.⁶⁵ Both the Act and the Land Registration Rules enable the Registrar to order production of a certificate.⁶⁶ Similar provisions exist in Northern Ireland.⁶⁷ If a donor hands over a transfer but fails to produce the land certificate, or a third party with the land certificate fails to produce it after being instructed by the donor to do so,

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⁵⁹ See below.

⁶⁰ [1995] 1 All ER 691.

⁶¹ (1990) 169 CLR 540.

⁶² *Ibid*, 590.

⁶³ See concerns of Santow J at first instance in *Costin v Costin* 1994 NSW LEXIS 13222.

⁶⁴ 1997 NSW LEXIS 406.

⁶⁵ Land Registration Act 1925, s64(1).

⁶⁶ *Ibid*, s64(2); Land Registration Rules 1925, r15.

⁶⁷ Land Registration Rules (NI) 1994, rr 128 and 129.

could the ineffective gift be cured either by the existence of the Registrar's power to order production, or its exercise? In *Scoones v Galvin*⁶⁸ the New Zealand Court of Appeal thought not in the case of similar New Zealand legislation, saying that if upon being called by the Registrar to produce the certificate a donor refused on the basis that the transaction was by way of gift and that he did not intend to complete the gift, such reply would be an effectual answer to the Registrar's requisition.

DEATH OF DONOR

In a number of cases the question whether a gift is complete so far as Equity is concerned has arisen because the donor has died before registration has taken place. If the gift is regarded as complete, then the death of the donor has no relevance: the property is already the donee's. So in the *Rose* cases the court considered that the deceased had made an effective *inter vivos* gift of shares. The same result was reached in *Re Ward*,⁶⁹ *Scoones v Galvin*⁷⁰ and *Kennedy v Tickner*⁷¹ in the case of transfers of land. The fact that the donor dies does not prevent registration taking place thereafter. If however the gift is not seen as complete by the time the donor dies, then the position is otherwise. The donee has no equitable interest which would enable a court to compel the donor's personal representatives to perfect the gift. If in such circumstances the donor was a joint tenant of the property, the absence of any equitable interest in the donee will preclude severance of the jointure, so that the donor's co-proprietor will take by survivorship.⁷² The same result will occur on the basis of the view of Dixon J in *Brunker v Perpetual Trustee Co (Ltd)*,⁷³ viz that the donee has no equitable interest in the land transferred, but rather a statutory right to have himself registered as owner. In *Corin v Patton*⁷⁴ Brennan J held the surviving joint proprietor entitled to the property on the basis that on the death of the donor the statutory right of the donee to be registered became valueless.

In *Scoones v Galvin*⁷⁵ a question was raised as to the effect of the death of a donor on any instruction given by him to a third party to produce the land certificate. It was argued for the donee that upon the death of the donor a third party in possession of the land certificate could no longer be said to be holding the certificate on behalf of the donor, so that the gift thereupon became complete. Fair J thought that the death of the donor would determine any authority which his solicitor had to produce the title for the purpose of perfecting the gift. This was accepted as correct by Dixon and McTiernan JJ in *Brunker v Perpetual Trustee Co (Ltd)*.⁷⁶ On the basis of *Costin v Costin*⁷⁷ however, any question as to the effect of the donor's death in cancelling his instruction is no longer relevant.

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⁶⁸ [1934] NZLR 1004, 1019.

⁶⁹ [1968] WAR 33; (1968) 42 ALJR 226.

⁷⁰ [1934] NZLR 1004.

⁷¹ [1950] NZLR 62.

⁷² See eg *Corin v Patton* (1990) 169 CLR 540; *Costin v Costin* (1997) NSW LEXIS 261.

⁷³ (1937) 57 CLR 555.

⁷⁴ (1990) 169 CLR 540, 571.

⁷⁵ [1934] NZLR 1004.

⁷⁶ (1937) 57 CLR 555, 599 and 609.

⁷⁷ (1997) NSW LEXIS 261.

CONCLUSION

The Commonwealth authorities illustrate some of the problems created by the *Re Rose* decisions in the case of transfers of registered land. The need for further consideration of the decisions is clear from the judgment of Bryson J in *The Minister, Aboriginal Land Rights Act 1983 v Aboriginal Corporation of the National Aboriginal Conference*:⁷⁸

“The terms in which the law was stated by Turner LJ in *Milroy v Lord* . . . when applied literally to a system of title by a registration (as in *Milroy v Lord* itself) would require that the property be actually transferred to the donee, that is, that the donee should become the registered proprietor. There are statements by judges whose views are entitled to great respect which would accept that less than this is sufficient for the perfect constitution of a gift of the beneficial ownership of land under the Torrens system. The content of any exception has been variously stated, while other judges of high reputation restate the matter substantially as in *Milroy v Lord*. . . If the view of Griffith CJ [in *Anning v Anning*] is to prevail there is, in my respectful view, room for much more consideration and exposition of the reasons why the transferor is to be bound in conscience by anything less than the completion of the process of transfer of registered proprietorship. There is a need for exposition of the point at which the transfer of beneficial ownership becomes complete, which must require some recognisable and distinct but as yet undefined act of adherence to the donation or adoption of it by the donee, and must be final so as to be binding on all concerned, including not only the donor and donee, but also public authorities and revenue authorities who are entitled to enforce onerous obligations against the owners of land, and to such an extent that the donor can compel the donee to contribute towards or indemnify the donor against such obligations. There is a need for exposition of the effect of supervening events such as death, liquidation, levy of execution, sequestration in bankruptcy and dissolution affecting the donor. . . . There is also a need to expound the maxims that there is no equity to perfect an imperfect gift and that equity does not assist a volunteer in their application where the donor or some person acting under him intervenes to impede a course towards registration which the donee could otherwise appear to be able to follow, so as to lodge the transfer and obtain registration without obtaining any judicial remedy: such as where the donor or someone claiming under him lodges a caveat or a transfer to some other person, whether or not for value”.

His Honour concluded:

“there do seem to be advantages in the principle as literally stated in *Milroy v Lord*, in which only registration makes the gift binding in equity; and not the least advantage is the difficulty of seeing how any other rule relates to the deeply underlying principle in which equitable remedies exist to prevent reliance on legal rights where it would be unconscionable to rely on them”.

There is nothing in the authorities since these views were stated to suggest a different conclusion. The objection that adoption of such a principle

⁷⁸ 1992 NSW LEXIS 6753.

would focus attention on the action of a third party (the Registrar) and the speed with which he carries out registration rather than the action of the donor, is of less weight since the decision in *Costin v Costin*. It is suggested that the disadvantage inherent in adoption of the principle that a gift is not effective until registration takes place is a lesser evil than the difficulties inherent in the *Rose* cases, illustrated by the recent decisions here and elsewhere concerning registered land.

LANDLORD AND TENANT – A NEW LEASE OF LIFE FOR THE DOCTRINE OF SPECIFIC PERFORMANCE

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INTRODUCTION

When is specific performance available? Being an equitable and therefore discretionary remedy, this has not always been an easy question to answer. In fact the converse question has often resulted in a more fruitful list of certainties, in that the courts in the past had less difficulty in setting out the situations in which the remedy would not be considered an appropriate answer to the problem at hand. Thus, law students learned that specific performance would not be available where, for example, damages would be an adequate remedy,¹ or undue hardship would be caused to the defendant,² or it would be futile,³ or in cases concerning contracts of service, to name but a few. In recent times, however, it has begun to appear that in time honoured equitable fashion not even this negative list is sacred, with gradual inroads occurring.

For instance, the courts traditionally refused to grant specific performance of a service contract on the ground that if it was for personal services its enforcement would be tantamount to slavery and in most other cases the need for continual supervision by the court would make it impossible to justify. The law, or rather Equity, has not stood still on this matter, however, and there have been a number of departures from this particular principle in the recent past. Indeed, it may be that the winds of change have not yet finished blowing, at least on this side of the Irish sea, if the interlocutory decision of Costello P. in *Wanze Properties (Ireland) Ltd v Five Star Supermarket and Tesco (Ireland) Ltd*⁴ is anything to go by.

The potential implications of this case will be of immense interest to property lawyers concerning as it does the issue of remedies available for breach of covenant in commercial leases, in this case a shopping centre lease between the centre owner and its anchor tenant. Given the fact that the High Court decision comes hot on the heels of a similar case in England, where the House of Lords reached a contrary conclusion on the availability of specific performance, this would seem to heighten the need for a timely consideration of the law in this area.

THE ENFORCEMENT OF BUSINESS OBLIGATIONS

The twin fears of continual supervision and the enforcement of personal service are best illustrated by the cases of *Ryan v Mutual Tontine Association*⁵ and *Ogden v Fossick*.⁶ Interestingly both cases arose in the context of Landlord and Tenant relationships. In the former a lease of an apartment block provided for the employment of a resident porter to

¹ *Wilson v Northampton & Banbury Junction Railway Co.* (1874) 9 Ch App 279.

² *Smelter Corporation v O'Driscoll* [1977] IR 305.

³ See the comments of Porter MR in *Gorringe v Land Improvement Society* [1899] 1 IR 142, at 152 in relation to agreements to lend money.

⁴ Unreported High Court, 24 October 1997.

⁵ [1893] 1 Ch 116

⁶ 4 De G. F. & J. 426.

service the building. When the appointee failed to fulfil his duties the lessee took an action against the lessor for breach of the covenant and sought to enforce the terms of the agreement by specific performance. The Court of Appeal unanimously reversed the decision of Smith J and refused to grant specific performance. Lord Esher MR described the arrangement as “a contract between a landlord and his tenant, by which the former undertakes to employ a porter to perform certain services for the benefit of the latter”⁷ rather than as a contract for personal services. Nevertheless, he refused relief on the ground that such a contract, being one where the services in question were to be performed during the whole of the term of the tenancy, was in essence a long-continuing contract and would therefore require continual supervision by the Court if specific performance were granted. Moreover both Kay and Lopes LJ pointed to the fact that an award of damages in this case could adequately compensate the breach of covenant.⁸

Similarly in *Ogden v Fossick*⁹ an action by the lessor of a coal wharf to enforce the lease proved unsuccessful as the agreement also provided for the employment of the lessor. Given that the latter clause was an integral part of this composite contract the court exercised its discretion not to grant specific performance. Commenting on the role of specific performance in such cases, Knight Bruce LJ stated,

“That there are terms and provisions in this agreement which the Court cannot enforce is clear beyond all doubt. The Courts cannot for instance decree the Plaintiff to carry on the business, the carrying on of which is essential to the complete performance of the entire agreement. It is scarcely less clear, that it is not according to the general course of the Court to decree the specific performance of part of an agreement when there are other terms of the same agreement which it is beyond its power to enforce.”¹⁰

Thus the early cases very clearly illustrated the courts’ adversity to compelling a party to carry out business obligations, even if it was the case that this party was the plaintiff in the action and more than willing to do so.

THE RE-EVALUATION OF EQUITY’S ROLE

The move away from such a hard line approach, at least in respect to plaintiffs seeking to specifically enforce business obligations, can be seen in the Irish case of *Lift Manufacturers Ltd v Irish Life Assurance and Sisk*.¹¹ There McWilliam J granted the plaintiff an interlocutory injunction prohibiting the nomination of a new subcontractor by the defendant pending the trial of the plaintiff’s action for specific performance of its existing subcontract with the defendant. It seems from the report of the case that the plaintiff had been awarded a contract by the defendants to

⁷ *Ibid.* at p. 123.

⁸ Indeed, Kay LJ went on to say that the fact that damages would not cover any future breaches of the covenant in question was not in itself a sufficient reason to grant specific performance – “*If that were sufficient, I cannot conceive of any case of a continuing contract where specific performance might not be granted.*” *Ibid.* at p. 128.

⁹ See note 6 above.

¹⁰ *Ibid.* at p. 434, emphasis added.

¹¹ [1979] ILRM 277.

install lifts at the ILAC Centre in Dublin. Owing to a delay in the auditing of the plaintiff's books it could not provide the necessary indemnity guarantee bond by the date stipulated in the agreement but it claimed it would be well in place prior to the undertaking of work at the Centre. On the plaintiff's application for an injunction to restrain the defendants terminating their contract, the latter argued that the injunction should be refused, as specific performance of a contract for services could not be decreed. Dealing with this objection, McWilliam J commented,

"As to the first objection, I have been referred to *Hounslow London Borough Council v Twickenham Garden Development* [1971] Ch 233; *Garrett v Barnstead & Epsom Downs Railway Ltd* (1864) 4 De GJ & Sm. 462 and *Cork Corporation v Rooney* (1881) 7 IR Ir. 191 which indicate that the rule is not rigid and that where there is a genuine claim an injunction may be granted. The basis for the rule is that the court cannot oversee the performance of the services and it seems to me that, where there does not appear to be any reason for the court to oversee such performance, the rule is not applicable."¹²

Indeed Megarry J had commented in a similar vein seven years earlier in the case of *C H Giles & Co Ltd v Morris*,¹³ where speaking of equity's role in respect of the enforcement of personal service or continuous service contracts, he stated

"In general, no doubt, the inconvenience and mischief of decreeing specific performance of most of such contracts will greatly outweigh the advantages, and specific performance will be refused. But I do not think that it should be assumed that as soon as any element of personal service or continuous services can be discerned in a contract the court will, without more, refuse specific performance. Of course, a requirement for the continuous performance of services has the disadvantage that repeated breaches may engender repeated applications to the court for enforcement. But so may many injunctions; and the prospects of repetition, although an important consideration, ought not to be allowed to negative a right. As is so often the case in equity, the matter is one of balance of advantage and disadvantage in relation to the particular obligations in question; and the fact that the balance will usually lie on one side does not turn this probability into a rule. The present case, of course, is a fortiori, since the contract of which specific performance has been decreed requires not the performance of personal services or any continuous series of acts, but merely procuring the execution of an agreement which contains a provision for such services or acts."

In both instances the respective judges were willing to look beyond the dogma and consider the reasoning behind such an approach in equity. In *Lift Manufacturers*, while the decree of specific performance would require the defendants to accept labour provided by the plaintiffs in line with their original agreement, the implication was that this would be within the scope of the remedy because there had been no loss in faith on the defendants' part in the ability of the plaintiffs to perform the task in hand. Despite their disagreement over preliminary matters, the mutual trust and integrity essential to any business relationship still existed in this case.

¹² *Ibid* at p 280.

¹³ [1972] 1 All ER 960, at 970.

Indeed, the judgment of McWilliam J may be contrasted with that of Barr J in the case of *Marine Port and General Workers Union v Pandoro Ltd*¹⁴ where the learned judge refused to grant an interlocutory injunction to the plaintiffs to prevent the defendants from hiring dock workers other than from its union register. Acknowledging that to grant the relief sought would be tantamount to ordering the defendants to employ the plaintiff's workers, Barr J made the point that where there remains *bona fide* doubt as to the competence and experience of a work force, specific performance is not a suitable remedy. In the words of the learned judge,

“The foisting on a reluctant employer of a work force not chosen by the employer and about which it has bona fide misgivings, whether well founded or not, is likely to be a recipe for trouble which, pending a full hearing at the trial of the action, would not seem to be in the best interest of either party.”¹⁵

In essence, it could be said that the lack of mutual trust and integrity between the parties here led the court to find as it did.

THE EXTENSION TO LANDLORD AND TENANT LAW

It is here that we turn our attention to landlord and tenant law and the relatively limited role played by specific performance in this area in the past. Prior to the decision in *Wanze Properties (Ireland) Ltd v Five Star Supermarket and Tesco (Ireland) Ltd*,¹⁶ a breach of a covenant in a lease could be dealt with in a number of ways. If the parties were the original parties to the lease, privity of contract enabled either side to sue for breach of its covenants. Subsequent successors in title of either the landlord or tenant could in turn rely on sections 12 and 13 of the Landlord and Tenant (Amendment) Act 1860, respectively.¹⁷ At common law the main remedy available was that of damages if the damage was quantifiable. This was subject, however, to statutory modification in a number of instances.¹⁸ In terms of statutory rights both the 1860 and the 1980 Acts provide for forfeiture and ejection. The theoretical relief available from equity includes injunctions and specific performance. Thus, for instance it is possible for a tenant to seek relief from equity where a landlord fails to carry out repairs in line with his obligations under the lease.¹⁹ In practical terms, however, the intervention of equity is more often exercised in

¹⁴ Unreported, High Court, 3 June 1994.

¹⁵ *Ibid* at p 5.

¹⁶ See note 4 above.

¹⁷ Commonly known as Deasy's Act sections 12 & 13 of the 1860 Act provide for a statutory version of the common law notion of privity of estate. See *Lyle v Smith* [1909] 2 IR 58.

¹⁸ See, for example, s 65 of the Landlord and Tenant (Amendment) Act 1980, which limits the amount of damages actually recoverable for breach of a covenant to repair to the diminishment of value caused to the reversion (s 65(2)) and in stated circumstances prevents recovery by the landlord from the tenant altogether (s 65(3)), provided in both instances that the damage is not the result of wilful waste or wrong on the part of the tenant.

¹⁹ Wylie, *Irish Landlord and Tenant Law*, p 423, who notes that specific performance would only be available in such a case where the Court is satisfied that it is clear exactly what needs to be done to comply with the order. See, for example, *Bernard v Meara* (1861) 12 Ir Ch R 389.

providing relief against forfeiture for non-payment of rent.²⁰ Indeed, it seemed clear that in line with equity's general principles in relation to specific performance where there was a lack of mutuality specific performance would not be available.

What then is the situation where the court is asked to grant equitable relief for breach of a covenant in a lease that obliges the tenant to continue to carry on a business? Is such a covenant open to specific performance or the granting of an injunction to enforce its terms? Or should damages be seen as an adequate remedy? What if it is proven that damages will not be an adequate remedy, does it follow that specific performance should then be granted in order that justice be done between the parties?

THE ENGLISH APPROACH

The issue is one which had raised its head a number of times in the United Kingdom in the past. In *Braddon Towers Ltd v International Stores Ltd*²¹ the Court refused to grant the plaintiffs a mandatory injunction to compel their defendant tenants to abide by a covenant in their lease to keep their supermarket open at all normal times and to use their utmost endeavours to develop, improve and extend the business and not to do or suffer anything to injure the goodwill. The defendants, on discovering their venture to be a loss making one, had closed the premises without consulting the landlords and in clear breach of the trading covenant in the lease. Drawing on the wisdom of Pennycuik J in *Dowty Boulton Paul Ltd v Wolverhampton Corp.*,²² Slade LJ stated,

“It is very well established that the court will not order specific performance of an obligation to carry on a business or, indeed, any comparable series of activities.”

It was in light of such authorities that the case of *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*²³ came before Judge Maddocks in the English High Court. The dispute between the parties concerned the anchor tenant unit at the Hillsborough Shopping Centre in Manchester. Argyll Stores held the lease of this unit for a term of 35 years from August 1979 and used it as a Safeways supermarket outlet. One of the covenants in the lease required the tenants to use the premises as a supermarket and to keep that premises open for retail trade during the usual hours of business.²⁴ The lease also allowed for the tenants to assign their interest

²⁰ *Blake v Hogan* (1933) 67 ILTR 237. Cf *Cue Club Ltd. v Navaro Ltd.* unreported, Supreme Court, 23 October, 1996 where the Supreme Court held that the nature of the equitable discretion exercised by the courts in granting a lessee relief against forfeiture is hardly applicable or applicable to the same extent where the court is dealing with substantial commercial transactions in which the lessor and lessee are on equal terms.

²¹ (1979) [1987] 1 EGLR 209.

²² [1971] 2 All ER 277 at 284 (court refusing to grant an injunction to compel the maintenance of an airfield as a going concern). See also *Hooper v Broderick* (1840) 11 Sim 47 (court refusing to order a lessee carry on loss making business as an inn, in spite of a positive covenant in the agreement to that effect); *A-G (ex rel Allen) v Colchester Corporation* [1955] 2 All ER 124 (refusal of an injunction to compel a ferryman to carry on a ferry business which was a losing concern on the ground that an injunction should not be granted to enjoin a person to carry on a business).

²³ [1996] 3 All ER 934 (Court of Appeal); [1997] 3 All ER 297 (House of Lords).

²⁴ Clause 4 (19) required the defendants to

during the life of the lease. In 1995, following trading losses for the previous year, the defendants decided to sell 26 Safeway stores including its anchor unit at the Hillsborough Centre. In pursuit of this aim and in spite of the trading covenant, the defendants closed the supermarket and stripped the store in May 1995.²⁵

The High Court gave summary judgment in favour of the plaintiffs (with damages to be assessed) but refused an order for specific performance against the defendants to compel them to keep their store open in line with the trading covenant.²⁶ It was from this decision that the plaintiffs appealed to the Court of Appeal, consisting of Leggatt, Roch, and Millet LJ, which by a two to one majority allowed the appeal.

The majority of the Court of Appeal²⁷ took the view that damages would be an inadequate remedy in this case as it would be impossible to quantify the scale of loss, extending as it would beyond those losses of the plaintiff itself to the other tenants of the shopping centre, many of whom would have signed leases in the knowledge that Safeways was the anchor tenant. Turning to the availability of specific performance, Roch LJ felt that the Court was in a position to specify quite clearly what was required of the defendants in any such order, namely that they continue to trade in accordance with the terms of their agreement either until 2014 or until a suitable assignee could be found. Continual supervision was unlikely to be a problem as it would be against the reputation and goodwill of the defendants to trade in any manner other than an efficient one. Such an order found support in decisions such as *Morris v Redland Bricks*,²⁸ *C H Giles & Co v Morris*,²⁹ and *Braddon Towers*,³⁰ the judges in those cases indicating that in exceptional circumstances the jurisdiction to grant such relief as was claimed here should be exercised unhesitatingly. Concluding his judgment Leggatt LJ added

“The defendants have acted with gross commercial cynicism, preferring to resist a claim for damages rather than keep an unambiguous promise. This is not a court of morals, but there is no reason why its willingness to grant specific performance should not be affected by a sense of fair dealing.”

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“Keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner, in keeping with a good class parade of shops provided that the tenant may close the demised premises: (a) For one day between Monday and Friday inclusive in each week of the term and (b) For a period not exceeding four months for the purposes of handing over the demised premises to an assignee or under-tenant following an assignment or under-letting under the terms of Clause 4(15) hereof”

²⁵ The plaintiffs had written to the defendants on learning of their intention and asked them to keep the store open on a lesser rent until an assignee could be found. It appears from the House of Lords report that this letter remained unanswered as its addressee had also fallen victim of the rationalisation plan and was himself made redundant before the letter arrived!

²⁶ This was in spite of the learned judge’s finding that the defendant’s conduct would cause serious damage to the reversion and that damages would not be adequate remedy, see [1996] 3 All ER at 946.

²⁷ Millet LJ dissenting,

²⁸ [1970] AC 652.

²⁹ See note 13 above.

³⁰ See note 21, above.

In his dissent Millet LJ set out the settled practice of the court not to grant a final injunction or specific performance where the effect of such an order would be to compel the defendant to carry on a business indefinitely.³¹ Looking at the rationale behind the court's approach in these cases, his Lordship admitted that the motivations of the court were varied – ranging from the impossibility of supervision on the part of the court to what Millet LJ described as “sounder objections” in that the court would not make an order obliging the defendant to do continuous acts involving labour and care. Reviewing the comment of Slade LJ in the Braddon Towers case³² that it might be possible to define an order in precise enough terms so as to make specific performance possible in cases of this nature, Millet LJ found fundamental objection to such a suggestion,

“If granted for any length of time or for an indefinite period, it is oppressive. To compel a defendant for an indefinite period to carry on a business which he considers is not viable, *or which for his own commercial reasons he has decided to close down*, is to expose him to potentially large unquantifiable and unlimited losses which may be out of all proportion to the loss which his breach of contract has caused to the plaintiff.”³³

Recognising the age-old conflict³⁴ between the fundamental freedom of a party to break a contract and pay in damages and what others regarded as “an intolerable travesty of justice” that a party should be able to disentangle himself from contractual commitments at his own pleasure merely by electing to compensate the other with damages, Millet LJ drew attention to the pragmatic middle ground which the English courts had adopted in resolving such disputes. He noted,

“Equitable relief is discretionary and exceptional. Courts of equity have never enforced the performance of all contracts, whatever their nature. Over the centuries rules of practice have evolved so that the parties can know in advance which contractual obligations will be specifically enforced and which sound in damages only. The leading principle is usually said to be that equitable relief is not available where damages are an adequate remedy.... But this is not the only test of the appropriateness of equitable relief.... Equitable remedies are instruments of justice; they should be refused where they would be potential instruments of oppression.”³⁵

The fact that the lease had a further nineteen years to run weighed heavily with his Lordship. Conceding that he would be willing to depart from some of the older grounds advanced for declining to make such an order, Millet LJ concluded that he remained “firmly of the view that the court ought not compel a party to carry on a business for an indefinite period regardless of the financial consequences of doing so.”

³¹ Citing authorities such as *Hooper v Broderick* (1840) 11 Sim 47, *Lord Abinger v Ashton* (1873) LR 17 Eq 358, and *Dowty Boulton Paul Ltd v Wolverhampton Corp.* [1971] 2 All ER 277 in support of this statement.

³² [1987] 1 EGLR 209, at 213-214.

³³ [1996] 3 All ER 934, at p 948 (emphasis added).

³⁴ His Lordship pointed out that such controversies had persisted even in the times of Sir Edward Coke and Lord Ellesmere LC.

³⁵ See note 33 above at p 949.

The House of Lords unanimously allowed an appeal from the decision of the Court of Appeal and ordered the restoration of the decision of Maddock J in the High Court. Lord Hoffman giving the judgment for the House raised for consideration a number of issues of importance. Citing as a main objection to the decree of specific performance the potential for imprecision in the order of the Court, it was noted that this could create a situation where it would be unclear to the defendant what exactly was required of him or her. The significance of this hurdle lay in the fact that the failure by a defendant to comply with an order for specific performance left him open to the threat of contempt proceedings.³⁶ Commenting on the sanction of contempt, Lord Hoffman stated,

“This is a powerful weapon; so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court’s order. The heavy-handed nature of the enforcement mechanism is a consideration which may go to the exercise of the court’s discretion in other cases as well, but its use to compel the running of a business is perhaps the paradigm case of its disadvantages . . .”³⁷

Drawing a distinction between circumstances where specific performance might be sought by a plaintiff, his Lordship felt the cases could be neatly divided into those where a result was sought to be achieved³⁸ and secondly situations where an order is sought to compel the defendant to carry on an activity. Of the two instances the learned judge felt that only the former should be subject to specific performance and even then not every obligation to achieve a result would be specifically enforceable. The rationale behind this was that only in result cases can a court really say whether the defendant has complied with the order – the finished product ending the need for the involvement of the court. However, in cases where an activity such as running a business is the subject of proceedings, it is not feasible to continually return to court to ensure that the spirit and not merely the letter of the order is complied with.

Moreover, the court availed of the opportunity to clarify the meaning of Lord Wilberforce’s comments in *Shiloh Spinners Ltd v Harding*³⁹ where the learned judge had remarked, “[w]here it is necessary, and, in my opinion right, to move away from some 19th century authorities, is to reject as a reason against granting relief, the impossibility for the courts to supervise the doing of work.” Lord Wilberforce had made his comments in the course of a result orientated specific performance case, but his views had been relied on in later cases by judges as being applicable to specific performance in a general sense, thereby confusing the issue.⁴⁰

³⁶ In the words of Lord Hoffman, “*The less precise the order, the fewer the signposts to the forensic minefield which he has to traverse*” at p 303.

³⁷ *Ibid* at p 302.

³⁸ Lord Hoffman stated that in these situations the order could by its nature be precisely defined by the court and consequently its effectiveness could be more easily monitored. Examples of “result orders” would include the enforcement of building contracts, as in *Wolverhampton Corp. v Emmons* [1901] 1 KB 515 and repairing covenants in leases, as in *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97.

³⁹ [1973] 1 All ER 90 at 102.

⁴⁰ *Shiloh* itself concerned liability under a covenant of repair but was applied generally by the Court in *Tito v Waddell (No. 2)* [1977] 3 All ER 129, not to mention by Leggatt LJ in the instant case at [1996] Ch 286 at 292 – 293.

Loss Making Concerns

Given that the defendants were involved in a loss making entity, the Court considered the wisdom of prolonging the battle. The view expressed was to the effect that it would hardly be in the public interest in such a situation to continue when an alternative existed in the form of compensation – “It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. The order for specific performance prolongs the battle. . . . This is wasteful for both parties and the legal system.”⁴¹

The Interpretation of Covenants

The interpretation of the covenants by the court should also provide food for thought given that such standard clauses are in use in many commercial leases.

It held that even a straightforward trading covenant, as in this case, was broad enough to give room for argument as to whether a tenant is doing enough to comply with the covenant. In so finding the House expressly disagreed with the view of the majority in the Court of Appeal that once an order was made that the defendants would for the sake of their business reputation make full efforts to comply with its terms.⁴² It stated,

“If ordered to keep the business open, it might well decide that the next best strategy was to reduce its costs as far as was consistent with compliance with its obligations, in the expectation that a lower level of return would be more than compensated by higher returns from additional expenditure on more profitable shops. It is in my view wrong for the courts to speculate about whether [the defendant] might voluntarily carry on business in a way which would relieve the court from having to construe its order.”⁴³

These comments arguably apply equally to going concerns as to loss making concerns and certainly there is nothing in Lord Hoffman’s speech which would indicate an intention to so limit their applicability.⁴⁴

The Role of Equity in Modern Commercial Relations

So whither the role of equity in a commercial case of this nature? The Court acknowledged the ethical backbone of equity’s principles but looked to commercial realities in respect of broken promises, reiterating the significance of arms length negotiations,

“Both landlord and tenant in this case are large sophisticated commercial organisations and I have no doubt that both were aware that the remedy for breach of the covenant was likely to be limited to an award of damages. The interests of both were purely financial; there was no element of personal breach of faith. . . .”⁴⁵

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⁴¹ At p 305.

⁴² See n.28 above and accompanying text.

⁴³ [1997] 3 All ER 297, at 306-307.

⁴⁴ If anything the learned judge’s consideration of the unquantifiable loss Argyll would suffer by continuing to trade is an *additional* factor as opposed to the *raison d’etre* behind the judge’s comments extracted above.

⁴⁵ See note 43 above, at p 307-308.

Concluding that while Argyll's decision would undoubtedly have an adverse effect on the remaining tenants at the shopping centre, Argyll had no covenant with such traders and indeed the plaintiffs had not made any warranty to these third parties in relation to the defendant's anchor tenancy.⁴⁶ "On the scale of broken promises, [the court] could think of worse cases."⁴⁷

THE CURRENT POSITION IN IRELAND

The arrival of British supermarket multiples on this side of the Irish sea has had a knock-on effect on existing landlord and tenant relationships, particularly with regard to trading covenants. In some instances the influx of competition has caused a downturn in rivals' business resulting in anchor tenants wishing to leave the market or rationalise their holdings. In other cases the take-over of Irish supermarkets, with the subsequent investment of new capital, has led the new owners to seek to relocate to premises more in keeping with their newly acquired image, thereby shedding former obligations.

In Northern Ireland, the former situation arose in *Ravenseft Properties Ltd v Stewarts Supermarkets Ltd and Crazy Prices*⁴⁸ where the defendant, in breach of its trading covenant, had sought to close its unit at the Towermill shopping centre in face of competition from the arrival of Sainsburys at a nearby shopping centre. The plaintiffs sought orders prohibiting cessation of the supermarket business and specific performance of the trading covenants in the lease.

Girvan J in the High Court, admitted that he was placed in an unenviable position in so far as the English Court of Appeal had given its decision in Argyll but the House of Lord's decision was still pending. Counsel for the defendant argued that in light of the wording of the relevant trading clause,⁴⁹ it would be impossible to formulate a clear mandatory order. Drawing on the authority of *Fawcett Properties v Buckinghamshire County Council*,⁵⁰ where the Court had held that a court in construing a contract should not hold it void for uncertainty unless it cannot resolve the ambiguity, Girvan J felt a high degree of assurance that a mandatory injunction could be drafted in sufficiently clear terms. In so holding the learned judge granted the injunction sought limited to the date of the House of Lords ruling in *Argyll*. Describing the circumstances before him as "exceptional", he stated that to refuse the injunction (thereby allowing the lessee to close) would give rise to greater injustice than granting the order should it appear at the trial of action that he had made the wrong decision.

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⁴⁶ The court went so far as to suggest that the loss to the other tenants was, if anything, a bargaining tool which they could use in negotiations at the next rent review.

⁴⁷ See note 43 above at p 308.

⁴⁸ Unreported, 6 May 1997, Girvan J.

⁴⁹ Clause 2 (11) in part stated that the defendants covenanted:

"Not during the first 18 years of the term without the lessor's consent to use or permit or suffer the demised premises or any part thereof to be used otherwise than as a general supermarket....provided that not less than half of the net sales area is used as a supermarket for the sale of food and such hardware and non food lines as are normally sold in similar food supermarkets elsewhere.....and to keep the demised premises for (sic) such purposes during normal trading hours...."

⁵⁰ [1960] 3 All ER 503, at 508.

A similar dilemma presented itself recently to the Irish High Court. In *Wanze Properties (Ireland) Ltd v Five Star Supermarket and Tesco (Ireland) Ltd*,⁵¹ the Court was asked to grant an interlocutory injunction to compel the defendants, (anchor tenants in the plaintiff's shopping centre), to reopen their store for business in line with the trading covenant in their lease.⁵² The defendants had taken a commercial decision to break their lease with Wanze by relocating to a new shopping centre a mere 400 yards away from the plaintiff's premises in Athlone. A significant difference between the facts of this case and the situation in *Argyll* and one which was fully stressed by counsel for the plaintiffs was that in the present case, the supermarket was not a loss making concern at the time it decided to relocate. The motivation here was rather one of increasing profitability as the second defendants had recently acquired the first defendants and were in the process of modernising and updating their holdings. The issue was whether this factual distinction between the two cases⁵³ was sufficient to warrant Costello P granting an interlocutory injunction on the ground that there was a reasonable probability that an order of specific performance would be made at trial.⁵⁴ While *Ravenseft* was not cited to the Court, arguably the facts in *Wanze* were even more extreme in that the supermarket here had been closed and stripped of its fixtures, whereas in the former at the time interlocutory relief was sought the store was still trading.

Costello P sought to ascertain whether there was an arguable case to be made by the plaintiffs. Evidence was produced before the Court that if the defendants were allowed to walk away from the 12-year term still remaining on the lease, the loss to the plaintiff would be catastrophic. Finding in favour of the plaintiff on the existence of a serious question to be tried the learned judge also felt that damages would not be an adequate remedy should the plaintiffs prove their case at a full trial of the action. In particular, he stated,

“I am quite satisfied that *if the Court decides that it has power to grant an injunction or an order of specific performance*, it would so do. It would not give damages in lieu because damages would be an entirely inadequate remedy.”⁵⁵ (*emphasis added*)

The significance of the President's comments in this regard should not be overlooked. The very issue as to whether the High Court should grant specific performance of a business contract for an indefinite or continuous period of time was not decided. The actual merits of such a decision could only be made after full oral argument and not on the basis of affidavit evidence produced for the purpose of an interlocutory, and therefore

⁵¹ See note 4 above.

⁵² Covenant 11 in the lease in question provided that the tenant was,
 “To keep the demise (sic) premises, or such portion thereof as is normally open to the public, open for the purpose of the said trade during the usual hours of business appropriate to the tenant's business, at least unless required to close by law or trade union regulation.”

⁵³ That is between breaching a trading covenant on the basis of non viability of the business in question (as in *Argyll*) and breaching a covenant in pursuit of a deliberate commercial decision to seek higher returns elsewhere (as in *Wanze*).

⁵⁴ See note 4 above, at p 2 of the judgment. The defendants had indicated a willingness to pay damages but argued that the Court had no jurisdiction to grant specific performance in a case of this nature.

⁵⁵ *Ibid* at p 4.

necessarily tentative, relief. Consideration was given to the House of Lords decision in *Argyll* with reference being made by the learned judge to the headnote of the case “that the decision of the House of Lords indicated a rule of law which should be applied other than in exceptional circumstances.”⁵⁶

To this end, the learned President made an order directing the defendants to carry on the supermarket trade in the premises in question, allowing the defendants three working days to properly staff the premises again and to remove signs indicating its closure.⁵⁷

ANALYSIS

It is certainly arguable as to whether specific performance should be available to the plaintiffs in *Wanze*. Indeed one hopes that the issue will proceed to a substantive hearing so that the issues arising may be fully teased out as they were by the House of Lords in *Argyll*. Even in the absence of any further litigation, a number of points may be made in respect of Costello P’s judgment. Firstly, the learned judge commented that the difference between the present case and *Argyll* was that in *Wanze* it would be open to the plaintiffs to argue that the financial loss the defendants would suffer as a result of being required to carry on business in the Athlone centre was attributable to their own actions. The implication was that this allocation of fault to the defendants would thereby strengthen (or rather, not detract from) the plaintiff’s claim for specific performance. However a close reading of the House of Lords decision indicates that the Lords did not think it right to differentiate between the motivation for and the breach itself – “although any breach of covenant is regrettable, the exercise of the discretion as to whether or not to grant specific performance starts from the fact that the covenant has been broken.”⁵⁸ Indeed Millet LJ in the Court of Appeal expressly stated that specific performance was not an appropriate remedy where, either for reasons of viability or “for his own commercial reasons”, a tenant decides to close a business.⁵⁹ Obviously if there was a gross breach of personal faith or attempts to blackmail the other party by threatening non-performance, the considerations would be different. In the ordinary instance of commercial relations, however, it is, with all due respect, a little disingenuous to suggest that the circumstances arising in *Wanze* constituted the “exceptional circumstances” referred to in the headnote of *Argyll* which might so warrant a departure from the settled practice of refusing specific performance in such instances.⁶⁰

The Irish authorities relied on by Costello P may be dealt with in a similar fashion. The *Lift Manufacturers* case, while being in point, concerning as

⁵⁶ Ibid at p 3.

⁵⁷ It is understood that the defendants have not appealed this decision to the Supreme Court.

⁵⁸ See note 43 above, at p 307.

⁵⁹ See note 33 above and accompanying text.

⁶⁰ As in most cases the actual text of the House of Lords decision in *Argyll* elaborates on the concept of “exceptional circumstances” mentioned in the headnote and which the trial judge in *Wanze* found so appealing. Indeed, Lord Hoffman does not actually refer to “exceptional circumstances” himself but rather gives illustrations of situations which have been summarised correctly by the headnoter as being exceptional. Such instances however, when considered in the context of his Lordship’s judgment would not include a commercial decision to relocate in the interests of doing better business.

it does the specific enforceability of a business contract, can be distinguished from the present case. In that case, as was noted above,⁶¹ the issue revolved more around the technicalities of the plaintiff's availability to do the work. It is arguable that if the situation had been reversed so that for whatever reason the lift company had no longer wished to work for the main contractor, the latter would not have been able to get an order of specific performance against them compelling them to install the lifts. Another authority mentioned in passing by Costello J is the case of *A & N Pharmacy v United Drug Wholesale Ltd.*⁶² In this case an interlocutory injunction was granted to the plaintiff compelling the defendant to supply the former pending the trial of action. While this may seem, therefore, an authority in favour of specific performance of business transactions, it again can be distinguished on its facts. In *A & N*, the plaintiff's main argument was that the defendant was in a dominant position and that its conduct towards *A & N* amounted to an abuse, contrary to section 5 of the Competition Act 1991. The injunction was granted because there were serious issues to be tried that such a statutory breach had taken place, and not on the basis that the court would just exercise its discretion otherwise to compel parties to do business. A final authority referred to by the learned judge was the decision of McCracken J in *Barlo Farm Machinery v Case United Kingdom Ltd.*⁶³ In that case the learned judge granted the plaintiffs an interlocutory injunction compelling the defendants to continue to supply them with agricultural machinery spare parts, pending the resolution of the dispute over the termination by the latter of the plaintiff's exclusive dealership. In so doing McCracken J. pointed out that the net issue in that case was whether sufficient notice of termination had been afforded to the plaintiffs.⁶⁴ Finding that a serious question therefore arose to be tried, he ordered the continued supply of parts to the plaintiffs pending trial. The decision in *Barlo* is arguably correct in so far as it goes. It is clear from the judgment that the parties were not disputing the actual termination of the relationship itself but merely the timeframe in which it was carried out. To compel the continued supply of parts on a cash on delivery basis pending a full hearing is substantially different from compelling a party to "trade on" for an indefinite period of time. Moreover, McCracken J in *Barlo* noted the unhelpfulness of other authorities cited to him stating that "each case must stand on its own facts". Secondly, even Costello J in *Wanze* noted that while the cases cited seemed to indicate a certain development of the law in this respect it "[had] not yet gone as far as that urged by [the plaintiffs]."⁶⁵

The compelling points raised by both Millet LJ and Lord Hoffman remain to be answered by the Irish courts. The essence of the *Argyll* decision would seem to be that where one has a lease with a number of years to run which contains a standard covenant to trade, breach of this covenant should sound in damages only. The rationale behind this is twofold – compelling a tenant to trade for an indefinite period of time is oppressive, given the sanction for breach and this remains the case regardless of the

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⁶¹ See p 3 in general.

⁶² Unreported High Court, 15 February 1996; [1996] Irish Competition Law Reports 358.

⁶³ Unreported High Court, 24 October 1996.

⁶⁴ The dealership arrangement dated back to 1948 and it was argued by the plaintiffs that in light of the length of their association with the defendants they ought to have been given at least 12 months notice as opposed to the six months actually given.

⁶⁵ At p 2 of the judgment.

reason for the tenant's wish to cease. Secondly, given the language of standard covenants to trade their enforceability would be impossible by the court in the absence of guidelines as to the level of trade required. In the words of Lord Hoffman, "running the business efficiently does not necessarily mean running in the way it was run before."⁶⁶

CONCLUSION

A number of options remain open to the High Court in deciding the substantive issues of relief raised by *Wanze*. Girvan J in *Ravenseft* considered the alternatives open to the House of Lords in anticipation of its ruling and it is submitted that as the High Court may soon be at a similar crossroads, those options are worthy of consideration. Being threefold, he suggested it was open to the court to hold that neither specific performance nor mandatory injunctions should be available in the situations discussed above; secondly it would be open to the Lords to rule that save in exceptional circumstances such an order should be made in the case of clear contractual provisions. Finally it may consider that every case must be considered on its own facts and it could decide to offer guidance as to the factors to be taken into account by courts in the exercise of that discretion.

The House of Lords has chosen the well-travelled road of principle. The Irish High Court stands at the divergence.

⁶⁶ See note 43 above, at p 306.

NEARLY, BUT NOT QUITE - PARTITION ACTIONS IN THE WAKE OF ARTICLE 48 OF THE PROPERTY (NI) ORDER 1997

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INTRODUCTION

In the cases of *Northern Bank Ltd v Haggerty*¹ and *Robin Rainey t/a R McA Rainey & Sons v Weatherup and Weatherup*², chargees and creditors with an order charging land under the Judgments Enforcement (NI) Order 1981 were confronted with the spectre of being unable to enforce their security, where that security was restricted to an undivided share of land. In such cases, the principle in *Tubman v Johnston*³ prevents an incumbrancer of an undivided share of land from exercising his normal power of sale: since the court cannot make an order for possession against the co-owner whose share is not subject to the incumbrance, the incumbrancer cannot obtain an order for possession to facilitate sale. The proper procedure is for the incumbrancer to bring an action under the Partition Acts 1868 and 1876, seeking an order for sale of the property, not just the share over which his security extends. It is well-established that the *locus standi* test for bringing an action under the Partition Acts requires that the plaintiff has a legal or an equitable estate or interest in possession in the subject property.⁴ As both Master Ellison and Campbell J (as he then was) explained in *Haggerty*, a chargee did not have *locus standi* to maintain a partition action because the creation of a charge, unlike a mortgage, does not involve any transfer of estate from the borrower to the chargee.⁵ Since an order charging land has the like effect as a charge on land created by a debtor in favour of a creditor⁶, creditors with an order charging an undivided share of land also lacked the necessary standing to proceed under the Partition Acts.

The practical consequences of this lacuna being more than disturbing for lending institutions, the legislature intervened in an attempt to alleviate the situation. However, despite the best efforts of the Parliamentary draftsmen, it is suggested that article 48 of the Property (NI) Order 1997 does not entirely succeed in its aims. This article illustrates that the difficulties encountered by creditors with an order charging an undivided share of land have not been wholly eradicated by article 48 and that creditors may still be unable to enforce their security in one particular situation. In addition to this, it highlights another problem which (rather

¹ [1995] NI 211.

² High Court (NI), unreported, 13 December 1996.

³ [1981] NI 53 and see *Albany Home Loans Ltd v Massey* [1997] 2 All ER 609.

⁴ *Evans v Bagshaw* (1870) 5 Ch App 340 and *Daniell's Chancery Practice* (8th edn, 1914) pp 1170-1. See further *Northern Bank Ltd v Haggerty* [1995] NI 211, pp 216-7, *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996, pp 14-15 and *Fraser Homes Ltd v Fraser Houses (NI) Ltd* [1998] NI 214, p 218.

⁵ Instead, the chargee merely has certain rights over the property for the purpose of enforcing his security.

⁶ 1981 Order, art 49.

surprisingly) has not yet been raised in Northern Ireland, but which may be lurking in the background as a trap to befall an unwary equitable mortgagee of an undivided share of land.

I. ARTICLE 48 OF THE PROPERTY (NI) ORDER 1997 AND CREDITORS WITH AN ORDER CHARGING LAND

Article 48 of the Property (NI) Order 1997 provides that:

“The owner of a charge (including a charge under Article 46 of the Judgments Enforcement (Northern Ireland) Order 1981) on land in co-ownership (that is to say, held jointly or in undivided shares) may make a request under the Partition Act 1868 and the Partition Act 1876...for an order for partition, or for sale and distribution in lieu of partition, and shall be treated as a party interested for the purposes of those Acts.”

Accordingly, chargees and creditors with an order charging land now have *locus standi* for the purposes of bringing an action under the Partition Acts. This avoids the consequences of the decision in *Tubman v Johnston* and allows the respective lenders to seek an order for sale as a means of enforcing their security. However, it appears that two specific problems still confront creditors with an order charging land in these circumstances.

1. Prospective Application

The first such problem derives from the recent case of *Ulster Bank Ltd v Carter*.⁷ The plaintiff Bank wished to enforce an order charging the debtor's undivided share of a matrimonial home which he and his wife owned as joint tenants. This order was made in July 1997. Several months later, the Bank brought an action for sale of the premises under the Partition Acts in accordance with article 48 of the 1997 Order. However, Girvan J held that the Bank was not entitled to an order for sale because article 48 does not apply to orders charging land which were created before 1 September 1997, the date on which this provision came into force.⁸ He referred to *L'Office Cherifien Des Phosphates v Yamashita-Shinnihō Steamship Co Ltd*⁹ in which the House of Lords held that a statute should not be construed retrospectively if the consequences of doing so were so unfair that Parliament could not have intended such a construction. Applying this test to article 48 of the 1997 Order, Girvan J asserted that a retrospective interpretation would prejudice those co-owners whose interests were not subject to the creditor's security since these interests were “materially affected” by the enactment of article 48.¹⁰

The learned judge observed that, whereas a non-debtor co-owner was secure in his/her possession of co-owned property prior to the legislative changes introduced by article 48, that person could now be required to yield up possession of the property to facilitate sale under the Partition Acts at the request of a judgment creditor whose security affects the interest of the other co-owner. Girvan J was of the opinion that the interests of such persons are thus prejudiced if an order charging land is

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⁷ High Court (NI), unreported, 29 January 1999.

⁸ Property (1997 Order) (Commencement No 1) Order (NI) 1997.

⁹ [1994] 1 AC 486, and in particular to the views expressed by Lord Mustill at p 525 approving the judgment of Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, p 724.

¹⁰ At p 10 judgment.

made against the interest of the debtor: it is creation of the security which results in the creditor acquiring *locus standi* to maintain a partition action, which ultimately leads to sale of the property. Girvan J stated that, after article 48 came into force, the possibility of a creditor enforcing his security under the Partition Acts and the impact this would have on a non-debtor co-owner were relevant factors for the Enforcement of Judgments Office to take into account in deciding whether to make an order charging the other co-owner's interest. However, this would not have occurred in respect of orders charging land which were made before the commencement date of article 48 since there was no prospect of the creditor bringing a partition action at this time:

“[I]t is clear that a pre-commencement date charge (...a “non-partitioning charge”) differs from a post-commencement date charge (...a “partitioning charge”). In deciding whether to make a charge the [Enforcement of Judgments] Office has to exercise a discretion taking into account all relevant considerations. The impact of such an order on immediately affected third parties must be a relevant consideration. What the Office must or may take into account in deciding whether to make a non-partitioning charge will in some and perhaps in the majority of cases differ from what should or might be taken into account in deciding whether to make a partitioning charge”.¹¹

Girvan J suggested that, in the wake of article 48, a non-debtor co-owner should be notified of a proposal to make an order charging land affecting the interest of the other co-owner¹², and that the former should be given an opportunity to make representations to the Enforcement of Judgments Office.¹³ This would not have been the practice prior to 1 September 1997.

If article 48 only applies to orders charging land created after 1 September 1997, it follows that creditors with an order charging land created before this date do not have *locus standi* to maintain an action under the Partition Acts. However, Girvan J suggested that this problem could be overcome by the creditor submitting an application to the Enforcement of Judgments Office to make a new order charging the land.¹⁴ In other words, the prospective interpretation of article 48 in *Ulster Bank Ltd v Carter* is essentially inconvenient for creditors in this situation, as opposed to creating a substantive obstacle to the creditor enforcing his security under the Partition Acts.

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¹¹ *Ibid*, p 12.

¹² Endorsing the judgment of Carswell LCJ in *Hallmark Furniture Ltd v Collins* [1998] NI 4, p 8.

¹³ For example, that the debtor has other resources available to discharge the debt, or that there was an agreement or understanding between the parties that the premises should not be sold or disposed of for a period-; High Court (NI), unreported, 29 January 1999, p 16. Girvan J also suggested that, as regards matrimonial property, the rights and interests of a spouse would be matters which the Enforcement of Judgments Office would have to consider in deciding whether an order affecting the other spouse's interest would be appropriate - *ibid*.

¹⁴ *Ibid*, p 9. Alternatively, Girvan J suggested that the creditor could consider other methods of enforcement including proceedings against the debtor under the Insolvency (NI) Order 1989.

2. Creditors with an Order Charging an Undivided Share of Matrimonial Home

However, the second problem which arises in this context creates serious difficulties for creditors proceeding under the Partition Acts in one particular situation. It is suggested that article 48 of the 1997 Order does nothing to improve the position of creditors with an order charging an undivided share of a matrimonial home. While a creditor in these circumstances now has the requisite standing to maintain a partition action, the court might nevertheless refuse to order sale because of the Family Law (Miscellaneous Provisions) (NI) Order 1984.¹⁵

The Family Law (Miscellaneous Provisions) (NI) Order 1984

Where a husband and wife are co-owners of a matrimonial home at law or in equity, each has a right to occupy the property.¹⁶ The Family Law (Miscellaneous Provisions) (NI) Order 1984 confers “rights of occupation” in the matrimonial home on a spouse with no proprietary interest in the property.¹⁷ Under article 5(1) these rights of occupation are a “matrimonial charge” on the estate of the owner-spouse, having the same priority as an equitable interest. Where a matrimonial charge is a charge on a legal estate, it may be registered in the Land Registry or Registry of Deeds under article 6 of the 1984 Order¹⁸ and will be binding on a subsequent “purchaser” of the matrimonial home. In other words, registration of this charge is essential in order to take priority over a purchaser.

The 1984 Order does not confer rights of occupation on a spouse with legal title - his or her legal estate is good against a purchaser and takes priority irrespective of whether the purchaser had notice of it.¹⁹ However, article 4(12) of the 1984 Order does confer statutory rights of occupation on a spouse with a mere equitable interest in a matrimonial home.²⁰ This allows a spouse with an equitable interest to fortify his or her position

¹⁵ The relevant provisions are contained in Part II of the 1984 Order. Although these provisions will be re-enacted in the Family Homes and Domestic Violence (NI) Order 1998, this Order has not yet been brought into force. Therefore it is convenient throughout this article to refer to the current practice under the 1984 Order, whilst noting the corresponding provisions of the 1998 Order. In any event, the practical consequences of both the 1984 Order and the 1998 Order as regards partition actions involving creditors with an order charging an undivided share of a matrimonial home are exactly the same.

¹⁶ It being a fundamental attribute of ownership that an owner of land has a right to occupy that land.

¹⁷ 1984 Order, art 4(1). Corresponding provisions are contained in arts 4(1) and (2) of the 1998 Order, although the term “matrimonial home rights” replaces that of “rights of occupation”.

¹⁸ 1998 Order, art 6.

¹⁹ This is not altered by the 1998 Order.

²⁰ The relevant part of art 4(12) reads: “Without prejudice to any rights which arise by virtue of an equitable estate, a spouse who has only such an estate shall be treated for the purpose of determining whether he or she has rights of occupation, as not being entitled to occupy by virtue of that estate...” To similar effect is art 4(9) of the 1998 Order.

against a purchaser by registering a matrimonial charge in order to avoid having to rely on the doctrine of notice as a means of protection.²¹

The 1984 Order and Mortgagees and Chargees

The implications of the 1984 Order for lending institutions whose security consists of an undivided share of a matrimonial home are dependent on the nature of the security held. Should the security take the form of a mortgage or a charge, the 1984 Order has few practical consequences for the security holder notwithstanding that the definition of “purchaser” in article 3(1) of the Order includes a mortgagee or a chargee.²² Take as an example a matrimonial home in the sole name of a husband, where his wife has acquired an equitable interest in the property under a resulting or a constructive trust.²³ If the husband creates a mortgage or a charge on the property and the lender takes his security subject to the wife’s prior equitable interest, the lender will have to bring an action for sale under the Partition Acts in the event of default by the husband. The provisions of the 1984 Order aside, the lender would almost certainly succeed in a partition action.²⁴ However, the 1984 Order envisages the wife’s matrimonial charge having priority over a mortgage or a charge by virtue of registration of this matrimonial charge prior to the creation of the security.²⁵ If the lender takes his security subject to the wife’s matrimonial

²¹ The first legislation conferring statutory rights of occupation in the matrimonial home was introduced in England in the form of the Matrimonial Homes Act 1967. However, as originally enacted, the 1967 Act did not confer rights of occupation on a spouse with a beneficial interest in the matrimonial home. Such rights were not introduced until 1970, and appear to have been prompted by *Gurasz v Gurasz* [1969] 3 All ER 822 in which the Court of Appeal held that the 1967 Act only conferred rights of occupation on a spouse with no proprietary interest in the matrimonial home. The anomalous situation developed whereby a spouse with no proprietary interest could register his or her matrimonial charge under the 1967 Act in order to be protected against a subsequent purchaser, yet, because the 1967 Act did not confer rights of occupation on a spouse with an equitable interest, that spouse had nothing to register under the Act and his or her equitable interest could be defeated by a *bona fide* purchaser for value without notice. The relevant legislation in England is now contained in the Family Law Act 1996.

²² 1998 Order, art 2(2).

²³ This example is employed solely for convenience - the same principles apply where title to the matrimonial home is in the sole name of the wife but the husband has acquired an equitable interest in the property.

²⁴ See for example, *Ulster Bank v Shanks* [1982] NI 143, *Northern Bank Ltd v Beattie* [1982] NIJB and *Ulster Bank Ltd v Carter*, High Court (NI), unreported, 29 January 1999. Although Master Ellison in *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996 refused to make an order for sale under the Partition Acts at the request of a mortgagee of a matrimonial home, this decision has been criticised - see Wallace, “Mortgages and Charges”, *Third Annual Review of Property Law* (1996) 7, pp 20-22. The court may, however, impose a stay or suspension on an order for sale under the Partition Acts-Property (NI) Order 1997, art 49.

²⁵ Article 6(3) of the 1984 Order provides that: “A matrimonial charge shall be void against a purchaser of an estate affected by the charge, unless the charge is registered before the purchaser...(b) takes as security for the payment of a sum of money - (i) the deposit of documents of title in pursuance of section 50 of the Land Registration Act (Northern Ireland) 1970, or (ii) in the case of unregistered

charge, it might be argued that the court should not order sale of the matrimonial home under the Partition Acts. To allow a mortgagee or chargee to obtain an order for sale in these circumstances would defeat the purpose of the 1984 Order by denying the wife the protection it confers on her where she has registered her matrimonial charge.

However, this particular situation is unlikely to arise in practice for two reasons. In the first place, it requires the wife to have taken the positive step of registering her matrimonial charge which in turn presupposes that she is aware of the protection afforded by the 1984 Order. Secondly, if the lender discovers that the wife has registered a matrimonial charge on the property, she will almost certainly be required to sign a postponement form as a pre-condition to the grant of the mortgage or charge.²⁶ Accordingly, the wife must have registered her matrimonial charge *and* the lender must have failed to secure his position by means of a postponement form before the wife can resist an order for sale under the Partition Acts. The likelihood of the court refusing to order sale in these circumstances because of the provisions of the 1984 Order must therefore be regarded as a theoretical as opposed to a practical possibility.

The 1984 Order and Creditors with an Order Charging Land

However, where the security takes the form of an order charging land under the 1981 Order there is a very real possibility of the court refusing to make an order for sale under the Partition Acts. Article 3(1) of the 1984 Order specifically defines a “purchaser” as any person “who, *for valuable consideration*, takes an estate in land.”²⁷ In the case of *In the Matter of Folio 3540 Co Tyrone*²⁸ Murray LJ held that the making of an order charging land is *not* a transaction for valuable consideration. This finding has serious practical consequences for a creditor with an order charging an undivided share of a matrimonial home. Returning to the above example, where a wife has a mere equitable interest in a matrimonial home, registration of her matrimonial charge under the 1984 Order is essential in order for her to take priority over a mortgagee or chargee of her husband’s interest and perhaps resist an action for sale under the Partition Acts by the former. However, where a creditor has an order charging the husband’s interest in the matrimonial home, it seems that the wife does not even have to register her matrimonial charge to take priority over the creditor, since the latter is not a “purchaser” for the purposes of the 1984 Order. The creditor takes his security subject to the wife’s matrimonial charge, irrespective of registration. Consequently, it might be argued that the court should not make an order for sale under the Partition Acts in these circumstances since the creditor’s security is necessarily subject to the wife’s matrimonial charge under the 1984 Order.

It follows that the 1984 Order may enable a spouse with an equitable interest in a matrimonial home to resist an action for sale under the Partition Acts brought by a creditor with an order charging the interest of the other spouse. Similar observations may be made in respect of a spouse with no proprietary interest in a matrimonial home. Where there is an order charging land against the other spouse in these circumstances, the

land, the deposit of title deeds in relation to that estate.” Identical provisions are contained in art 6(3) of the 1998 Order.

²⁶ See *Woolwich Building Society plc v Dickman* [1996] 3 All ER 204.

²⁷ Emphasis added, and see art 2(2) of the 1998 Order

²⁸ [1991] NI 273.

creditor may exercise his normal power of sale²⁹ since his security is not restricted to an undivided share of land. However, since the spouse with no proprietary interest has statutory rights of occupation giving rise to a matrimonial charge under the 1984 Order, the court might refuse to order sale of the property as the creditor's security is subject to this matrimonial charge, registered or not.

This raises the question of whether a spouse with a legal estate in a matrimonial home may also resist an action for sale under the Partition Acts brought by a creditor with an order charging the estate of the other spouse. At a cursory glance, this question might be answered in the negative - since the 1984 Order does not confer statutory rights of occupation on spouses who are co-owners at law, the spouse whose interest is not subject to the creditor's security does not have a matrimonial charge on the property which might persuade the court to refuse an order for sale under the Partition Acts. However, the policy of the 1984 Order may be relevant in this context. If, as suggested above, both a spouse with no proprietary interest in a matrimonial home and a spouse with an equitable interest in a matrimonial home may be able to resist an action for sale by a creditor in these circumstances because of the protection conferred on them by the 1984 Order, it would produce a strange result if a spouse with a legal estate could not do so. Where a spouse with a legal estate opposes a request for sale of the matrimonial home under the Partition Acts by a creditor, the court might refuse to order sale by analogy to the policy of the 1984 Order and the protection which it gives to spouses with no legal estate in such property.

Support for this proposition may be found in *Northern Bank Ltd v Haggerty*. After dismissing the Bank's action for sale on the basis that, as a creditor with an order charging land, it lacked the necessary standing to maintain a partition action, both Master Ellison and Campbell J went on to consider a number of other submissions which had been put forward by the respective parties. Counsel for the wife argued that a spouse without legal title was protected against a judgment creditor by virtue of her matrimonial charge under the 1984 Order. Counsel submitted that, when enacting the 1984 Order, the legislature could not have intended to place a spouse with a legal estate in a matrimonial home in a worse position than a spouse without such an estate. Delivering the judgment at first instance, Master Ellison doubted whether an order for sale under the Partition Acts should be made in such cases:

“[I]t seems to me that a wife who has no proprietary interest in the matrimonial home, and who accordingly enjoys the benefit of a matrimonial charge under Article 5 of the [1984 Order] may well find herself in a position to resist an action for possession to enforce an order charging land registered against the home after her matrimonial charge came into being. Furthermore, since the existence of a matrimonial charge is not dependent on its registration, and since Article 6 of the 1984 Order...only deals with priority vis-à-vis a “purchaser of an estate”...it seems to me that...a spouse without a proprietary interest need not even register her matrimonial charge to have standing to resist eviction on the application of a creditor with an order charging land registered against the entire estate in the matrimonial home. If this view of the law is correct, and if the Bank's arguments about standing for partition were also correct, a wife without any proprietary interest in the property would seem to be in a

²⁹ See art 52 of the Judgments Enforcement (NI) Order 1981.

much stronger position than one who owns a [share]...in the home to resist eviction on foot of an order charging land against her husband's interest. In my view, that would be a very anomalous result indeed".³⁰

While Master Ellison did not mention that the 1984 Order also confers protection on a spouse with a mere equitable interest in a matrimonial home, he nevertheless recognised the divergence in practice which might arise by virtue of the 1984 Order between a spouse with no proprietary interest in a matrimonial home and a spouse with a legal estate when resisting an action for sale by a creditor with an order charging land. The fact that the 1984 Order extends to spouses with a mere equitable interest would surely have reinforced his opposition to an order for sale being made in such cases. On appeal, Campbell J expressed tacit support for this proposition, describing counsel's submission as a "persuasive argument" which tended to confirm his conclusion that a judgment creditor of an undivided share of land could not maintain a partition action.³¹

Although raised as a theoretical issue in *Haggerty*, the question of whether a creditor with an order charging an undivided share of a matrimonial home can obtain an order for sale under the Partition Acts has become a substantive issue since article 48 of the 1997 Order came into force. However, the recent case of *Ulster Bank Ltd v Carter*³² provides further support for the proposition that the provisions of the 1984 Order are likely to be relevant in these circumstances. Girvan J had to consider whether a spouse with legal title could resist an action for sale by a creditor with an order charging the other spouse's share of the matrimonial home in light of article 48. The learned judge referred to the views expressed by Campbell J in *Haggerty*, and continued:

"[T]he position of spouses raises special considerations and problems which are not fully or clearly addressed by the provisions of the 1997 Order...The spouse of a debtor may be faced by a charge affecting the property which effectively undermines his or her right to occupy the premises. Parliament has clearly sought to protect the interests of spouses without a legal interest in premises by the 1984 Order and it is unfortunate that the legislature has either overlooked spouses with a legal joint interest or accidentally or deliberately deprived them of the protection conferred on spouses without a title. It is unlikely that this was a deliberate policy since it produces an absurd and unjust result. In balancing the interests of the creditor against a debtor spouse as against the interests of the non-debtor spouse with a joint interest it is not inevitably the case that justice or fairness demands that the scale should come down in favour of the creditor".³³

In other words, the court might refuse to order sale of a matrimonial home here because, if the non-debtor spouse had no legal title, he or she would be protected by the 1984 Order and to decide otherwise would prejudice a spouse with legal title. However, having determined the case by reference to the commencement date of article 48, Girvan J did not find it necessary to express a final opinion on this particular issue.

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³⁰ High Court (NI), unreported, 23 March 1994, pp 18-19.

³¹ [1995] NI 211, p 217.

³² High Court, unreported, 29 January 1999.

³³ *Ibid*, p 9.

Effect on the Court's Jurisdiction under the Partition Acts

It appears that the court's jurisdiction to order sale of a matrimonial home under the Partition Acts at the request of a creditor with an order charging land may be qualified by the 1984 Order, irrespective of whether the spouse opposing sale has a legal or an equitable estate in the property. The jurisdiction to order sale in lieu of partition is conferred by sections 3 and 4 of the Partition Act 1868.³⁴ Section 4 applies where the plaintiff is interested to the extent of a moiety or more in the property³⁵ and states that the court "shall" order sale unless those who object can establish "good reason to the contrary." The relevant authorities suggest that "good reason" for refusing sale under section 4 is confined to those situations in which the action is vexatious³⁶ or where there are serious objections to an order for sale being made.³⁷ Moreover, instances of the court refusing to

³⁴ Although this jurisdiction is also conferred by section 5 of the 1868 Act, section 5 is seldom relied on in practice, especially where a partition action is brought by an incumbrancer of an undivided share of land. Section 5 applies where the plaintiff is interested in less than half of the property (and therefore cannot proceed under section 4) but is unable to establish a reason for sale being more beneficial than partition as required by section 3 - see *Drinkwater v Ratcliffe* (1875) LR 20 Eq 528 and *Pitt v Jones* (1880) 5 App Cas 651. Where the subject-matter of a partition action is a matrimonial home, an incumbrancer will usually have little difficulty establishing that sale is more beneficial than partition under section 3.

³⁵ Not where the plaintiff is entitled to at least half of the realisable monetary value of the property as suggested by Master Ellison in *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996. Section 4 of the 1868 Act refers to a request for sale being made by "the party or parties interested...to the extent of one moiety or upwards *in the property* to which the suit relates" (emphasis added), and see the criticisms of Master Ellison's interpretation of section 4 in Wallace, *op cit*, pp 20-22.

³⁶ For example, in *Saxton v Bartley* (1879) LJ Ch 519 the court refused to order sale under section 4 upon it being established that the action was instituted through vindictive motives. See further *Rayner v Rayner* [1956] 3 DLR (2d) 522 and *Schnytzer v Wielunski* [1978] VR 418.

³⁷ In *Porter v Lopes* (1877) 7 Ch D 358, pp 363-364 Jessel MR stated: "There are reasons which will strike one at once against a sale. Property may be of a peculiar description so as not to be actually saleable, or, at the time the sale is asked for, may be temporarily very much depreciated in value...There are cases where the nature of the property is such that you could not sell it. There are various properties of such a nature; thus, where the property is so attached to some other property, or such a mere dependence on another property as to be almost valueless except in connection with that property, though of very great value in connection with it...Again you may have very peculiar rights, which cannot be properly divided, attached to property - manorial rights, and rights to game..., which could not be properly severed from the land or well sold. All these are objections to the sale, and I think those are the chief objections the Court has to consider." However, instances of the courts actually refusing to order sale under section 4 by virtue of any of these factors are difficult to find. On the contrary, both Monroe J in *Re Whitwell's Estate* (1887) LR Ir 45 and McWilliam J in the more recent case of *CH v DGO'D* (1978) 114 ILTR 9 were of the opinion that a temporary depreciation in value did not constitute "good reason to the contrary." However, McWilliam J did suggest that where the disputed land was owned by one family and the conduct of one or more of the

order sale where physical partition of the property in question is impracticable are difficult to find.³⁸ However, if a creditor with an order charging a half share or more³⁹ in a matrimonial home brings an action for sale under section 4, the court might regard the policy of the 1984 Order as “good reason” for refusing to order sale even though partition of the property would be impracticable.⁴⁰ Section 3 of the 1868 Act applies where the plaintiff is interested in less than a moiety of the property and can show some reason⁴¹ why sale is “more beneficial” for all⁴² the parties interested than partition, in which case the court “may, if it thinks fit” order sale of the property. Where there is an order charging less than a half share of a matrimonial home and the creditor brings an action for sale under section 3, sale of the property will usually be more beneficial for the relevant parties than physical partition. However, the court may refuse to order sale under section 3 because of the policy of the 1984 Order.

If the court does refuse to order sale of a matrimonial home in these circumstances, this raises the question of whether it must then order

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family members was intended to deter outsiders from bidding at the sale thus causing a depreciation in value, this might be considered good reason for refusing to order sale - *ibid*, p 14.

³⁸ The courts have traditionally regarded the feasibility of physical partition as being an important factor in deciding whether “good reason to the contrary” exists - see for example, *Rowe v Gray* (1877) 5 Ch D 263 and *Re Moore, Moore v Moore* [1952] NZLR 273. In *Northern Bank Ltd v Beattie* [1982] NIJB, pp 23-24 Murray J (as he then was) suggested that the court could not refuse to order sale under the Partition Acts where physical partition of the disputed property was impractical. See, however, fn 40, *post*.

³⁹ To date there is no authority on the practical application of article 48 of the 1997 Order. One practical difficulty which may arise is in deciding under which section of the 1868 Act the chargee or creditor should proceed, since his security is for a specific sum as opposed to a specific estate in the property- see the comments of Campbell J in *Northern Bank Ltd v Haggerty* [1995] NI 211, p 217 and see further Mee, “Partition and Sale of the Family Home” (1993) 15 *DULJ* 78, p 86. However, it is submitted that the determining factor in these cases must be the fractional share of the borrower over which the security extends. Even though a chargee or a creditor with an order charging land does not have an estate in the property, the partition action derives from his security over the estate of the defaulting borrower.

⁴⁰ See the comments of Master Ellison at first instance in *Northern Bank Ltd v Haggerty* High Court (NI), unreported, 23 March 1994, pp 19-20. While this suggestion is contrary to Murray J’s comments in *Northern Bank Ltd v Beattie* [1982] NIJB (see fn 38, *ante*), the arguments for refusing to order sale because of the protection conferred by the 1984 Order might outweigh the otherwise strong presumption in favour of ordering sale because partition is impracticable in this one particular situation. In this limited sense, “good reason to the contrary” under section 4 may indeed be wider today as suggested by the judiciary in *Haggerty* (*ibid*, and [1995] NI 211, p 217) and by Master Ellison in the subsequent case of *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996, pp 12-13.

⁴¹ The reasons specified in section 3 are the nature of the property in question, the number of parties interested in the property, the absence or disability of some of those parties or any other circumstance which renders it more beneficial for the parties to have a sale of the property than physical partition.

⁴² *Corporation of Huddersfield v Jacomb* [1874] WN 80.

partition of the property.⁴³ The prevailing view in Northern Ireland appears to be that the court must usually make an order for *either* partition *or* sale in a partition action.⁴⁴ However, if the court refuses to make an order for sale of a matrimonial home at the request of a creditor with an order charging land, it is unlikely to order partition of the property. Apart from the fact that the plaintiff in these circumstances will almost certainly not want an order for partition since this will not assist in the effective realisation of his security, there is a fundamental obstacle to partition of a matrimonial home. Partition of a single dwelling house is likely to be a material change of use requiring planning permission under article 11(3)(a) of the Planning (NI) Order 1991. If the planning authority has indicated that planning permission would be refused or no inquiries have been made as to whether permission is likely to be granted, the court could, in theory, still order partition of a matrimonial home upon refusing to order sale.⁴⁵ However, this is very unlikely to occur in practice as the court will invariably be reluctant to make an order for partition where it is within the power of a third party (in this context, the planning authority) to prevent the order from being carried out- the court will not usually make an order which is futile.⁴⁶ Thus, even if the court does refuse to order sale

⁴³ Joint tenants and tenants in common of land in Ireland were first granted a right to compel partition at common law by An Act for Jointenants 1542. This statutory jurisdiction was superseded by an equitable jurisdiction to partition, and prior to the enactment of the Partition Act 1868, all partition actions were brought in and determined by the Court of Chancery. However, because the equitable jurisdiction was derived from the statutory jurisdiction, the Court of Chancery also regarded a decree for partition as a matter of right - see, for example, *Warner v Baynes* (1750) Amb 589 and *Turner v Morgan* (1803) 8 Ves 143. Since the 1868 Act empowered the court to order sale in lieu of partition, the practice developed whereby sale and partition were regarded as alternatives, so that the automatic consequence of refusing sale was an order for partition - see Walker, *The Partition Acts 1868 and 1876* (2nd edn, 1882) pp 14-15. In *Pitt v Jones* (1880) 5 App Cas 651, p 661 Lord Watson remarked: "Before the passing of the Partition Act the Respondents would have had an absolute right to a decree of partition; and it appears to me that the leading purpose of the Act, as disclosed in sects. 3, 4, and 5, was to enable the Court to substitute, in certain cases, sale and distribution for division, which was the only remedy previously competent."

⁴⁴ See the comments of Murray J in *Northern Bank Ltd v Beattie* [1982] NIJB, pp 23-24 and cited with approval by Girvan J in *Glass v McManus* [1996] NI 401. Although Master Ellison in *Northern Bank Ltd v Adams*, High Court (NI), unreported, 1 February 1996 suggested that the court may refuse both partition and sale by analogy to the practice under section 30 of the Law of Property Act 1925 and article 309 of the Insolvency (NI) Order 1989, these provisions are not relevant when considering the nature of the court's jurisdiction under the Partition Acts - see Wallace, *op cit*, pp 22-24

⁴⁵ Since making an order for partition and carrying the order into effect are separate matters - see the comments of Lord Porter delivering the advice of the Privy Council in *Patel v Premabhai* [1954] AC 35, pp 47-8. Similar views were expressed by Deane J in *Squire v Rogers* (1979) 39 FLR 106, p 119.

⁴⁶ The consent of a third party to carrying out an order for partition may be required in two other situations- namely, where the lands have been acquired under the Land Purchase Acts and cannot be partitioned without the prior consent of the Department of Finance, and where the lands in question comprise leasehold property and partition would be in breach of one of the covenants in

of a matrimonial home in these circumstances, it might also refuse to order partition, leaving a judgment creditor of an undivided share of such property without any practical means of realising his security.

To summarise, while article 48 of the 1997 Order improves the position of creditors with an order charging land in cases such as *Rainey & Sons v Weatherup* where the property in question comprised agricultural land, it may provide little assistance to creditors in the situation which arguably occurs most often in practice - namely where a creditor has an order charging an undivided share of a matrimonial home. Although the creditor in the latter situation now has *locus standi* to bring a partition action, article 48 may not improve his position in view of the protection which the 1984 Order confers on a spouse with an equitable interest in a matrimonial home who resists an action for sale under the Partition Acts and the implications this may also have for a spouse with a legal estate in a similar situation. It remains to be seen whether the courts in Northern Ireland will regard the 1984 Order as encroaching upon the jurisdiction to order sale under the Partition Acts in these circumstances. However, if the courts do adopt this approach, creditors like the plaintiff in *Northern Bank Ltd v Haggerty* may still be unable to obtain an order for sale. While a creditor with an order charging an undivided share of a matrimonial home is now over the *locus standi* hurdle, he may not be any closer to realising his security.

II. PARTITION ACTIONS AND EQUITABLE MORTGAGEES

Problems may also arise where an equitable mortgagee of an undivided share of land wishes to enforce his security by means of an order for sale under the Partition Acts. To reiterate, the *locus standi* test in partition actions requires that the plaintiff has a legal or equitable estate or interest in possession. Where the security takes the form of a legal mortgage of an undivided share of land the position is relatively straightforward. The mortgagor's estate in the property is conveyed to the mortgagee who has, by virtue of this estate, a right to possession.⁴⁷ Accordingly, a legal mortgagee may maintain a partition action since he has a legal estate in possession.⁴⁸ Where the mortgage is an equitable one, the position is more

the lease. For example, in *North v Guinan* (1829) Beat 342 Hart LC refused to partition a house held under a lease which contained a covenant prohibiting waste, remarking that: "A series of decisions has settled, that a commission of partition is due of common right to every tenant in common, however minute his share...The partition of the house must re-model and re-construct the fabric of the building, and it would throw some discredit on the jurisdiction of the Court, if the landlord, disliking the alterations, should, in defiance of the decree, enter for the waste committed, and turn both parties, with the Court and its decree, out of doors" - *ibid*, pp 344-5. It could be argued that the court has discretion to refuse partition in these three particular situations if the order would be futile - see the comments of Campbell J (as he then was) in *Fraser Homes Ltd v Fraser Houses (NI) Ltd* [1998] NI 214, p 218. These three situations aside, however, it is submitted that the court cannot refuse to order partition if it refuses to order sale under the Partition Acts in accordance with the practice discussed at fn 43, *ante*.

⁴⁷ See the comments of Harman J in *Four-Maids Ltd v Dudley Marshall Properties Ltd* [1957] Ch 317, p 320.

⁴⁸ This is implicit in Murray J's judgment in *Ulster Bank Ltd v Shanks* [1981] NI 143, pp 150-1. See further *Northern Bank Ltd v Beattie* [1982] NIJB. This is not

complicated. Although he has no estate vested in him⁴⁹, an equitable mortgagee does have an equitable interest in the mortgaged property⁵⁰ and accordingly satisfies the first criterion of the *locus standi* test under the Partition Acts. However, problems arise in respect of the second criterion of this test. There is a lack of consensus as to whether an equitable mortgagee has a right to possession by virtue of his interest in the mortgaged property. A number of authorities have answered this question in the negative, taking the view that an equitable mortgagee has no right to possession at law because he does not have a legal estate in the property.⁵¹ In contrast, other authorities appear to favour the view that an equitable mortgagee is nevertheless entitled to possession in equity:

“It is generally said that an equitable mortgagee has no right to take possession. Certainly he has none at law, for he has no legal estate. But in equity he should be entitled to the same rights as if he had a legal mortgage, and there would seem to be no reason why he should not take possession under the doctrine in *Walsh v Lonsdale*⁵², for the basis of an equitable mortgage is the creation of the relationship of mortgagor and mortgagee forthwith, rather than a mere contract for a future mortgage”.⁵³

Thus, whether an equitable mortgagee has *locus standi* to bring a partition action depends on which line of authorities is followed. If those authorities which take the view that an equitable mortgage confers an entitlement to possession are correct, then an equitable mortgagee would have the necessary standing to proceed under the Partition Acts. However, if the alternative view is correct, this would have serious implications for equitable mortgagees of an undivided share of land. The principle in *Tubman v Johnston*⁵⁴ prevents a mortgagee of an undivided share of land from exercising his normal power of sale. Whereas a legal mortgagee may avail of the jurisdiction under the Partition Acts in these circumstances, this alternative would not be available to an equitable mortgagee because the latter would not have the necessary standing to maintain a partition action. An equitable mortgagee of an undivided share of land would therefore be left without an effective means of realising his security.

altered by the fact that, in most instances, the mortgagee will elect not to enforce his right to possession and will allow the mortgagor to remain in occupation so long as the latter is not in default- the mortgagee's right to possession is merely suspended during this time.

⁴⁹ See Fisher and Lightwood, *Law of Mortgage* (8th edn, 1969) p 315 and Wylie, *Irish Land Law* (3rd edn, 1997) p 733.

⁵⁰ Wylie, *op cit*, p 372.

⁵¹ See, for example, 32 *Halsbury's Laws of England* (4th edn, 1982) p 309 and Gray, *Elements of Land Law* (2nd edn, 1993) pp 990-1. See further *Barclay's Bank Ltd v Bird* [1954] Ch 274, *Patel v Bank of India*, Court of Appeal, unreported, 26 November 1997 and *Bank of Credit and Commerce International SA v BRS Kumar Bros Ltd* [1994] 1 BCLC 211.

⁵² (1882) 21 Ch D 9.

⁵³ Megarry and Wade, *The Law of Real Property* (5th edn, 1984) pp 951-2. The authors cite a number of cases supporting this proposition including *Ex parte Bignold* (1834) 4 Deac & Ch 259, *Trichborne v Weir* (1892) 67 LT 735, *Antrim County Land, Building and Investment Co Ltd v Stewart* [1904] 2 IR 357 and *Spencer v Mason* (1931) 75 SJ 295. Similar views are expressed in Fisher and Lightwood, *op cit*, p 315 and Wylie, *op cit*, p 733.

⁵⁴ [1981] NI 53.

One possible solution to this problem is to say that article 48 of the 1997 Order extends to equitable mortgagees. Although the 1997 Order does not define a “charge” as including an equitable mortgage⁵⁵, Walker C in *Shea v Moore*⁵⁶ stated that: “...every charge is not an equitable mortgage, though every equitable mortgage is a charge”.⁵⁷

An equitable mortgagee might therefore be regarded as an “owner of a charge” for the purposes of article 48 of the 1997 Order, and would accordingly have *locus standi* to bring an action for sale under the Partition Acts. One possible difficulty with this approach is that it may be straining the language of article 48 somewhat to suggest that a charge by implication includes an equitable mortgage in the absence of a specific statutory direction to this effect in the 1997 Order. Although a “mortgage” under the 1997 Order includes a “charge” and the terms “mortgagor” and “mortgagee” are to be construed accordingly⁵⁸, this does not necessarily mean that an equitable mortgage is a charge for the purposes of the 1997 Order. Thus, article 48 of the 1997 Order may not provide any assistance to equitable mortgagees of an undivided share of land.

It appears that this difficulty has not yet been raised in Northern Ireland. Indeed a number of early cases have expressly decided that an equitable mortgagee *does* have *locus standi* to maintain a partition action. For example, Bacon VC in *Davenport v King*⁵⁹ described both legal and equitable mortgagees as “persons interested” for the purposes of the Partition Acts, while in *Hill v Maunsell-Eyre*⁶⁰ Overend J remarked:

“A tenant in common has by law a right to a decree for partition and, subject to the provisions of the Partition Acts, to a sale in lieu thereof..., and in my opinion a mortgagee of an undivided share has the same right although he may not have the legal estate in the mortgaged premises”.

More recently, similar views have been expressed in *Northern Bank Ltd v Beattie*⁶¹, *Northern Bank Ltd v Haggerty*⁶² and in *Northern Bank Ltd v Adams*.⁶³ However, given the apparent conflict over whether an equitable mortgage confers a right to possession on the mortgagee, serious doubts must exist as to whether such a course of action is in fact available to an equitable mortgagee of an undivided share of land. One possible means of allaying these doubts is by legislative intervention in the form of a simple

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⁵⁵ There is no statutory definition of a “charge” given in the 1997 Order.

⁵⁶ [1894] 1 IR 158, p 168.

⁵⁷ See further *Matthews v Gooday* (1861) 31 LJ Ch 282. For a recent discussion of the nature of equitable mortgages, see *United Bank of Kuwait v Sahib* [1996] 3 All ER 215.

⁵⁸ 1997 Order, art 2(1).

⁵⁹ (1883) WR 911.

⁶⁰ [1944] IR 499, p 505.

⁶¹ [1982] NIJB, endorsing the decisions in *Davenport v King* and *Hill v Maunsell-Eyre*.

⁶² [1995] NI 211.

⁶³ High Court (NI), unreported, 1 February 1996. Master Ellison appears to have had no difficulty in accepting that the plaintiff Bank as owner of an equitable mortgage satisfied the *locus standi* test: “The *locus standi* test is governed by the principle that the plaintiff must be entitled to a legal or equitable estate in possession...In the instant case the plaintiff bank, having an equitable second mortgage by deed, is entitled in equity to an estate in possession”- pp 14-15.

statutory provision to the effect that equitable mortgagees do have *locus standi* to bring an action under the Partition Acts.

CONCLUSION

The issue of whether lending institutions may enforce their security where it is restricted to an undivided share of land is one of obvious practical importance. It is not disputed that article 48 of the Property (NI) Order 1997 improves the law insofar as it grants chargees of an undivided share of land and creditors with an order charging an undivided share of land *locus standi* under the Partition Acts. However, to describe article 48 as a panacea in this area would be optimistic to say the least. Since article 48 is not a retrospective provision, it does not grant *locus standi* to creditors with an order charging land created before 1 September 1997. More fundamental problems arise where this particular type of security relates to a matrimonial home. Assuming that the creditor does have standing to bring a partition action, it is doubtful whether the court will order sale in these circumstances due to the effect of the Family Law (Miscellaneous Provisions) (NI) Order 1984. That aside, equitable mortgagees of an undivided share of land are confronted with a more fundamental problem as they may not satisfy the *locus standi* test for bringing an action under the Partition Acts. The consequences of this are potentially much more far-reaching than those experienced by a creditor with an order charging land - while the latter might encounter problems where his security relates to an undivided share of a *matrimonial home*, an equitable mortgagee would be unable to rely on the Partition Acts to realise his security in *any case* in which it was restricted to an undivided share of land.

The outlook in the aftermath of article 48 of the 1997 Order has improved but remains less than trouble-free. Although one of the problems which previously confounded lending institutions whose security was restricted to an undivided share of land has been remedied, difficulties clearly persist. In the absence of further legislative intervention, the enforcement of orders charging an undivided share of a matrimonial home and equitable mortgages of an undivided share of land may yet frustrate unwary lenders.

**RECENT DEVELOPMENTS IN THE LAW RELATING TO
ABUSE OF PROCESS AND THE END OF THE RIGHT TO
BE NON-SUITED: THE EFFECT OF *ARBUTHNOT
LATHAM V TRAFALGAR HOLDINGS*¹ AND *GILHAM V
BROWNING*²**

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Arbuthnot is a decision of the Court of Appeal framed largely in the context of the imminent changes to English civil procedure following Lord Woolf's reports (indeed, the judgment of the court is delivered by Lord Woolf sitting as Master of the Rolls). However, the case actually turns on well-established principles of equal application to practice in Northern Ireland.

The facts of *Arbuthnot* are, in summary, as follows. The plaintiff was a bank which had advanced funds to Trafalgar Holdings Ltd. The advance was secured by a guarantee given to the bank by Trafalgar's UK representative, a Mr Ashton, and his wife. The guarantee itself was supported by a mortgage in favour of the bank over the Ashtons' home.

In August 1989, the bank started proceedings against Trafalgar and the Ashtons for repayment of the advance. Trafalgar did not defend the action, but the Ashtons did. Pleadings closed in May 1990, and discovery was completed in June 1991. In August 1995, the limitation period applying to the bank's claim under the Ashtons' guarantee expired, and in May 1996, the Ashtons applied to have the bank's claim struck out on the grounds of delay. The bank opposed the application, explaining the delay by stating that the bank had inherited a huge portfolio of bad debt, and that since this particular debt was secured, it was accorded only a low level of priority in the bank's debt recovery programme. The judge at first instance found that the bank had been guilty of inordinate and inexcusable delay, but refused to strike the claim out, since the bank was still in time to commence a fresh action on foot of the mortgage given by the Ashtons to support their guarantee³. The Ashtons appealed.

The principles governing the issue of delay are set out in the well-known House of Lords decision in *Birkett v James*⁴. Lord Woolf summed these up in *Arbuthnot* as follows:-⁵

1. An action should only be dismissed for want of prosecution where:-
 - a. the plaintiff's default has been intentional and contumelious; or
 - b. where there has been inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible, or to

¹ [1998] 2 All ER 181.

² [1998] 2 All ER 68.

³ In English law, mortgages, being contracts under seal, are "specialties" within the meaning of s.8 of the Limitation Act 1980. In the context of mortgage actions, the nearest equivalent to this provision in Northern Ireland is contained in arts.32-3 of the Limitation (NI) Order 1989.

⁴ [1977] 2 All ER 801; [1978] AC 297.

⁵ [1998] 2 All ER 181, at 187.

serious prejudice to the defendant.

2. Before the limitation period has expired, an action will not normally be dismissed for inordinate and inexcusable delay if fresh proceedings for the same cause of action could be initiated⁶.

The second branch of the principle in *Birkett v James* is, to a degree, simply the application of common sense. It is of no benefit to a defendant to have the first action struck out, only to be confronted with a second, identical action, with the inevitable further delay and expense which that would entail. However, this approach looks at the matter only from the perspective of the “complaining” defendant. The court is, nonetheless, entitled to look at the way an action has been conducted quite independently of whether or not a defendant has raised the question of prejudice. If the court finds that its process has been abused, then it has the power to take punitive action against the guilty party. Lord Woolf cited with approval⁷ the following passage from the judgment of Parker LJ in *Culbert v Stephen Westwell & Co Ltd*⁸:-

“An action may also be struck out for...abuse of process of the court...[A] series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of the consequences can also properly be regarded as contumelious conduct, or, if not that, an abuse of the process of the court. Both this and the question of fair trial are matters in which the court itself is concerned and do not depend on the defendant raising the question of prejudice.”

However, Lord Woolf identified a further consideration, one directed very much towards his impending reforms. He said⁹:-

“In *Birkett v James* the consequence to other litigants and to the court of inordinate delay was not a consideration that was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also on the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed”.

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⁶ Lord Woolf stated at p 189: “In *Birkett v James* no consideration was given to the situation where the only claim which had been relied on would be statute-barred if the action was dismissed, but there was another cause of action which would not be barred”. This is true, but this question was considered in Northern Ireland by Campbell J in *McCluskey v Colas (NI) Ltd* [1994] 4 BNIL 69, in which an action for slander (on which the limitation period had expired) was struck out on the grounds of inordinate and inexcusable delay, despite the existence of parallel claims in contract and negligence which were not statute-barred.

⁷ At p 188.

⁸ [1993] PIQR 54, at pp 55-6.

⁹ At p 191f-g.

Delay may, therefore, amount to an abuse of the court's process which the court may punish *irrespective* of any prejudice (or lack of same) to any non-defaulting party in the action. And although this judgment is clearly framed with the reforms of next April in mind, it is a decision on the rules *in their current form*. Indeed, as Lord Woolf himself put it¹⁰:- "Most of the powers which the court requires for the purposes of case management are already contained in the existing rules". These rules are, of course, largely identical to the current Rules of the Supreme Court applicable in Northern Ireland.

Where the court strikes out an action on the grounds of abuse of the court's process, and the cause of action is not statute-barred, the defaulting plaintiff may, in theory at least, commence fresh proceedings forthwith on that same cause of action. In these circumstances, however, the principle in *Janov v Morris*¹¹ comes into play, which Lord Woolf restated as follows¹²:

"In exercising its discretion as to whether to strike out the second action, the court should start with the assumption that if a party has had one action struck out for abuse of process, some special reason has to be identified to justify a second action being allowed to proceed".

This is not to say, of course, that delay is the only way in which the court's process may be abused. Returning to the facts in *Arbuthnot*, it was contended on behalf of Mr and Mrs Ashton that not only had the bank been guilty of inordinate and inexcusable delay, but that it had commenced litigation which, because of its mortgage security, it had no intention of bringing to a conclusion. That this is conduct which may amount to an abuse of the court's process was established by the House of Lords in *Grovit v Doctor*¹³. Many institutional lenders, faced with a large volume of bad debtors, habitually start a great many actions, and then pick which of them they wish to pursue. The remainder are "warehoused", to be progressed when - if - the lender chooses to do so. Lord Woolf condemns this practice¹⁴ save in circumstances where it occurs either with the agreement of all the other parties to the action¹⁵, or under the direction of the court.

It is important to bear in mind that neither delay in the prosecution of a case, nor "warehousing" multiple actions without progressing them, are *automatically* abuses of the court's process. Delay may be justified in the context of settlement negotiations, and "warehousing" in circumstances where, for example, the decision of an appellate court is awaited on a particular point of relevance to the actions left in abeyance.

Conversely, however, conduct which is legitimate in itself may, by reason of the party's motive for pursuing it, amount to abuse of the court's process. In these circumstances, the court's task of deciding whether or

¹⁰ At p 191*d*.

¹¹ [1981] 3 All ER 780.

¹² [1998] 3 All ER 189 at 192*b*.

¹³ [1997] 2 All ER 417 (HL).

¹⁴ [1998] 3 All ER 189 at 192.

¹⁵ Which may cover instances where "protective" proceedings are issued, as for instance in personal injury cases where liability is admitted, but quantum is disputed, and the plaintiff wishes to avoid his claim becoming statute-barred. *cf.* the practice in Admiralty proceedings of issuing several writs *in rem* in "sister ship" arrest cases.

not its process has been abused is less clear-cut. A striking illustration of this is *Gilham v Browning*¹⁶, another very recent decision of the English Court of Appeal. The facts grounding the original dispute between the parties were as follows. Mr Gilham and his wife operated a farm as a partnership. They agreed to sell the farm, together with various assets and goodwill to Mr and Mrs Browning. Mr Gilham took proceedings in the county court claiming just under £8,800 from the Brownings, being the balance of the purchase price. The Brownings defended, and counter-claimed £120,000 without giving details as to how this was made up.

This relatively straightforward case gave rise to a myriad of procedural twists and turns. To begin with, the Brownings required leave to defend. As a condition of obtaining leave, they were ordered to lodge the sum of £5,000 into court. A year later, directions for trial were given, including a timetable for the exchange of evidence (which has been standard practice in English civil litigation for several years, both in the High Court and the County Court). For the following three years, very little was done to progress the action. The court eventually set it down for trial and allocated a date in December 1996. The original plaintiff, Mr Gilham, died in August of that year and about six weeks after his death, the Brownings served a substantial expert's report, which contained the first detailed exposition of their counterclaim. They also served supplemental witness statements and indicated an intention to serve more. All of this was, of course, well outside the timetable originally laid down in 1993. In October 1996, Mrs Gilham was substituted as plaintiff (as her husband's executrix) and the court refused the Brownings leave to adduce in evidence the expert's report and the supplemental witness statements which they had served the previous month.

The Brownings then instructed new solicitors. They took the view¹⁷ that if the Brownings discontinued their counterclaim and then issued fresh proceedings, this would enable them to introduce the fresh evidence that they had been barred from relying upon in the original proceedings. Accordingly, notice of discontinuance was served under Order 18, Rules 1 and 3 of the English County Court Rules¹⁸. The county court judge set aside the notice, holding that the collateral purpose behind its service rendered it an abuse of the court's process. The Brownings then elected to be non-suited on their counterclaim. The judge refused to non-suit, whereupon the Brownings offered no evidence on the counterclaim, which was dismissed. The Gilhams' own claim was settled by compromise. The Brownings appealed both the order setting aside the notice of discontinuance and the refusal to non-suit.

The appeal relating to the setting aside of the notice of discontinuance was grounded on the submission that - by contrast with the High Court¹⁹ - a plaintiff in the English County Court can withdraw his claim and start again at any time before judgment or final order in the action. There is no judicial discretion, and no need for leave at any time. By contrast, discontinuance without leave in the High Court is expressly limited²⁰ to a period of 14 days after service of a defence or the service of the defendant's affidavit, where the proceedings are begun by originating

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¹⁶ [1998] 2 All ER 68.

¹⁷ [1998] 2 All ER 68 at 71j.

¹⁸ The equivalent provision in Northern Ireland with regard to discontinuance is Order 21 Rule 1 of the County Court Rules (NI) 1981.

¹⁹ See RSC Order 21 Rules 1-3.

²⁰ RSC Order 21 Rule 1.

summons. Thereafter²¹ the plaintiff may disengage only with leave of the court, or the written consent of all other parties. The Brownings argued that:-

- a. The code of discontinuance operative in the county court is materially different from that of the High Court;
- b. The “materiality” of this difference is that it is expressly designed to allow a plaintiff to disengage if he considers that he will gain a collateral advantage from so doing;
- c. Consequently, serving a notice of discontinuance in order to obtain a collateral advantage is not an abuse of the court’s process - indeed, it is using the court’s process for the exact purpose for which it was designed.

May LJ dealt with the superficial attraction of this submission in relatively short order. He held, applying the decision of the House of Lords in *Castanho v Brown & Root (UK) Ltd*²², that the County Court has an inherent jurisdiction to prevent abuse of its process. He said²³:-

“In my judgment...there is...no good reason for not applying the *Castanho* decision to notices of discontinuance in the county court. There is no express power in the High Court Rules to strike out a notice of discontinuance yet the jurisdiction exists.²⁴ The fact that there is no express discretion in county court Ord 18 does not help [the Brownings] since *Castanho v Brown & Root (UK) Ltd* applied to a non-discretionary part of the High Court Rules. I consider that the judge was correct to hold that he had jurisdiction to strike the notice out if it were an abuse. Whether in a particular case there is an abuse will be a question of fact and degree. It is a jurisdiction to be used with circumspection no doubt, but it is a jurisdiction which is available in the county court as in the High Court.”

Any decision of the Court of Appeal in England is treated here with the highest respect, and will be followed by the courts here, unless there is a good reason for not doing so²⁵. It is submitted that, on this point, *Gilham* ought to be followed in this jurisdiction. The provision for discontinuance in CCR Order 18 is the same as that in CCR(NI) Order 21, save for the

²¹ RSC Order 21 Rules 2 and 3.

²² [1980] 3 All ER 72.

²³ [1998] 2 All ER 68 at 76c-d.

²⁴ In *Castanho*, the plaintiff had served notice of discontinuance without leave in compliance with RSC Order 21 Rule 1 in an action for damages personal injury in which he had already obtained an admission of liability and interim payments. His motive for disengaging was to begin fresh proceedings in Texas, where it was thought that he might get a better result. Parker J struck out the notice of discontinuance at first instance, and granted an injunction restraining proceedings in the United States.

²⁵ For a striking example of a refusal by a Northern Ireland court to follow a decision on point from the English Court of Appeal, see *National and Provincial Building Society v Lynd* [1996] 9 BNIL 69 in which Girvan J declined - correctly, it is respectfully submitted - to follow the decision of the English Court of Appeal in *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 All ER 449.

treatment of costs²⁶, and it is clearly right that the County Courts in Northern Ireland should have powers to prevent abuse of their process in line with those now recognised as existing in England and Wales.

May LJ then turned to the appeal against the refusal of the County Court judge to non-suit the Brownings. Their counsel had contended that, in the County Court, a common law right survived whereby the plaintiff might elect to be non-suited at any time up to final order or judgment. Since this was an election which the plaintiff might make as of right, the court had no discretion to refuse to non-suit. If this was correct, then May LJ's decision on the propriety of the Brownings' notice of discontinuance would have been rendered nugatory: denied one exit route by a finding of abuse of process, the Brownings had only to choose to be non-suited in order to extricate themselves from the case. As the exercise of an unfettered common law right, rather than a rule of procedure, it could not, for that very reason, be impeached as an abuse of process.

In the course of submissions, counsel for the Brownings accepted that discontinuance under CCR Order 18 is, essentially, identical with the common law right of election to be non-suited. This caused the Court of Appeal to question whether or not the common law right to elect for non-suit had indeed survived the introduction of the discontinuance machinery into the county court rules. The editors of the *County Court Practice 1997* state in the notes to CCR Order 18 that it does survive, based on the decision of Wilmer LJ in *Clack v Arthur's Engineering Ltd*²⁷ in which he said²⁸: "...At any time up to verdict, if the plaintiff elected to be non-suited he was entitled to it as of right and the court had no discretion to refuse..." This conclusion was reached on the basis of two pre-Judicature Act cases, namely *Robinson v Lawrence*²⁹ and *Outhwaite v Hudson*³⁰. Yet in the High Court, the position was different, and was clarified at an early stage. The right of a High Court plaintiff to be non-suited was abolished by the 1883 Rules, and any doubt on the point was resolved conclusively by the House of Lords in *Fox v Star Newspaper Co Ltd*³¹. The Earl of Halsbury LC said this³²:-

"Our whole system has now been changed, and I think that the reason why the word "nonsuit" itself is not now to be found in the rules is that it was determined that the power of a plaintiff at the common law to claim a nonsuit, or the plaintiff in equity to dismiss his bill at his own option, should no longer be permitted, and it is probable that the word "discontinuance" was supposed to apply to both forms of procedure both at common law and in equity. Accordingly, by Order XXVI., r.1, the only mode by which a plaintiff can submit to defeat is under that Order, unless he allows the proceedings to go on until the verdict is recorded against him. The word "discontinuance" no doubt had, under the former system, the more limited application, and the old system of nonsuit is manifestly no longer capable of being reconciled with the new procedure either in form or substance. The substance is that when it once comes into court,

²⁶ Costs are required to be taxed in England, whilst in Northern Ireland, actual payment is required.

²⁷ [1959] 2 All ER 503.

²⁸ At page 507.

²⁹ (1852) 7 Exch 123.

³⁰ (1852) 7 Exch 380.

³¹ [1900] AC 19.

³² At page 20.

and when the plaintiff offers no support for his action, there must be a verdict for the defendant.”

Given that a broadly similar scheme of discontinuance had been introduced even earlier into the county court (starting with section 79 of the County Courts Act 1846, which contains provisions largely similar to those in the present CCR Order 21 Rule 2(1)), May LJ held that an unfettered right to be non-suited did not survive in the county court. He said this³³:-

“...it is clear that the reasoning in *Fox v Star Newspaper Co Ltd* must also apply to the County Court Rules. In the High Court, discontinuance, fairly recently introduced when *Fox v Star Newspaper Co Ltd* was decided, had taken the place of nonsuit which had ceased to be available. In the county court there is discontinuance under Ord 18 up to judgment, and a discretionary power in the court to nonsuit when the evidence has been heard if the plaintiff fails to prove his claim. That covers the entire ground, and there is no room for a general right to be nonsuited, which in my judgment, on the authority of *Fox v Star Newspaper Co Ltd* did not survive the introduction of rules for discontinuance. Discontinuance was not addressed in *Clack's* case and the critical statement about nonsuiting was obiter³⁴”

The anachronism of the unrestricted right to be non-suited has thus finally been banished from English law, more than 150 years after the process first began. What, then, of Northern Irish law on the point? The Supreme Court of Judicature (Ireland) Act 1877 abolished the right of non-suit in the superior courts, and discontinuance of proceedings in the High Court in Northern Ireland is now governed by Order 21 Rules 1-3 of the Rules of the Supreme Court (NI) 1980. These provisions mirror those contained in the English RSC Order 21 Rules 1-3, referred to earlier. The similarity between CCR Order 18 and CCR(NI) Order 21 has already been addressed. In the light of this, it is submitted that the unfettered right to elect to be non-suited in the County Courts of Northern Ireland has not survived the introduction of the machinery for discontinuance, for the same reasons as those given by May LJ for the demise of its English counterpart.

Nonetheless, there remains, it would seem, an important difference in English and Northern Irish practice with regard to the power of the *court* to compel a plaintiff to submit to a non-suit (or, in the terminology of Northern Irish practice, a “dismiss without prejudice”), arising from the decision in *Swift v Swift*.³⁵ This seems to be authority for the proposition that the power of a Northern Irish county court to compel a dismiss without prejudice ceases with the start of the trial or hearing whereas in England, the county court has the power, as we have seen, to order its equivalent - a non-suit - at any time prior to judgement or order. However, although the decision in *Swift v Swift* was unanimous, Crampton

³³ [1998] 2 All ER 68 at page 81*b-d*.

³⁴ In *Clack's* case, the court was concerned whether or not the *court* had an unfettered discretion to non-suit, and if so in what circumstances. The question of the plaintiff's right to elect to be non-suited was not before the court, but Wilmer LJ made a finding on the point, as it had come up in the course of a review of the authorities relating generally to non-suited. There is no doubt that May LJ was quite correct in characterising the finding as obiter.

³⁵ (1852) ICLR 218.

J expressed doubts, and would clearly have been happier to hold that the matter was one for the discretion of the judge³⁶. He acquiesced with the majority view “for conformity sake”³⁷. The authority is old and clearly out of step with prevailing English practice, which has - rightly, it is submitted - broadened the discretion of the trial judge to order a non-suit at any stage prior to judgement or order if the interests of justice so require. It is submitted that the county courts in Northern Ireland should have the equivalent power to compel submission to a dismiss without prejudice, where the justice of the case so demands. For that reason - justifying the doubts expressed at the time by Crampton J - it is submitted that *Swift v Swift* should no longer be followed.³⁸

³⁶ *Ibid* at page 221.

³⁷ *Ibid* at page 221.

³⁸ The author is grateful to Barry Valentine BL for making available relevant extracts from his forthcoming work “Civil Proceedings: The County Court” (SLS Legal Publications (NI)) in connection with this article. The views expressed are entirely those of the author.

RECEIPT OF RENT AND WAIVER OF LEASEHOLD COVENANTS: AN EQUITABLE APPROACH?

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INTRODUCTION

The decision of the High Court of the Republic of Ireland in *Crofter Properties Ltd v Genport Ltd*¹ has raised, once again, an issue concerning the requirements for an effective waiver of a leasehold covenant in Northern Ireland. Section 43 of the Landlord and Tenant Law (Amendment) Act 1860,² provides that:

“Where any lease made after the commencement of this Act shall contain or imply any condition, covenant, or agreement, to be observed or performed on the part of the tenant, no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant, or agreement, or a waiver of the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord, or his authorised agent in writing under his hand.”³

Section 43 appears clearly to require that where a landlord waives his tenant's breach of covenant, that waiver will only be effective if signified in writing.

The requirement of writing in section 43 appears to reverse the antecedent common law principle, whereby receipt of rent amounts to an implied waiver of breach of a covenant.⁴ The provision of section 43 appears to enable a landlord to continue receiving rent from his tenant, with knowledge of the tenant's breach, and yet to claim that the breach has not been waived. The operation and effect of section 43 has been questioned, however, largely on the basis of an *obiter* statement by Palles CB in *Foot v Benn*.⁵ The court's reference to section 43 was made in an intervention, in the course of counsel's argument, wherein Palles CB observed that he had:

“frequently considered.. whether [section 43] does not apply merely to a waiver of the covenant generally, and that a receipt of rent after the breach, with knowledge of it, would still waive all rights of the landlord arising from that particular breach, although it would not amount to a dispensation of the covenant.”⁶

• I am indebted to Dr Alan Dowling, who commented on this article in draft

¹ Unreported (HC, RI), 15 March 1996 (1988/222 Sp).

² Hereafter 'Deasy's Act'.

³ *Deasy's Act*, section 43.

⁴ See *Pennant's Case*, (1596) 3 Co Rep 64a; *Clifford v Reilly* (1869) IR 4 CL 218.

⁵ (1884) 18 ILTR 90

⁶ *Ibid*, at 91. It may be noted that the headnote reported a much stronger finding, to the effect that: “Section 43 of the Landlord and Tenant Act 1860, applies merely to a waiver of covenant generally. And a receipt of rent after breach of covenant, with the knowledge of it, still amounts to a waiver of all rights of the landlord arising from that particular breach.”, *ibid*, at 90.

Although Palles CB expressed his opinion in qualified terms, it was reported as an *obiter dictum*, and has given rise to some uncertainty concerning the scope of section 43.

The distinction drawn by Palles CB, between waiver of a covenant generally, and waiver of a particular breach, is not made in section 43, but is drawn from the previous common law position.⁷ At common law, a waiver can be either general or particular: a general waiver amounts to an undertaking by the landlord to waive all rights arising under a covenant, for all time, whereas a particular waiver excuses the tenant from liability only in relation to a specified breach, of which the landlord has knowledge. The common law distinction between general and particular waivers was preserved by the Law of Property (Amendment) Act 1860, section 6 of which provides that where a landlord waives his tenant's breach of covenant, this is to be taken as a waiver of the particular breach only, unless there appears an intention to the contrary.⁸

The comments of Palles CB in *Foott v Benn*, which suggested that conduct, such as receipt of rent, would continue to act as implied waiver of particular breaches, implies a distinction in section 43 between general and particular waiver, which appears to be unjustified considering the clear language with which the provision requires that waiver be in writing. The comments suggest that waiver could be effected without writing, so long as such waiver was confined a particular breach of a covenant.⁹

The decision in *Crofter Properties Ltd v Genport Ltd* rejects this approach. The court there held that the meaning of section 43 is clear: any waiver of a covenant, whether general or particular, must be effected in writing. The proposition that a landlord could waive his rights on the tenant's breach, notwithstanding the absence of writing, was dismissed by McCracken J, who stated that:

“The wording of the section is quite clear, and relates to ‘any breach thereof’, which I think can only be reasonably interpreted as meaning that there cannot be a waiver of any specific breach unless that waiver is in writing.”¹⁰

This decision has, in the Republic of Ireland at least, displaced the strained analysis of section 43 suggested by *Foott v Benn*, and interprets the provision in a manner which reflects the clear language in which it is framed.

⁷ The distinction was however clear to the draftsman, as section 22 of Deasy's Act indicates. Under that section consent to subletting is not deemed a general waiver of a covenant against subletting.

⁸ “Where any actual waiver of the benefit of any covenant or condition in any lease on the part of the lessor.. shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear”; Law of Property (Amendment) Act 1860, section 6.

⁹ The suggestion that section 43 applies to general waivers only is not universally accepted: see Dowling, “Waiver of Leasehold Covenants” (1987) 38 NILQ 265.

¹⁰ *Ibid.*

RECEIPT OF RENT: THE NORTHERN IRELAND APPROACH

An important practical ramification of the waiver issue is the effect of a landlord's receipt of rent with knowledge of the tenant's breach. At common law the acceptance of rent by a landlord, following a tenant's breach of covenant entitled the tenant to consider the breach to have been waived, and deprived the landlord any further right of action on the foot of the breach. This common law principle¹¹ was based on the fact that:

"..acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. The acceptance of rent being, in the circumstances, an unequivocal act, waiver of the breach followed"¹²

Allowing the landlord to accept rent, without relinquishing his right of action on a breach of covenant has raised concern regarding the potential for a landlord to 'have his cake and eat it';¹³ or to: 'approbat[e] and reprobat[e] the tenancy at the same time..¹⁴ A literal application of section 43 enables landlords to behave inconsistently: ostensibly to affirm the tenancy following breach, by accepting rent, and then subsequently to deny that the tenant's breach has been waived, because there has been no waiver in writing. It is clear, however, that the decision in *Crofter Properties* represents an inclination towards a strict application of section 43.

The literal construction to section 43, adopted in *Crofter Properties* does not, however, coincide with Northern Ireland authority on this point. The Northern Ireland High Court in *Duncan v Mackin*¹⁵ allowed a landlord's receipt of rent to act as a waiver of his tenant's forfeiture. Lowry LCJ clearly asserted that:

"Receipt of rent with knowledge of the breach of a covenant against alienation amounts to a waiver of the forfeiture."¹⁶

The court clearly sympathised with the plaintiff,¹⁷ yet it is significant that its conclusions were based on English authorities, and without reference to the relevant statutory provision, section 43 of Deasy's Act.¹⁸ Although there was no discussion of section 43, this decision indicates that in Northern Ireland, receipt of rent can presently operate as a waiver of a leasehold covenant. The decision in *Duncan v Mackin* is clearly at odds with the current Republic of Ireland authority of *Crofter Properties*. The Northern Ireland courts are therefore faced with a number of options for the future. These include following *Duncan v Mackin*, which did not

¹¹ Which continues to govern this issue in England.

¹² *Oak Property Co Ltd v Chapman* [1947]1 KB 886 (CA) at 898, per Evershed LJ.

¹³ Dowling, *op cit*, at 271.

¹⁴ Final Report of the Land Law Working Group, (1990), para 4.4.15. As Bramwell B stated pre-1860: "...I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect to treat the breach as a forfeiture"; *Croft v Lumley* [1857-58]6 HLC 672 at 705.

¹⁵ [1985]2 NIJB.

¹⁶ *Ibid*, at 8.

¹⁷ "Relief can and should be granted to the plaintiff.", *ibid*, at 7.

¹⁸ See Dowling 'Anglo but perhaps not Irish', (1987)38 NILQ 58.

consider section 43, or to adopting the Republic of Ireland's strict approach to the provision.

The Land Law Working Group, in its 1990 report, recognised the existence of two principles relating to waiver of leasehold covenants in Northern Ireland. These were, firstly, that:

“..waiver of a particular breach of obligation is to be strictly construed as relating to that breach alone (and, in particular, does not operate as a licence dispensing from that obligation for the future...)”;

and also that: “..a general waiver of all past breaches of an obligation is effective only if given in writing executed by the landlord or his agent.”¹⁹ The Working Group proposed that section 43 should be replaced with a new provision, which would recognise the distinction between general and particular waiver. It also recommended that receipt of rent should continue to operate as waiver,²⁰ on the basis that:

“..the landlord could not be permitted the illogicality of both approbating and reprobating the tenancy at the same time, and the acceptance of rent was taken as an election by him to continue the tenancy rather than forfeit it.”²¹

While the statutory repeal and re-enactment of a modified section 43 would appear to present a solution to the current problems, until these proposals are in force, the Northern Ireland courts remain faced with the problems associated with interpreting section 43. In the meantime, if the decision in *Crofter Properties v Genport* is followed in Northern Ireland, its more literal interpretation of section 43 may leave unresolved the underlying problems concerning receipt of rent.

‘WRITING REQUIRED’ PROVISIONS AND RECEIPT OF RENT: THE COMMONWEALTH APPROACH

Although Deasy’s Act applies only in Ireland, a similar question to that posed by section 43 has arisen in the Commonwealth, where the courts have been called on to consider provisions in a lease that nothing shall operate as a waiver by the landlord in the absence of writing. The judicial approach to such clauses provides an interesting perspective on the approach of Irish courts to section 43. In both cases, the issue under consideration is whether a common law rule, which considers a landlord’s acceptance of rent with knowledge of the tenant’s breach to amount to a

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¹⁹ *Final Report of the Land Law Working Group*, (1990). para 4.4.10.

²⁰ The Land Law Working Group recommendation was that: “..the law of waiver serves a useful purpose in periodically drawing a line under past breaches of obligation and wiping the slate clean... [and] for this reason we think it should be adhered to and should continue to be activated by payments of rent.”; *Final Report*, Land Law Working Group, (1990) para 4.4.12. This approach accords with the English common law position, whereby receipt of rent is treated as a ‘special category’, on the basis that: “..its legal consequences are well known and established.”; Wilkinson, ‘Acceptance of rent as a waiver’, (1988)138 NLJ 95, 96.

²¹ Land Law Working Group, *op cit*, para 4.4.15. Although the report also proposed the removal of the landlord’s power to forfeit a lease, the rule regarding receipt of rent was considered equally applicable under the new procedure for termination of tenancies.

waiver of that breach, is ousted by provisions requiring that waiver be in writing.²²

The Commonwealth courts have been reluctant to allow a landlord to accept rent from his tenant, and at the same time be able to take action for a breach of covenant, even where the lease contains a provision stating that breach of covenant can only be effectively waived in writing.²³ In *R v Paulson*,²⁴ the Privy Council held that the landlord had waived his tenant's particular breach of the covenant by accepting rent with knowledge of the breach, notwithstanding the inclusion of a provision in their lease which required writing for a valid waiver. The common law rule, which recognised receipt of rent as evidence of waiver, prevailed despite the parties agreement to the contrary, saying:

“The principle of law that a lessor who accepts rent knowing that there has been a breach of covenant in the lease thereby irrevocably elects to treat the lease as subsisting, and is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver shall take effect unless it is in writing.”²⁵

The reasoning in *R v Paulson* indicated judicial concern, also reflected in Northern Ireland, with the potential inequity of allowing a landlord to continue accepting rent, thereby giving the tenant the impression that the lease would continue notwithstanding a breach of covenant, and yet subsequently to take action on the foot of the breach. The court emphasised the implications of an acceptance of rent following breach, particularly that:

“..the landlord, by the receipt of rent under such circumstances, shows a definite intention to treat the lease or contract as subsisting, has made an irrevocable election so to do, and can no longer avoid the lease or contract on account of the breach of which he had knowledge.”²⁶

The inclusion of a provision in the lease, which required that any waiver had to be in writing did not render the common law principle inapplicable, since to do so would enable the landlord: “.. at the same time to blow hot and cold, to approbate and reprobate the same transaction.”²⁷ The inequity

²² Whether these cases are analogous to the position under section 43 is considered below.

²³ It has been accepted as a matter of principle that: “..there are occasions when, notwithstanding the presence of a provision to the effect that a waiver must be in writing, the courts have found that waiver has occurred despite the absence of writing.”; *Re Canberra Advance Bank Ltd and Barry Anthony Taylor*, (1992)115 ALR 207.

²⁴ [1921]1 AC 271; on appeal from the Supreme Court of Canada. This decision was relied upon by the High Court of Australia in *Mulcahy v Hoyne*, (1925) 36 CLR 41, where Starke J held that: “..[acceptance of rent] .. unequivocally recognised the tenancy as still subsisting, and operated as a waiver of the forfeiture down to that time.”

²⁵ “The principle of law that a lessor who accepts rent knowing that there has been a breach of covenant in the lease thereby irrevocably elects to treat the lease as subsisting, and is precluded from claiming a forfeiture, is applicable although the lease provides that no waiver shall take effect unless it is in writing”; *R v Paulson*, *op cit*, at 271.

²⁶ *Paulson*, *op cit*, at 283.

²⁷ *Ibid*.

of allowing the landlord to accept rent, and yet reject the tenancy was foremost in the considerations of the court: “[i]t would be wrong and unjust on the part of the landlord so to treat the tenant”.²⁸ Acceptance of rent was therefore deemed to be a waiver of the breach notwithstanding that the lease provided that it would not be. Lord Atkinson considered that the crucial factor was not the clause in the lease, but the landlord's intention. Although the court allowed that the clause could be effective in some circumstances,²⁹ if by receiving rent, the landlord showed an intention to treat the lease as subsisting, the Privy Council considered it to be ‘wrong and unjust’ for the tenant to be subsequently evicted.³⁰

The principle espoused in *R v Paulson* was applied by the High Court of Australia in *Owendale Pty Ltd v Anthony*.³¹ Again, the terms of the lease included an agreement between landlord and tenant that any waiver of the tenant's breach of covenant would not be effective unless made in writing. At first instance, Windeyer J noted that at common law, when a landlord, with knowledge of his tenant's breach of covenant, unequivocally acts in a manner: “...inconsistent with his avoiding the lease, he is deemed to have elected not to avoid it.”³² The court noted that receipt of rent has always been regarded as a clear and unequivocal act of waiver:³³ “[a]part from any special term in a lease.. or any statutory modification of the common law”; since: “..acceptance of rent due in respect of a current period is an obvious recognition of the tenancy then subsisting.”³⁴ The task before the court was therefore to consider whether a provision to the contrary, either by statute or in the lease, was capable of displacing the common law rule regarding receipt of rent. Windeyer J held that the terms of the lease ousted the common law, and governed the dispute. Since the lease required that any waiver be in writing, it was held that receipt of rent did not constitute waiver by the landlord of the particular breach.³⁵

The decision of Windeyer J in *Owendale* was reversed on appeal. The main thrust of the appellant lessee's case was the *inequity* of allowing a lessor to accept rent, and yet deny that he had waived the breach of covenant, even where the parties had agreed that any waiver must be made in writing. The court was clearly influenced by the inconsistency inherent in allowing a landlord: “..on the one hand [to] insist that the lease is still

²⁸ “..to hold in fact the price of what the latter paid for, the enjoyment of his holding for the entire term during which the rent actually paid was accruing, and yet deprive him of half of that very property”, *Paulson, op cit*, at 283.

²⁹ “..it may well be that many cases may occur to which the clause as to waiver would be applicable; their Lordships think that it is not applicable in the present case under all its circumstances”; *Paulson, op cit*, at 286.

³⁰ “The point is that he cannot do both at the same time. He cannot by receiving twelve months' rent determine that the lease was a subsisting lease while that rent was accruing, and in the middle of that period determine that it no longer subsists.”; *ibid*, at 284.

³¹ (1967) 117 CLR 539.

³² *Ibid*, para 47, *per* Windeyer J.

³³ “One act which, by the common law, is always regarded as unequivocal and therefore necessarily a waiver of a right of re-entry on account of a breach of covenant by the lessee, is the lessor's acceptance, with knowledge of the fact of the breach, of rent accrued due after the breach”, *op cit*, para 47.

³⁴ *Ibid*.

³⁵ “A lessor's acceptance of rent for the period cannot, in my view, be said to be a waiver of his right to determine the lease.”, *Owendale v Anthony, op cit*, para 51, *per* Windeyer J.

subsisting and on the other insist that the relationship between himself and the lessee is not that of lessor and lessee.”³⁶

Even though the parties had agreed in their lease that waiver was to be made in writing, the court was reluctant to enforce the terms of the lease if to do so would be inequitable. The common law principle, which enabled the court to reach an equitable result, was allowed to supersede the inclusion of an express provision to the contrary. While the terms of the lease were considered, Owen J took the view that the question of waiver rested, not upon whether a written waiver had been made, but on whether the landlord had made an “unequivocal election” not to end the lease following the tenant’s breach. The inclusion of a clause in the lease, requiring waiver to be in writing, was no more than *a factor to be taken into account* by the court, when judging whether an unequivocal election had taken place.³⁷ It was the election which mattered, and its effect on the tenant’s understanding of the position, not the manner in which that election had been made.³⁸

The willingness of the court in *Owendale* to consider the fact that the lease has provided a procedure regarding waiver represents a noteworthy development of the approach in *R v Paulson*, where the fact the parties had included a provision requiring waiver to be in writing was said to be ineffectual where the act of waiver relied upon was receipt of rent. It remains the case, however, that the landlord may be found to have waived his right to act on breach on the basis of unequivocal *words or conduct*, notwithstanding an express provision to the contrary in the lease. The parties’ agreement remained no more than a factor to be considered by the court when addressing what is now the crucial question: has the landlord *unequivocally elected* not to terminate the lease on the basis of this breach.

The Commonwealth position remains closely allied to the common law regarding a landlord’s acceptance of rent with knowledge of the tenant’s breach of covenant. The court’s decision in *Owendale Pty Ltd v Anthony* indicated its reluctance to allow a landlord to ‘approbate and reprobate’, by accepting rent and subsequently denying that the lease remained operative, even though the parties had agreed that the landlord would only waive his rights if he did so in writing. Even where the lease contains an express provision requiring that any waiver by the landlord be in writing, the courts have considered this to be, at most, one of the factors to be taken into account when assessing whether there has been an “unequivocal election” to treat the lease as still subsisting.

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³⁶ *Ibid*, per Owen J, para 6.

³⁷ “I can see no good reason why the parties to a lease should not validly incorporate such a clause into their agreement and if they do so, that seems to me to be a very relevant fact to be borne in mind when it is claimed by a lessee who has committed a breach of covenant that by accepting rent his lessor has made an election to keep the lease on foot”; *Owendale v Anthony*, per Owen J, para 11.

³⁸ The reasoning was also adopted by the New Zealand Supreme Court in *Inner City Businessmen’s Club Ltd v James Kirkpatrick Ltd* [1975]2 NZLR 636. Henry J considered: “..the whole of the conduct of the parties at the time, and.. the form of the statement.. and the operation of clause 18..”; before concluding that the landlord had *not* waived his tenant’s breach of covenant. Although the receipt of rent was held *not* to amount to waiver, this was not based solely on the clause in the lease, but on the finding that the landlord had not, by his words and conduct, and also considering the terms of the lease, elected to waive the breach.

While the Commonwealth decisions support a construction of Deasy's Act which allows for waiver to take place by receipt of rent, it is arguable that the "writing required" provision cases are not an exact analogy. The Commonwealth decisions concern provisions inserted into the lease by the landlord, and accepted by the tenant. Section 43 of Deasy's Act on the other hand does not operate by inserting a provision concerning waiver into the lease.³⁹ While the Commonwealth decisions involve an agreed clause which the parties have chosen to include, section 43 of Deasy's Act is intended to apply notwithstanding the intentions of the parties.

The perceived inequity of allowing the landlord to continue accepting rent, and so leading the tenant to believe that the breach has been disregarded, has led the Commonwealth courts to find waiver on the basis of receipt of rent, even though the parties to the lease made an agreement to the contrary. The Northern Ireland courts have shared this reluctance to allow the landlord to "approve and reprobate" the lease with knowledge of the tenant's breach. This has given rise, in the Commonwealth decisions, to a willingness to ignore the provisions which the parties have chosen to adopt as governing their relations: the sanctity of their bargain is disregarded. In Northern Ireland, the result has been an attempt to preserve the common law position, regardless of a clear statutory provision to the contrary. The following section will consider whether any alternatives exist, which might enable the Northern Ireland courts, as the Republic of Ireland has done,⁴⁰ to follow the clear meaning of section 43 while protecting tenants against the inequitable actions of landlords who endeavour to "have their cake and eat it".

ESTOPPEL

An alternative means of avoiding the undesirable outcome, whereby a landlord can 'approve and reprobate' by accepting rent with knowledge of a breach, may be found in the doctrine of estoppel. *Craigdarragh Trading Co. v Doherty*⁴¹ raised the possibility of utilising estoppel principles in order to achieve a just result, where the landlord accepted rent with knowledge of his tenant's breach. Having stated that section 43 required that waiver be in writing, Murray J revealed that he was:

"...sympathet[ic] with the view that if the facts disclose a situation in which it would be unconscionable for the landlord to insist upon the formality of a written consent or written waiver, our law does allow for the lessee's equity, whether by estoppel or otherwise, to prevail."⁴²

This led the Land Law Working Group to ask:

"...whether implied waiver is the best way of tackling the question of what should be the effect of acceptance of rent in knowledge of a breach of obligation, or whether it would be better to rely on a kind of estoppel - that the landlord's conduct led the tenant to believe that the landlord would not

³⁹ Contrast the provisions of sections 41 and 42, which do imply terms into the lease.

⁴⁰ *Crofter Properties v Genport*, *op cit*.

⁴¹ *Op cit*.

⁴² *Op cit*, at 230A.

seek to have the tenancy terminated, and a reasonable tenant would have taken that view.”⁴³

Having consulted on the question, the report concluded that waiver was preferred to estoppel.⁴⁴

The search for an equitable solution has continued to appear in arguments before the court, and was acceded to by Girvan J, in *Belfast West Power Ltd v Belfast Harbour Commissioners*.⁴⁵ Counsel for the tenant submitted that the landlord had waived his right to object to a change in user of the leasehold property by consenting to a sub-lease, or an assignment which permitted or required a different use. An estoppel argument was raised on the basis that the landlord had represented, actively or impliedly to the tenant, that he would not object to the change in user. The court accepted that as a consequence:

“..it would be inequitable for him at a later date to seek to revert to the contractual provisions which he has expressly or impliedly agreed not to enforce.”⁴⁶

The estoppel principle was advanced with the object of ensuring that where a landlord represented to his tenant, by acceptance of rent or otherwise, that the lease was still ‘on foot’, he would not subsequently be permitted to deny that the breach had not been waived.

Estoppel arguments have been raised in the past, in relation to section 18 of Deasy’s Act. In *Byrne v O’Neill & Dempsey*,⁴⁷ a plaintiff sub-landlord argued against his tenant, that the sub-letting was void, due to his own failure to obtain the required consent in accordance with section 18. The court accepted the defendant’s submission, that the doctrine of estoppel could be utilised in order to prevent a landlord from expressly endorsing a lease, and then subsequently relying on Deasy’s Act to vitiate the tenancy which he had recognised. Although the reference to estoppel was *obiter*, Maguire J stated that he would have been prepared to rest his decision on his opinion that:

“..the plaintiff is estopped from relying for his own advantage upon this implied prohibition to vitiate the sub-tenancies which he had deliberately and expressly purported to create.”⁴⁸

The approach taken in *Byrne v O’Neill & Dempsey* was initially seen as “open[ing] up considerable possibilities..”⁴⁹ The application of estoppel

⁴³ Land Law Working Group, *op cit*, para 4.4.11.

⁴⁴ This point is considered below.

⁴⁵ [1998]NI 112. This was reinforced in the Court of Appeal [1998]NI 347. Although the landlord was not found to have ‘estopped’ himself in this case, Carswell LCJ cited with agreement the English authority of *Killick 2nd Covent Garden Property Co* [1973]2 All ER 337 at 339-40, that: “Of course, a landlord who gives his consent to an assignment knowing that the assignee intends to use the premises in breach of a user covenant may incautiously estop himself from thereafter relying on the covenant or may waive the right to enforce it.”

⁴⁶ *Ibid*, at 127d, *per* Girvan J.

⁴⁷ [1948]Ir Jur Rep 17.

⁴⁸ *Ibid*.

⁴⁹ ‘Assignments and Sub-Lettings by a Lessee in breach of agreement: How far will the Lessee be Estopped from Impugning the Validity of his own Act’ [1948]14 Ir Jur 19, at 23.

was perceived to be: “..an endeavour to mitigate the hardships and avoid the palpable dishonesty which results from the rigid operation of sections 10 and 18 of [Deasy’s] Act..”;⁵⁰ and could by analogy have applied in relation to section 43, where the strict application of the provision has been avoided on the basis that it can give rise to inequitable results. *Byrne v O’Neill & Dempsey* has not been considered in later cases, and subsequent decisions have questioned the applicability of equitable principles where a statutory provision has clearly laid down a procedure to be followed.⁵¹

Professor Wylie has suggested a similar approach in response to *Crofter Properties v Genport*, which involves the equitable doctrine that: “a statute may not be used as an instrument of fraud”.⁵² This analysis is supported by the decision in *Burke v Prior*,⁵³ where the court asked whether, in relation to a covenant against assignment or sub-letting, a landlord who “approbates and reprobates” the same transaction, would be thwarted by the maxim that: “equity will not allow a statute to be used as an instrument of fraud”.⁵⁴ The court concluded that this could not be permitted:

“If the landlord has been guilty of what in the view of a Court of Equity is a fraud.. the Court has a power to relieve the tenant, notwithstanding ...the provisions of the Subletting Act.”

The acceptability of applying equitable doctrines to reach a result favoured by the court, where they conflict with a statutory provision remains, however, a matter of contention. The question has been considered in the context of reliance on statutory provisions in connection with registration to the effect that notice will not affect a party.

In *Re Monolithic Building Co*,⁵⁵ the court said that: “..it is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties.”⁵⁶ The Court of Appeal was not prepared to allow equitable principles to contravene the clear intention of Parliament,⁵⁷ based on the authority of *Edwards v Edwards*, that: “..it would be dangerous to engraft an equitable exception upon a modern Act of Parliament.”⁵⁸ Since: “..[b]oth parties stood on their legal rights - neither of them was misleading the other.. It is not consistent with the policy of the Legislature to import fine equitable distinctions..”;⁵⁹ where the

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⁵⁰ *Ibid.*

⁵¹ *Re Monolithic Buildings* [1915]1 Ch 643; *Midland Bank Ltd v Green* [1980]Ch 590; [1981]AC 513. See below.

⁵² Wylie, ‘*Irish Land Law*’ (3rd Edn, 1998) p919.

⁵³ 15 Ir Chan Rep 106.

⁵⁴ “The question is whether, in the view of a Court of Equity, it is a fraud for a landlord not only to look on at but encourage the execution of an assignment or sub-lease by a tenant - to throw the tenant off her guard by witnessing the execution of the deed, and then to insist that a forfeiture had been created by the execution of the deed which he sanctioned, approved of and witnessed”; *ibid*, at 117.

⁵⁵ *Op cit.*

⁵⁶ [1915]1 Ch 643 (CA) at 662, *per* Cozens-Hardy MR.

⁵⁷ See also Astbury J (ChD): “It is no doubt extremely desirable that Acts of Parliament should be construed literally to mean what they say”; *ibid*, at 656.

⁵⁸ *Edwards v Edwards* 2 ChD 291, 295, 297, *per* James LJ.

⁵⁹ *Ibid.*

language of the Legislature is clear, the court's interpretation should be merely that: "...the section means exactly what it says."⁶⁰

This approach was endorsed by the House of Lords in *Midland Bank Ltd v Green*, where Lord Wilberforce rejected the application of equitable principles in the teeth of a statute, since the relevant provision⁶¹ was:

"...clear in its terms, should be applied according to its plain meaning, and should not be weakened by the infusion of equitable doctrines applied by the courts during the nineteenth century."⁶²

The decision in *Re Monolithic Building Co* was described as:

"...dispos[ing], for the future, of the old arguments.. for reading equitable doctrines into modern Acts of Parliament: it makes clear that it is not 'fraud' to rely on legal rights conferred by Act of Parliament: it confirms the validity of interpreting clear enactments as to registration and priority according to their tenor."⁶³

Although these decisions have established that it is 'not fraud to rely on your strict legal rights', the equitable argument could find greater favour in relation to a Commonwealth-type situation, where the requirement of writing is based on the terms of a lease. The landlord who asserts section 43 in his defence may legitimately argue that the rights on which he relies are based on the 'law of the land', and that it is not unconscionable to rely on a statutory provision. Where the writing requirement has been written into the lease, this position becomes tenuous. In considering whether the defendant's reliance on his statutory rights amounted to fraud, Dillon LJ in *Lys v Prowsa Developments Ltd*⁶⁴ claimed that:

"...the fraud on the part of the defendants.. lies not just in relying on the legal rights conferred by an Act of Parliament, but in .. renegeing on a positive stipulation in favour of the plaintiffs in the bargain under which the defendants acquired the land. That makes, as it seems to me, all the difference."⁶⁵

While the Commonwealth cases deal with the perceived inequity of allowing a landlord to rely on a 'writing required' provision which he has inserted into the lease, under section 43, the landlord is not relying on a provision of the lease, but on the statute itself. The court in *Owendale Pty Ltd v Anthony* noted that the term in the lease was based on agreement, and Owen J commented that:

"I can see no good reason why the parties to a lease should not validly incorporate such a clause in their agreement and if they do so, that seems to me to be a very relevant fact to be borne in mind when it is claimed by a

⁶⁰ *Re Monolithic Building Co*, *op cit*, at 672, *per* Joyce J.

⁶¹ Land Charges Act, 1925, section 13(2).

⁶² *Midland Bank Ltd v Green*, (HL) *op cit*, at 530 G-H, *per* Lord Wilberforce.

⁶³ *Ibid*, at 531A-B, *per* Lord Wilberforce. This statement reinforce the observation of Oliver J at first instance, that he: "[could not], with the best will in the world, allow my subjective moral judgment to stand in the way of what I apprehend to be the clear meaning of the statutory provisions"; [1980]Ch 590 at 614.

⁶⁴ [1982]2 All ER 953.

⁶⁵ *Ibid*, at 962.

lessee who has committed a breach of covenant that by accepting rent his lessor has made an election to keep the lease on foot.”⁶⁶

Where a landlord seeks to argue that receipt of rent is not a waiver, even though the agreed terms of the lease state that waiver must be in writing, the court may be more willing to find his conduct unconscionable.

The recent English decision in *Banker's Trust Co. v Namdar*,⁶⁷ has indicated, however, that there may remain some scope for the application of estoppel, even where the Legislature has laid down a clear provision to govern the dispute. Gibson LJ in the Court of Appeal acceded to the submission that *estoppel* could nullify the effect of a statutory provision, in this case, section 2 of the Law Reform (Miscellaneous Provisions) 1989 Act. The court held that, since a transaction was not rendered illegal by s2, an estoppel argument could be made.⁶⁸

It remains unclear whether the doctrine of estoppel could be, or ought to be available to a tenant, when the landlord has accepted rent, and yet proposes to rely on the absence of writing to assert that there has been no waiver in accordance with section 43 of Deasy's Act. The Land Law Working Group recognised that the estoppel doctrine had some advantages, particularly since it would enable a landlord to accept rent already accrued, ‘for periods now past’, without condoning the tenant's breach of covenant. It was suggested that: “...if estoppel could be tailored to produce this result it would be useful.”⁶⁹ While the application of equitable doctrines, where a statutory provision is clear, has been judicially discouraged, the decision in *Namdar* suggests that there may remain some scope for the doctrine of estoppel, where one party has led the other to expect that his strict legal rights will not be asserted.

CONCLUSION

The Northern Ireland position regarding the requirements for a valid waiver where a tenant has breached a covenant, remains unclear. Current judicial opinion in the Republic of Ireland supports a strict interpretation of section 43, so that any waiver must be made in writing in order to have effect. The inequity of allowing a landlord to accept rent from his tenant, and yet deny that the lease subsists, has been a source of concern where a landlord seeks to rely on the strict application of section 43. The Commonwealth decisions also indicate judicial reluctance to allow a landlord to accept rent with knowledge of a breach of covenant, and thereafter demand his right of action on the breach. This has remained the case, even where the parties have provided in their lease that any waiver

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⁶⁶ *Owendale v Anthony*, *op cit*, para 11, *per* Owen J.

⁶⁷ 14 February 1997, (CA), Unreported; Transcript: Lexis.

⁶⁸ The court held that, since the relevant transaction was not rendered illegal by section 2, estoppel remained available where necessary to avoid harsh results. Although the Court of Appeal had previously rejected such an argument: *Godden v Merthyr Tydfil Housing Association* ([1997] NPC 1) on the basis that “A contract void for non-compliance with the statutory formalities is not saved by estoppel. This was not sufficient answer to the statutory defence: the doctrine of estoppel was not to be invoked to render valid a transaction which the legislature had on grounds of public policy enacted was to be invalid.”; Gibson LJ in *Namdar* relied on the earlier CA decision of *McCausland v Duncan Lowrie Ltd* [1996] NPC 94, which raised as a possibility, the doctrine of estoppel in the same context. See also Law Com No 164, paras. 5.4-5.5.

⁶⁹ Land Law Working Group, *op cit*, para 4.4.11.

must be made in writing. A landlord's acceptance of rent, followed by his reliance on the breach of covenant, has been found to lead to inequitable results.

The Northern Ireland courts may follow the decision on the Republic of Ireland in *Crofter Properties Ltd v Genport Ltd*, which has interpreted section 43 according to its clear meaning. Judicial reluctance to allow a landlord to have it both ways may, however, present an enduring difficulty. This could be resolved through an application of the doctrine of estoppel, whereby a landlord who represents that the lease is to continue, by acceptance of rent or otherwise, is estopped from relying on a breach of which he had knowledge, in order to bring the tenancy to a premature end. Alternatively, a more equitable approach to the problems associated with waiver and receipt of rent could be found by adopting the maxim: "equity will not allow a statute to be used as an instrument of fraud." in relation to section 43.⁷⁰

The suitability of adopting equitable principles within a statutory framework is questionable, however. It is submitted that the court's unwillingness to permit a landlord to act unconscionably will ensure that, if the decision in *Crofter Properties* is followed in Northern Ireland, an alternative means of protecting tenants from the inequitable actions of the landlord who seeks to 'approve and reprobate' the tenancy, will be found. It may, however, be preferable if section 43 were to be repealed, and replaced with a provision to which the courts can, in good conscience, interpret according to its clear meaning.

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⁷⁰ Wylie, *op cit*, (3rd ed) p919.